

Legal Update



PRESENTED BY:
KACEY COLEMAN, J.D.

STURGILL
TURNER

Status of DEI

January 2025 – Executive Orders

- Termination of all discriminatory programs, including illegal DEI and “diversity, equity, inclusion, and accessibility” (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear.

Consistent with prior Supreme Court Ruling

- *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (generally referred to as the “SFFA Decision”) is best practices. The SFFA Decision was in 2023. The U.S. Supreme Court ruled the University of North Carolina’s (UNC) and Harvard College’s admission policies, which included consideration of an applicant’s racial status to achieve the educational benefits of diversity, were unlawful.

DEI

Generally, admissions criteria for institutions of higher education and other equality (read DEI) advancing policies and programs that confer benefits and opportunities on individual students should be guided by three sets of principles:

1. Legally Compelling Interest. The *SFFA* decision did not change the basic strict legal requirements that there must be a “legally compelling” interest and precise policy design to achieve that aim (what we term legally “narrowly tailored”) whenever any policy or program confers an opportunity or benefit to some students (and not others) based on consideration of a student’s racial or ethnic status.

Narrowly tailoring traditionally includes analysis, and documentation, of:

- Whether workable race-neutral alternatives have been effectively pursued,
- The level of overbreadth and harm to students who are not targeted for a benefit when any policy confers benefits on students of some races and not others or uses a student’s race as a factor when conferring benefits, and
- Whether the race-conscious policy has an end point.

Certain minority-focused programs will not trigger this level of “strict scrutiny” if they do not confer material benefits tied to a student’s racial/minority status.

DEI

2 . Evaluation of applicant-specific race experience. The Court endorsed the use of legally neutral criteria relevant to institutional mission that don't trigger strict legal scrutiny standards— knowledge, skills, qualities, and inspirations—that an applicant may have gained from their race-related experience, even when tied to their own racial identity. However, evaluations of such information must not be based on assuming that societal inequities affect any applicant's experience or ability to contribute; rather, evaluations must be grounded in the actual information submitted by or on behalf of applicants about what they've gained from their own experiences. It is important though that you avoid posing questions that require students to describe negative or traumatic experiences related to race, though some who wish to do so may.

DEI

3. The race-neutral landscape.

- If economic disadvantage is the priority aim, use many means to identify such students without regard to race but pay attention to making sure the range of means used are designed not to exclude or favor any race.
- Award graduate scholarships, and other educational benefits using neutral criteria. Provide undergraduate scholarships that are all or predominantly need-based with a demonstration of authentic commitment to economic equity as the priority aim that would be pursued even without a race-based secondary aim.
- Use of selection criteria and process are the same for applicants of all races.

DEI

Following the *SFFA* Decision the Department of Education issued Guidance: “Strategies for Increasing Diversity And Opportunity In Higher Education” which can be found here:

<https://sites.ed.gov/ous/files/2023/09/Diversity-and-Opportunity-in-Higher-Education.pdf>

Feb. 14, 2025 Dear Colleague Letter

Focus on how *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (“*Students v. Harvard*” or “*SFFA*”), applies to racial classifications, racial preferences, and racial stereotypes² as well as how OCR will interpret the ruling in its enforcement of Title VI of the Civil Rights Act of 1964 and its implementing regulations.

Take-aways consistent with *SFFA*:

- Programs focused simply on interests in particular cultures, heritages, and areas of the world, provided they are open to all students regardless of race.
- Educational, cultural, or historical observances that recognize historical events and contributions and promote awareness (e.g., Black History Month).
- *But* the programs cannot discourage members of a particular race from attending or participating.

Enforcement

- OCR's assessment of DEI programs and policies will depend on the facts and circumstances of each case, as well as the nature of the school, the age of the students, and the relationship of the parties involved.
- If OCR determines a school has not complied with civil rights laws, OCR will contact the school and attempt to secure the school's willingness to negotiate a voluntary written resolution agreement with specific remedial actions.
- Failure to negotiate a resolution may result in enforcement through either administrative proceedings or referral to the DOJ for court action, and this could include the suspension, loss, or withholding of federal funding.

KY HB 4


- Largely consistent with *SFFA*
- Create new sections of KRS Chapter 164 to prohibit a public postsecondary education institution from providing differential treatment or benefits on the basis of an individual's religion, race, sex, color, or national origin.
- Excludes (e.g.) programs/activities related to:
 - ADA
 - ADEA
 - Title IX
 - Federal and state Religious Freedom and Restoration Act

June 30, 2025 – Boards must adopt policy consistent

KY HB 4

On an application for employment, promotion, contract, contract renewal, admission, housing, financial aid, or scholarship, compel, solicit, or consider any pledge or statement on an applicant's experience with or views on religion, race, sex, color, or national origin.

Does not Apply to (e.g.)

- 1st Amendment Rights
 - Veterans' programs
 - Arrangements for guest speakers and performers with short-term engagements, including those invited by students or faculty
 - Bona fide qualifications based on sex, national origin
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Other Legislation of Note (not passed)

HB 362 – requires employers to include wages or wage ranges in job postings

SB 79 – eliminate ability of state employees to work remotely except in declared state of emergency – question whether applicable to Universities.

HB 598 – mandate for employers with 50+ employees to provide 12 weeks of paid parental leave

FLSA Status

November 2024 – Texas federal court struck down the final rule that increased the minimum salary requirements for exempt employees

Rule, to be effective January 1, 2025, would have:

- Increased the salary minimum to \$1,128 per week (\$58,656 per year)
- Increased the minimum salary threshold under the highly compensated exemption
- Provided automatic salary increases every three years

Return to:

- Minimum salary for exempt employees reverts back to \$684 per week (\$35,568 per year)

No action at this time



Reminders from Last Session

Title IX

U.S. District Court for the Eastern District of Kentucky granted a preliminary injunction/stay filed by Tennessee, Kentucky, Ohio, Indiana, Virginia and West Virginia enjoining the DOE from “implementing, enacting, enforcing, or taking any action to enforce” the 2024 regulations.

Biden Administration did not appeal – as Trump voiced intent to repeal 2024 Regs

2020 Regulations controlling

No impact for Kentuky

Kentucky Pregnancy Discrimination

Expanded to provide obligation to provide reasonable accommodations to employees who have known limitations due to pregnancy, childbirth, and related medical conditions, unless the accommodation would impose an undue hardship on the employer.

Pregnancy, con't

Examples of reasonable accommodations which may be provided to an employee who has a known limitation due to pregnancy, childbirth, or a related medical condition include the following:

- More frequent or longer breaks to pregnant employees, and to employees who have given childbirth to allow for the need to express breast milk after childbirth;
- Time off to recover from childbirth;
 - Reasonable time period no more than 6 weeks – ALSO for adoption
- Acquisition or modification of equipment;
- Appropriate seating;
- Temporary transfer to a less strenuous or hazardous position, job restructuring, modified work schedules or light duty;
- Private space, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public to express breastmilk for one year after giving childbirth.

Pregnancy, con't

Employees shall not be required to take leave from work if another reasonable accommodation can be provided.

Pregnancy Discrimination Notice

An employer shall *post* a written notice of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions, including the right to reasonable accommodations. [KRS 344.040\(3\)\(b\)](#).

Under new [KRS Section 337.015](#), adoptive parents must receive, upon written request, a reasonable period of unpaid leave not to exceed six weeks, or a greater leave period if stipulated under company policy.

Statute of Limitations Update

- Discrimination and Harassment (KRS Chapter 344) – Statute of Limitations now 3 years (was 5 yrs)
 - Also includes actions against an employer for wrongful discharge in violation of public policy
- Wage & Hours 337.385(5) now provides: Any court or administrative action under any provision of this chapter, not otherwise subject to an express period of limitations, shall be commenced within three (3) years after the cause of action accrued.

Medical Cannabis

As of July 1, 2024, Kentucky permits the use of medical cannabis. [KRS 218B.015](#). [SB 47](#) was signed into law on March 31, 2023, amending various statutes relating to the criminalization of marijuana.

Revisions to [KRS 218B.040](#), effective January 1, 2025, do not restrict an employer's ability to create employment contracts or establish personnel policies that restrict the use or possession of marijuana in the workplace or on the property. Employers may establish and enforce drug-testing policies, a drug-free workplace, or a zero-tolerance drug policy. [KRS 218B.040\(1\)\(f\)](#).

Medical Cannabis, con't

Employers are not required to “permit or accommodate the use, consumption, possession, transfer, display, transportation, distribution sale, or growing of medicinal cannabis in the workplace. [KRS 218B.040\(1\)\(a\)](#).”

Additionally, the revisions do not create or permit a “cause of action against an employer for wrongful discharge or discrimination.” [KRS 218B.040\(1\)\(d\)](#).”

A registered qualified patient or visiting qualified patient who uses medicinal cannabis must be afforded all the same rights under state and local law, including those guaranteed under KRS Chapter 344, as the individual would have been afforded if he or she were solely prescribed pharmaceutical medications as they pertain to drug testing required by any state or local law. [218B.045\(1\)](#).”

Questions & Discussion

