

Re-examining Diverse Slate and Other Initiatives in the Aftermath of Students for Fair Admission

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On February 6, 2024, America First Legal (AFL) sent a request for investigation to the U.S. Equal Employment Opportunity Commission (EEOC) urging it to investigate the NFL and its member clubs over their adherence to the Rooney Rule and other DEI programs designed to provide opportunities to interview for minority and female candidates for certain coaching and senior-level football operations and front-office positions.

The EEOC investigation request is one of a growing number of challenges on multiple fronts brought by activist groups (including AFL), investors, certain state attorneys general, and employees to employers' DEI initiatives following the June 2023 Supreme Court of the United States decision in [*Students for Fair Admissions, Inc. v. Harvard College*](#) (*SFFA* decision), in which the court held that certain race-conscious admissions policies in higher education were unconstitutional.

The Rooney Rule

In 2003, the NFL adopted the Rooney Rule, named after Dan Rooney, the late owner of the Pittsburgh Steelers and former chair of the league's diversity committee. The rule originally required teams to interview at least one or more diverse candidates when hiring for a head coaching vacancy.

The NFL has modified and expanded the Rooney Rule on several occasions. According to a 2020 statement from the NFL, the rule was expanded to require teams to interview at least two external minority candidates for head coaching positions and at least one minority candidate for coordinator positions, senior football operations and general manager positions. Also, the rule now requires teams to interview members of minority groups and/or women for senior level front-office positions.

As one component of diversity and inclusion initiatives, many employers have adopted some version of the "Rooney Rule" (more commonly referred to as a diverse slate initiative) in an effort to ensure that members of underrepresented groups are considered for job openings.

However, employer DEI programs are facing new challenges following the *SFFA* decision. While the decision was focused on higher education admissions, the Court's reasoning could influence the interpretation of similarly worded nondiscrimination provisions in employment laws.

Against this backdrop, AFL alleged that the Rooney Rule "facially violates" Title VII (42 U.S.C. §§ 2000e-2(a) and (d)) because the limited time teams have to make hiring

decisions on coaches has led to “sham interviews” and resulted in “fewer opportunities for similarly situated, well-qualified candidates who are not minorities.”

AFL also alleged that other NFL programs, such as the leadership programs for women of color and its program for the development of game officials from college football to the NFL with an emphasis on “diverse” candidates, “facially violate” Title VII.

Legal Considerations

Before the *SFFA* decision, the trend in case law had been that diversity outreach that seeks to expand opportunities or to increase the size of qualified candidate or employee pools presented comparatively less legal risk. But the Supreme Court’s reasoning on race-conscious admissions has raised questions about whether numbers-oriented or deadline-driven initiatives with clear screening out (e.g., one out of five interviewees or employees must be diverse) could be viewed skeptically by courts.

In particular, questions remain over the lawfulness of diverse slate policies to the extent that they require a certain number of diverse candidates be considered for every opening in a way that creates a “zero-sum” equation whereby diverse candidates are advanced to the exclusion of other qualified candidates who do not self-identify in one or more diverse categories.

Key Takeaways

In light of these developments, employers that seek to continue their DEI and environmental, social, and governance (ESG) commitments may want to consider steps to mitigate risk of a successful discrimination claim, which can include:

- reviewing whether there is an actual absence of diverse applicants for all roles or specific positions;
- augmenting the channels used to publicize openings that have historically attracted fewer candidates;
- establishing guidelines for advancing prospective candidates to ensure all candidates advanced through the selection process meet predefined minimum qualifications;
- avoiding caps on the size of interview pools or hard requirements to interview a diverse candidate for every opening;
- keeping diversity demographic information about job candidates hidden from decision-makers through the interview process; and
- providing periodic refresher training about permissible and impermissible criteria for determining which candidates advance through the interview process.

More broadly, employers may wish to consider:

- **Developing a cohesive, overall strategy for mitigating risk related to DEI and ESG** to ensure that DEI and ESG goals are aligned with their organization’s risk tolerance and business goals.
- **Conducting a privileged risk assessment of DEI and ESG initiatives and public commitments** to understand the legal risk level of these programs and to

assess proactively the potential implications of descriptions of current and planned initiatives in ESG reports and other outward facing communications.

- **Focusing on inclusion and belonging**, which may help retain existing diverse workers and create a culture that supports opportunities for all employees.