Updates
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Three Questions About the Recent Attorneys General Letter Related to DEI Programs

Thirteen attorneys general signed a public letter (AG Letter) on July 13, 2023, voicing opposition to employers' use of diversity, equity, and inclusion (DEI) plans. The letter alleges that the U.S. Supreme Court's recent decision banning race-based affirmative action in college admissions implicates corporate DEI programs. The letter frames many corporate commitments arising out of the racial protests in 2020 as "commonplace" discrimination and illegal quotas. It warns that employers face legal action where employer practices fall outside of the legal lines. We describe the letter's contents, its legal effect, and its impact on employers.

What Did the AG Letter State?

The AG Letter begins with a reference to the Supreme Court's decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023) (*SFFA*), which ruled that race could not be used as a factor in university admissions. The letter then references commitments made by some *Fortune* 100 corporations in response to the George Floyd murder. Framing those commitments to recruit, retain, and foster diverse environments as quotas and race-based contracting, the letter cites heavily to broad pronouncements in *SFFA* and attempts to apply them to the employment context. Although the stated intent of the letter is to "remind" employers of their antidiscrimination obligations, it warns businesses that they "will be held accountable—sooner rather than later" if they do not choose to cease "any unlawful race-based quotas or preferences."

Does the AG Letter Change the Legal Landscape?

The AG Letter does not set forth any new legal standard and, by its own terms, recognizes that the *SFFA* decision is cabined to the university admissions context. Rather, close review of the letter reveals that the legal authority it cites are longstanding principles that many employers have followed in creating and expanding their DEI programs. The guiding principle of carefully developed programs has been that race should not govern employment decisions and that any efforts to increase diversity should be grounded in expanding opportunities through improved recruiting, retention, and belonging efforts. Federal contractors are required to conduct broad analyses of their workplaces, set appropriate goals for employment practices and engage in efforts to ensure equal employment opportunities. Indeed, in one of the few legal decisions evaluating whether the federal government itself could require contractors to set goals, the U.S. Court of Appeals for the D.C. Circuit ruled that the Department of Labor did not violate federal law by requiring federal contractors to set a 7% goal for disability representation in the workplace. *Associated Builders and Contractors (ABC) v. Shiu*, 773 F.3d 257 (2014). Also, longstanding Equal Employment Opportunity Commission (EEOC) regulations provide similar avenues for private employers to make comparable efforts. Neither the federal contractor regulations nor Title VII of the Civil Rights Act allow quotas, and employers with well-crafted DEI programs and practices likely remain on firm legal grounds.

What Are the Takeaways for Employers?

Employers should note that the AG letter represents a part of broader efforts to challenge robust environmental, social, and corporate governance (ESG) programs. Many companies are facing new shareholder proposals claiming that ESG efforts are not only contrary to political and economic goals but also violate the law. These efforts can be traced to earlier government actions—including a now-defunct executive order from the Trump administration and various efforts at the state level, such as Florida's STOP WOKE Act—that broadly banned trainings related to certain divisive concepts, including trainings addressing whether systemic racism is interwoven into the fabric of the United States and whether ideas of color blindness and meritocracy are inherently biased. The Trump administration executive order also encouraged complaints to the Department of Labor, and private litigants have cited these concepts as evidence of reverse discrimination in lawsuits challenging DEI programs.

Employers should proactively review and monitor their ESG and DEI programs to ensure they fall within the legal requirements. Programs focused on recruiting and retention, such as outreach efforts to diverse networks, holistic review of applications, maintaining employer resource groups, and publicly reporting representation figures, will often remain inside the legal lines. However, to the extent efforts require hiring diverse applicants or shutting employees out of significant employment opportunities, such efforts should be reviewed carefully. Further, employers should brace themselves for an increase in potential litigation even when engaging in common practices that fit within existing legal guidelines.

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