

Washington State Solicitor General Noah Purcell

The Status of Affirmative Action in Washington

Role of the AG's Office

- Deep commitment to diversity, equity, inclusion
- Created Civil Rights Division
- Created Racial Equity Unit
- Significantly improved attorney diversity

Role of the AG's Office

- We control affirmative litigation, e.g., civil rights
- Primary role is advising and representing clients: hundreds of state agencies and boards
- In that role, we give advice, clients make policy
- We give options-based advice, explaining risks, not dictating what they do

Status of Affirmative Action in WA

- Short answer: It's complicated
- Limitations come from state and federal law
- Rules have changed significantly

Federal Law

- Pre-dates I-200 and applies to the state and all local governments in Washington
- Allows limited use of affirmative action in contracting, but imposes stringent requirements
- “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *Adarand Constructors, Inc. V. Peña*, 515 U.S. 200, 227 (1995).

Federal Requirements

- State must specifically identify the industry in which discrimination is occurring (broad categories are insufficient) and who is facing discrimination.
- “While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.” *Croson*, 488 U.S. at 504.

Federal Requirements

- Race-conscious measures “may only be used as a last resort.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989).
- Quotas are prohibited, but flexible goals are allowed if the standards above are met.

State Law

- In 1998, Washington voters passed Initiative 200.
- I-200 said: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” RCW 49.60.400(1).

State Law

- Governor Locke then issued Directive 98-01, interpreting and implementing Initiative 200.
- Directive 98-01 interpreted I-200 to mean that “Race, sex, color, ethnicity and national origin may not be used in the final selection of a bidder for a public contract.”

State Law

- In 2003, the Washington Supreme Court interprets I-200 only to “prohibit[] reverse discrimination where race or gender is used by government to select a less qualified applicant over a more qualified applicant.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1*, 149 Wn.2d 660, 689-90, 72 P.3d 151 (2003).

State Law

- Our Office issued AGO Opinion 2017 No. 2:
- “Initiative 200 does not categorically prohibit all uses of race- or sex-conscious measures in state contracting. The measure allows the use of measures that take race or gender into account in state contracting without elevating a less qualified contractor over a more qualified contractor. In narrow circumstances, an agency may be allowed to use a narrowly tailored preference based on race or sex when no other means is available to remedy demonstrated discrimination in state contracting. State agencies may also employ race- or sex-based preferences when necessary to do so in order to avoid losing eligibility for programs providing federal funds.”

State Law

- In 2022, Governor Inslee rescinds directive 98-01 and issues three new executive orders
- EXECUTIVE ORDER 22-01 (January 7, 2022) - Equity in Public Contracting
 - Implements Measures for Equity in Public Spending for Cabinet State Agencies, including data collection, outreach efforts, and other steps
- EXECUTIVE ORDER 22-02 (January 17, 2022) - Equity in State Government
 - Focuses on four main public sector areas: contracting, employment, education, and services
- EXECUTIVE ORDER 22-04 (March 21, 2022)- Implementing the Washington State Pro-Equity Anti-Racism (PEAR) Plan & Playbook
 - Office of Equity to create Plan to “bridge opportunity gaps and reduce disparities so everyone in Washington flourishes”

Bottom Line

- Federal law allows limited use of certain forms of affirmative action if there is evidence of discrimination in areas of state contracting
- I-200 restricts but does not eliminate the State's ability to use affirmative action
- I-200 allows use of affirmative action to select among equally qualified bidders, where there is no other way to remedy demonstrated discrimination, or where required by federal law
- Implementing affirmative action programs requires careful analysis and planning to withstand legal challenges

Questions?

