Lathrop GPM

**BLOGS**

Archives;Discrimination;Employment Law Updates

# Revisiting Affirmative Action

The United States Supreme Court will be deciding an important affirmative action case this term and has now agreed to hear a second, similar case. These are not employment cases, but the Court's decisions will still be of interest to those of us who advise employers and who have followed the twists and turns of affirmative action over the years. Some observers think that the Court's decision in *Fisher* is going to signal the end of affirmative action once and for all. Others predict a divided Court and decisions so narrowly tailored that they have no real impact on the future of affirmative action. Almost nobody predicts that the future of affirmative action will be brighter after *Fisher* and *Schuette* have been decided. The cases before the Court both involve a determination of when and how – if ever – racial preference can be used to increase minority enrollment in colleges and universities.

It's important to remember that affirmative action and equal employment opportunity are not the same thing. Affirmative action consists of positive action programs designed to remedy past discrimination. It is essentially an exception to equal opportunity laws. Equal opportunity laws require that race, sex, and other protected status not be considered at all. Affirmative action programs allow, encourage, or may even require the consideration of protected class status. The affirmative action exception to anti-discrimination laws was created in recognition of this country's history of discrimination in employment, education, housing, and other areas of life. It has never been a broad exception, and over the past twenty years the courts have made it very narrow indeed. Whether the Roberts court will eliminate it completely remains to be seen.

Today, affirmative action in employment is limited to three situations. First, if an employer chooses to become a federal, state, or local government contractor, it may have to adopt an affirmative action plan. A government agency determines the parameters of the plan and monitors its implementation. Second, if an employer is found by a court to have committed discrimination, the court can require the employer to adopt an affirmative action plan as part of the remedy imposed in the case. In that situation, the court determines the parameters of the plan and monitors its implementation. In both contractor and court-imposed affirmative action plans, the employer is required to make good faith efforts to bring its workforce demographics (or portions of its workforce demographics) in line with the demographics of the community from which workers are drawn. The third kind of affirmative action in employment is the voluntary affirmative action plan, in which an employer chooses to adopt policies or undertake programs designed to increase the number of minorities or women in its workforce. Voluntary affirmative action plans must be developed with extreme care in order to fit the remaining narrow exception to equal employment opportunity laws that allows positive action programs to remedy past discrimination. There is considerable risk for employers who develop and adopt voluntary affirmative action plans casually.

For an excellent discussion of the history and current status of affirmative action law, click HERE. The Modern Workplace will continue to monitor the Supreme Court's deliberations on this topic and report on the impact of its decisions on employers.