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DEI Task Force Update (January 17, 2024)

Diversity | January 17, 2024

Gibson Dunn has formed a Workplace DEI Task Force, bringing to bear the Firm's experience in employment, appellate and Constitutional law, DEI programs, securities and corporate governance, and government contracts to help our clients develop creative, practical, and lawful approaches to accomplish their DEI objectives following the Supreme Court's decision in *SFFA v. Harvard*. Prior issues of our DEI Task Force Update can be found in our DEI Resource Center. Should you have questions about developments in this space or about your own DEI programs, please do not hesitate to reach out to any member of our DEI Task Force or the authors of this Update (listed below).

Key Developments:

On January 1, Texas's ban on DEI offices and programming at public colleges and universities took effect. The new law prohibits public higher education institutions from establishing DEI offices, contracting with third parties to perform the functions of a DEI office, requiring any DEI training as a condition of enrollment, or according any preference based on diversity metrics, in admissions or otherwise. Covered institutions must adopt policies for disciplining employees or contractors who violate the ban, and the institutions' boards must certify compliance. The law provides for periodic auditing and offers equitable relief to students or employees required to participate in a training in violation of the law. Institutions that fail to cure violations identified by an auditor within 108 days will be ineligible for certain state funding and institutional enhancements. On January 2, America First Legal (AFL) sent letters to the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) seeking investigations of Sanofi Pasteur for alleged violations of federal law. In its letter to the EEOC, AFL cited a video released to X (formerly Twitter), that appears to record an internal company meeting in which Sanofi Senior Vice President and U.S. Country Lead Carole Huntsman discusses Sanofi's diversity goals and lists specific ratios of new hires that should be Black and Latinx. AFL also referenced the company's Diverse Slate Policy, which requires Sanofi's recruiting team to include "a minimum of one person of color and one female in each slate presented to a hiring leader," and sets percentage goals for employee representation by race. In its letter to the OFCCP, AFL argued that Sanofi has violated a nondiscrimination clause integrated into every federal contract and subcontract through 41 C.F.R. § 60-1.4(a)(1)–(2), and that it is therefore subject to sanctions by the Secretary of Labor, including cancellation of contracts and a declaration of ineligibility for future government contracts. AFL also referenced the Supplier Diversity program discussed in Sanofi's Diversity, Equity & Inclusion 2022 Impact Report for North America, which identifies specific goals for contracting with women-owned businesses and for "total diversity spend," and argued that the program "may signify discriminatory quotas and potential violations of law." On January 4, the Foundation Against Intolerance and Racism ("FAIR") reported that it had sent a letter to the National Institutes of Health ("NIH") on November 30, 2023, concerning the NIH's Consortium Underrepresented Student Program ("CUSP"), a summer internship program for individuals from underrepresented groups. FAIR states that, at the time of its letter, the NIH's application defined *underrepresented* to include individuals with disabilities, individuals from disadvantaged backgrounds, and individuals from certain ethnic groups. Use of these criteria, according to FAIR, violated the NIH's own non-discrimination policy, as well as the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. FAIR requested that the NIH remove the criteria prior to the CUSP program's application deadline in mid-January. The NIH has since removed the term *underrepresented* from the name of the program, the application eligibility criteria,

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and the application itself. The CUSP program page now encourages individuals of all backgrounds to apply, including those from "populations underrepresented *in the clinical and biological sciences*, such as underrepresented racial and ethnic groups, individuals with disabilities, individuals from disadvantaged backgrounds, and women." On January 5, attorneys general from nineteen states, spearheaded by Kansas, Montana, and Tennessee, wrote a letter to the Department of Commerce to oppose the Department's proposed Business Diversity Principles, which seek to advance "best practices related to diversity, equity, inclusion, and accessibility (DEIA) in the private sector." The attorneys general claimed that the Principles violate the Equal Protection Clause and Title VII of the Civil Rights Act, stating that "federal law makes clear that well-intentioned racial discrimination is just as illegal as invidious discrimination." The attorneys general asserted that any race-based initiatives in the Principles are patently illegal and will garner unnecessary litigation, and referenced several recent lawsuits in which defendant employers and law firms changed their race-based recruitment programs or settled. The letter asserted that it "speaks volumes about [such programs'] lack of legal footing" that "some of the nation's leading law firms can[not] craft a colorable defense to race-based DEIA efforts." On January 11, Arkansas Republican Senator Tom Cotton sent letters to ten different recruiting firms he alleged may be "conspiring with companies to exclude 'non-diverse' candidates from the hiring pool." Recipients included Robert Half, Kelly Services, Randstad North America, Korn Ferry, ManpowerGroup, Egon Zehnder, Spencer Stuart, Heidrick & Struggles, Russell Reynolds Associates, and Diversified Search Group. In his letter, Senator Cotton noted the tension companies face between improving diversity metrics sometimes needed to access investment capital and avoiding the recent wave of legal scrutiny over corporate DEI initiatives, and suggested that companies "are increasingly outsourcing the dirty work of diversity discrimination to recruiting firms." Noting that these initiatives may violate Title VII, Senator Cotton assured letter recipients that "corporate DEI initiatives that discriminate based on race will soon suffer the same fate as affirmative action in academia." Citing EEOC Commissioner Andrea Lucas's June 2023 statement that corporate diversity programs "pose both legal and practical risks for companies," Senator Cotton urged letter recipients "to refuse any request to racially discriminate in recruiting practices."

Media Coverage and Commentary:

Below is a selection of recent media coverage and commentary on these issues:

- Law360 Pulse, "Law Firm DEI Efforts At Crossroads Amid '24 Litigation Threat" (January 2): Law360's Ryan Boysen describes the shifting DEI landscape for law firms following the Supreme Court's *SFFA* decision. Although Edward Blum recently expressed that AAER was done suing law firms (following AAER's now-dismissed suits against Morrison Foerster, Perkins Coie, and Winston & Strawn), Boysen writes that "experts say law firms should remain vigilant in 2024." Gibson Dunn Partner Jason Schwartz, head of the firm's DEI Task Force and co-Chair of the firm's Labor & Employment group, told Boysen that the "litigation around diversity and related topics that we've seen in the wake of SFFA is really only the beginning." Schwartz also flagged that the "key issue heading into 2024 will be how *Muldrow*[, the Title VII case pending before the Supreme Court,] is decided," concluding that "[i]f that ruling creates a lower bar for filing Title VII lawsuits, then you will see a lot of diversity programs being challenged in litigation."
- Wall Street Journal, "How the Push for Diversity at Colleges and Companies Came Under Siege" (January 4): WSJ's Ray A. Smith and Lauren Weber describe the "legal, economic and geopolitical forces" threatening DEI initiatives. Smith and Weber spoke to DEI consultants about the potential long-term effects of the recent increase in opposition to DEI. Paradigm CEO Joelle Emerson said that many Fortune 500 companies are continuing their diversity and inclusion efforts but are planning to be "quieter" about their implementation. Johnny C. Taylor, Jr., CEO of the Society for Human Resources Management, has seen some companies begin moving away from certain DEI efforts, especially those that are "tied to numeral

targets for hiring or promotions" or that base executive bonuses on those targets. Rory Lancman, director of corporate initiatives and senior counsel at the Louis D. Brandeis Center for Human Rights Under Law, notes that the DEI landscape is further complicated by diverging opinions on the Israel-Hamas war, which have garnered significant attention on college campuses and have caused tension in some workplaces.

- Fortune, "The anti-DEI movement has gone from fringe to mainstream. Here's what that means for corporate America" (January 4): Paradigm CEO Joelle Emerson discusses how, in her view, conservative activists have "weaponized" DEI, and what proponents of diversity initiatives can do to reframe the discussion. Notwithstanding the recent wave of litigation challenging DEI-related programs, "anti-diversity activists have been working towards this moment for decades," writes Emerson. But she opines that the recent success of the anti-DEI narrative is due in part to the nature of the pro-DEI narrative—one that, in some cases, has not "always left room for conversations, questions, or nuance" and leads to "drawing a line in the sand, pro-DEI vs. anti-DEI." The result, says Emerson, is that many corporate leaders who care about increasing representation of diverse voices are nonetheless concerned about being criticized for not going far enough, and worry about the legal ramifications of setting diversity goals. Emerson advocates for a return to fundamentals—"the actual principles of diversity, equity, and inclusion"—with renewed focus on the precise access and experience gaps DEI work is seeking to close.
- Washington Post, "Conservative anti-DEI activists claim victory in Harvard leader's fall" (January 5): The Post's Julian Mark and Taylor Telford report on conservative activists' response to the resignation of Harvard University President Claudine Gay. Gay recently came under fire for her Congressional testimony related to on-campus anti-Semitism, and has also faced accusations of plagiarism in her scholarly work. As Mark and Telford note, conservative activists and public figures have characterized Gay's achievements as the result of her race and not her merit. In a post on X, activist Chris Rufo called Gay's resignation "the beginning of the end for DEI in America's institutions"; in his own post on X, hedge fund manager and Harvard alumnus Bill Ackman, who described DEI as "inherently a racist and illegal movement," called Gay's resignation "an important step forward for the University." In an op-ed published in the New York Times, Gay stood by her scholarly work and characterized her resignation as part of a larger attack on DEI, stating that "the campaign against me was about more than one university and one leader."
- Harvard Business Review, "DEI Is Under Attack. Here's How Companies Can Mitigate the Legal Risks." (January 5): Kenji Yoshino and David Glasgow, both of the NYU School of Law and the Meltzer Center for Diversity, Inclusion, and Belonging, advocate for businesses to take a proactive approach in adapting to the shifting legal landscape surrounding DEI. Yoshino and Glasgow lay out a framework for identifying risk among DEI programs, noting that high-risk programs: (1) confer "a preference" on some individuals and not others; (2) give that preference to a legally protected group; and (3) confer, as part of that preference, some "palpable benefit" related to work. Applying this framework, Yoshino and Glasgow identify examples of high-risk programs, including enforcing hiring, promotion, or other quotas, using protected criteria as a tiebreaker in making employment decisions, targeting specific programs to specific protected groups, and linking managers' compensation to meeting DEI targets. To mitigate risk, Yoshino and Glasgow recommend that companies seek to level the playing field for all candidates, focus on commonalities other than membership in protected groups, and identify ways to increase DEI buy-in untethered to any palpable benefits in the workplace.
- Corporate Counsel, "Many Companies Doubling Down on DEI Despite Backlash" (January 10): Corporate Counsel's Trudy Knockless reports on a new study by law firm Littler Mendelson, finding that companies have maintained their DEI

commitments even while seeking to minimize legal risk in the wake of *SFFA*. Surveying over 320 senior corporate executives, the study found that 57% of respondents say their organizations have increased diversity efforts over the last year and 91% say DEI is as much of a priority as it was before the Supreme Court's decision. Despite this commitment, the study also identified DEI as a challenge to corporations, as executives try to "find a balance" among competing priorities in the shifting legal and political landscape.

- The New York Times, "D.E.I. Goes Quiet" (January 13): The New York Times' Sarah Kessler asks whether the recent decrease in visibility of corporate DEI programs means companies have "pulled back" on DEI, or whether they have simply "changed how they approach and talk about it." Kessler asked this question of Paradigm CEO Joelle Emerson, who suggested that the pushback against diversity programs has led some companies to rebrand their efforts as a broader attempt to improve workplace culture. Porter Braswell, founder of the professional membership network 2045 Studio, told Kessler that many companies are opening diversity programs to all employees and reframing them as opportunities to increase representation of diverse experiences. Experts have different opinions on this rebranding. Braswell said that what mattered was that the "end goals of these diversity initiatives and programs will not change." But Misty Gaither, vice president of diversity, inclusion, equity and belonging at Indeed, advocated against walking back the use of the term *DEI*: "The data says that all of these positive things happen when you have diversity, equity and inclusion. So we're not going to mask it or call it something different."

Case Updates:

Below is a list of updates in new and pending cases: **1. Contracting claims under Section 1981, the U.S. Constitution, and other statutes:**

- ***Am. Alliance for Equal Rights v. Fearless Fund Mgmt.***, LLC, No. 1:23-cv-03424-TWT (N.D. Ga. 2023), on appeal at No. 23-13138 (11th Cir. 2023): AAER sued a Black women-owned venture capital firm with a charitable grant program that provides $20,000 grants to Black female entrepreneurs; AAER alleged that the program violates Section 1981 and sought a preliminary injunction. Fearless Fund is represented by Gibson Dunn.
    - **Latest update**: On January 3, AAER filed its reply in support of its merits brief before the Eleventh Circuit. AAER reiterated that it had standing despite the use of pseudonymous declarations by members, and also claimed the fact that the members had never applied to the contest was irrelevant because Fearless Fund explicitly excluded non-Black non-female businesses. AAER also challenged Fearless Fund's characterization of the program as legal affirmative action, arguing that the use of blanket racial categorizations lacked the structured, measurable benchmarks of a valid affirmative action program under 29 U.S.C. § 1608, and was not sufficiently tailored to meet strict scrutiny. AAER also reasserted that Fearless Fund's program is a contract, and that any changes to the program's rules made after the litigation began should not exempt Fearless Fund from liability. Finally, AAER argued that Fearless Fund's program should be considered a contest rather than a charitable donation program, and that, as a result, it lacked the requisite expressive content to constitute protected speech under the First Amendment. Oral argument is scheduled for January 31, 2024.

- ***Roberts & Freedom Truck Dispatch v. Progressive Preferred Ins. Co.***, et al., No. 23-cv-1597 (N.D. Oh. 2023): On August 16, 2023, plaintiffs represented by AFL sued defendants Progressive Insurance and Hello Alice, alleging that defendants' grant program that awarded funding specifically to Black entrepreneurs to support their small businesses violated Section 1981.

- **Latest update**: On December 21, 2023, a coalition of four civil rights organizations filed a motion requesting leave to file an amicus brief on behalf of the defendants, which the court granted on January 2. In their brief, the civil rights groups argued that historical evidence from the 1866 Congress that passed Section 1981 shows that Congress's overriding intent was to grant Black citizens the tools to be independent and empowered actors in the economy. Thus, they argued, interpreting the statute to impede voluntary private philanthropy like a grant program that supports Black economic mobility would subvert Congress's intent and misread the statute. On January 3, the plaintiffs amended their complaint, adding new exhibits and pleading additional facts to support its contention that the grant program at issue is a contract and not a charitable donation. The defendants' motion to dismiss the amended complaint is due February 7, 2024.

- ***Do No Harm v. Vituity***, No. 3:23-cv-24746-TKW-HTC (N.D. Fla. 2023): On December 8, 2023, Do No Harm, an advocacy group representing doctors and healthcare professionals, sued a nationwide physician partnership that runs a Bridge to Brilliance Incentive Program—a DEI and recruitment program that advertises a sign-on bonus and benefits specifically to qualified Black physicians. The plaintiff alleged the program violates Section 1981 as well as Section 1557 of the Affordable Care Act, which prohibits discrimination by healthcare providers receiving federal financial assistance. Do No Harm sought a temporary restraining order and preliminary injunction, barring the defendant from closing the application period on December 17, 2023.
  - **Latest update:** On January 3, the parties voluntarily dismissed the case after Vituity ended the challenged incentive program. In a joint stipulation of dismissal, Vituity stipulated to having "already made the decision to end the Black Physician Leadership Incentive." The company agreed that "moving forward, when applicable, while reviewing applications for incentives, Vituity may only take into consideration how race affected a physician's life, be it through discrimination, inspiration, or otherwise," paraphrasing language the Supreme Court used in *SFFA v. Harvard* to describe a permissible use of race in the school admissions context.

- ***Landscape Consultants of Texas, Inc, v. City of Houston***, No. 4:23-cv-3516 (S.D. Tx. 2023): Plaintiff landscaping companies owned by white individuals challenged Houston's government contracting set-aside program for "minority business enterprises" that are owned by members of racial and ethnic minority groups. The companies claim the program violates the Fourteenth Amendment and Section 1981.
  - **Latest update**: On December 20, the plaintiffs filed their opposition to the City of Houston's motion to dismiss. As to their alleged injury-in-fact, the plaintiffs argued that they did not need to plead that they lost contracts due to the minority business enterprise policy; rather, they only needed to allege that the policy forced them to compete for contracts on an unequal basis. Further, the plaintiffs argued that Equal Protection claims do not require an allegation of racial animus when challenging a facially-discriminatory government program.

2. Employment discrimination under Title VII and other statutory law:

- ***Farkas v. FirstEnergy Corp. et al.***, No. cv-23-986280 (Ohio Ct. Common Pleas Cuyahoga Cty.): On September 29, 2023, a white male former corporate counsel at FirstEnergy sued the company under Ohio's antidiscrimination statute, alleging that he was fired in retaliation for expressing concerns about the company's DEI programs.

- **Latest update**: On December 19, 2023, FirstEnergy filed its motion to dismiss the complaint under seal, arguing in the unsealed portions that the plaintiff failed to provide sufficient notice of the claims being asserted, that some of his claims are time-barred, and that he failed to state a claim under Ohio procedural law. The plaintiff filed his opposition, also under seal, on January 8.

- ***Grande v. Hartford Board of Education et al.***, No. 3:24-cv-00010-JAM (D. Ct. 2024): On January 3, 2024, Plaintiff, a white male physical education teacher in the Hartford school district, filed suit against the Hartford School Board after allegedly being forced to attend mandatory DEI trainings. He claimed that he objected to the content of a mandatory professional development session focused on race and privilege, stating that he felt "white-shamed" after expressing his political disagreement with the training's purposes and goals, and that he was thereafter subjected to a retaliatory investigation and was wrongfully threatened with termination. He claims the school's actions constitute retaliation and compelled speech in violation of the First Amendment.
    - **Latest update**: According to the docket, the defendant has not yet been served with the complaint.

3. Educational Institutions and Admissions (Fifth Amendment, Fourteenth Amendment, Title VI, Title IX):

- ***Students for Fair Admissions v. U.S. Military Academy at West Point et al.***, No. 7:23-cv-08262 (S.D.N.Y. 2023), on appeal at No. 24-40 (2d Cir. 2024): On September 19, 2023, SFFA sued West Point Academy, arguing that affirmative action in its admissions process, including alleged racial "benchmarks" of "desired percentages" of minority representation, violates the Fifth Amendment of the U.S. Constitution by taking applicants' race into account.
    - **Latest update**: On January 3, 2024, the court denied SFFA's request for a preliminary injunction. Although the court found that SFFA had standing to sue notwithstanding its reliance on pseudonymous members, it held that the organization failed to satisfy the factors warranting a preliminary injunction. For likelihood of success on the merits, the court emphasized that SFFA had a very high burden to prove a negative (that West Point was not likely to be able to justify its race-conscious admissions with a compelling government interest) with limited and speculative facts at the preliminary injunction stage. The court found that the speculative "patchwork" of putatively non-compelling interests and justifications that SFFA attributed to West Point in its complaint did not actually align with those offered by the government at oral argument, muddling rather than clarifying the legal issues. Further, the court stated that the Supreme Court's instructions to give "great deference" to military authorities encouraged the court to be apprehensive of rendering a preliminary decision "without a full understanding . . . as to what exactly are the compelling interests asserted [and] to whom those compelling interests belong." As a result, the court found that SFFA's request for a preliminary injunction at most "creates questions of fact," falling short of the "clear showing required for the extraordinary and drastic remedy sought." On the other factors, the court found that SFFA did not establish irreparable harm because it appeared its pseudonymous members were still eligible for admission to West Point. The court also held that the public interest and the balance of the equities favored West Point because an injunction would disrupt West Point's ongoing admissions cycle and potentially lead to withdrawn admission offers. On January 4, SFFA filed an emergency appeal to the Second Circuit, requesting immediate review of the district court's decision.

The following Gibson Dunn attorneys assisted in preparing this client update: Jason Schwartz, Mylan Denerstein, Blaine Evanson, Molly Senger, Zakiyyah Salim-Williams, Matt Gregory, Zoë Klein, Mollie Reiss, Teddy Rube, Alana Bevan, Elizabeth Penava, and Mary Lindsay Krebs.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following practice leaders and authors:

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