

DEI Task Force Update (November 29, 2023)

Diversity | November 29, 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*. 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:

In California, new challenges have emerged to DEI-related programs in the state's community college system. In April 2023, the California Community College system adopted new regulations, requiring faculty to "employ teaching, learning, and professional practices that incorporate DEIA . . . principles" and directing community colleges to "consider[] an employee's demonstrated, or progress toward, proficiency in diversity, equity, inclusion, and accessibility [] competencies" in employee evaluations. Cal. Code Regs. tit. 5, §§ [53602](#), [53605](#). Two groups of professors, represented by the nonprofit organization Foundation for Individual Rights and Expression (FIRE), sued the California Community College system in June and August 2023 in the Eastern District of California. Both suits seek to enjoin the application of the new evaluation standards. The professors argue that the system's new regulations compel speech in violation of the First and Fourteenth Amendments by requiring faculty to either parrot the state's stance on DEI or be punished. On November 14, 2023, a magistrate judge in the June lawsuit (*Johnson v. Watkin*) [recommended](#) granting an injunction, writing that "California's goal of promoting diversity, equity, inclusion, and accessibility in public universities does not give it the authority to invalidate protected expressions of speech." The district court has not yet ruled on this recommendation. More details on these cases can be found in the case updates section below. On November 21, 2023, America First Legal Foundation ("AFL") sent a [letter](#) to the EEOC, calling for the Commission to initiate an investigation into Macy's, Inc.'s DEI initiatives. The letter to the Commission, as well as a [letter](#) AFL sent to Macy's Board of Directors, alleges violations of Title VII and Section 1981 based on the company's 2022 Diversity & Inclusion Annual Report. The stated goals of the Report include achieving ethnic and gender diversity of 50% for the company's models, 30% for its senior-level management, and 5% for its supplier relationships. On November 8, 2023, United States Senator Eric Schmitt (R - Missouri) introduced [Senate Bill 3252](#), proposing to terminate the authorities of certain DEI offices and officers of the Federal Government. The Bill, short-titled the "Abolish Government DEI Act," lists a total of 40 executive offices and officer positions that would be terminated on the date of the Bill's enactment. The Bill targets the DEI and Civil Rights offices of numerous executive departments and agencies, including—among others—the Department of State, the Department of the Interior, the Department of the Treasury, the Department of Energy, the Department of Health and Human Services, and the Equal Employment Opportunity Commission. The Bill, if enacted, would abolish a number of DEI officer positions in these agencies and would prohibit the head of a covered agency from carrying out "any plan relating to diversity, equity, and inclusion." The Administrator of the United States Agency for International Development would also lose the ability to implement the agency's [Diversity, Equity, Inclusion, and Accessibility strategy](#). The Bill has been read twice and referred to the

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Committee on Homeland Security and Governmental Affairs.

Media Coverage and Commentary:

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

- [New York Law Journal. “‘Affirmative Recruiting’ Under Title VII” \(November 15\):](#) New York University School of Law Professor Samuel Estreicher and employment attorneys Erin Connell and Alexandria Elliott explore courts’ historical treatment of race- and diversity-conscious recruiting under Title VII. The authors survey EEOC guidance and decisions from federal courts of appeals and find that, although Title VII does not explicitly prohibit consideration of race or other protected characteristics in recruiting, diversity-focused recruiting violates Title VII when it results in a disparate impact in hiring. Estreicher, Connell, and Elliott advise that employers should focus on diversifying talent pools while maintaining merits-focused hiring practices to mitigate risk in the current landscape.
- [Law360. “10th Cir. Keeps Cards Close To Vest In DEI Bias Suit” \(November 17\):](#) Law 360’s Grace Elleston reports on the recent [oral argument](#) heard by a three-judge panel of the Tenth Circuit in *Young v. Colorado Department of Corrections*. Joshua Young, a white ex-corrections officer, is appealing the dismissal of his Title VII suit that claims a Colorado Department of Corrections DEI training session created a hostile work environment by implying that white people are inherently racist. Elleston notes that Judge Timothy M. Tymkovich seemed skeptical that a single training session could meet the severe and pervasive standard necessary to create a hostile work environment for white employees, and queried whether a training session perceived by the plaintiff to cause offense based on his race could alter the conditions of his employment. Elleston concludes that the panel’s questioning shed little light on how it will rule.
- [Inc.. “How Firms Are Winning Anti-DEI Lawsuits” \(November 22\):](#) According to Brit Morse, Associate Editor at Inc., the recent wave of litigation challenging law firm diversity programs has only strengthened those firms’ commitment to promoting diversity in the legal profession. Those firms’ strategy of adjusting diversity program criteria seems to be working, writes Morse, and may also work for companies in other industries seeking to mitigate risk while maintaining a strong commitment to diversity. But Morse emphasizes that those hardest hit by recent litigation may be nonprofits and minority business owners reliant on diversity-focused funding, which is increasingly becoming the target of advocacy groups challenging diversity initiatives in court.
- [Paradigm. “New Data: 2023 DEI Trends & 2024 Opportunities” \(November 19\):](#) Paradigm Co-Founder and CEO (and former civil rights attorney) Joelle Emerson highlights Paradigm’s new [report](#) on corporate DEI trends. The report aggregates data from 148 companies using Paradigm’s strategy and analytics platform. Emerson identifies four areas of opportunity for DEI in 2024, recommending that companies increase reliance on data to identify areas for improvement and to track progress, use DEI training to “reset the narrative” about diversity goals, focus on increasing (and measuring) inclusion, and assess hiring plans to ensure access to a wider pool of diverse candidates.
- [Bloomberg News. “Corporate America Is Rethinking Diversity Hiring” \(November 22\):](#) Bloomberg’s Jeff Green and Kelsey Butler report on the corporate response to the recent wave of lawsuits targeting diversity programs. Interviews with employment lawyers, consultants, and diversity executives suggest that “[t]he biggest companies that were already committed to diversity initiatives prior to 2020 are more likely to be sticking with their programs,” while “[e]mployers that are newer to DEI or haven’t really started are more likely to pull back.” But the authors indicate that, despite these different approaches, the majority of private employers are changing the language they use to discuss diversity initiatives and reducing public communications about DEI efforts.

- [The Charlotte Post, “Affirmative action backlash hits maternal health program” \(November 26\)](#): Freelance journalist Ronnie Cohen reports on the [lawsuit](#) filed in May 2023 by the Californians for Equal Rights Foundation—represented by the American Civil Rights Project—against the city of San Francisco and the state of California over the “Abundant Birth Project,” which provides monthly stipends to pregnant San Franciscans who are Black or of Pacific Island heritage. According to its website, the Project aims to address higher-than-average rates of maternal mortality and preterm births among members of these communities. But the plaintiffs argue that the Project, along with other city programs providing financial support to Black and transgender residents, violates Title VI and the equal protection clauses of the Fourteenth Amendment and the California Constitution.

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:

- ***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): Advocacy group American Alliance for Equal Rights (“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 13, 2023, the Eleventh Circuit granted the parties’ motion to expedite oral argument and tentatively scheduled argument for the week of January 29, 2024.
- ***Landscape Consultants of Texas, Inc. v. City of Houston***, No. 4:23-cv-3516 (S.D. Tex. 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 November 13, 2023, the City of Houston filed its motion to dismiss, arguing that the plaintiffs failed to state claims for disparate treatment under the Equal Protection clause and contracting discrimination under Section 1981. In particular, the City argued that one plaintiff, as a company owned 51% by a woman, might have been treated identically to a minority business enterprise, and that all plaintiffs failed to allege that they were “actually prevented, and not merely deterred” from contracting with the City. The City also argued that since the plaintiffs never actually submitted a bid to contract with Houston, they could not make out a Section 1981 claim.
- ***Am. Alliance for Equal Rights v. Winston & Strawn LLP***, No. 4:23-cv-04113 (S.D. Tex. 2023): AAER sued law firm Winston & Strawn, challenging its 1L diversity fellowship program as racially discriminatory in violation of Section 1981. The firm had previously announced that it would continue the program in response to a threat letter from AAER.
 - **Latest update:** On October 30, 2023, AAER moved for a preliminary injunction seeking to bar the firm from considering race as a factor for its diversity fellowship program, to require it to use race-neutral language for program eligibility, and if necessary, to require the firm to restructure its hiring process. On November 14, 2023, the district court entered a briefing schedule; Winston & Strawn’s response is due on December 11, 2023.

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

- **Netzel v. American Express Company**, No. 2:22-cv-01423 (D. Ariz. 2022), on appeal at No. 23-16083 (9th Cir. 2023): On August 23, 2022, a group of former American Express employees alleged that the company's diversity initiatives discriminated against white workers and that the company retaliated against the same workers after they complained, in violation of Title VII and Section 1981.
 - **Latest update:** After the district court granted American Express's motion to compel arbitration, the plaintiffs appealed to the Ninth Circuit, filing their opening brief on November 9, 2023. The plaintiffs argue in part that they should not be compelled to arbitrate because they seek "public injunctive relief" against alleged "racial discrimination . . . that specifically harms the general public," a right they claim is not waivable under California law. American Express's response is due January 10, 2024.

3. Challenges to agency rules, laws, and regulatory decisions:

- **Johnson v. Watkin**, No. 1:23-cv-00848-ADA-CDB (E.D. Cal. 2023): On June 1, 2023, a community college professor in California sued to challenge new "Diversity, Equity and Inclusion Competencies and Criteria Recommendations" enacted by the California Community Colleges Chancellor's Office, claiming the regulations violated the First and Fourteenth Amendments. The plaintiff alleged that the adoption of the new competency standards, which require professors to be evaluated in part on their success in integrating DEI-related concepts in the classroom, will require him to espouse DEI principles with which he disagrees, or be punished. The plaintiff moved to enjoin the policy.
 - **Latest update:** On November 14, 2023, a magistrate judge issued a recommendation and proposed order to grant a preliminary injunction. The judge recommended enjoining the colleges from investigating or disciplining the plaintiff based on his proposed political speech in the classroom. The judge also recommended denying the defendant's motion to dismiss. The parties have until November 29, 2023 to file their objections to the magistrate judge's findings.
- **Palsgaard v. Christian**, No. 1:23-cv-01228-SAB (E.D. Cal. 2023): On August 17, 2023, community college professors in California filed suit, challenging the adoption of the state's new DEI-related evaluation competencies and corresponding language in their faculty union contract, which they allege requires them to endorse the state's views on DEI concepts. The plaintiffs challenge the regulations and contract language as compelled speech in violation of the First and Fourteenth Amendments.
 - **Latest update:** On August 23, 2023, the plaintiffs moved for a preliminary injunction, which is fully briefed. The court has not yet ruled on the motion. The defendants' current deadline to respond to the initial complaint is December 15, 2023.

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

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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