GIBSON DUNN

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COLORADO ATTORNEY GENERAL UPHOLDS COMMITMENT TO DIVERSITY, EQUITY, AND INCLUSION IN FORMAL LEGAL OPINION

To Our Clients and Friends:

On October 4, 2023, Colorado's Attorney General Philip J. Weiser issued a formal legal opinion ("Opinion") confirming the legality and praising the benefits of diversity, equity, and inclusion ("DEI") programs and policies in the workplace. The Opinion makes clear that, despite the increase in legal challenges to DEI programs after the Supreme Court struck down affirmative action in college admissions (*Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) ("*SFFA*")), the Colorado Attorney General's Office is highly unlikely to challenge the DEI policies or programs of companies under its jurisdiction.

A. Background

Attorney General Weiser first affirmed his office's commitment to workplace DEI initiatives on July 19, 2023, when he signed a joint letter to Fortune 100 companies from 21 Democratic attorneys general, reassuring companies that efforts to recruit diverse workforces and create an inclusive work environment are still legal after the *SFFA* decision. That letter was issued just six days after a group of 13 Republican state attorneys general published a letter to the same Fortune 100 companies, which threatened "serious legal consequences" for the use of race-based employment preferences and diversity policies.

In an October 4 press release, the Colorado Attorney General's Office explained that AG Weiser issued the Opinion in an effort "to respond to questions and concerns about the constitutionality of DEI programs in the wake of the recent U.S. Supreme Court decision in [*SFFA*]," and to clarify that the Supreme Court decision was limited to colleges' and universities' admissions policies—not private workplaces, which are subject to Title VII of the Civil Rights Act of 1964 ("Title VII").

B. Legal Opinion

The Colorado Attorney General's five-page opinion poses the question, "Are Diversity, Equity, and Inclusion programs ('DEI programs') used by employers now unlawful following the recently decided [*SFFA*] decision[?]" AG Weiser's short answer is "No." He clarifies that "[w]orkplace DEI programs were not addressed and were not held unconstitutional by the U.S. Supreme Court in *SFFA*," because that decision applied only to college and university admissions, and interpreted the Equal Protection Clause of the U.S. Constitution and Title VI of the Civil Rights Act of 1964, neither of which governs private companies that do not receive federal funds.

The Opinion further explains that the Supreme Court in *SFFA* "relied exclusively on case law developed in the context of university admissions programs" and found that the admissions policies at issue (1) failed the "strict scrutiny" test applicable to *government* policies that discriminate on the basis of race; (2) impermissibly used race as a negative or a stereotype; and (3) lacked an "end point." The *SFFA* decision, therefore, "did not address the law governing consideration of race in the employment context, nor did it address the validity of DEI programs in hiring practices and in the workplace."

AG Weiser observes that, by contrast, "[e]mployer DEI programs remain valid under federal law." Irrespective of *SFFA*, he explains, it has long been illegal for an employer to discriminate on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Under this standard, DEI programs that "ensure that all employees receive access to *the same* opportunities in the workplace—not to 'adversely affect' or 'deprive' employees of opportunities—do not violate Title VII." AG Weiser notes that a policy aimed at expanding an organization's outreach "to historically underrepresented groups," for instance, would be legal, as it would not adversely impact other applicants.

The Opinion also underscores the validity of the "valid affirmative action" defense, which, as AG Weiser explains, means that "employers may take protected status into account in employment decisions in certain limited circumstances," where the affirmative action is taken to correct a "manifest imbalance" in a given position and does not "unnecessarily trammel" the rights of employees not subject to the affirmative action program. *See United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979); *Johnson v. Transportation Agency*, 480 U.S. 616, 626-27 (1987).

AG Weiser further argues that, far from paring down DEI programs, employers may need to take additional steps to avoid policies that "have a disparate impact on protected classes of employees," to avoid claims under Title VII. He therefore advises employers to "carefully monitor their policies to ensure that they are not inadvertently disadvantaging protected classes of employees through facially neutral policies."

AG Weiser also offers a policy defense of DEI programs. The Opinion's "Factual Background" section contends that Title VII exists to address "well documented" "inequities" in the workplace which persist to this day, including the facts that "[o]n average, women are paid less than men," that "[w]omen, and particularly women of color, are less likely to hold executive positions," and that "Black and Hispanic employees suffer workplace discrimination at a 60% higher rate than white employees." "In order to combat these persistent inequities and achieve the benefits of a diverse workforce," AG Weiser asserts, "public and private employers of all types have adopted DEI programs." AG Weiser notes that such programs help "remove barriers" for underrepresented groups, while increasing diversity, equity, and inclusion. The Opinion lists what the AG views as valid DEI programs, including the hiring of "chief diversity officers who ensure that all employees enjoy access to mentoring and career development opportunities"; mentorship programs "to increase employee engagement and opportunities for advancement," especially for underrepresented groups; recruiting efforts aimed at "ensur[ing] a diverse pipeline of applicants"; and employee affinity groups "that can help employees feel a sense of belonging, community, and worth in the workplace."

The press release accompanying the Opinion confirms the AG's commitment to DEI in clear terms: "Research demonstrates compelling reasons for why public and private employers would be interested in better meeting the needs of an increasingly diverse world. Organizations with diverse teams are more profitable and companies with diversity across the board are more innovative. The law permits DEI efforts to achieve these benefits of diversity, and employers should periodically review their policies to ensure they are in compliance with the law."

C. Implications

AG Weiser already took a stance on private-sector DEI programs when he signed the Democratic AGs' letter to Fortune 100 companies in July. This additional Opinion solidifies AG Weiser's view on the value and legality of certain workplace DEI programs, signaling to Colorado employers that—at least from the Attorney General's perspective—they may maintain existing, lawful DEI programs, and take appropriate steps to avoid "a disparate impact on protected classes of employees." At the same time, depending on the nature of their DEI programs, employers still face legal risk from private plaintiffs and other government agencies who may challenge the legality of DEI programs and allege that they are discriminatory under Title VII or Section 1981 of the 1866 Civil Rights Act. Gibson Dunn has formed a DEI Task Force to assist employers with these issues.

The following Gibson Dunn attorneys assisted in preparing this client update: Jessica Brown, Jason C. Schwartz, Katherine V.A. Smith, and Anna Ziv.

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, the authors, or the following practice and DEI Task Force leaders and partners:

Jessica Brown – Partner, Labor & Employment Group, Denver
(+1 303-298-5944, jbrown@gibsondunn.com)

Mylan L. Denerstein – Partner, Labor & Employment Group, Chair, Public Policy Group, New York
(+1 212-351-3850, mdenerstein@gibsondunn.com)

Zakiyyah T. Salim-Williams – Partner & Chief Diversity Officer, Washington, D.C.
(+1 202-955-8503, zswilliams@gibsondunn.com)

Molly T. Senger – Partner, Labor & Employment Group, Washington, D.C.
(+1 202-955-8571, msenger@gibsondunn.com)

Jason C. Schwartz – Partner & Co-Chair, Labor & Employment Group, Washington, D.C.
(+1 202-955-8242, jschwartz@gibsondunn.com)

Katherine V.A. Smith – Partner & Co-Chair, Labor & Employment Group, Los Angeles
(+1 213-229-7107, ksmith@gibsondunn.com)