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Employee Affirmative Action 101—Overview, History, and Likely Challenges Post-*Students for Fair Admissions*

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Introduction

When entities enter into a federal prime contract or subcontract, they often encounter contract or subcontract clauses that include the following employee affirmative action commitments: FAR 52.222-26 Equal Opportunity (E.O. 11246), FAR 52.222-36 Equal Opportunity for Workers with Disabilities, and FAR 52.222-35 Equal Opportunity for Veterans.

At first glance, such clauses sound like references to common EEO policies that most organizations already have in place. That, however, is not the case. And the implications of entering into procurement contracts or subcontracts with such clauses are wide-ranging—and changing.

Indeed, unlike typical non-discrimination obligations, covered federal government contractors and subcontractors face extensive (and expensive) legal, recordkeeping, reporting, and audit disclosure requirements beyond those applicable to other private businesses. This includes the development of annual written employee affirmative action plans and the burdensome applicant, hiring, promotion, termination, and compensation data compilation and statistical analyses that go with them.

Federal law regarding affirmative action is also under attack and evolving. For example, on June 29, 2023, the US Supreme Court struck down the affirmative action student admissions practices at Harvard College and the University of North Carolina at Chapel Hill in a pair of cases brought by Students for Fair Admissions (SFFA).[1] On its face, the decision does not directly concern employment, as the Supreme Court's prior rulings that endorsed the limited use of race in pursuing the educational benefits of diversity was a special exception for college admissions that never applied to public and private employment. However, the Supreme Court notably relied on case law concerning race in employment to reach its *Students for Fair Admissions* decision. And the decision's holdings and language have broader implications for corporate hiring practices, employee affirmative action, and other diversity, equity, and inclusion initiatives—the effects of which are already being felt.

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Employee Affirmative Action History

Executive Order 11246 (the Executive Order or E.O. 11246),[2] Section 503 of the Rehabilitation Act of 1973 (the Rehabilitation Act),[3] and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA)[4] each impose non-discrimination *and* affirmative action obligations on holders of covered federal government contracts. General non-discrimination requirements for federal contractors first began when President Franklin Roosevelt signed an executive order in 1941[5] requiring non-discrimination clauses to be contained in all government defense contracts. Such obligations, however, have since been expanded to include current requirements concerning non-discrimination protections and affirmative action commitments with respect to minorities, women, individuals with disabilities, and certain veterans for most all supply/service and construction contracts above certain defined contractual and monetary thresholds.

Specifically, on September 24, 1965, more than a year after the Civil Rights Act of 1964 was enacted, President Lyndon Johnson issued E.O. 11246. With it, the president charged the US Secretary of Labor with the responsibility of ensuring equal opportunity for minorities and women in federal contractors' recruitment, hiring, promotion, training, and other employment practices—moving enforcement authority from various presidential committees to a cabinet-level official. The Executive Order (and its later regulations) further required that covered executive agencies include in every government contract a clause effectively requiring, among other things, that contractors take positive proactive recruiting, outreach, goal-setting, statistical self-analysis, and other steps beyond base non-discrimination (that is, "affirmative action") to ensure equal opportunity based on race/color and gender.[6] Similar non-discrimination and affirmative action obligations as they relate to (a) individuals with disabilities and (b) certain "qualified covered veterans" were then later adopted by Congress under the Rehabilitation Act (in 1973) and VEVRAA (in 1974).

The Executive Order, the Rehabilitation Act, and VEVRAA all delegate to the US Secretary of Labor responsibility to administer and enforce their requirements. In turn, the Secretary of Labor has established the Office of Federal Contract Compliance Programs (OFCCP) within the US Department of Labor. The OFCCP has the authority to audit covered contractor facilities with regard to federal affirmative action compliance, even when there is no individual or class complaint or charge of discrimination. Further, audits may occur at multiple locations for a covered contractor in the same year and repeatedly from year to year.

In conducting such reviews, the OFCCP relies heavily on its power to negotiate "conciliation" agreements as a method of resolving perceived violations in an administrative fashion.[7] Through such negotiations, the OFCCP generally attempts to secure monetary and nonmonetary relief for the benefit of alleged victims of discrimination from contractors whom it believes are out of regulatory compliance or engaging in actual discriminatory conduct.[8]

When conciliation fails, the OFCCP may commence administrative proceedings to enjoin violations, seek appropriate monetary relief on a class basis, and impose sanctions.[9] Such sanctions may include the cancellation, termination, or suspension of an employer's federal contracts.[10] In addition, a contractor may be declared ineligible for or "debarred" from future government contract awards.[11]

OFCCP Prime Contractor and Subcontractor Coverage

There are two general jurisdictional coverage thresholds regarding affirmative action compliance as a US federal contractor or subcontractor under the Executive Order, the Rehabilitation Act, and VEVRAA:

1. The "basic threshold," which requires non-discrimination and certain reporting, recordkeeping, and other added compliance/regulatory practices, but *no* written affirmative action plan (AAP); and
2. The "AAP threshold," which further requires the preparation and maintenance of detailed, written AAPs—and the voluminous statistical workforce, job group, incumbency vs. availability, goal, applicant flow, hiring, promotion, and termination records and analyses that support them.

Unless specifically exempted by E.O. 11246, as amended, an employer satisfies the basic threshold under the Executive Order if it has a single federal government contract, subcontract, or federally assisted construction contract that exceeds $10,000. The basic threshold is also triggered for purposes of the Executive Order if a covered employer has government contracts or subcontracts with an *aggregate* total value or expected value that exceeds $10,000 in any 12-month period, even if no single contract equals or exceeds $10,000. Further, Executive Order basic threshold coverage applies to financial institutions that act as depositories of federal funds or that act as issuing and paying agents for US savings bonds and savings notes, regardless of amount.[12]

An employer must have a single contract worth at least $15,000 to be covered by the basic threshold provisions of the Rehabilitation Act and $25,000 to be covered by VEVRAA.[13]

The more burdensome AAP threshold for purposes of the Executive Order is met for supply and service contractors when, among other triggers, a non-construction contractor or subcontractor has at least 50 employees and at least a *single* covered federal contract or subcontract of $50,000 or more.[14] With some exceptions, this same test

applies for purposes of AAP threshold coverage under the Rehabilitation Act. However, under VEVRAA, a contractor or subcontractor must have 50 or more employees and a single contract or subcontract of $150,000 or more for the AAP threshold to apply.[15] Thus, in some circumstances, it is possible that an employer may be required to prepare AAPs for minorities and women under the Executive Order and for individuals with a disability under the Rehabilitation Act, but no AAPs for covered veterans under VEVRAA.

In addition, the regulations have a "trickle down" effect and instruct prime contractors to "require" each non-construction subcontractor to develop written AAPs in compliance with the Executive Order, the Rehabilitation Act, and VEVRAA for each of the subcontractor's establishments if the subcontractor likewise meets the applicable employee and monetary trigger thresholds.[16]

In many instances, even if a contractor establishes a separate operating entity to perform federal contracting work, it is likely that OFCCP will argue that all of the contractor's US corporate entities are required to have detailed AAPs.

Under OFCCP regulations, "subcontractor" means any entity holding a subcontract. In turn, a "subcontract" is defined as any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee) "(i) [f]or the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more [government] contracts; or (ii) [u]nder which any portion of the contractor's obligation under any one or more [government] contracts is performed, undertaken or assumed."[17]

Personal property can include real estate, physical assets, and other property.[18] Further, per OFCCP, "nonpersonal services" can include such items as utilities, construction, transportation, research, insurance, and reinsurance.[19] Thus, some but not all subcontractor relationships with a prime federal contractor or covered subcontractor will trigger coverage, even if the applicable monetary thresholds are met.

Which Entities Must Have Employee Affirmative Action Plans?

OFCCP regulations generally define a contractor to mean a prime federal contractor or subcontractor. In addition, if multiple companies or legal entities are involved (e.g., a parent and subsidiary, or separate entities under a holding company umbrella), the OFCCP has historically applied a "single entity" test to determine which entities are required to have written AAPs with regard to the Executive Order, the Rehabilitation Act, and VEVRAA.

In analyzing such issues, the OFCCP has historically used a five-factor "actual control" test.[20] The result is that unless entities are legally and operationally distinct with respect to the day-to-day control of employees at all levels of an organization (e.g., finance, HR, marketing, and operations), once a US legal entity within a family of companies is deemed to be a covered federal contractor or subcontractor for purposes of E.O. 11246, Rehabilitation Act, and VEVRAA jurisdiction, *all* of the US legal entities of that family of companies are presumptively deemed covered as well. This is the case even if only one legal entity actually holds and performs the federal contract(s) or subcontract(s).

Thus, in many instances, even if a contractor establishes a separate operating entity to perform federal contracting work (e.g., in what is commonly referred to as a "ring-fence" approach), it is likely that OFCCP will argue that all of the contractor's US corporate entities are required to have detailed AAPs.

What Must an E.O. 11246 Affirmative Action Plan Contain?

Assuming a contractor meets the statutory coverage threshold requirements as a federal contractor or subcontractor, the Executive Order directs that each of a contractor's US establishments are required to develop and update annually a detailed written AAP for women and certain specified racial/ethnic groups.

As for which locations need AAPs, as a general rule, a contractor must develop and maintain a written AAP for each of its establishments that has "50 or more employees" at such location.[21] In addition, each employee in the contractor's workforce (excluding temporary workers assigned by an agency) must be included in an AAP.[22]

Further, with respect to AAP content, the regulations under the Executive Order require AAPs for women and minorities to include various detailed narrative and statistical sections, which are described below.

Narrative Sections

The narrative portions of an Executive Order AAP for minorities and women must contain a summary of a contractor's equal employment opportunity and affirmative action policies as well as action steps for implementing those policies. For example, specific items that must be addressed include internal and external dissemination of a contractor's equal employment opportunity and affirmative action policies, establishment of responsibilities for implementing the AAP, identification of potential "problem areas" by organizational units (i.e.,

departments) and job groups (i.e., similar positions), and the establishment of statistical "placement goals" (i.e., regarding external hiring and internal promotions) and objectives by organizational units and job groups.[23]

Statistical Sections

In addition to narrative provisions, an Executive Order AAP also generally must contain five statistical sections: a workforce analysis, a job group analysis, an incumbency versus availability analysis, specific statistical goals, and a personnel transactions report. These sections are the "meat" of an Executive Order AAP and are by far the costliest part of affirmative action compliance.

1. Workforce Analysis[24]

The workforce analysis is comprised of a statistical breakdown of a contractor's current workforce by job title, gender, and race for each organizational unit (i.e., by department). This analysis provides a snapshot of the workforce as organized by the contractor on the first day of the 12-month period covered by the AAP. A contractor must prepare a separate workforce analysis chart for each organizational unit. Each chart must list each job within the unit, ranked by wage rate or salary range from the lowest-paid to the highest-paid job, along with information concerning the gender and racial subgroups for the individuals performing each job as of the workforce analysis "snapshot" date.

2. Job Group Analysis[25]

This statistical analysis differs from the workforce analysis because it is not divided along departmental lines. Instead, for the required job group analysis, each position at a facility covered by the AAP must be placed into an artificial "job group" outlined by regulation (i.e., jobs that have similar content, wage rates, and opportunities, such as professionals and managers, administrative professionals, technicians, entry-level operatives, etc.). Further, a contractor must then prepare a separate job group analysis chart for each artificial job group. Each chart must, in turn, list each job within the job group, along with information concerning the gender and racial subgroups for the individuals performing each job as of the job analysis "snapshot" date.

Once each position and employee are placed into a job group, a contractor's representation of minorities and women in each group is later compared with the availability of such persons in the general labor pool from which candidates may be selected. Through this process, a contractor can determine whether minorities and/or women are being "underutilized." (*See* subsections 3 and 4 below.) Further, the designated job group for each position is also used to compile, analyze, and report statistics regarding applicants, hires, promotions, and terminations in a given AAP year. (*See* subsection 5 below.)

3. Incumbency v. Availability Analysis[26]

For this analysis, a contractor first attempts to determine the appropriate percentage representation (i.e., availability) of women and minorities having the skills required to fill the positions in each job group. In calculating the availability of minorities and women, the regulations require a contractor to consider at least eight separate factors: for example, (a) the percentage of women and minorities in the workforce compared to the total workforce in the recruiting labor area and (b) the availability of promotable and transferable women and minorities within the contractor's organization.

Part of such information is derived from federal Census data. Other availability data must be tracked and compiled internally by the contractor. Contractors must also attempt to (i) statistically "weigh" availability depending on the percentage of different recruiting sources used (e.g., internal vs. external, local vs. national) and (ii) match each position to a specific federal Census code for comparison as part of this process.

After completing the availability analysis, a contractor must determine if minorities or women are "underutilized" by comparing the availability percentages for minorities and women with their actual percentage representation in each AAP job group (i.e., "incumbency"). Regulations under the Executive Order define the term "underutilization" as having fewer minorities or women in a particular job group than would reasonably be expected given their overall availability.

4. Development of "Goals" to Correct Underutilization[27]

For each job group in which total minorities or women are deemed to be statistically underutilized, a contractor must set annual aspirational "goals" to begin the process of eliminating such underutilization. These goals focus on the placement of minority or female employees into identified underutilized job groups through hiring and promotion over time, using targeted recruiting efforts and other outreach efforts to reach diverse candidates (and *not* by "hiring by the numbers" or the use of quotas, which are per se unlawful under E.O. 11246 and Title VII of the Civil Rights Act of 1964, as amended (Title VII)).

Indeed, per 41 C.F.R. § 60-2.16(e):

1. Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.
2. In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, sexual orientation, gender identity, or national origin.
3. Placement goals do not create set-asides for specific

groups, nor are they intended to achieve proportional representation or equal results.
4. Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

5. Personnel Activity Reports and Adverse Impact Analyses Regarding Hiring, Promotions, and Terminations[28]
Lastly, for the prior AAP year, a contractor is required to compile detailed data regarding and analyze hiring, promotion, and termination rates for different categories of employees. Through this process, a contractor hopes to show that minorities and women were selected and/or promoted at the same or a higher rate than men or whites (and/or other "favored" racial categories). Similarly, a contractor hopes to show that minorities and women were terminated at the same or a lower rate than men or whites (and/or other "favored" racial categories).

This analysis typically takes the form of two separate sets of statistical reports, albeit only the first is technically part of the AAP itself (as opposed to expected background):

- ***Personnel activity reports*** for all hires, promotions, and terminations—reporting total *counts* for each job group with detailed information regarding gender, minority status, racial subgroups, and "unknowns" for each activity.[29]
- ***Adverse impact analyses*** (aka impact ratio analyses), which attempt to identify statistically significant variations in hiring, promotion, and termination *rates* as compared to that which would otherwise be expected based on, for example, the applicant or employee pool within a given job group, separated by gender, minority status, racial subgroups, and "unknowns" for each activity. OFCCP considers any difference in selection rates between genders or racial subgroups within a given job group or other analytical category that is more than two standard deviations (typically using a Z-test calculation) to be evidence of alleged discrimination.

  Notably, this analytical approach creates pressure on contractors to engage in hiring practices that are expressly *prohibited* by 41 C.F.R. § 60-2.16(e), Title VII, and other federal and state EEO laws to avoid such statistical "indicators" from arising during an OFCCP audit (i.e., the unlawful consideration and use of race or gender as a "factor" in employee selection).

  Such pressure is part of the inherent legal tension that underlies federal employee affirmative action plans generally and related OFCCP enforcement in particular. This tension, in turn, is part of likely Equal Protection and other challenges to come regarding the operation of E.O. 11246 employee affirmative action in practice (versus in theory) post–*Students for Fair Admissions*. (*See* sections below discussing SCOTUS decision and its impact).

What Must a Veterans/Disabled AAP Contain?

Unlike AAPs required under E.O. 11246, until 2015, neither the Rehabilitation Act nor VEVRAA required contractors to prepare statistical analyses similar to that contained in the Executive Order AAP. Rather, veterans/disabled AAPs needed only contain narrative sections describing a contractor's equal employment opportunity and affirmative action policies (i.e., with no statistics). This is no longer the case. Beginning in 2016, new regulatory changes to the Rehabilitation Act and VEVRAA now require, among other things:

- The use of veterans and disability placement "benchmarks" (aka goals) based on national availability.
- The collection, tracking, and reporting of data regarding certain veterans and applicants with disabilities and hiring transactions.
- The tracking and reporting of data regarding the utilization of individuals with disabilities at a location by job group, as compared to a national percentage goal.
- The tracking and reporting of data regarding the hiring of veterans generally at a location, as compared to a national percentage benchmark (or an individually established benchmark, developed by an employer using certain factors).[30]

Key Prior E.O. 11246 Legal Challenges

As a general rule, the key articulated statutory basis for E.O. 11246 and its related regulatory obligations is the Federal Property and Administrative Services Act (FPASA),[31] which gives the president the authority to create regulations to promote economy and efficiency in the federal procurement system. Specifically, the OFCCP has historically argued that FPASA and Title VII implicitly authorized the OFCCP's overall affirmative action regulatory scheme. OFCCP also commonly contends that because E.O. 11246 is "consistent with" the FPASA prohibition of sex discrimination in programs receiving federal assistance and Title VII's prohibition of sex and race discrimination in employment, E.O. 11246 is adequately rooted in congressional authority.

Several lower courts have addressed (directly or in part) the argument that the FPASA and/or other federal sources (e.g., Title VII or its 1972 amendments) provide statutory authorization for OFCCP action imposing obligations on particular employers or industry sectors.[32] However, it should be noted that no express authorization exists under FPASA to institute

affirmative action requirements for federal contractors. Further, the US Supreme Court indirectly addressed the question of statutory authorization for E.O. 11246 and its related regulations in *Chrysler Corp. v. Brown*,[33] calling into question the Executive Order's statutory and constitutional support.

The litigation in *Chrysler* arose out of a dispute involving OFCCP's proposed disclosure regulations, which provided for the public disclosure of information filed with or maintained by OFCCP about contractors' compliance with their contractual non-discrimination and affirmative action requirements. Chrysler objected to the proposed release of their AAP, asserting that disclosure was not "authorized by law" because OFCCP regulations that purported to authorize such disclosure did not have the force and effect of law.

In analyzing the issue, the Court in *Chrysler* explained:

> Section 201 of Executive Order 11246 directs the Secretary of Labor to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof." But in order for such regulations to have the "force and effect of law," it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress.[34]

Although the president delegated authority to the Secretary of Labor to interpret E.O. 11246, the Supreme Court noted that the Executive Order does not itself contain any substantive interpretation of any statute, nor does it identify the statutory basis for the issuance of the Order.[35] Further, the Court in *Chrysler*:

- Cast doubt on the overall validity of OFCCP regulations, noting that "[t]he origins of the congressional authority for Executive Order 11246 are somewhat obscure and have been roundly debated by commentators and courts."[36]
- Observed that it is not clear "whether [EO 11246] is authorized by the Federal Property and Administrative Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority."[37]

The Court ultimately did not find it necessary to resolve this question, ruling that federal agencies do not have inherent authority to disclose confidential information obtained from private businesses without explicit statutory permission. In so holding, the Court expressly noted in *Chrysler* that "[f]or purposes of this case, it is not necessary to decide whether [E.O. 11246] as amended is authorized by the [Procurement Act]" or another statute.[38] And the Supreme Court has not addressed the question since.

However, by way of example, the legitimacy of E.O. 11246 has been recently called into question in the Eleventh Circuit's opinion in Georgia v. President of the United States, upholding the preliminary injunction of the federal contractor COVID-19 vaccine mandate based on the "major questions doctrine."[39] In reaching its decision, the appeals court noted as an aside that

> This reading also aligns with an early treatment of the Procurement Act by the Supreme Court. Decades ago, in *Chrysler Corp. v. Brown*, the Court suggested that the President's authority should be based on a "specific reference" within the Act. 441 U.S. 281, 304 n.34, 99 S. Ct. 1705, 60 L.Ed.2d 208 (1979). Though the Court identified other potential sources of statutory authority for the order it was considering—an executive order prohibiting employment discrimination by federal contractors—it doubted that the Procurement Act on its own delegated sufficient authority. . . . *The Supreme Court [in Chrysler] ultimately did not decide whether any statute authorized . . . [EO 11246], but suggested that the Procurement Act alone was not enough to carry the day. . . . Chrysler thus points to interpreting the Act as a limited grant of authority, empowering the President to carry out the Act's specific provisions—but not more*. For whatever reason, *Chrysler* has received scant attention from the lower courts, but we do not see ourselves at liberty to disregard it.[40]

SCOTUS's 2023 *Students for Fair Admissions* Decision

Separate from (but related in partial function to) the above *employee* affirmative action background, on June 29, 2023, the US Supreme Court issued a landmark decision on the use of race as a factor in collegiate *student admissions* in two cases brought by Students for Fair Admissions (SFFA). The Court held that admissions processes at Harvard University and the University of North Carolina at Chapel Hill (UNC-CH) violate Title VI of the Civil Rights Act of 1964 and, with respect to the public university, the Equal Protection Clause of the Fourteenth Amendment in the manner in which the universities consider race.[41]

In the first case, filed against Harvard University, the plaintiffs contended that the university's race-conscious admissions policy discriminates against Asian American student applicants. According to the plaintiffs, Asian American students are significantly less likely to be admitted to Harvard than similarly qualified white, Black, or Hispanic students. The group argued that the policy violates Title VI of the Civil Rights Act of 1964, which bans racial discrimination by entities receiving federal funding (and has been interpreted to impose the same limits as the Equal Protection Clause on funding recipients).

In the second case, filed against the UNC-CH, the plaintiffs argued that the university's consideration of race in its undergraduate admissions process violates both Title VI and the US Constitution—and, like Harvard's process, constitutes discrimination against Asian American student applicants. (Unlike Harvard, UNC-CH is a public university and is therefore covered by the

Fourteenth Amendment's guarantee of equal protection.)

In both cases, SFFA asked the Supreme Court to overrule the Court's 2003 decision in *Grutter v. Bollinger*.[42] In *Grutter*, the Court held that, despite limits imposed by Title VI and the Equal Protection Clause of the US Constitution, colleges and universities could consider race as part of a holistic admissions process—but only if considerations are "narrowly tailored" to advance the compelling interest in the educational benefits that come from a diverse student body (that is, if they satisfy the "strict scrutiny" standard). *Grutter* required colleges to (a) individually review applications, (b) not use racial quotas, and (c) evaluate whether race-neutral options could achieve the same diversity objective. SFFA argued in both cases that even if the racial diversity objectives and legal rule endorsed in *Grutter* are good in theory, they cannot be and were not being applied faithfully in practice.

In *Students for Fair Admissions*, the Supreme Court, in a decision authored by Chief Justice Roberts, sided with the student plaintiffs, holding:

> [W]e have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[43]

The Court explained that the "core purpose" of the Equal Protection Clause was "doing away with all governmentally imposed discrimination based on race."[44] It reasoned that "[e]liminating racial discrimination means eliminating all of it."[45] The Court thus held that the Equal Protection Clause applies "without regard to any differences of race, of color, or of nationality—it is universal in its application . . . [such that] the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[46]

"That principle," the Court explained, "cannot be overridden except in the most extraordinary case."[47] Although the Court had previously recognized such an exception in *Grutter*, the Court found that neither the Harvard nor UNC-CH programs could satisfy the limits that *Grutter* imposed. In particular, the Court concluded that both universities' admissions processes "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today."[48]

The Court also noted that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. . . . But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today" as "[w]hat cannot be done directly cannot be done indirectly."[49]

Impact of the *Students for Fair Admissions* Decision on E.O. 11246

Although the terminology is similar, nothing in the Supreme Court's *Students for Fair Admissions* student "affirmative action" decision strikes down the current legal structures that allow federally required affirmative action in employment for covered federal contractors and subcontractors under E.O. 11246, the Rehabilitation Act, or VEVRAA.

This is because "affirmative action" means something quite different in the college admissions context. Unlike student admissions, employers in the United States have long been prohibited from making employment decisions on the basis of certain legally protected classes, including race and gender. Thus, "affirmative action" for employers and employees involves a number of different facets, including targeted recruiting, outreach, pipeline development, aspirational goal setting, AAP preparation, and reporting.

Unlike the prior special constitutional exception created for college admissions under *Grutter*, federal courts have always held that there can be no "race-conscious" or "gender-conscious" hiring or promotion decisions at work. Further, neither anti-discrimination laws in the employment context nor "affirmative action" obligations for employers were at issue in the Harvard or UNC-CH cases. Thus, post–*Students for Fair Admissions*, the law remains that, with some limited case law exceptions, US employers (including federal contractors and subcontractors covered by E.O. 11246, the Rehabilitation Act, and VEVRAA) *cannot* use a person's race, gender, or any other legally protected category in making selection and other employment decisions—even if such a factor is used as a positive benefit for a particular group in advancing worthy organizational affirmative action and other diversity goals.

Having said this, several aspects of the Supreme Court's *Students for Fair Admissions* ruling are likely to be cited in future cases (a) as a defense in OFCCP agency enforcement actions and/or (b) in actions seeking to invalidate the overall "affirmative action" structure under E.O. 11246 as a whole.[50]

For example, challengers may argue that:
The proffered rationales for affirmative action in education (like "producing new knowledge stemming from diverse outlooks," "promoting the robust exchange of ideas," and "fostering innovation and problem-solving"), while reflecting "commendable goals," are too amorphous to justify what the Court majority described as "the perilous remedy of racial preferences"—such that a similar

argument could be applied to E.O. 11246 employee affirmative action justifications generally.[51]

- Affirmative action in employment by its very nature and implementation harms some individuals based on race—since hiring (like the Supreme Court asserted regarding student admissions) is arguably "zero-sum" where "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[52]
- Federally required affirmative action arguably violates the Equal Protection Clause's prohibition on racial stereotyping and cannot withstand "strict scrutiny," citing the Supreme Court's statement that "[w]e have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those 'who may have little in common with one another but the color of their skin.'"[53]
- There is no "meaningful connection between [the] means [companies and other entities] employ and the goals they pursue" when required to comply with employee affirmative action goal setting, adverse impact analyses, and related responsive actions because such mandates assertedly rely on "opaque racial categories" that are "imprecise in many ways," in some cases "plainly overbroad" and in other cases "underinclusive."[54]

With respect to potential Equal Protection issues raised by the use of racial categories generally, the Court in *Students for Fair Admissions* noted:

2024 Public Contract Law Writing Competition

Deadline – Monday, September 30, 2024

Entries are now being accepted for the 2024 ABA Public Contract Law Section Annual Writing Competition for law students, young lawyers, and LL.M graduates.

In addition to cash awards, quality papers are considered for publication in the *Public Contract Law Journal*. Papers should address a topical issue of interest to the public contract and grant law community.

The competition will be conducted in **two divisions**. Each division will be judged separately, and separate prizes will be awarded to the winners of each division.

- **Division I** is open to candidates for a J.D. degree attending ABA-approved law schools within the United States and its possessions or who have a J.D. degree in 2024 from an ABA-approved law school within the United States and its possessions.
- **Division II** is open to (a) lawyers under the age of 36 years or admitted to practice less than five years as of September 30, 2024, and (b) LL.M. students and recent LL.M graduates who attended law schools within the United States and its possessions and completed their LL.M. degrees after September 30, 2023.

Qualifying entrants must be members in good standing of the ABA and Section of Public Contract Law. Membership information may be obtained by contacting the ABA Service Center at 800.285.2221 or visiting ambar.org.

The **deadline for receipt of articles** for the 2024 Section of Public Contract Law Writing Competition is **11:59 p.m. Central Time on Monday, September 30, 2024**. Entries should be submitted by email to PCL Section Director Patty Brennan. **Late entries will not be accepted**.

For more information and the complete rules visit our awards page.

> For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether South Asian or East Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. . . . And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question." . . . *Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals*.[55]

Justice Gorsuch, concurring, also noted the *Students for Fair Admissions* decision's potential ramifications on Title VII jurisprudence, stating:

> If this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it "unlawful . . . for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." Appreciating the breadth of this provision, just three years ago this Court read its essentially identical terms the same way. This Court has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they "have the same meaning." And that presumption surely makes sense here, for as Justice Stevens recognized years ago, "[b]oth Title VI and Title VII" codify a categorical rule of "individual equality, without regard to race."[56]

Thus, if taken to its logical legal endpoint, it is easy to see how the same arguments made about constitutionally "opaque racial categories" in *Students for Fair Admissions* can be transposed to challenges to the analytical reporting, enforcement actions, and other AAP structures at the heart of E.O. 11246.

Further, future challengers may assert that various aspects of current OFCCP AAP regulations arguably conflict with the Supreme Court's *Students for Fair Admissions* Equal Protection analysis as well. For example, legal attacks may focus on:

- The premise that, under E.O. 11246, employers are required to engage in annual goal setting and aspirational efforts to achieve statistical "balancing" as compared to the theoretical labor market (i.e., "availability"), even where an employer's current employee racial representation (i.e., "incumbency") is significantly and historically diverse.
- The lack of any temporal endpoint to E.O. 11246 affirmative action requirements. For example, OFCCP regulations may require a covered employer to establish a placement goal in a job category that in prior years never needed one simply because of changes to asserted Census availability.
- The regulatory suggestion that the development and implementation of E.O. 11246 AAPs are not designed to address an employer's *own* current or past discrimination but to address historical *governmental* or *societal* discrimination as a whole—or the positive benefits of diversity generally.

Conclusion

At a high level, the entire E.O. 11246, Rehabilitation Act, and VEVRAA affirmative action regulatory structure is designed to require employer statistical and other self-reflection about how and why a given worksite does (or does not) meet analytical expectations—and what an employer should do to remove any unintended or discriminatory barriers to employment access and advancement.

These are valid and extremely important governmental, societal, and moral goals. However, arguably, from some legal perspectives, federal employee affirmative action obligations as they have evolved over time implicitly encourage employers to achieve a form of racial, gender, and other workforce demographic alignment that crosses the legal line. Indeed, as the Supreme Court in *Students for Fair Admissions* stressed in addressing the Equal Protection issues surrounding student affirmative action:

> The problem with these approaches is well established. *"[O]utright racial balancing" is "patently unconstitutional." That is so, we have repeatedly explained, because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."* By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on its head. Their admissions programs "effectively assure that race will always be relevant . . . and that the ultimate goal of eliminating" race as a criterion "will never be achieved."[57]

Thus, if courts later extend this reasoning to public and private employment activity, some or all of the AAP and other affirmative action requirements imposed on federal contractors and subcontractors—or at least their application as currently enforced by OFCCP—may be struck down as unconstitutional. PL

Endnotes

1. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. and Students for Fair Admissions, Inc. v. Univ. of N.C., Docket Nos. 20-1199 & 21-707, 143 S. Ct. 2141 (2023) (collectively referred to here as *Students for Fair Admissions*).
2. Exec. Order 11246, Equal Employment Opportunity, 30 Fed. Reg. 12,319 (Sept. 28, 1965); Executive Order 11246, Employment Opportunity, Correction, 30 Fed. Reg 12,935 (Oct. 12, 1965).
3. Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. V, § 503, 87 Stat. 355 (codified at 29 U.S.C. § 793).
4. Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, tit. IV, § 402, 88 Stat. 1578 (amending

38 U.S.C. § 4212).

5. Exec. Order 8802, in Which President Franklin D. Roosevelt Prohibits Discrimination in the Defense Program (June 25, 1941), https://catalog.archives.gov/id/300005. In 1943, E.O. 8802 was amended by E.O. 9346, which required that a non-discrimination clause be written into all government contracts, not just those related to defense. Exec. Order 9346, Establishing a Committee on Fair Employment Practice, 8 Fed. Reg. 7183 (May 29, 1943). *See also History of Executive Order 11246*, Off. of Fed. Cont. Compliance Programs, https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history.

6. E.O. 11246, sec. 202.

7. *See, e.g.*, *Conciliation Agreements*, Off. of Fed. Cont. Compliance Programs (2024), https://www.dol.gov/agencies/ofccp/foia/library/conciliation-agreements. *See also* 41 C.F.R. § 1.20(b).

8. *See* 41 C.F.R. § 60-1.20(b).

9. See *id.* § 60-1.26.

10. *See id.* § 60-1.27.

11. *Id.*

12. *See id.* §§ 60-1.1–1.5, 60-2.1.

13. *See id.* §§ 60-250.1–250.5, 60-300.1, 60-741.1–741.5. *See also* Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 75 Fed. Reg. 53,129 (Aug. 30, 2010); Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 80 Fed. Reg. 38,293 (July 2, 2015).

14. *See* 41 C.F.R. § 1.20(b). A different, lower "AAP threshold" test applies under the Executive Order with respect to construction contractors. *See id.* §§ 60-4.1–4.4.

15. *See id.* §§ 60-250.1–250.5, 60-300.1, 60-741.1–741.5. *See also* Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 75 Fed. Reg. 53,129; Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 80 Fed. Reg. 38,293.

16. *See, e.g.*, 41 C.F.R. § 60-2.1(b)(2).

17. *See id.* § 60-1.3. *See also Jurisdiction Frequently Asked Questions*, Off. of Fed. Cont. Compliance Programs (Sept. 6, 2023), https://www.dol.gov/agencies/ofccp/faqs/jurisdiction.

18. 41 C.F.R. § 60-1.3. *See also* 40 U.S.C. § 102(8).

19. 41 C.F.R. § 60-1.3. *See also* OFFCCP v. Fla. Hosp. of Orlando, 2009-OFC-2, Decision and Order of Remand on Reconsideration (Dep't of Labor July 22, 2013) (ruling that health care services qualify as "nonpersonal services" under OFCCP's regulations); OFFCCP v. O'Melveny & Myers LLP, 2011-OFC-7, Decision and Order of Remand (Dep't of Labor Aug. 30, 2013) (ruling that legal services qualify as "nonpersonal services").

20. *See, e.g., In re* Ernst-Theodore Arndt, 52 Comp. Gen. 145 (1972). *See also Single Entity Test FAQs*, Off. of Fed. Cont. Compliance Programs (Nov. 13, 2020), https://www.dol.gov/agencies/ofccp/faqs/single-entity-test.

21. *See* 41 C.F.R. § 60-2.1(b)(1).

22. *See id.* §§ 60-2.1(d), (e). For smaller "establishments" with less than 50 employees, contractors have several choices, which include "rolling up" the establishment into the location of the personnel function that supports the smaller site. *Id.* § 60-2.1(d)(1)–(3). Further, once a contractor decides which "establishments" need AAPs, there are separate rules for determining which employees go into which AAPs.

23. *See, e.g., id.* §§ 60-2.10, 60-2.17.

24. *See id.* § 60-2.11.

25. *See id.* §§ 60-2.12, 60-2.13.

26. *See id.* §§ 60-2.14, 60-2.15.

27. *See id.* § 60-2.16.

28. *See id.* §§ 60-1.12(d), 60-2.17.

29. Some AAPs refer to these reports by different names, such as "personnel transaction reports" or "employee activity summaries."

30. *See* 41 C.F.R. § 60-300 *et seq.*; *id.* § 60-741 *et seq.*

31. *See* 40 U.S.C. § 101 *et seq.*

32. *See, e.g.*, Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1516 (11th Cir. 1985); Legal Aid Soc'y of Alameda Cnty. v. Brennan, 608 F.2d 1319, 1330 (9th Cir. 1979); United States v. E. Tex. Motor Freight Sys., Inc., 564 F.2d 179, 184 (5th Cir. 1977); United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 466–68 (5th Cir. 1977); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973); S. Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159 (3d Cir. 1971). *Cf.* Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164 (4th Cir. 1981).

33. 441 U.S. 281 (1979).

34. *Id.* at 304.

35. *Id.* at 304 n.33 (noting that "[t]he Executive Order itself merely states that it is promulgated '[u]nder and by virtue of the authority vested in [the] President of the United States by the Constitution and statutes of the United States'" (citations omitted)).

36. *Id.* at 303–04. This contrasts with the express statutory authorization of affirmative action in employment for qualified individuals with disabilities and covered veterans. Further, the fact that Congress expressly provided for affirmative action for such individuals but did not do so with respect to minorities or women in either (a) Title VII or (b) FPASA provides an argument that Congress did not implicitly authorize OFCCP's affirmative action programming. For example, although Title VII prohibits employment discrimination, it does not require employers to engage in "affirmative action" in employment except as a *remedy* based on a judicial finding of intentional discrimination. *See, e.g.*, 42 U.S.C § 2000e-5(b).

37. *Chrysler*, 441 U.S. at 304–06.

38. *Id.* at 304.

39. *See* 46 F.4th 1283 (11th Cir. 2022).

40. *Id.* at 1295 (emphasis added).

41. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll. and Students for Fair Admissions, Inc. v. Univ. of N.C., Docket Nos. 20-1199 & 21-707, 143 S. Ct. 2141 (2023).

42. 539 U.S. 306 (2003).

43. *Students for Fair Admissions*, 143 S. Ct. at 2166.

44. *Id.* at 2161.

45. *Id.*

46. *Id.* at 2162.

47. *Id.* at 2163.

48. *Id.* at 2175.

49. *Id.* at 2176.

50. Given (a) significant differences in AAP structure under E.O. 11246 versus the Rehabilitation Act and VEVRAA and (b) the lack (for now) of required job group adverse impact analysis reporting for individuals with disabilities and veterans, the implications of the Supreme Court's decision in *Students for Fair Admissions* seems more potent with regard to E.O. 11246.

51. *Students for Fair Admissions*, 143 S. Ct. at 2166.

52. *Id.* at 2119.

53. *Id.* at 2170.

54. *Id.* at 2167–68.

55. *Id.* at 2167–68 (emphasis added).

56. *Id.* at 2209 (Gorsuch, J., concurring).

57. *Id.* at 2171 (majority op.) (emphasis added).