WorkSmarts Virtual Seminar

Live from Spencer Fane, It's Legal Update!

Featuring Helen Holden and Toni Ojoyeyi

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Agenda

- US Supreme Court
  - *Students for Fair Admissions, Inc. v. Harvard*
  - *Groff v. DeJoy*
- Federal Courts of Appeal
- EEOC Changes
  - Pregnant Workers Fairness Act (PWFA)
  - Pump Act
  - Current EEOC structure
- NLRB
  - Stericycle
  - *McLaren Macomb v. NLRB*
  - Non-competes: NLRB General Counsel & FTC
- DOL
  - FMLA
  - FLSA Independent Contractor News
  - Proposed Overtime Rules
- What NOT to do!

U.S. Supreme Court

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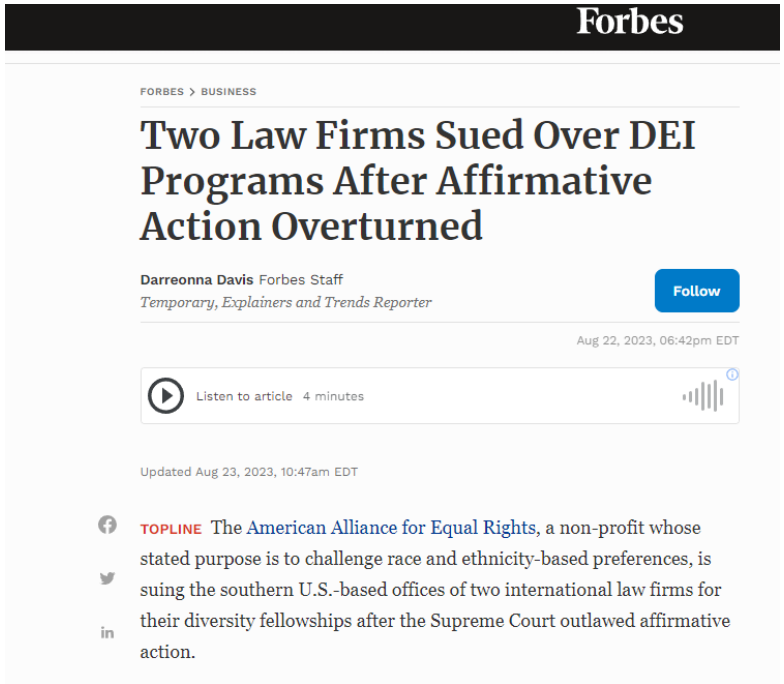
Students for Fair Admissions, Inc. v. Harvard

- On June 29, 2023, the U.S. Supreme Court held that certain race-conscious college admissions policies violate the Equal Protection Clause of the Fourteenth Amendment, which prohibits discrimination based on race.
- This ruling may have implications for employer efforts to foster diverse and inclusive workforces.

Reactions to *Students for Fair Admissions*



Forbes

FORBES > BUSINESS

Two Law Firms Sued Over DEI Programs After Affirmative Action Overturned

Darreonna Davis Forbes Staff
Temporary, Explainers and Trends Reporter

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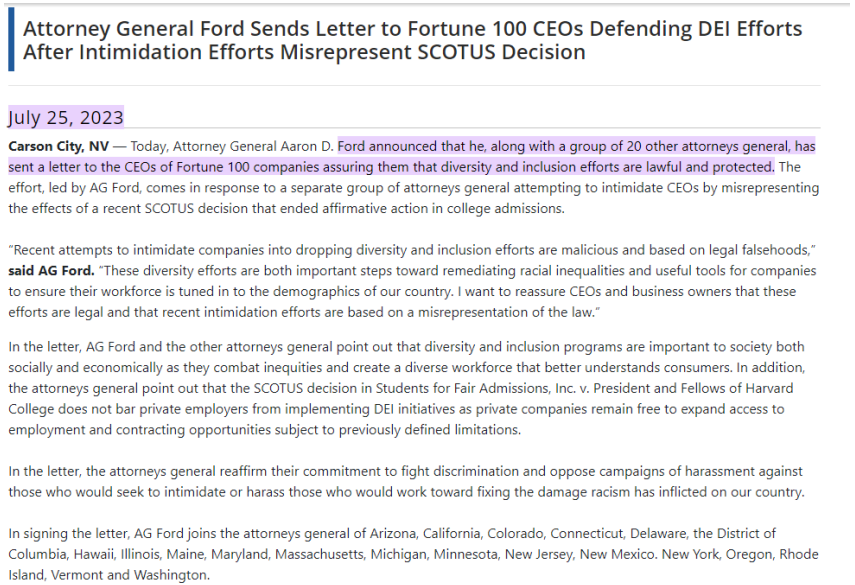
Aug 22, 2023, 06:42pm EDT

Listen to article 4 minutes

Updated Aug 23, 2023, 10:47am EDT

TOPLINE The American Alliance for Equal Rights, a non-profit whose stated purpose is to challenge race and ethnicity-based preferences, is suing the southern U.S.-based offices of two international law firms for their diversity fellowships after the Supreme Court outlawed affirmative action.



Attorney General Ford Sends Letter to Fortune 100 CEOs Defending DEI Efforts After Intimidation Efforts Misrepresent SCOTUS Decision

July 25, 2023

Carson City, NV — Today, Attorney General Aaron D. Ford announced that he, along with a group of 20 other attorneys general, has sent a letter to the CEOs of Fortune 100 companies assuring them that diversity and inclusion efforts are lawful and protected. The effort, led by AG Ford, comes in response to a separate group of attorneys general attempting to intimidate CEOs by misrepresenting the effects of a recent SCOTUS decision that ended affirmative action in college admissions.

"Recent attempts to intimidate companies into dropping diversity and inclusion efforts are malicious and based on legal falsehoods," **said AG Ford.** "These diversity efforts are both important steps toward remediating racial inequalities and useful tools for companies to ensure their workforce is tuned in to the demographics of our country. I want to reassure CEOs and business owners that these efforts are legal and that recent intimidation efforts are based on a misrepresentation of the law."

In the letter, AG Ford and the other attorneys general point out that diversity and inclusion programs are important to society both socially and economically as they combat inequities and create a diverse workforce that better understands consumers. In addition, the attorneys general point out that the SCOTUS decision in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College does not bar private employers from implementing DEI initiatives as private companies remain free to expand access to employment and contracting opportunities subject to previously defined limitations.

In the letter, the attorneys general reaffirm their commitment to fight discrimination and oppose campaigns of harassment against those who would seek to intimidate or harass those who would work toward fixing the damage racism has inflicted on our country.

In signing the letter, AG Ford joins the attorneys general of Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico. New York, Oregon, Rhode Island, Vermont and Washington.

Discrimination

- Discrimination against any individual on the basis of race, color, religion, sex, or national origin violates Title VII.
- Title VII protections are not limited to members of any particular race, color, religion, sex, or national origin.

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).

Religious Accommodations

- *Groff v. DeJoy*, June 2023
- Religious accommodations in the workplace required for sincerely held religious beliefs unless they pose an undue hardship.
- Undue hardship means a substantial burden in the overall context of the employer's business.
- Previously, undue hardship was interpreted to be anything that was more than a *de minimus* cost to the business.

Common Religious Accommodations

- Time off for religious observances (*e.g.,* no weekend work).
- Prayer space availability in the workplace.
- Exceptions to grooming and dress code requirements.

Courts of Appeal and Cases to Watch

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Muldrow v. City of St. Louis

- Female police sergeant brought a lawsuit alleging sex discrimination contending she was laterally transferred to a position in another district because leadership of the department wanted to hire a man for her role.
- City contended that the lateral transfer was not a materially significant disadvantage for the employee, and the Eighth Circuit agreed. Other circuits have found the opposite.
- The U.S. Supreme Court has agreed to review this case.

Muldrow v. City of St. Louis Missouri, 30 F.4th 680, 689 (8th Cir. 2022), cert. granted in part, 143 S. Ct. 2686 (2023).

Judicial Review of Regulatory Actions

- The U.S. Supreme Court has agreed to hear *Loper Bright Enterprises v. Raimondo*, which relates to the deference federal courts must give to agency interpretations of statutes.
- Could impact interpretations of statutes by all major federal regulatory agencies, including the U.S. Department of Labor, EEOC, and the NLRB.
- Currently, courts defer to agencies when statutes are ambiguous, provided that agency interpretations are reasonable.

FLSA Collective Actions

- Most courts apply a “lenient” standard with a two-step process:
  - Showing of some evidence that there are “similarly situated employees, followed by notice to employees and period of time to “opt in,” called “conditional certification.”
  - Employer opportunity to “decertify.”

2021: Fifth Circuit (Texas, Louisiana, Mississippi)

- Rejected minimal burden approach.
- Requires consideration of “all available evidence,” and provides for notice when employees are found to be *actually* similarly situated.

2023: Sixth Circuit (Michigan, Ohio, Kentucky, Tennessee)

- Rejected minimal burden approach.
- Requires employees to show “strong likelihood” that other employees are similarly situated.

Hamilton v. Dallas County

- The Dallas County Sheriff's Office provided its detention service officers with two days off per week. The sheriff's implemented a policy that only male officers could select full weekends off.
- The Fifth Circuit had previously held that Title VII's prohibition against sex discrimination only applied to an "ultimate employment decision."
- The full Fifth Circuit reversed the decades-old prior case, and held that a claim for discrimination under Title VII arises if the employee alleges she was treated differently "in hiring, firing, compensation, or the 'terms, conditions, or privileges' of her employment."

Hamilton v. Dallas Cnty., No. 21-10133, 2023 WL 5316716, at *1 (5th Cir. Aug. 18, 2023)

EEOC Changes

Pregnant Worker's Fairness Act

- *Young v. United Parcel Service*, U.S. Supreme Court, 2015
- PWFA: requires employers to provide accommodations to pregnant workers, regardless of whether they provide similar accommodations to other employees.
- Includes pregnancy, childbirth and related medical conditions.
- Requires interactive process (similar to the ADA).

Accommodation Examples

- Water during workday
- Closer parking
- Flexible hours
- Appropriately sized uniforms and apparel
- Time off
  - For appointments
  - For bedrest
  - To recover from childbirth
- Be excused from strenuous activities
- Frequent bathroom breaks
- Assistance with lifting
- Light duty
- Remote work
- Temporary reassignment or transfer

Regulation Examples

- A pregnant employee tells her supervisor, “I’m having trouble getting to work at my scheduled starting time because of morning sickness.”
- An employee who gave birth three months ago tells the person who assigns her work at the employment agency, “I need an hour off once a week for treatments to help with my back problem that started during my pregnancy.”
- An employee verbally informs a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because the employee is pregnant, but does not complete the employer’s online form for requesting accommodation.

Providing Urgent Maternal Protections for Nursing Mothers Act

- Effective December 29, 2022, the PUMP Act builds on prior protections for the expression of breastmilk during working hours.
- PUMP specifies that while these breaks are still presumptively unpaid, time spent expressing milk will be considered hours worked if the employee is not completely relieved of their job responsibilities during that period.
- PUMP also provides for an employee's ability to seek legal remedies if their employer violates the law.
- PUMP applies to breastfeeding mothers who work remotely. Remote workers have the right to use private and shielded spaces in their homes or other workplaces without their employer's observation.

Accommodations for Breastfeeding

- PWFA may apply after one year.
- Additional accommodations may be sought
  - Access to a sink or refrigeration
  - Proximity to location for pumping

EEOC Structure

- Democratic majority on the EEOC commission with the confirmation of Kalpana Kotagal.
- The EEOC chair Charlotte Burrows is a Democratic as well.
- Potential guidance:
  - Sexual harassment guidance;
  - Expanding pay disclosure requirements; and,
  - Regulation of AI.

EEOC Strategic Plan

- Focus on systemic discrimination.
- Increased monitoring of conciliation agreements.
- Expanding access to intake services.
- Outreach to vulnerable and diverse communities.

EEOC Strategic Enforcement Plan

- Four-year plan
- Specifies substantive priorities for EEOC
- Priority one: AI in employment and “Electronic Monitoring”
- Targeted industries (construction and technology)
- Vulnerable populations
- Recruitment and hiring
- Systemic harassment
- COVID

EEOC Strategic Enforcement Plan

- Pay equity
- Pregnancy-related issues
- Current events
- Settlement, confidentiality, arbitration agreements

The National Labor Relations Board

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Stericycle, Inc., 372 NLRB No. 113 (2023)

- The NLRB adopted a strict new legal standard for evaluating the validity of workplace rules under the National Labor Relations Act (NLRA).
- NLRB majority overruled *The Boeing Co.,* 365 NLRB 154 (2017), the prior standard under which rules, policies and handbook provisions were treated either as categorically lawful or as subject to a balancing test that weighed their tendency to restrict employee rights against the business needs justifying them.
- NLRB will no longer treat categories of rules as appropriate but will separately scrutinize discrete provisions in employee handbooks on their own merits.

McLaren Macomb, 372 NLRB No. 58 (February 21, 2023)

- Holding that certain confidentiality and non-disparagement provisions contained in employee severance agreements violate employees' rights under the NLRA.
- Board sought enforcement by the US Court of Appeals for the 6th Circuit on July 27, 2023.

Non-Competes: NLRB General Counsel & FTC

- On May 30, 2023, NLRB General Counsel Jennifer Abruzzo sent a memo setting forth her view that non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act except in limited circumstances.
- The Federal Trade Commission (FTC) is expected to vote next April on the final version of its proposal to ban noncompete agreements in employment contracts.

Department of Labor

Proposed Changes to Overtime Regulations

- Notice of Proposed Rulemaking – August 30, 2023
- Salary threshold for white collar exemptions
  - $684 to $1059 weekly ($35,568 to $55,068)
  - More than 50% increase

Proposed Changes to Overtime Rules

- Salary threshold for Highly Compensated Employees
  - $107,432 to $143,988
- Salary threshold applies for white-collar exemptions in U.S. Territories (some exceptions for American Samoa)
- Automatic increasing mechanism every three years
- No changes to duties test

Proposed Changes to Overtime Rules

- Potential challenges to the rule
- Implementation and compliance strategies

FMLA Updates

- FMLA eligibility includes 50 or more employees within 75 miles of a worksite.
- Worksite:
  - Not a personal residence; and
  - Place where work assignments are made or where the employee reports, including remote employees.
- Entitlement to FMLA leave is based on workweeks, not hours worked.

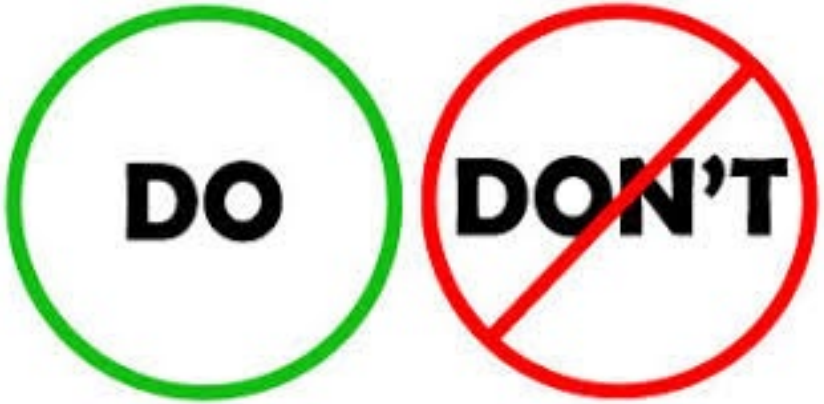
FLSA Independent Contractor News

- Proposed Rule – October 2022
- The proposed rule plans to apply a version of the “economic realities test” as its standard for determining whether a worker is an employee or an independent contractor.
- Litigation in Fifth Circuit Court of Appeals relating to prior rule published January 7, 2021.

New Form I-9 Changes

- Now only one page long, the new edition is easier for employers and employees.
- Other improvements include clearer instructions and providing guidance on acceptable receipts and the auto-extension of some documents found on the Lists of Acceptable Documents.
- Employers may begin using the new edition beginning August 1, 2023, but may continue to use the 2019 version of the form through October 31, 2023.

What NOT to Do!



Employer Offered Priest for Confessions of Workplace Sins

- In May 2023, during litigation by the DOL in federal court, an employee of Che Garibaldi Inc., operator of Taqueria Garibaldi, testified that the restaurant offered employees a person identified as a priest to hear confessions during work hours.
- The employee told the court the priest urged workers to “get the sins out,” and asked employees if they had stolen from the employer, been late for work, had done anything to harm their employer, or if they had bad intentions toward their employer.
- The judge ordered the restaurant and its owners to pay the department $5,000 in civil money penalties due to the willful nature of their violations and $70,000 in back wages and an equal amount in liquidated damages.

Severed Heads as Punishment for Complaints?

- In June 2023, an employee reported concerns about the mishandling and poor conditions of donated bodies to his supervisors.
- Following this, he came into work and found three severed heads lying on a plastic container by his desk.

"Gee... Nothing says 'I'm dead' like a severed head."

Any Questions or Comments?

Thank You

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