DEI Task Force Update

November 20, 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 October 8, the American Civil Rights Project ("ACR Project") sent a letter notifying Sacramento County and the California Department of Social Services of its intent to sue to block the County's Family First Economic Support Pilot Program. The program aims to provide basic minimum income for parents and guardians living in certain zip codes, who are under 200% of the federal poverty level and caring for children under the age of five who are "Black/African American or American Indian/Alaska Native." ACR Project alleges that the Program is "racially exclusive" and "clearly violates . . . the California Constitution, the United States Constitution's Equal Protection Clause, and Title VI of the Civil Rights Act of 1964," along with Section 1981. ACR Project points out that the Program explicitly screens applicants based on race and therefore "disfavored races" will be "systematically rejected" if they try to apply. ACR Project sent the letter to provide notice

"so that [the County] will not be able to contend later that [it was] not warned" that ACR Project will take further action if the Program remains in place.

On October 29, the Foundation Against Intolerance and Racism (FAIR) filed a complaint against the Washington State Housing Finance Commission, alleging that the state's Covenant Homeownership Program limits benefits to applicants of certain races in violation of the Equal Protection Clause of the Fourteenth Amendment. FAIR claims that the program, which offers downpayment and closing cost assistance for first-time homebuyers, is available only to applicants who have a parent, grandparent, or great-grandparent who is Black, Hispanic, Native American, or one of several other racial or ethnic minorities. FAIR requests a judgment declaring that the program is unconstitutional, a permanent injunction prohibiting the enforcement of the discriminatory aspects of the Program, and nominal damages in the amount of $1.

On October 30, the Equal Protection Project (EPP) filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR) against the University of Wisconsin-Madison (UW-Madison), alleging that the University's Mentorship Opportunities in Science and Agriculture for Individuals of Color program violates federal antidiscrimination laws. EPP alleges that the program's requirement that members be Black, Indigenous, or People of Color amounts to discrimination on the basis of race, color, and national origin in violation of the Fourteenth Amendment's Equal Protection Clause. EPP also alleges that the program violates Title VI, which prohibits discrimination by entities that receive federal funding. EPP requests that OCR investigate the program and award remedial relief as needed, including imposing fines, initiating administrative proceedings, and referring the case to the Department of Justice.

On October 31, the United States District Court for the Eastern District of Kentucky issued an order clarifying and expanding the scope of a preliminary injunction issued last month enjoining the U.S. Department of Transportation's Disadvantaged Business Enterprise ("DBE") program. In October 2023, two non-minority contractors, represented by the Wisconsin Institute for Law & Liberty ("WILL"), challenged the DBE program's purpose of directing at least 10% of federal transportation infrastructure funding to contracting firms owned by women and minorities. The October 31 court order clarified the geographical scope of the preliminary injunction, providing that the preliminary injunction order applies to every state where the plaintiffs operate. WILL issued a press release on its website, praising the court order and its nationwide reach.

On November 5, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) held an informal compliance conference with United Airlines regarding a complaint filed by America First Legal (AFL) in January of this year. In the complaint, AFL alleged that United is violating its federal contract covenants by instituting "diversity quotas" for certain training programs and including "unlawful benchmarks, classifications, and quotas" in its hiring goals. AFL also alleged that United is engaging in "unlawful subcontracting practices" through its supplier diversity program. According to a press release issued by AFL, United said at the compliance conference that its placement and hiring goals are not "requirements," but rather "benchmarks" for expected workforce representation. AFL said United explained that if it fails to meet these benchmarks, the company will interpret this fact as a signal that it must reassess its employment practices, including by revising policies and practices, broadening recruitment and outreach, and instituting trainings.

Media Coverage and Commentary:

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

- CNBC, “Retailers brace for DEI blowback in lead-up to election, holiday shopping season” (November 4): Gabrielle Fonrouge of CNBC reports that retailers are concerned that their DEI policies and initiatives might alienate shoppers during the upcoming holiday shopping season. Fonrouge reports that the concern stems from the recent trend of consumer backlash against DEI initiatives. Fonrouge highlights the experiences of Anheuser-Busch and Target, which both “faced severe blowback” and drops in sales for marketing campaigns and products “geared toward the LGBTQ community.” Fonrouge says that retailers are trying the “hedge their bets” by either preparing for potential backlash or “preemptively walking back certain policies and practices” relating to DEI.

- Law.com, “Law Firm Diversity Pros Fear for Future of DEI Efforts Under Trump Presidency” (November 6): Law.com’s John Campisi reports that some members of the legal industry are concerned that the re-election of President Donald Trump will reverse recent progress made by law firms in increasing diversity among their ranks. Campisi reports that although industry leaders anticipate that the Trump administration will attempt to dismantle DEI programs and initiatives, they caution that it is too early to estimate the effect of the next administration’s policies. Several DEI professionals quoted in the article anticipate that law firms will remain committed to hiring and supporting candidates from diverse backgrounds. Joelle Emerson, co-founder and CEO of diversity consultancy Paradigm, told Campisi that the best thing for law firms to do is to resist "the idea that these concepts are controversial” and to “be clear about what, specifically, these programs and initiatives are designed to do.”

- Law.com, "Newly Formed DEI Practices Expect Heightened Demand During Trump Administration" (November 12): Law.com's Dan Roe reports that law firms expect an increase in demand for "practices and industry groups geared at advising clients on matters related to" DEI. Roe says that the demand is driven by increased opposition to DEI by lawmakers, federal agencies, and legal activists. Gibson Dunn partner and co-Chair of the firm's Labor and Employment Practice Group Jason Schwartz commented on the current uncertain regulatory landscape, stating that "[t]here's so much uncertainty in the law around this; the only people who benefit from this are lawyers, which is unfortunate. You want people to understand what the law is so you can follow it." Schwartz cited the EEOC's conflicting response to the Supreme Court's *SFFA* decision as evidence of the confusing regulatory landscape surrounding DEI, but noted that the agency is unlikely to take a strong anti-DEI approach under the Trump administration until the makeup of the Commission changes.

- Wall Street Journal, “Companies Walk a Tightrope on Diversity; ‘No Industry Should Feel Safe.’” (November 14): Jennifer Williams of the *Wall Street Journal* reports that anti-DEI activist Robby Starbuck is preparing a new list of companies to target through his social media campaigns. Starbuck told the *Wall Street Journal* that he will focus on companies in the retail industry going into the holiday season. Williams notes that companies’ responses to anti-DEI efforts have ranged from reshaping DEI policies, to eliminating DEI officers and goals, to scrubbing DEI language from public-facing materials. Gibson Dunn partner Jason Schwartz emphasized that many companies are “reframing some of their programs and the way they talk about them,” but are “not completely abandoning their efforts.”

- Bloomberg Law, “Contractor Watchdog Under Trump Stands Ready to Police DEI Again” (November 7): Rebecca Klar of *Bloomberg Law* reports that the OFCCP under the new Trump administration is “poised to take a more antagonistic stance towards diversity, equity, and inclusion,” including revisiting an executive order issued during President Trump’s first term that limited federal contractors from carrying out DEI trainings that would “promote race or sex stereotyping or scapegoating” or could cause an individual to feel “guilt” based on their race or sex. Craig Leen, the director of the OFCCP during the first Trump administration, told Klar that the agency may also expand the ability of religious organizations to participate in federal contracting and enhance protections against religious bias. Klar also notes that Project 2025 proposes to eliminate the OFCCP entirely, and that the sub-agency may face reorganization under the new administration.

- Washington Post, “Robby Starbuck declared war on DEI. Trump’s win could add momentum.” (November 15): Taylor Telford of the *Washington Post* reports that conservative activist Robby Starbuck plans to ramp up anti-DEI campaigns in the wake of the presidential election as part of his quest “to restore sanity to corporate America.” Telford says that Starbuck views the re-election of Donald Trump as “a referendum on wokeness,” and predicts that companies will be forced to reevaluate their DEI programs given President-elect Trump’s anti-DEI stance. Telford notes that “Starbuck’s campaigns serve as more of a litmus test of a company’s willingness to defend [DEI] policies – which many claim to prioritize – in the court of public opinion,” and that so far, companies have been unwilling to resist Starbuck’s campaigns. And “with Trump returning to the White House, momentum has swung to Starbuck’s side.” However, Telford reports that “[d]espite the pushback, most Americans approve of corporate DEI,” according to a *Washington Post* poll, with roughly 6 in 10 respondents saying they believe DEI programs are “a good thing.”

Case Updates:

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

1. Employment discrimination and related claims:

- ***Spitalnick v. King & Spalding, LLP*, No. 24-cv-01367-JKB (D. Md. 2024):** On May 9, 2024, Sarah Spitalnick, a white, heterosexual female, sued King & Spalding, alleging that the firm violated Title VII and Section 1981 by deterring her from applying to its Leadership Counsel Legal Diversity internship program. Spitalnick alleged that she believed she could not apply after seeing an advertisement that stated that candidates "must have an ethnically or culturally diverse background or be a member of the LGBT community." On September 19, 2024, King & Spalding moved to dismiss, arguing that Spitalnick failed to state a claim, her claims were time-barred, and she lacked standing because she never applied to the program.
    - **Latest update:** On November 8, 2024, Spitalnick responded to the firm's motion to dismiss, arguing that her claim was not time-barred and that being deterred from applying was sufficient to confer standing.
- ***Langan v. Starbucks Corporation*, No. 3:23-cv-05056 (D.N.J. 2023):** On August 18, 2023, a white, female former store manager sued Starbucks, claiming she was wrongfully accused of racism and terminated after she rejected Starbucks' attempt to deliver "Black Lives Matter" T-shirts to her store. The plaintiff alleged that she was discriminated and retaliated against based on her race and disability as part of a company policy of favoritism toward non-white employees. On July 30, 2024, the district court granted Starbucks' motion to dismiss, agreeing that the plaintiff's claims under the New Jersey Law Against Discrimination were untimely and that she failed to sufficiently plead her tort or Section 1981 claims. The court found that she failed to allege that her termination was based on anything other than her "egregious" discriminatory comments and her violation of the company's anti-harassment policy. On August 11, 2024, the plaintiff filed an amended complaint.
    - **Latest update:** On November 8, 2024, the defendant moved to dismiss the amended complaint, arguing that the additional facts alleged to explain plaintiff's untimeliness—specifically, her difficulty obtaining a right to sue letter—were insufficient to state a claim.
- *Miall v. City of Asheville*, 1-23-cv-00259 (W.D.N.C. 2024): On September 26, 2023, five white residents of Asheville, North Carolina filed an amended complaint against the city, the city manager, and the mayor, alleging that the city violated the Equal Protection Clause, Title VI, Section 1981, and Section 1983 by preferring applicants of minority racial groups for seats on city boards. The plaintiffs sought to enjoin Asheville from using race as a factor in considering board applicants, and to require that the city review applicants without awareness of any applicant's race or ethnicity. On November 14, 2023, the defendants moved to dismiss both the Section 1981 and Section 1983 claims.

- **Latest update:** On October 29, 2024, the district court denied the motion to dismiss the Section 1983 claim, which it held was plausibly pled. The court declined to accept a Magistrate Judge's recommendation to dismiss the Section 1981 claim on the basis of the plaintiff's race, holding that white litigants may sue under Section 1981.

- *Do No Harm v. William Lee*, No. 3:24-cv-1334 (M.D. Tenn): On November 7, 2024, a membership organization of medical professionals, students, and policymakers sued Tennessee Governor William Lee, challenging a Tennessee law that requires the governor to consider race as a factor when making appointments to the state Board of Chiropractic Examiners. The organization seeks a declaratory judgment that the Tennessee law violates the Equal Protection Clause of the Fourteenth Amendment and seeks to enjoin continued enforcement of the three code sections.

    - **Latest update:** An initial case management conference has been set for January.

2. Actions against educational institutions:

- ***Palsgaard v. Christian et al.*, No. 1:23-cv-01228-SAB (E.D. Cal. 2023):** On August 8, 2023, six professors in the State Center Community College district sued the college's CEO and members of the Board of Governors, alleging that the school district's diversity, equity, inclusion, and accessibility (DEIA) rules "discriminate based on viewpoint." They seek to enjoin the rules—including a requirement that professors be evaluated based on their commitment to DEIA principles—and ask for a declaratory judgment that the rules violate the First and Fourteenth Amendments. On September 27, 2024, the professors filed a supplemental brief to differentiate their case from the district court's decision in Johnson v. Watkins, where the court granted a motion to dismiss on similar facts. No. 1:23-cv-00848 (E.D. Cal. 2023).

    - **Latest update:** On November 1, 2024, the defendants responded to the supplemental brief, arguing that, as in *Johnson v. Watkins*, the professors cannot show that the district can or will enforce the DEIA rules against them, and that they cannot bring a pre-enforcement challenge to non-binding district guidance.

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