DEI Task Force Update

April 24, 2024

Gibson Dunn's Workplace DEI Task Force aims 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 April 17, 2024, the Supreme Court held in *Muldrow v. City of St. Louis*, No. 22-193, that plaintiffs who challenge employers' job transfer decisions as discriminatory under Title VII do not need to demonstrate that the harm suffered was "significant," "material," or "serious." But plaintiffs must still show "some harm respecting an identifiable term or condition of employment," such as hiring, firing, or transferring employees. A plaintiff also must show that her employer acted with discriminatory intent and that the transfer was based on a characteristic protected under Title VII. The Court emphasized that the decision does not reach retaliation or hostile work environment claims. The Court did not address how the decision might impact corporate DEI programs. For a more detailed discussion of this decision, see our April 17 Client Alert .

On April 12, 2024, Arkansas teachers and students, along with the Arkansas State Conference of the NAACP (NAACP-AR), filed a complaint against Governor Sarah Huckabee Sanders, challenging the constitutionality of Section 16 of Arkansas's Literacy, Empowerment, Accountability, Readiness, Networking and School Safety Act (the "LEARNS Act") and seeking to enjoin its enforcement. In *Walls v. Sanders*, No. 4:24-cv-002 (E.D. Ark. April 12, 2024), the plaintiffs allege that the LEARNS Act "expressly bans" the teaching of "Critical Race Theory" (which the Act refers to as "forced indoctrination") in violation of their First Amendment and Fourteenth Amendment rights. After the Act was passed, Arkansas Secretary of Education Jacob Oliva revoked state approval for the AP African American Studies course, alleging that the course and educational materials violated Section 16. The plaintiffs allege that Section 16 chills speech, impermissibly regulates speech based on viewpoint discrimination, and violates the equal protection guarantees of the Fourteenth Amendment because it was motivated by racial animus and "created, in part, to target Black students and educators on the basis of race." On April 17, 2024, the court denied the plaintiffs' request for expedited briefing but scheduled a preliminary injunction hearing for April 30, 2024.

April continues to be a busy month for state legislation on both sides of the DEI debate. On April 22, 2024, Tennessee Governor Bill Lee signed H.B. 2100—a "social credit score" bill—into law. The bill limits factors that insurers and financial institutions can consider in decisions about the provision or denial of services. Specifically, the bill prohibits insurers and financial institutions from denying services or otherwise discriminating against persons for failure to satisfy ESG standards, corporate composition benchmarks, or compliance with DEI training policies. Meanwhile, on April 8, 2024, Virginia Governor Glenn Youngkin signed H.B. 1452 into law. This new law takes effect on July 1, 2024, and will require state agency heads to maintain comprehensive diversity, equity, and inclusion strategic plans. Strategic plans will need to integrate DEI goals into each agency's mission and detail best practices for addressing equal opportunity barriers and promoting equity in operational activities including pay, hiring, and leadership. Agencies will be required to submit annual reports to enable the Governor and the General Assembly to monitor progress.

Media Coverage and Commentary:

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

- The Wall Street Journal, "Diversity goals are disappearing from companies' annual reports" (April 21): The Wall Street Journal's Ben Glickman and Lauren Weber report on shifts in how companies are discussing DEI in their annual reports as a result of increased scrutiny of DEI initiatives. Glickman and Weber conclude that "[d]ozens of companies [have] altered descriptions of diversity, equity and inclusion initiatives in their annual reports to investors," citing several examples. Glickman and Weber note that these shifts do not necessarily mean companies are abandoning their commitment to DEI, just that they are choosing to be less public about their DEI programs. Ivy Feng, an accounting professor at the University of Wisconsin, observed, "What gets disclosed gets managed. So if they don't say anything, it's more difficult for outsiders to find out what's really going on." Jason Schwartz, Gibson Dunn partner and co-head of the firm's Labor

and Employment practice group, concludes that many companies are just trying to determine what is lawful: "Forget about any ideological agenda. [Companies are] just trying to figure out, how do I follow the law? You don't want to overcommit or undercommit or misdescribe where you'll eventually land."

- The Washington Post, "DEI 'lives on' after Supreme Court ruling, but critics see an opening" (April 19): Julian Mark of The Washington Post writes on the potential impact on DEI programs following the Supreme Court's decision in Muldrow v. City of St. Louis, Missouri. Mark notes the divergence of views on the scope of the Court's ruling. Some practitioners interpret Muldrow narrowly. But EEOC Commissioner Andrea Lucas contends that DEI programs are now more susceptible to legal challenges than ever. Lucas asserts leadership development or training programs that are restricted to certain racial groups are now "high risk," as are employers' efforts to foster diverse hiring slates, opining that "the 'some harm' standard will [not] be the saving grace for a DEI program."

- Bloomberg Law, "The Supreme Court Just Complicated Employer DEI Programs" (April 18): Writing for Bloomberg Law, Simon Foxman examines the Supreme Court's ruling in *Muldrow v. City of St. Louis, Missouri*, in which the Supreme Court unanimously held that an employee could bring suit under Title VII based on her reassignment to a position of the same pay but less favorable workdays and other benefits. The Court explained that an employee only has to suffer "'some harm' under the terms of their employment," but that harm "doesn't need to be 'material,' 'substantial' or 'serious.'" Foxman reports that racial justice groups like the Legal Defense Fund celebrated the decision but expressed fears that "opponents of DEI programs likely will see this as an opening to launch new attacks on diversity programs."

- The New York Times, "What Researchers Discovered When They Sent 80,000 Fake Résumés to U.S. Jobs" (April 8): Claire Cain Miller and Josh Katz of *The New York Times* report on a social experiment performed by a group of economists on roughly 100 of the largest companies in the

country. The economists submitted thousands of fake “résumés with equivalent qualifications but different personal characteristics,” changing the name on each application to suggest whether an applicant was “white or Black, and male or female.” Miller and Katz report that the results were striking, with one company contacting “presumed white applicants 43 percent more often” than minority applicants with the same credentials. The study identifies other trends, including potential biases against older workers, women, and LGBTQ individuals. Miller and Katz note the study found various measures companies use in an effort to reduce discrimination, such has employing a chief diversity officer, offering diversity training, or having a diverse board, had no effect on the outcome of their experiment. But there was one thing all the companies who exhibited the least bias had in common: a centralized human resources function.

- The New York Times, “With State Bans on D.E.I., Some Universities Find a Workaround: Rebranding” (April 12): Writing for *The New York Times*, Stephanie Saul reports on what she terms the “rebranding” many state universities have undertaken in the wake of legislation targeting DEI programs in higher education. Saul writes that, as an example, the University of Tennessee’s “campus D.E.I. program is now called the Division of Access and Engagement,” and at LSU, what was once the Division of Inclusion, Civil Rights and Title IX is now called the Division of Engagement, Civil Rights and Title IX. Saul states that some, like LSU VP of Marketing Todd Woodward, celebrate this “rebranding” as an effort to retain the impact of the departments and avoid job cuts. Woodward explained that the switch from “inclusion” to “engagement” better signifies the “university’s strategic plan.” But others, like Professor David Bray at Kennesaw State University, express skepticism, saying moves like this are little more than “the same lipstick on the ideological pig.”

- AP News, “Texas diversity, equity and inclusion ban has led to more than 100 job cuts at state universities” (April 13): Writing for AP News, Acacia Coronado examines the effect that SB17, Texas’ ban on DEI initiatives, has had in higher education. According to Coronado, the bill, which prohibits training and activities that reference race, color, ethnicity, gender identity, or sexual

orientation, “has led to more than 100 job cuts across university campuses in Texas.” SB17 does not “apply to academic course instruction and scholarly research” positions, but Professor Aquasia Shaw, the only person of color in the Kinesiology Department at the University of Texas at Austin, suspects SB17 was responsible for the University’s decision not to renew her contract.

- The Hill, “Republican states urge Congress to reject DEI legislation” (April 16): The Hill’s Cheyanne Daniels reports on Representatives Ayanna Pressley (D-MA) and Jamie Raskin’s (D-MD) introduction of the Federal Government Equity Improvement and Equity in Agency Planning Acts in the wake of “attempts to limit DEI programs . . . around the country.” These bills are designed to encourage federal agencies to enact policies focused on “providing equal opportunity for all, including people of color, women, rural communities and individuals with disabilities.” The legislation has not been welcomed by all, with Republican West Virginia Attorney General Patrick Morrisey penning a letter to Raskin and Representative James Comer (R-KY), Chairman of the Committee on Oversight and Accountability, declaring the bills “divisive.”

- Law360, “Anti-DEI Complaints Filed With EEOC Carry No Legal Weight” (April 15): In an op-ed for Law360, Rutgers law professor and former EEOC counsel David Lopez asserts that the series of EEOC complaints conservative organizations like America First Legal Foundation (“AFL”) are filing against companies “carry no legal weight.” He describes these complaints as mere attempts to “weaponize the [public’s] lack of knowledge as a means of bullying employers into retreating from core values.” He encourages employers “not [to] be intimidated” by AFL’s tactics but to continue “develop[ing] workplace practices focused on rooting out entrenched and ongoing discriminatory practices against Black people, women and others in the workplace.”

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:

- ***Suhr v. Dietrich,* No. 2:23-cv-01697-SCD (E.D. Wis. 2023):** On December 19, 2023, a dues-paying member of the Wisconsin Bar filed a complaint against the Bar over its "Diversity Clerkship Program," a summer hiring program for first-year law students. The program's application requirements had previously stated that eligibility was based on membership in a minority group. After *SFFA v. Harvard*, the eligibility requirements were changed to include students with "backgrounds that have been historically excluded from the legal field." The plaintiff claims that the Bar's program is unconstitutional even with the new race-neutral language, because, in practice, the selection process is still based on the applicant's race or gender. The plaintiff also alleges that the Bar's diversity program constitutes compelled speech and compelled association in violation of the First Amendment.
    - **Latest update:** Under a partial settlement agreement, the Bar agreed to "make clear that the Diversity Clerkship Program is open to all first-year law students." In exchange, the plaintiff will drop his claims about the clerkship program and file an amended lawsuit challenging only the mandatory dues and how they are spent.
- ***Do No Harm v. Pfizer*, No. 1:22-cv-07908 (S.D.N.Y. 2022), *aff'd,* No. 23-15 (2d Cir. 2023):** On September 15, 2022, conservative medical advocacy organization Do No Harm (DNH) filed suit against Pfizer, alleging that Pfizer discriminated against white and Asian students by excluding them from its Breakthrough Fellowship Program. To be eligible for the program, applicants must "[m]eet the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic and Native Americans." DNH alleged that the criteria violate Section 1981, Title VI of the Civil Rights Act, the Affordable Care Act, and multiple New York state laws banning racially discriminatory internships, training programs, and employment. In December 2022, the Southern District of New York dismissed the case for lack of subject matter jurisdiction, finding that DNH did not have standing because it did not identify at least one member by name. On March 6, 2024, the United States Court of Appeals for the Second Circuit affirmed the district court's dismissal, holding that an organization must name at least one affected member to establish Article III standing under the "clear language" of Supreme Court precedent. On March 20, 2024, DNH petitioned the court for a rehearing *en banc*.
    - **Latest update:** On April 3, 2024, four amicus briefs were filed in support of DNH's petition for a rehearing *en banc*. Briefs were filed by: (1) Speech First, an organization "committed to restoring freedom of speech on college campuses," (2) Pacific Legal Foundation, an organization which "defend[s] individual liberty and limited government," (3) Young America's Foundation, which supports "individual freedom, a strong national defense, free enterprise, and traditional values," The Manhattan Institute, "whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility," and Southeastern Legal Foundation, which is "dedicated to defending liberty and Rebuilding the American Republic," and (4) the American Alliance for Equal Rights, which is

"dedicated to challenging distinctions and preferences made on the basis of race and ethnicity." The four briefs argue that prohibiting anonymity in sensitive cases with "vulnerable plaintiffs" violates the First Amendment and negates the purpose of associational standing in the public interest litigation context.

2. Employment discrimination and related claims:

- ***Bowen v. City and County of Denver*, No. 1:24-cv-00917 (D. Colo. 2024):** On April 5, 2024, Joseph Bowen, a sergeant in the Denver Police Department, sued the Department and the City and County of Denver alleging that the Department's 30x30 initiative, which pledges that 30% of all police recruits will be women by 2030, caused him to lose out on a promotion to captain to three less-qualified women. Bowen alleges that the Department discriminated against him on the basis of his sex, in violation of Title VII of the Civil Rights Act of 1964.
    - **Latest update:** A scheduling conference is scheduled for June 25, 2024.
- ***Renault v. Adidas,* No. 2024-CP-420-1549 (Court of Common Pleas, South Carolina, April 15, 2024):** On April 15, 2024, pro se plaintiff Peter Renault sued Adidas in South Carolina state court for employment discrimination after he was rejected for a supply chain analyst position. Renault alleges that he was qualified but not hired due to the company's DEI policies.
    - **Latest update:** The docket does not reflect that Adidas has been served.

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

- ***Alliance for Fair Board Recruitment v. SEC,* No. 21-60626 (5th Cir. 2021):** On October 18, 2023, a unanimous Fifth Circuit panel rejected petitioners' constitutional and statutory challenges to Nasdaq's Board Diversity Rules and the SEC's approval of those rules. Gibson Dunn represents Nasdaq, which intervened to defend its rules. Petitioners sought a rehearing en banc.
    - **Latest update:** On March 21, 2024, petitioners' briefs were filed. On March 28, 2024, Arizona, Alabama, Alaska, Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, and Utah filed an amicus brief in support of petitioners, arguing that Nasdaq's rules violate the Equal Protection Clause and states' rights. Nasdaq and the SEC will file their briefs on April 29, and oral argument is scheduled for May 14.

4. Actions against educational institutions:

- ***Elliott v. Antioch University*, No. 2:24-cv-502 (W.D. Wash.):** On April 15, 2024, the plaintiff, a white woman, sued Antioch University for suspending her account after she criticized the school's decision to have students sign a "civility pledge" committing to anti-racism. Elliott made a series of public videos and online posts expressing her criticisms of the policy changes at Antioch and alleges that when she refused to sign the civility pledge, she was excluded from courses necessary for her to graduate with her degree. Elliott sued Antioch under Title VI of the Civil Rights Act, breach of contract, and defamation.

- **Latest update:** The docket does not reflect that Antioch University has been served.

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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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