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DEI Task Force Update (November 15, 2023)

Diversity | November 15, 2023

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*. This is our second DEI Task Force Update (the first, issued on November 1, 2023, can be found here) and we will continue to circulate similar updates bi-monthly moving forward. 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 November 1, 2023, America First Legal Foundation ("AFL") sent letters to the EEOC calling for the Commission to initiate investigations into the DEI initiatives of American Airlines, United Airlines, and Southwest Airlines. AFL also sent letters to each airline, alleging violations of both Title VII and Section 1981, and primarily referenced each company's published DEI reports, which detail the companies' efforts to hire and retain diverse talent through various hiring goals, affinity retreats, and training programs focused on diverse employees. On November 2, 2023, AFL also sent the EEOC a letter calling for the agency to investigate NASCAR and a privately owned affiliate, Rev Racing, for violating Title VII through its "Drive for Diversity" and "Diversity Pit Crew Development" programs. The programs are part of NASCAR's ongoing efforts to increase the diversity of its drivers and pit crew members by providing additional coaching, training, and apprenticeship to historically underrepresented demographics within its ranks. Before the SFFA decision, the selection criteria limited eligibility for these programs to women, Black or African Americans, Asians, and Hispanics. Following SFFA, NASCAR and Rev Racing expanded the programs to include all individuals from any "diverse background" or possessing "diverse experiences." AFL's letter questions whether the companies' rebranding efforts led to an actual change in selection criteria. At a press event on November 7, 2023, Kalpana Kotagal, the newest EEOC commissioner, said that she plans to collaborate with her two Democratic colleagues to encourage lawful diversity, equity, inclusion, and accessibility practices in the workplace. Kotagal was previously a civil rights and employment attorney, has represented workers in discrimination class actions, and is the co-author of the "Inclusion Rider," a sample provision for actors' or filmmakers' contracts to ensure equity and inclusion at every level in a production. EEOC Chair Charlotte Burrows and Commissioner Kotagal also held a DEI listening session with corporate leaders on November 7. On October 8, 2023, California governor Gavin Newsom signed into law Senate Bill 54 ("SB 54"), under which covered entities in the venture capital industry will be required to annually report certain diversity statistics to the California Civil Rights Department ("CRD") if their portfolio companies or investors have a covered connection to California. The demographic data, which includes race, ethnic identity, individuals who identify as LGBTQ+, gender identity, disability status, veteran status, and California resident status, must be reported on an aggregated and anonymized basis. Investments made in the prior calendar year in portfolio companies with diverse founding teams must also be reported as a percentage of the covered entity's aggregate venture capital investments. SB 54 allows the CRD to publish this anonymized information online and conceivably to sue funds on the basis of discrimination. SB 54 also delegates to the CRD the power to investigate and prosecute complaints of discrimination. SB 54 is

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scheduled to go into effect on March 1, 2025. Gibson Dunn published a Client Alert on November 7, 2023, discussing in more depth the scope, consequences, and uncertainties of SB 54's implementation.

Media Coverage and Commentary:

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

- Bloomberg Law, "Nasdaq's Board Diversity Win Invigorates SEC Disclosure Plans" (November 9): Bloomberg Law's Andrew Ramonas and Clara Hudson report on the recent decision by the United States Court of Appeals for the Fifth Circuit upholding Nasdaq's rules requiring companies listed on Nasdaq's exchange to disclose certain information about their board members' diversity characteristics. (Gibson Dunn represented Nasdaq in this matter.) Ramonas and Hudson report that the SEC is considering proposing regulations to enhance board-diversity disclosures. Although DEI remains a priority for many companies, a recent Spencer Stuart report on board appointments indicates that the proportion of new directors appointed between May 2022 and April 2023 who identified as female or underrepresented minorities is down from the prior year.
- US Law Week, "Throw Out the Diversity Playbook and Reimagine Inclusive Hiring" (November 7): William & Mary Law School Dean A. Benjamin Spencer argues that traditional law-firm diversity programs were flawed because they "signaled—unfairly—that 'diverse' candidates mostly couldn't cut it in the regular hiring process." He advocates for an "inclusive excellence" approach, including identifying larger pools of prospective hires through regional and specialty group career fairs and junior lateral hiring.
- The Brookings Institution, "Admissions at most colleges will be unaffected by Supreme Court ruling on affirmative action" (November 7): According to Sarah Reber, Gabriela Goodman, and Rina Nagashima of Brookings, new data based on public reporting confirm prior findings that affirmative action is primarily used by highly selective, private four-year colleges. The data further show that most students from historically excluded racial groups do not attend colleges using affirmative action. Reber and her colleagues write that it is unlikely that the SFFA ruling will have a significant effect on college enrollment of historically marginalized racial and ethnic groups overall, although enrollment at highly selective institutions is likely to decline.
- The Washington Post, "A law that helped end slavery is now a weapon to end affirmative action" (November 6): According to the Post's Julian Mark, more than a dozen lawsuits filed over the last three years attempt to use the Civil Rights Act of 1866 (42 U.S.C. § 1981), which Congress passed to provide newly emancipated slaves with equal rights of citizenship, to assert claims of reverse discrimination. Plaintiffs in these suits argue that Section 1981 prohibits race-conscious programs, even those designed to remedy historic underrepresentation of certain groups. But critics of these suits say plaintiffs "have distorted the law's intent." The article highlights Gibson Dunn's representation of the Fearless Fund: *"This is a seminal civil rights statute, passed right after the Civil War, to ensure that the newly freed people who were slaves have the same rights as everybody else," Jason Schwartz, a lawyer with Gibson Dunn, a law firm defending the Fearless Fund, said in a recent interview. "And to try to use that statute as a weapon against Black people . . . is outrageous."*
- Forbes, "Balancing Diversity And Meritocracy: The Gannett DEI Lawsuit" (November 6): Arizona State University professor Susan Harmeling summarizes a putative class-action complaint filed in August against Gannett, one of the country's largest newspaper publishers. The plaintiffs allege that Gannett terminated and denied promotion to white employees while favoring less-qualified underrepresented minorities. Harmeling predicts that the case signals a new era in the DEI landscape as companies attempt to pursue broad diversity goals "while

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ensuring that meritocracy remains at the forefront of their employment practices."

- National Law Journal, "How Employers Can Embrace DEI Without Inviting Lawsuits" (November 2): NLJ's Chris O'Malley provides an overview of recent DEI-related litigation and risk reduction strategies. He highlights Gibson Dunn's defense of the Fearless Fund:*Arguing for the fund, Jason Schwartz, of Gibson Dunn & Crutcher, cited the irony of using Section 1981 to attempt to end the grant program. "Here, the irony would be even worse to take Section 1981, passed in the wake of the Civil War, to make freedom real for Black citizens, and use it to shut down the charitable endeavor of my clients supporting other Black women who face discrimination."*O'Malley notes that one of the "unusual" ways plaintiffs might challenge DEI initiatives is through the form of antitrust suits, citing a New York State Bar Association report highlighting that impermissible information sharing about "competitive conduct" may be interpreted broadly "to include any metrics used to compete for business or talent, including DEI commitments."
- Wall Street Journal, "Small Business Gets Caught in DEI Crossfire" (October 12): WSJ's Ruth Simon and Theo Francis write that reverse-discrimination lawsuits targeting programs providing grants and other support to minority-owned small businesses are having a negative effect on small-business funding more generally. The Small Business Administration has also been ordered by federal judges to adjust its distribution of certain grant funds meant for socially and economically disadvantaged individuals and groups. For one SBA program that provided grants to restaurants, a court ordered the SBA to stop giving priority to restaurants owned by minorities, women, and other disadvantaged groups, and to instead allocate the grants on a first-come, first-served basis.

Current Litigation:

Below is a list of updates in new and pending cases.

1. Contracting claims under Section 1981, the U.S. Constitution, and other statutes:

- ***Alexandre v. Amazon.com, Inc.***, No. 3:22-cv-1459 (S.D. Cal. Sept. 29, 2022): White, Asian, and Native Hawaiian entrepreneur plaintiffs, on behalf of a putative class of past and future Amazon "delivery service partner" program applicants, challenged a DEI program that provides a $10,000 grant to qualifying delivery service providers who are "Black, Latinx, and Native American entrepreneurs." Plaintiffs alleged violations of California state civil rights laws prohibiting discrimination.
    - **Latest update:** The court dismissed the plaintiffs' initial complaint for lack of standing and failure to state a claim on September 9, 2023, but granted leave to amend. Plaintiffs filed an amended complaint on September 22. Defendants' deadline to respond is December 6, 2023.
- ***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 November 6, 2023, AAER filed its merits brief in the Eleventh Circuit in support of a preliminary injunction. AAER argued that Fearless Fund's grant program is not protected by the First Amendment because it is "conduct, not speech," and is not "inherently expressive." AAER also argued that Section 1981 prohibits discrimination against whites as well as other racial groups and that AAER's failure to disclose the names of the putatively harmed non-black non-female business owners did not defeat its standing to bring suit.

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- ***Mid-America Milling Company v. U.S. Dep't of Transportation***, No. 3:23-cv-00072-GFVT (E.D. Ky. 2023): Two plaintiffs, construction companies, sued the Department of Transportation, requesting the court enjoin the DOT's Disadvantaged Business Enterprise Program, an affirmative action program that awards contracts to minority-owned and women?owned small businesses in DOT-funded construction projects with the statutory aim of having such business comprise 10% of certain DOT-funded contracts nationally. Plaintiffs allege that the program constitutes unconstitutional race discrimination in violation of the Fifth Amendment.
    - **Latest update:** DOT's deadline to respond to the complaint is December 30, 2023.

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

- ***Harker v. Meta Platforms, Inc.***, No. 23-cv-7865 (S.D.N.Y. 2023): A lighting technician who worked on a set where a Meta commercial was produced sued Meta and a film producers association, alleging that Meta and the association violated Title VII, Sections 1981 and 1985 and New York law through a diversity initiative called Double the Line. Plaintiff also claims that he was retaliated against after raising questions about the qualifications of a coworker hired under the program.
    - **Latest update:** On November 3, 2023, the defendants filed their motions to dismiss, arguing the plaintiff lacked standing and failed to state plausible discrimination claims because he did not actually apply for a Double the Line position, nor did he meet the non-racial eligibility qualifications had he applied. The plaintiff's deadline to respond is December 5, 2023.

3. Board of Director or Stockholder Actions:

- ***Craig v. Target Corp.***, No. 2:23-cv-00599-JLB-KCD (M.D. Fl. 2023): America First Legal sued Target and certain of its officers on behalf of a stockholder, claiming the board falsely represented that it monitored social and political risk, when it allegedly focused only on risks associated with not achieving ESG and DEI goals. Craig claims that this focus depressed Target's stock price, alleging violations of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934.
    - **Latest update:** On November 7, 2023, Target filed a motion to dismiss for lack of standing and failure to state a claim. Target argued that the plaintiff's case alleged only a policy disagreement, not fraud. On the plaintiff's claim of misrepresentation, Target pointed out that it has never hidden its commitment to DEI or potential risks of its approach and that plaintiff purchased his stock before Target made any of the allegedly fraudulent statements, meaning he could not have relied on them.

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

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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