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David Sparkman, Editor **Volume 11, Issue 14** **August 1, 2023**

SCOTUS Ruling Impacts DEI

The Supreme Court's landmark ruling on affirmative action in college and university admissions has a limited but potentially significant impact on employers and private diversity, equity and inclusion (DEI) and Environment, Social and Governance (ESG) programs.

"Employers should consider their workplace DEI programs and strategies as they brace for the potential impact of the court ending affirmative action for college admissions," explain Andrew Turnbull, Carrie Cohen and Michael Schulman, who are employment attorneys with the law firm of Morrison & Foerster.

Private DEI programs are controversial and widely viewed as divisive and coercive by many people. A number of states have challenged these initiatives and 19 of them have introduced or enacted anti-DEI legislation of various kinds.

"While these initiatives are focused on state agencies and state-funded higher education, they may cause concern for private employers," warn attorneys Emily Bushaw and Elizabeth Gardner of the law firm of Perkins Coie. "Private employers should take note of these efforts as well as broader attacks on ESG initiatives."

ESG also has become so much of a political hot potato that one of its earliest and most powerful proponents, Larry Fink, chief executive of BlackRock Inc., recently announced he is abandoning the term, if not the ideas behind it. "I don't use the word ESG anymore, because it's been entirely weaponized by the far left and weaponized by the far right," he explained.

Legal experts appear to be divided on the decision's ultimate impact on non-university employers.

To the Biden appointed Equal Employment Opportunity Commission Chair Charlotte A. Burrows, it "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs."

Andrea Lucas, a member of the EEOC appointed by President Trump, disagrees, predicting, that the Supreme Court ruling will lead to an increase in court challenges to what she holds are already illegal corporate DEI programs.

"I think this is going to be a wake-up call for employers," she said. "Today is a time – the best time – for lawyers to really take a look at the lawfulness of their corporate diversity programs. Even though many employers don't use the word affirmative action, it's rampant today, from ESG, to focuses on equity, pretty much everywhere."

"Employers should review their DEI and affirmative action initiatives and consider how and

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if to revise those programs in light of the potential implications of the court's decision," says Andrew Turnbull, Carrie Cohen, and Michael Schulman of the Morrison & Foerster law firm.

"There may be heightened scrutiny of business efforts on multiple fronts, and questions from employees and stakeholders about what these rulings mean for their business." This includes being able to explain how their diversity strategies align with legal and practical considerations.

They say companies consider lessening the risk of legal challenges to their DEI programs by:

- Reviewing existing DEI efforts with an eye toward areas of vulnerability and confirm that the initiatives do not create unlawful preferences based on protected characteristics or include quotas or set asides. "Employers should consider including race-neutral factors, such as socioeconomic status, first-generation professionals, and geographic diversity, which could help increase racial diversity in the workplace while mitigating the risk of potential challenges," they add.

- Looking over DEI program materials for any statements that describe their companies' practices in a manner that could be viewed as unlawful. The attorneys also note that in some cases, those suing employers have used statements in DEI policies and literature to support reverse discrimination claims.

- Being prepared to justify the importance of their existing DEI programs and how those programs are consistent with the law.

- Make sure that company leaders and managers are educated about the benefits and objectives of the DEI and affirmative action programs. "It will be important for managers to understand what DEI means and that they cannot give preferential treatment to underrepresented groups when making employment decisions," the lawyers stress.

- Undertaking a review of current diversity trainings, including unconscious bias training, considering recent legislation aimed at limiting DEI programs and trainings that might make their programs vulnerable to legal attack.

They also stress that companies should continue to monitor state and local laws and regulations aimed at limiting or requiring DEI efforts to ensure compliance with those laws.

OSHA Targets Warehousing

In its ongoing effort to support the unionization of Amazon, OSHA has launched a new National Emphasis Program for safety enforcement that specifically targets warehousing operations.

"Our enforcement efforts are designed to do one thing: lead to permanent change in workplace safety," said OSHA Chief Doug Parker.

"This emphasis program allows OSHA to direct resources to establishments where evidence shows employers must be more intentional in addressing the root causes of worker injuries and align their business practices with the goal to ensure worker health and safety."

In the past 10 years, warehousing and distribution centers have experienced tremendous growth with more than 1.9 million people employed in the industry, the agency pointed out.

"The Bureau of Labor Statistics data shows injury and illness rates for these establishments are higher than in private industry overall and, in some sectors, more than twice the rate of private industry," according to the OSHA announcement.

Under the new three-year NEP, the agency will conduct comprehensive safety inspections focused on hazards related to powered lift truck operations, material handling and storage, walking and working surfaces, means of exit and fire protection.

OSHA added that these activities are expected to include inspections of retail establishments with high injury rates with a focus on storage and loading areas. The agency stressed that it may expand the scope of an individual inspection when evidence shows that violations may exist in other areas of a facility.

OSHA said that while conducting the NEP inspection activities it also intends to assess heat and ergonomic hazards. In addition, the agency said health inspections may be conducted and additional enforcement actions undertaken if it finds these hazards are present. OSHA also initiated separate NEPs earlier this year addressing falls and heat.

School Sales to Set New Record

Consumers are expected to spend record amounts for both back-to-school and back-to-college shopping this year, according to projections made by the National Retail Federation

Back-to-school spending is seen reaching an unparalleled $41.5 billion, up from $36.9 billion last year and the previous high of $37.1 billion in 2021. NRF also forecasts that back-to-college spending is expected to hit $94 billion, about $20 billion over last year's record.

"Our research for 2023 shows American consumers are eager to jumpstart their back-to-school and college purchases early," observes NRF President Matthew Shay. The forecast says that families with children in K-12 are planning to spend an average of $890, compared with 2022's record of $864.

As of early July, 55% of consumers said they had already started shopping. According to NRF, this is on par with last year, but is up from 44% in 2019, and is in line with the trend of consumers shopping earlier for major spending events, like holidays.

However, while consumers have started shopping early, as of early July, 85% said they still had at least half of their shopping left to do.

NRF says 69% of back-to-school shoppers expect to buy electronics or other computer-related accessories, up from 65% last year and the highest in the survey's history.

Total spending on electronics is predicted to reach a record $15.2 billion and the top electronics purchases will be laptop computers (51%), tablets (36%) and calculators (29%).

College student spending is seen rising to an average of $1,3667 per person, up from 2022's $1,199, and a new record from the previous record of $1,200.32 in 2021. Since 2019, back-to-college spending has nearly doubled, NRF pointed out.

Court Defines Undue Hardship

The U.S. Supreme Court set a new standard for religious accommodations for employers by defining undue hardship for the first time.

The decision was widely misreported as allowing employees to be granted the sabbath off, which has been long permitted under law.

The restriction had been that the employer was not required to provide such an accommodation if it would result in creating an unreasonable hardship, which up to now had been defined only on a case-by-case basis in various court decisions.

In the Groff v. DeJoy ruling, the court now says undue hardship exists only if the accommodation "would result in substantial increased costs; in relation to the conduct of the particular business."

Robin Shea, partner in the law firm of Constangy Brooks Smith & Prophete, says employers should:

- Require requests for religious accommodation to be made in writing, with exceptions for employees who are not fluent in English or who have literacy issues. The request should briefly explain as to how the employer's policy or practice conflicts with the employee's religious beliefs.

- Review the requests, and make sure they are really religious in nature. With Covid vaccines, many employers received "religious" accommodation requests that were not based on religion but on politics or fears concerning the safety of the new vaccines.

"Those may be legitimate concerns, but they are not 'religious' in nature," she points out.

- If the request is religious in nature, assess whether the employee's belief is sincerely held. "When in doubt, assume that the belief is sincere."

- If the request is religious in nature, and if the employee's belief appears to be sincere, then either grant the accommodation request or go through the ADA "interactive process" with the employee before making an "undue hardship" determination.

EEO-1 Form's Date Postponed

The Equal Employment Opportunity Commission recently announced that the 2022 EEO-1 Form reporting deadline is again being postponed

Reporting, which was expected to begin in July, is now "tentatively" scheduled to open sometime this fall, according to the commission

"The EEOC is currently completing a mandatory, three-year renewal of the EEO-1 Component 1 data collection by the Office of Management and Budget under the Paperwork Reduction Act (PRA)," the commission explained.

It said that all updates for the 2022 EEO-1 Component 1 data collection, including the final opening date and opening of the Filer Support Message Center, eventually will be posted to www.eeocdata.org/eeo1 as they become available.

"OMB's approval of the EEO-1 report every three years has generally been a routine matter," points out attorney David Goldstein of the law firm of Littler Mendelson

"It seems reasonable to suspect that the continued delay in the 2022 reporting cycle reflects a political battle over proposals to resume the collection of pay data as part of annual EEO-1 reporting," he says.

The newest federal pay reporting requirement had been adopted in 2017 and 2018 but discontinued later by the Trump administration.

While the Biden administration appears to favor its return, the current commission, composed of two Democrat and two Republican commissioners, seems unlikely to agree to such a proposal.

"Therefore, as long as the nomination of a third Democrat to the five-person commission remains stalled in the Senate, such a change in reporting requirements seems unlikely," Goldstein adds.

EEOC points out that the delay does not change the types of demographic workforce data historically collected by the EEO-1 (that is, employee data by job category and sex and race or ethnicity).

Hiring Trends Add New Rigor

Employers are introducing new rigor into their hiring process, according to recent research conducted by the talent solutions firm Robert Half.

As a result of the company's newest research findings, Half stressed five trends applicants need to keep in mind before embarking on a job search this year.

"Landing the right job requires patience and persistence," observed Paul McDonald, senior executive director of Robert Half. Job seekers "should target their search, tailor application materials, network and be proactive throughout the process," he adds.

For entry-level candidates, Employers typically conduct four interviews before extending an offer, Half notes. In addition, companies typically take five weeks on average to make a hire.

Expect questions that gauge soft skills. One in five managers attribute their hiring mistakes to placing too much weight on technical skills. To avoid making the same misstep, they are asking situational questions to learn more about a candidate's traits and interpersonal abilities, such as self-motivation and collaboration, especially critical in hybrid and remote work environments.

Beyond skills, managers said the following actions can tip the scales in an applicant's favor: researching the company (67%); maintaining a respectable online presence (51%); and sending a thank-you note after an interview (49%)

Except for certain roles, employers today also are focusing more on in-office experience than they did in the immediate aftermath of the Covid pandemic.

Fewer than one in three entry-level jobs (29%) are advertised as hybrid or fully remote. However, off-site opportunities are more common for technology and finance and accounting positions, Half says

OSHA Finally Issues Report Rule

After an excruciatingly long wait, OSHA has issued its revised injury and illness reporting and recordkeeping requirements for employers regarding the 300 and 301 forms they are expected to file electronically with the agency.

"OSHA will use these data to intervene through strategic outreach and enforcement to reduce worker injuries and illnesses in high-hazard industries," said OSHA Administrator Doug Parker.

"The safety and health community will benefit from the insights this information will provide at the industry level, while workers and employers will be able to make more informed decisions about their workplace's safety and health," he added.

The rule generally will become effective on Jan. 1, 2024, with data submission requirements beginning on March 2, 2024. The rule was originally proposed in 2013and was supposed to go into effect in 2017 but was delayed due to legal challenges brought by employer groups, which are likely to be renewed.

This rule reverts to a prior regulation OSHA had published near the end of the Obama administration, which was later withdrawn by the Trump administration and hung fire until just recently

The new final rule is expected to draw further legal challenges, which could very well delay or prevent its ultimate implementation. Employers all along have objected to OSHA making the collected information public by publishing it online. explain attorneys for the law firm of Morgan Lewis.

In the past, employers covered by OSHA's recordkeeping regulations collected and maintained information regarding covered work-related injuries and illnesses. Generally, OSHA only gained access to those records as part of an onsite inspection, or on occasion as part of specific written requests.

Under the revised regulation, however, employers in "high risk" industries with 100 or more employees at one establishment must electronically provide certain information on their OSHA 300 and 301 forms to OSHA annually. Importantly, employers must include their company name in their electronic submissions which then will be made public in a searchable online database.

The high-risk industries listed in the rule's appendix include warehousing and storage, wholesales trade, and the various modal freight transportation industries including road, air and trucking operations.

OSHA contends that "expanded public access to establishment-specific, case specific injury and illness data" will allow various stakeholders, including the general public, to "make more informed decisions about workplace safety and health at a given establishment.," say attorneys with the law firm of Morgan Lewis.

Employers subject to OSHA's recordkeeping regulations can take certain steps now to comply with the new requirements and limit citation liability, they point out.

Industries labeled "high risk" should begin to develop a process for collecting the information detailed in the 300 and 301 forms electronically, to the extent that this is not already being done, to assist in meeting the electronic submission deadline.

These employers should also review their injury and illness reporting procedures to ensure that such programs are reasonable and do not discourage injury and illness reporting.

Employers should develop procedures so that if an establishment reaches the 100 or 250 employee thresholds in the regulation, the employer receives notification so that it can be in a position to comply with the new electronic submission requirements.

The Morgan Lewis attorneys say that the cost and resources necessary to implement electronic data collection and maintenance will be significant. "The cost and resources necessary to implement electronic data collection and maintenance will be significant," the attorneys stress.