



September 22, 2023

The Honorable Vanita Gupta,
Associate Attorney General of the United States,
The Honorable Kristen Clarke,
Assistant Attorney General of the United States,
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Dear Associate Attorney General Gupta and Assistant Attorney General Clarke:

Last month, 13 Republican state attorneys general wrote to some of America's largest companies threatening legal consequences for those companies' hiring policies and accusing them of "racial discrimination" for setting diversity, equity, and inclusion goals¹.

What their letter failed to consider is that diversity and inclusion in hiring allows companies to better serve their customers, promotes creativity and problem-solving, and makes the entire economy perform better. In the face of a political attack on diversity efforts in the private sector, we urge the Civil Rights Division of the Department of Justice to issue guidance to the private sector expressly affirming that corporate diversity, equity, and inclusion policies in hiring remain protected.

Chamber of Progress is devoted to a progressive society, economy, workforce, and consumer climate by supporting public policies at the federal and state level that will build a fairer, more inclusive country in which all people benefit from technological leaps.

The Economic Benefits of Diverse Hiring Practices

Research has consistently shown that companies with diverse workforces perform better. Having diverse voices and viewpoints at the table increases creativity and improves problem-solving and decision-making. Studies analyzing small-group decision-making also found that groups made up of similar individuals processed

¹ <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf>

information less effectively than diverse groups, “hinder[ing] creativity and innovation.”² Another analysis of 200 different business teams found that “inclusive teams make better decisions up to 87% of the time.”³ Importantly, companies that employ a workforce which mirrors the diversity of their customer base are also better able to plan and execute business strategies that meet the needs of the people they serve.

Taken together, these benefits result in better performance. One McKinsey study found that companies with the highest levels of diversity were more likely to achieve above industry averages.⁴

Promoting diversity and inclusion at work also promotes economic growth. Better performing companies can provide better jobs, better pay, and increase overall GDP. A study by the W.K. Kellogg Foundation found that the U.S. could expand the economy by \$8 trillion by 2050 by eliminating racial disparities in a number of sectors including employment.⁵

A lack of diverse hiring also negatively impacts American families and the economy as a whole. Persistent racial gaps in employment rates have resulted in wealth gaps, suppressing consumer spending and investments. As the Department of Treasury warned, “When a significant share of the population is unable to fully participate in the economy, private consumption and investment suffers, stifling GDP growth.”⁶

Addressing Attacks on D&I Practices Following *SFFA* Cases

This August, following the Supreme Court’s decisions in *SFFA v. Harvard* and *SFFA v. UNC*, the Civil Rights Division of the Department of Justice issued resources to aid colleges and universities in understanding the new legal landscape for institutions of higher education committed to building inclusive, diverse campuses.⁷

Now, as Republican attorneys general take their legal fight against diversity and inclusion to the private sector, American companies face a similar need for affirmation of their legal right to build an inclusive and diverse workforce.

Contrary to the arguments raised by the attorneys general in their letter, considerations of diversity and inclusion in hiring are not only smart business practices, but also well within the bounds of the Constitution. The Supreme Court’s decisions in *SFFA v. Harvard* and *SFFA v. UNC*, which eliminated the use of affirmative action in college decisions, was

² <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/>

³ <https://www.forbes.com/sites/eriklarson/2017/09/21/new-research-diversity-inclusion-better-decision-making-at-work/?sh=4df9d9d94cbf>

⁴ <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/why-diversity-matters>

⁵ <https://wkkf.issuelab.org/resource/business-case-for-racial-equity.html>

⁶ <https://home.treasury.gov/news/featured-stories/racial-differences-economic-security-racial-wealth-gap>

⁷ <https://www.justice.gov/opa/blog/continuing-advance-diversity-and-opportunity-higher-education>

narrowly tailored to Title VI claims, and does not apply to race-conscious diversity efforts in private companies. Importantly, the Court's decision did not address Title VII (the law governing private companies) nor employment-based diversity and inclusion initiatives.

It is important that private employers be advised that the legal arguments underpinning the Republican attorneys general letter fall apart under scrutiny. Notably, the Supreme Court purposefully refrained from offering specific interpretations of Title VII of the Civil Rights Act of 1964, a foundational piece of legislation governing employment practices, including the prevention of hiring discrimination. Consequently, the recent court rulings do not immediately alter the well-established legal standards that govern affirmative action or diversity and inclusion initiatives undertaken by private employers.

Under Title VII, employers have long been prohibited from considering race as a factor in their decision-making processes. This prohibition sets them apart from higher education institutions, which enjoyed more latitude in this regard prior to these rulings. The only exception in the employment context is narrow and is applicable solely in situations where temporary measures are deemed necessary to rectify a thoroughly documented racial imbalance within a specific workplace.⁸

Notably, in *Johnson v. Transp. Agency, Santa Clara County*,⁹ the Court affirmed that employers could incorporate sex as a factor within a voluntary affirmative action plan for employee promotions, specifically aimed at addressing traditionally segregated job classifications. The affirmative action plan did not involve establishing quotas but rather aimed to correct the gender imbalance in the workforce.

The Supreme Court's recent decision in *Students for Fair Admissions* further underscored this point by distinguishing between the remedial efforts of employment-focused affirmative action plans and those within higher education. Citing its earlier ruling in *Franks v. Bowman Transp. Co.*,¹⁰ the Court reiterated that plans designed to redress instances of past workplace discrimination are indeed a permissible use of race-based government action.

Moreover, the Supreme Court made clear that its decision did not even apply to all colleges, saying that it would not weigh in on race-conscious admissions programs at the U.S. Naval Academy and West Point.¹¹ An analysis from the Harvard Business Review found that companies are still “free to promote a more inclusive culture and break down

⁸ *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979).

⁹ *Johnson v. Transportation Agency, Santa Clara County*, Cal., 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987).

¹⁰ *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976).

¹¹

barriers preventing women, people of color, and other marginalized groups from thriving in their workplaces.”¹²

Advising the Private Sector

While the attack on diverse hiring practices in the private sector may not hold up in court, the reality is that the threat of liability will have a chilling effect on companies’ readiness to develop diversity and inclusion initiatives, regardless of the benefit such practices have for a company’s bottom line.

Abandoning the decades-long effort to improve workforce diversity in a range of professions would be damaging for both leading U.S. companies, for working families, and for the economy as a whole.

In an effort to debunk partisan attacks on private sector hiring initiatives, we urge you to provide guidance to employers expressly affirming their right to pursue diverse hiring practices. It is clear that diversity in the workplace results in more successful businesses and a stronger economy for all Americans.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jess Miers', with a long horizontal flourish extending to the right.

Jess Miers
Legal Advocacy Counsel
Chamber of Progress

¹² <https://hbr.org/2023/07/what-scotuss-affirmative-action-decision-means-for-corporate-dei>