Lessons from the University of Michigan Decisions: Diversity Counts and Context Matters

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One View of Legal Compliance…

Legal	Illegal

A Preventive Law Perspective: When Evaluating Policies, Legal Sufficiency is Likely A Question of Location on a Spectrum, Based on Educational Judgments

Not Compliant ⟷ Compliant

The University of Michigan Decisions: Key Rulings

- The educational benefits of diversity can justify the limited consideration of race when making admissions decisions.
  - As a matter of law, the benefits of diversity constitute a compelling interest.
- Race-conscious admissions policies must provide for individual student evaluations, rather than provide an "automatic" system that awards points based on race.

The University of Michigan Decisions: Key Questions

1. What evidence regarding the benefits of diversity must higher education institutions assemble to support their race-conscious admissions programs?

2. Under what circumstances must higher education institutions consider or try race-neutral alternatives to promote their diversity-related goals?

3. How may the Court's decisions affect race-conscious financial aid, outreach/recruitment, and employment practices?

1. The Analysis of Diversity Interests: What Evidence is Necessary?

- The Educational Benefits of Diversity
  - Defined with reference to goals of enrolling a critical mass of students from various backgrounds, with deference to educational judgments
  - Recognized as "substantial" and "real", based upon:
    - The institutional mission of the University (assembling a "broadly diverse" class)
    - Testimony regarding enhanced classroom discussion
    - Expert and research studies demonstrating the educational benefits of diversity
    - External perspectives related to the institutional mission
      - Employers
      - Military

2. The Analysis of Alternatives: Is the Consideration of Race Necessary?

- Race Neutral Alternatives
  - Must be evaluated in the context of institutional goals. Institutions:
    - Must undertake "serious, good faith consideration of workable race-neutral alternatives" that may achieve diversity-related ends
    - Need not attempt every conceivable race-neutral alternative, especially if such an effort would undermine other mission-driven goals
  - Note: Percentage plans may not be viable alternatives in all cases
    - The formulaic approach of percentage plans may preclude needed individualized consideration of student applicants when pursuing a full range of diversity interests

3. The Analysis of Other Race-Based Practices: Does Context Matter?

- Facts control results.
  - Particular facts will shape legal conclusions.
    - Strict scrutiny standards apply to all race-conscious practices, but…
    - Not all race-conscious practices (admissions, recruitment, financial aid) are evaluated identically
  - Note: The U.S. Dept. of Education has concluded that there are "important differences" between admissions and financial aid decisions in this legal context
      - Race-conscious financial aid may have less negative impact on non-beneficiaries than in race-conscious admissions decisions
        - If the race-conscious practice is eliminated…
        - When considering the total pool of $$…

Other Points of Note…

- Six justices voted to affirm Justice Powell's *Bakke* opinion as the law of the land
- The Court expanded on Justice Powell's concept of diversity with a focus on access
- The Court did not address other potentially "compelling interests"
- Purely private conduct (contracting) appears to be subject to strict scrutiny standards

Conclusion

- Every institution has a legal obligation to periodically review and evaluate its race-conscious policies
- Many questions have been answered...and a new generation of questions must be addressed in the context of policy reviews and audits
- The U.S. Department of Education Office for Civil Rights can be expected to apply the principles of the University of Michigan decisions in its case resolutions and policy guidance.