

Is DEI dead after the Supreme Court’s decision on Affirmative Action? No!

By: *Karen Driscoll* and *Stephanie Ramirez*

Many companies are reevaluating their diversity, equity, and inclusion (DEI) strategies since the Supreme Court’s Affirmative Action decision in June 2023. Many private workplaces have changed how they calculate their risks related to DEI even if not legally valid.

As the backlash against DEI is mounting, you may be questioning what you can and should be doing with your DEI work. Leaders become overly cautious when a decision like this is made at the highest court, but you do not have to “throw the baby out with the bathwater.” We have provided this resource to help you understand what’s generally in and out after the decision.

What did the Supreme Court decision do?

The ruling overturned legal precedent and effectively ended the use of affirmative action in **college admissions**.¹ The Court’s decision found that the admissions programs at Harvard, a private institution, and the University of North Carolina, a public institution, violated the equal protection clause of the 14th Amendment.²

The Court’s decision was about affirmative action in higher-education admissions. The Court held that affirmative action violates the Equal Protection Clause in the U.S. Constitution (and, by extension, Title VI of the Civil Rights Act of 1964).³

What remains in effect after the Supreme Court’s decision?

The Court’s decision was not about affirmative action in private workplaces. According to NYU legal experts Kenji Yoshino and David Glasgow, the Court “did not hold that affirmative action violates Title VII of the Civil Rights Act of 1964—the main statute governing the employment relationship. To end workplace affirmative action, the Court would need to overrule two of its longstanding precedents—*United Steelworkers v. Weber* (1979) and *Johnson v. Transportation Agency* (1987)—which authorized affirmative action under Title VII. The ruling did not extend to hiring practices.”⁴

Is affirmative action legal under Title VII?

Affirmative action under Title VII is legal under very specific circumstances. Employers must admit to a problem and use affirmative action for a remedial purpose. The American Bar Association states, “an

¹ Dean Charlie Rose, [After Affirmative Action](#) (Ohio: Ohio Bar, 2023) 1.

² Dean Charlie Rose, [After Affirmative Action](#) (Ohio: Ohio Bar, 2023) 1.

³ Esther G. Lander & Amanda S. McGinn, [Impact of SCOTUS Affirmative Action Ruling on Employers](#) (Illinois: American Bar Association, 2023) 1.

⁴ Kenji Yoshino and David Glasgow, [Does the US Supreme Court Decision on Affirmative Action Affect Your Company’s Diversity Initiatives?](#) (New York: Catalyst, 2023) 1.

affirmative action plan must be justified by a ‘manifest imbalance’ reflecting an underrepresentation of minorities or women in ‘traditionally segregated job categories,’ and any race- or gender-based preference in the plan must be properly tailored to cure the disparity without unnecessarily trammeling the interests of non-minorities or males.

“In order for employers to engage in race- or gender-conscious employment decisions, they must (i) have a written plan; (ii) engage in reasonable self-analysis of the relevant employment practice (e.g., hiring or promotion); (iii) have reasonable basis to conclude from the self-analysis that the relevant employment practice has had an adverse effect on ‘previously excluded groups’ or groups whose opportunities have been ‘artificially limited’; (iv) include reasonable action in the plan that is narrowly tailored to solve the problem identified without placing unnecessary restrictions on the workforce as a whole; and (v) maintain the plan no longer than necessary to achieve the plan’s objective.”⁵

How does the Court’s decision impact Diversity, Equity, and Inclusion (DEI) programs in private workplaces?

This decision did not materially change DEI programs in private workplaces. DEI programs are still legal as long as they comply with Title VII and other non-discriminatory laws. According to Yoshino and Glasgow, “most DEI initiatives in the workplace are not affirmative action in the way it is addressed in this decision.”⁶ Most DEI initiatives involve broader efforts to expand a more diverse, inclusive workplace while ensuring everyone is heard and valued. DEI programs should focus on expanding opportunities to all as opposed to decision-making based on protected classes. Embracing DEI is essential to creating a workplace that thrives on the collective strength of a company’s staff. If you have specific questions about your DEI programs and risks, seek counsel!

Recommendations:

The following recommendations are based on the experience and expertise of Raben’s team. These recommendations are specific to private workplaces and do not include guidance for higher education.

DON'T:	DO:
Code, scrub, or change your language on diversity, equity, and inclusion.	Re-educate your workplace that DEI is NOT a bad word. Diversity, equity, and inclusion are distinct values and interventions in creating a better workplace. DEI should not be taken as a blanket term. Instead, define each value on its own and explicitly share how these values support one another.

⁵ Esther G. Lander & Amanda S. McGinn, [Impact of SCOTUS Affirmative Action Ruling on Employers](#) (Illinois: American Bar Association, 2023) 1.

⁶ Kenji Yoshino and David Glasgow, [Does the US Supreme Court Decision on Affirmative Action Affect Your Company's Diversity Initiatives?](#) (New York: Catalyst, 2023) 1.

	<p>For example, diversity includes <i>all</i> of the characteristics that make a group different; inclusion is a sense of belonging for everyone; and equity is accounting for the different needs of everyone. These values support the well-being of individuals of all backgrounds. Understanding the nuances of DEI can help you contribute to a workplace where every individual thrives.</p>
<p>Leave DEI initiatives to chance.</p>	<p>Audit your DEI programs using data to understand your risks and inform your approach going forward.</p> <p>Set specific and measurable DEI goals using insights gained from the audit.</p> <p>Conduct your audit in close coordination with your legal counsel.</p>
<p>Set hiring quotas based on racial and ethnic categories (e.g., Hire 5 Black candidates, 6 Latinx candidates, etc.).</p>	<p>Invite candidates to share narrative aspects of their background that speak to their lived experiences (e.g., how has your background and lived experience impacted your career and leadership?).</p> <p>Track recruitment data in accordance with data privacy regulations to understand your hiring pools across roles and levels. You can also track or review employee life cycles across roles and levels to understand retention and promotion rates.</p>
<p>Create professional development programs only eligible to candidates of specific races and ethnicities (or other protected classes).</p>	<p>Ensure your programs are seeking to expand opportunities for everyone and consider intersectional identities.</p> <p>Use specific narrative questions to understand your candidate pool.</p>
<p>Abandon your current DEI policies and practices.</p>	<p>Revitalize your DEI commitment into concrete actions like developing policies that highlight the importance of inclusivity (e.g., recruitment and promotion practices that are fair, transparent, and designed to reduce bias).</p> <p>Create timelines to review and assess goal achievement.</p> <p>If Employee Resource Groups (ERGs) have been a part of your culture, continue to encourage their use. ERGs can serve as representatives for your company while providing leadership</p>

	development and mentoring opportunities. ERGs can foster connections, advocate for equity, resulting in increased employee satisfaction and productivity.
--	---

Additional Resources:

- [Gibson Dunn DEI Task Force Update](#) (includes key case developments and updates)
- [Anti-DEI Complaints Filed With EEOC Carry No Legal Weight](#)
- [Report and Recommendations of the New York State Bar Association Task Force on Advancing Diversity](#)
- [Affirmative Action in Higher Education: The Racial Justice Landscape after SFFA cases](#)
- [Why Companies Can – and Should – Recommit to DEI in the Wake of the SCOTUS Decision](#)
- [How Your Company Can Prioritize DEI After the US Supreme Court Affirmative Action Ruling \(Blog Post\)](#)

Want to make your DEI initiatives successful? Raben can help; reach out to info@raben.co for more information.

Note: This document is a general resource on this topic. The document is specific to private workplaces. It is not legal advice. If you want advice on what impact this decision will have on your own organization’s specific diversity, equity, and inclusion (DEI) practices, please seek advice from your legal counsel. The quotations included are for informational purposes only. Raben does not endorse the views of the individuals or organizations referenced.

