

UNC and Harvard: 3 DEIA Questions Employers Should Consider

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In June of 2023, the Supreme Court of the United States ruled on the use of affirmative action in higher education admission decisions¹, leading to an uptick of companies requesting clarification regarding diversity practices within the employment realm. As the legal landscape overlays the Court's opinion within varied contexts, employers should continue to maintain their focus on how employment opportunities are presented, engaged, directed, and advocated in a fair and just manner. Affirming these same sentiments, Equal Employment Opportunity Commission (EEOC) Chair Burrows **released a statement** emphasizing employer diversity, equity, inclusion, and accessibility (DEIA) programmatic efforts that are focused on inclusive environments and fostering diverse talent were not included in, nor affected by, the Court's opinion. Therefore, private employers should remain committed to the mission of the DEIA values embedded within their strategic priorities.

As employers continue to navigate the increasingly complex DEIA landscape, they should consider three questions to help improve and minimize the risk of their practices, programs, and policies.

1. What evidence-based practices have employers adopted to increase diversity while minimizing employee rebuttal, public scrutiny, and legal risk?

Employers have made great strides with diversity messaging, adapting organizational mission and values, creating new DEIA task forces, allocating additional resources for meeting diversity goals, and implementing new policy and procedures for the understood benefits of having a diverse workforce. Organizational utility and profits run parallel with DEIA initiatives, so it is critical to implement DEIA efforts that have been supported through research as having positive business outcomes. Otherwise, organizations may have great narratives but at the expense of legal risk and financial losses.

Each organization's workforce, motivations, and goals are unique, so this question is best answered through a customized approach. In general, DCI has seen employer success when focusing on opportunities across the entire employee lifecycle. This includes outreach and recruitment, job descriptions, interview styles, diverse hiring panels, onboarding, orientation, employee engagement surveys, training, focus groups, time to promotion, policy review, communications, and attrition, among other things. Rather than engaging in generic diversity initiatives, an option that helps employers to strategically focus their efforts is to conduct an employee life cycle analysis to help understand diverse representation and its movement at various stages of the organization's employment phases. Reviewing the entire employment lifecycle ensures the employer has identified the correct areas to target for intervention. For example, should an organization willingly choose to keep efforts high and increase funds towards recruitment initiatives for increased diversity if the root cause of underrepresentation stemmed from attrition? At some point, the return on investment for recruitment might plateau or worse, see a reduced applicant pool, if the attrition is not addressed.

Many DEIA initiatives are supported with social science research and practitioner experience. However, if DEIA initiatives are implemented incorrectly or rushed, they could have counterintuitive effects, which may increase legal risk.

2. Considering the focal points of the Court's opinion, what can employers consider as next steps to carry forward, embrace, enhance, and sustain DEIA efforts?

Understanding workforce diversity can be a strategic business practice when it helps organizations tap underutilized but qualified talent available in the labor market. To help with this, organizations can use labor market information to focus their diverse recruitment strategies. There are various methodologies for organizations to understand their respective workforce diversity, current representation, and areas that have underrepresentation of protected groups, but each must be customized to the organization and its business practices. Once established, customized methodology can then be used in recurring years to identify trends, establish aspirational goals, and link DEIA initiatives back to diversity effort gains and overall effect on the organization's bottom line.

It is critical to have a valid framework to establish which diverse groups are currently underrepresented in an employer's workforce. Methodological nuances should include considerations to ensure accuracy and reliability of conclusions. Specifically, all employers should engage in strategies to maximize voluntary self-identification practices, ensure job titles align to correct EEO categories and other comparator categories, and utilize endorsed census occupation codes. Since there is heightened public exposure and scrutiny surrounding diversity benchmarks and goals, it is best to retain counsel and partner with an expert to establish practices for analyzing workforce diversity that direct DEIA initiatives.

3. How can employers monitor DEIA progress?

The Court's majority opinion sought measurable objectives to justify established practices. For federal contractors², this type of measurable objective could be found in the employer's annual results of good faith efforts and its totality of efforts. Federal contractors should be familiar with Section 503 of the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) requirements in this regard³. These regulations require employers to measure DEIA initiatives based on pre-established criteria that organizational leaders define prior to implementing efforts. This may include qualitative and quantitative data and information that is already readily available, such as the number job seekers, qualified applicants, and partnership referrals, as well as marketing costs and employee attendance over a given timeframe.

After tracking DEIA initiative criteria, employers should then synthesize feedback across all efforts to identify effectiveness in line with their vision for diversity goals. If an employer cannot determine how DEIA initiatives are impacting goals, they should realign measurement criteria to better collect information for guided findings. Establishing appropriate criteria for success, as well as understanding progress towards goals, is foundational for continued DEIA and business profit growth. As such, senior leadership should embed continuous follow-up for company strategy planning.

While the Court's purview was not within the employment context, DCI is monitoring increased requests for organizational DEIA transparency from applicants, employees, the public, and company stakeholders. To effectively establish strategic DEIA practices while mitigating legal risk, DCI recommends employers be proactive by retaining counsel and partnering with an external DEIA expert. This encompasses organizations analyzing workforce diversity, setting aspirational goals, measuring progress towards goals, trending results, and linking DEIA initiatives.

¹ *Students for Fair Admissions v. President and Fellows of Harvard College and Students for Fair Admissions v. University of North Carolina* (2023).

² A federal contractor is an organization that enters into a contract, or is bidding on such a contract, with any agency or department of the United States government and is paid, or is to be paid, for services, material, equipment, supplies, land or buildings with funds appropriated by Congress. (<https://www.fec.gov/>)

³ The Office of Federal Contract Compliance Programs (OFCCP) administers and enforces three equal opportunity mandates: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212. These mandates prohibit Federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, national origin, disability, or veteran status. They also require Federal contractors and subcontractors to take affirmative steps to ensure equal opportunity in their employment processes. OFCCP also shares responsibility with the U.S. Equal Opportunity Employment Commission in enforcing Title I of the Americans with Disabilities Act. (<http://www.dol.gov/ofccp/>)

