The U.S. Supreme Court observed in 2003 that “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Indeed, today, affirmative action policies adopted by most employers are not narrowly focused on remediating the effects of past discrimination. Rather, most employers establish policies to advance diversity, either as a social good in its own right or as a means of offering better goods and services and competing more effectively in a global marketplace. They tend to focus their efforts on expanding and targeting outreach efforts and enhancing their reputations for diversity and inclusion in their communities.

The Supreme Court has not yet squarely addressed the question of whether promoting diversity can be a sufficient justification for an employer considering race or another protected characteristic when making employment decisions.

Yet, in expanding diversity programs, many employers have been relying on guidance from the court’s decisions on affirmative action in the higher education context. In February 2012, the Supreme Court granted certiorari in *Fisher v. University of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), cert granted, 132 S.Ct. 1536 (2012), and is now poised to consider the use of racial preferences in education for the first time since 2003. The court will confront issues surrounding the use of affirmative action in the name of diversity that no doubt may influence thoughts about the use of these practices by employers.

This month’s column reviews the current law on affirmative action in the employment context and examines the potential impact of the Supreme Court’s decisions in the higher education context, including the highly anticipated *Fisher* ruling. We conclude with a discussion of the government contractor’s obligation to set hiring goals with respect to individuals with disabilities.

**Government Contractors**

Many businesses that contract with the federal government are subject to affirmative action obligations under Executive Order 11246. The Executive Order, enforced by the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP), requires covered federal government contractors and subcontractors to take affirmative action to ensure that applicants and employees are treated without regard to their race, color, religion, sex or national origin.

OFCCP regulations require each covered government contractor and subcontractor to implement a written affirmative action plan that includes an analysis identifying any underutilization of qualified minorities and women in its workforce and, where an underutilization is detected, sets forth placement goals, timetables for achieving a balanced workforce and an outline of programs to achieve those goals and timetables 41 CFR §§60-2.15(b), 60-2.16(a). However, such goals may not include quotas, set-asides or other preferential treatment. See id. at §60-2.16(e). The OFCCP also enforces similar affirmative action obligations pertaining to individuals with disabilities under Section 503 of the Rehabilitation Act, 29 USC §793, and protected veterans under the Vietnam Era Veterans’ Readjustment Assistance Act, 38 USC §4211 et seq.

**Voluntary Programs**

A substantial number of affirmative action programs in the United States do not fall in the government
contract category and are voluntary efforts implemented by employers to further equal opportunity. Such voluntary efforts face tension with Title VII of the Civil Rights Act of 1964, which makes it illegal for covered employers to make employment decisions “because of” an individual’s race, color, religion, sex or national origin. In fact, the Supreme Court has construed Title VII’s prohibition against discrimination to recognize reverse discrimination claims by non-minority groups. See McDonald v. Santa Fe Trail Transp., 427 U.S. 273 (1976).

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In its first case to address the legality of voluntary affirmative action programs, the Supreme Court in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), held that, given Congress’ clear intent in enacting Title VII to remedy discrimination against minority workers, the statute’s ban on discrimination “cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges.” Specifically, the court ruled Title VII allows voluntary, race-conscious affirmative action plans when:

1. preferences are intended to “eliminate conspicuous racial imbalances in traditionally segregated job categories”;
2. the rights of nonminority employees are “not unnecessarily trammeled”—meaning the plan neither requires the termination of such employees and their replacement with minority employees, nor creates an absolute bar to advancement; and
3. preferences are temporary in their duration.

Based on these factors, the Weber Court upheld Kaiser Steel’s program designed to eliminate racial imbalances in the company’s craft workforce by reserving half the openings in its craft-training program for black employees until the percentage of black craft-workers at the company mirrored the percentage of blacks in the local labor force.

The court extended Weber to cover gender-based preferences in Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987), where the agency had adopted a voluntary affirmative action plan advocating that gender be used as a plus factor in employment decisions within a traditionally male-dominated skilled job classification. Looking to the criteria utilized in Weber, the court concluded the plan did not violate Title VII because women were underrepresented in certain skilled job categories, the plan was based on aspirations and not quotas, the plan did not unnecessarily trammel the rights of male employees because no positions were set aside for women, and the plan was temporary.

Weber and Johnson make it clear that race- or gender-conscious decisions made pursuant to an appropriately tailored voluntary affirmative action plan designed to remedy the effects of discrimination in traditionally segregated job categories will not violate Title VII. However, the court has yet to address whether a private employer’s voluntary affirmative action could be supported by a non-remedial purpose, such as a need or desire to achieve or maintain diversity in the workplace. The court had agreed to confront this issue when it granted certiorari in Taxman v. Board of Education, 91 F.3d 1547 (3d Cir. 1996), cert granted, 521 U.S. 1117 (1997), in which the U.S. Court of Appeals for the Third Circuit held an affirmative action plan aimed at promoting racial diversity rather than remedying the historical effects of discrimination was prohibited by Title VII. However, the Taxman case was settled before the Supreme Court answered the question.

**Education Context**

Without clear direction in the employment context, cases decided by the Supreme Court in the educational context, while analyzed under the 14th Amendment’s Equal Protection Clause rather than Title VII, have provided guidance for private employers considering diversity initiatives. In the landmark case of Grutter v. Bollinger, 539 U.S. 306 (2003), the court, by a 5-4 decision, upheld the affirmative action policy used by University of Michigan Law School which considered the race or ethnicity of applicants as a “plus factor” in its individualized review of each candidate.

Applying a strict scrutiny analysis under the Equal Protection Clause, the court found that “student body diversity is a compelling state interest that can justify the use of race in university admissions,” and that Michigan’s plan, which sought to admit a “critical mass” of minority students but did not have a specific number in mind, was narrowly tailored to serve this compelling interest. Cf. Gratz v. Bollinger, 539 U.S. 244, 279 (2003) (finding university’s undergraduate admissions system of “predetermined point allocations,” which awarded 20 points to underrepresented minorities (with 100 points guaranteeing admission), had the effect of making race the decisive factor and was therefore unconstitutional).

The Grutter decision, by focusing on societal considerations to justify affirmative action in higher education, such as breaking down racial stereotypes and preparing students for “work and citizenship” in a global economy, raised the question of whether these considerations may justify affirmative action in other contexts, such as employment. In
fact, Justice Antonin Scalia’s dissent in Grutter cautioned on the possible extension of the majority’s reasoning to affirmative action in employment when he stated:

If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a “critical mass” that will convey generic lessons in socialization and good citizenship… surely private employers cannot be criticized—indeed, should be praised—if they also “teach” good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring.

Following Grutter, the U.S. Court of Appeals for the Seventh Circuit concluded the court’s diversity rationale applies to hiring in public employment. See Petit v. City of Chicago, 352 F.3d 1111 (7th Cir. 2004) (ruling the Chicago Police Department “had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community”). It is unclear at this point what impact Grutter and Petit may have on private employers under Title VII.

‘Fisher’ Case

On Oct. 10, 2012, the Supreme Court heard oral arguments in Fisher v. University of Texas. The University of Texas at Austin follows a state mandate through which students in the top 10 percent of their high school graduating class are automatically admitted to the state university of their choice. In addition, since 2004, after Grutter was decided, the university allows race to be considered as one of several factors when admitting individuals who failed to qualify for admission under the top 10 percent rule.

A non-minority Texas resident who was denied undergraduate admission to the university challenged the school’s policy under the 14th Amendment’s Equal Protection Clause. Plaintiff argues the policy should not have been adopted absent a “strong basis in evidence” that remedial action was necessary to address historical race discrimination by the university; the top 10 percent rule created racial diversity such that consideration of race in admissions was not necessary; and the university’s consideration of race involved “racial balancing” in violation of a general prohibition against quotas. Relying on the Grutter precedent, the district court granted summary judgment in favor of the university, and the Fifth Circuit affirmed.

If the court makes a sweeping declaration that preferences based on diversity goals at universities are unconstitutional, the lawfulness of similar private employer programs may be open to question.

Fisher is being closely watched to see whether, given the current composition of the Supreme Court, the court will change its position with respect to consideration of diversity in school admissions, which may provide employers with additional guidance as they consider policies and programs designed to enhance workplace diversity. The outcome of the case could directly impact employers in the public sector, where constitutional restrictions apply.

And if the court makes a sweeping declaration that preferences based on diversity goals at universities are unconstitutional, the lawfulness of similar private employer programs may be open to question. Such an outcome also may have implications on the permissible scope of affirmative action under executive orders, such as Executive Order 11246. Thus, the Equal Employment Advisory Council filed an amicus brief supporting neither party, urging the court not to issue a decision that makes it more difficult for federal contractors to comply with government-mandated affirmative action requirements or impedes employers’ ability to maintain successful voluntary diversity initiatives. The advisory council is a nationwide association of private sector employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices.

Proposed Rule

In a related development, permissible affirmative action toward individuals with disabilities may be drastically expanded pursuant to a proposed OFCCP rule that would require federal contractors to strive to hire specific numbers of individuals with disabilities. On Dec. 9, 2011, the OFCCP issued a Notice of Proposed Rulemaking (NPRM) proposing changes to Section 503 of the Rehabilitation Act, which requires that federal contractors and subcontractors take affirmative action on behalf of qualified individuals with disabilities. 76 Fed. Reg. 77056 (Dec. 9, 2011). The NPRM proposes to establish a “utilization goal” of 7 percent for the employment of individuals with disabilities in each job group of a contractor’s workforce. The NPRM also contemplates a 2 percent sub-goal for individuals with “severe disabilities.”

OFCCP received approximately 400 comments in response to the NPRM. Critics claim the NPRM, by explicitly looking to numbers, imposes a quota which has long been held unlawful in the race and gender context. Defenders argue that a numerical goal is good to strive for and is only just a goal. The comment period closed on Feb. 21, 2012, and the OFCCP has not scheduled a release date for a final rule.