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DEI Task Force Update (April 10, 2024)

Diversity | April 10, 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:

America First Legal (AFL), the conservative organization founded and run by former Trump policy advisor Stephen Miller, announced two new actions targeting DEI policies. On March 27, the organization sent a letter to The Walt Disney Company's CEO Bob Iger, Board of Directors, and management, alleging breaches of fiduciary duty and violations of federal securities laws. AFL claims that Disney's internal DEI policies and certain diversity-related content in Disney's children's streaming programming have contributed to a nearly 40% decline in the company's market capitalization. AFL has asked Disney to immediately cease and desist from all employment and contracting practices that may discriminate on the basis of race, color, sex, or national origin; disclose the risks associated with its DEI practices and policies in its Form 10-K and proxy statements; and retain an independent counsel for a full investigation of the company's hiring, promotion, recruitment, and purchasing practices. Two days later, on March 29, AFL released internal research alleging that the Bill and Melinda Gates Foundation is funding DEI programs, highlighting donations made by the Gates Foundation to the Inland Empire Community Foundation's Black Equity Fund, the Indian American Impact Project, and the Equity in Education Coalition, among others. Miller said in a statement that "these foundation gifts appear to be funding extreme activists and programs that promote illegal racial discrimination against whites and other groups, radically undermine public safety, and foment dangerous anti-cop extremism." AFL demanded an "explanation and accounting" from the Foundation. On March 25, the Equal Protection Project of the Legal Insurrection Foundation (EPP), a conservative non-profit organization, filed a complaint with the Department of Education's Office for Civil Rights (DOE) alleging that the George Floyd Memorial Scholarship at Minnesota's North Central University violates Title VI of the Civil Rights Act. The scholarship, a four-year, full-tuition award, is granted to one undergraduate Black student based on community recommendations and a written essay. EPP contends that the scholarship discriminates against non-Black students by excluding them from consideration. This complaint follows EPP's January 22nd complaint against the University of Wisconsin-Madison regarding its Creando Comunidad: Community Engaged BIPOC Fellows program. That scholarship program requires applicants to be a "member of a historically underrepresented racial or ethnic group or community." EPP alleges that UW's active promotion of the program violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. The same day that EPP filed its complaint against North Central University, DOE confirmed it is investigating UW's program. On March 21, Idaho Governor Brad Little (R) signed into law Senate Bill 1274, which restricts the use of diversity statements by colleges and universities. The law prohibits public postsecondary institutions from requiring candidates for employment or admission to submit or ascribe to any "diversity statement," defined broadly to include written or oral statements relating to "race, sex, color, ethnicity, or sexual orientation," views on DEI and social justice, or experiences working with others of diverse backgrounds. The law also prohibits institutions from requiring or soliciting diversity statements in any contract renewal or promotion process "or as a condition of participation

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in any administrative or decision-making function of the institution." The law does not bar students from voluntarily submitting information that would fall under the definition of a diversity statement. Because the law states that it is responsive to an "emergency," it takes effect on July 1, 2024. On March 6, the Congressional Black Caucus, chaired by Representative Steven Horsford (D-Nev.), issued a letter to Attorney General Merrick Garland, calling for the Department of Justice to "examine the lawfulness of states acting to dismantle the Diversity, Equity, and Inclusion (DEI) programs at American institutions of higher learning." The letter emphasizes the historical importance of civil rights laws in promoting the growth of diversity on college campuses, and notes that diverse college students continue to face ongoing challenges in obtaining equal access to higher education. The letter—which follows the recent moves by the University of Florida to eliminate all of its DEI-related spending, Alabama Senate Bill 129 which limits DEI programs and teaching, and Texas Senate Bill 17 that eliminates DEI programs in state colleges—stresses that "Anti-DEI bills have been introduced in more than 30 states as of February 29, 2024." The letter contends that because these university systems are recipients of federal funding, their anti-DEI actions constitute potential violations of federal anti discrimination laws codified in Title VI and Title IX of the Civil Rights Act of 1964.

Media Coverage and Commentary:

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

- Axios, "'The backlash is real': Behind DEI's rise and fall" (April 2): Emily Peck of Axios reports on the recent decline of corporate DEI programs over the past two years in the wake of widespread attacks from lawmakers and conservative activists. Peck suggests that some companies, which may have been less invested in DEI or more concerned about potential lawsuits, are using this moment to back away. Peck reports that these businesses are cutting back funding, trimming DEI staff, and considering limits to initiatives like employee resource groups based on workers' races, ethnicities or interests. Conversely, according to Peck, companies that are continuing their DEI efforts are doing so quietly and altering their approach.
- Bloomberg Law, "States Clash With First Amendment on DEI, Captive Audience Laws" (April 1): Bloomberg Law's Chris Marr reports on the impact of recent state legislation on private companies' approach to communications with their employees regarding diversity-related topics. Roughly a half-dozen states, including California and New York, have enacted statutes requiring diversity training, while courts in other states such as Michigan have found diversity training to be an implied part of employers' obligations under state anti-discrimination laws. However, Marr opines that the First Amendment may be in tension with these diversity statutes, which may be construed as impermissibly requiring content-based communication. Marr also discusses instances where the courts have struck down conservative state legislation aimed at limiting diversity-related discussion in the workplace as a violation of employees' free-speech rights, such as the Eleventh Circuit's recent decision in *Honeyfund.com, Inc. v. DeSantis*, — F.4th —, 2024 WL 909379 (11th Cir. Mar. 4, 2024). Marr notes that states are poised to continue testing the bounds of when and how they can regulate workplace speech, setting up future courtroom clashes over the extent of employers' First Amendment rights in protecting their communications with employees.
- Law.com, "What's in a Name? Group Urges Full 2nd Circuit to Scrap Rule Against Pseudonymity" (March 29): Avalon Zoppo of Law.com reports on the efforts of conservative nonprofit group Do No Harm to petition the U.S. Court of Appeals for the Second Circuit to scrap its new standing test requiring organizations to provide members' names when seeking preliminary injunctions. In its petition for en banc review of the court's recent decision in *Do No Harm v. Pfizer, Inc.*, — F.4th —, 2024 WL 949506 (2d Cir. Mar. 6, 2024), Do No Harm argues that the rule will deter organizations from bringing lawsuits on behalf of individuals who may wish to remain anonymous due to fears of retaliation. Gibson Dunn partner and co-head of

the firm's Labor and Employment practice group Jason Schwartz said the case could affect a recent influx of lawsuits against corporate diversity initiatives, where conservative groups have sued on behalf of anonymous members: "This is a super important threshold question for a lot of this new wave of lawsuits . . . If the court says you have to come forward with real live human beings, that's going to change the wave of these cases in a material way."

- The Hill, "Texas AG Paxton probes Boeing supplier, takes aim at DEI practices" (March 29): The Hill's Saul Elbein reports on Texas Attorney General Ken Paxton's investigation of a major supplier to aerospace company Boeing, whose flagship 737 MAX aircraft has been linked to a series of deadly accidents since 2018. Paxton ordered the supplier, Spirit AeroSystems, to provide documents related to manufacturing defects that resulted in the grounding of numerous Boeing planes. Elbein reports that, as part of his request for information, Paxton also asked for information related to the company's DEI policy and demanded the company substantiate its claim that a diverse workplace improves product quality, enhances performance, and/or helps Spirit make better decisions. Paxton reportedly also asked the company to explain how company-wide demographics for race, national origin, sexual orientation, and age have changed since 2022, when Spirit first adopted its DEI policy.
- CNN, "University of Texas at Austin students say cultural programs are struggling to stay afloat in wake of anti-DEI law" (March 28): CNN's Nicquel Terry Ellis reports on the impact of Texas SB17 on students at the University of Texas at Austin. Signed into law in 2023 by Texas Governor Greg Abbott, SB17 prohibits public colleges and universities in Texas from maintaining diversity, equity, and inclusion offices; hiring or assigning anyone to perform DEI office duties; giving preference to any job applicants or employees based on race, sex, color, ethnicity or national origin; or requiring anyone to complete DEI training. Ellis reports that, at UT Austin, the implementation of the law has caused cultural and identity groups on campus to struggle to find funding for events, meetings, and conferences previously sponsored by the school. According to Aaliyah Barlow, president of the University's Black Student Alliance, the anti-DEI law makes marginalized communities feel unwanted on campus. However, UT Austin President Jay Hartzell emphasized that although the University will comply with the new law, it will not change the institution's "commitment to attracting, supporting, and retaining exceptional talent across diverse backgrounds and perspectives."
- Wall Street Journal, "Government Changes How It Asks About Race and Ethnicity, Adds Middle Eastern" (March 28): The Wall Street Journal's Paul Overberg and Michelle Hackman report on how, for the first time in 27 years, the U.S. government is changing the racial and ethnic categories used in the federal census and on other government forms. Under the new standard, respondents can now identify with more than one race, including American Indian or Alaska Native; Asian; Black or African-American; Hispanic or Latino; Middle Eastern or North African; Native Hawaiian or Pacific Islander; and white. Overberg and Hackman note that the change marks the first time that "Middle Eastern or North African" is included as its own category. Under the previous standard, individuals from these backgrounds were categorized as white.
- CNN, "US House Office of Diversity and Inclusion to be disbanded as part of government spending bill" (March 25): Reporting for CNN, Nicquel Terry Ellis, Chandelis Duster, and Eva McKend cover the dissolution of the U.S. House of Representatives' Office of Diversity and Inclusion as part of the spending bill that passed on March 22. The office, established in March 2020 with a mission to foster a congressional workforce reflective of the nation's demographics, will be replaced by a newly-formed entity, the Office of Talent Management.

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:

- ***Roberts & Freedom Truck Dispatch v. Progressive Preferred Ins. Co., et al.***, No. 23-cv-1597 (N.D. Oh. 2023): On August 16, 2023, plaintiffs represented by AFL sued defendants Progressive Insurance, Hello Alice, and Circular Board, Inc., alleging that the defendants' grant program that awarded funding specifically to Black entrepreneurs to support their small businesses violated Section 1981.
    - **Latest update:** On March 22, the plaintiffs filed a response to the defendants' combined motion to dismiss, motion to stay and compel arbitration, and motion to transfer. On March 28, the Equal Protection Project of the Legal Insurrection Foundation (EPP) filed an amicus brief in support of the plaintiffs. EPP argued that the grant of the defendants' motion would prevent civil rights groups from enforcing laws against civil rights violations by "carving out a massive loophole to characterize discriminatory conduct as protected speech."
- ***Am. Alliance for Equal Rights v. Zamanillo***, No. 1:24-cv-509-JMC (D.D.C. 2024): On February 22, 2024, AAER filed a complaint and motion for a preliminary injunction against Jorge Zamanillo in his official capacity as the Director of the National Museum of the American Latino, part of the Smithsonian Institution. The complaint targets the Museum's internship program, which aims to provide Latino, Latina, and Latinx undergraduates with training in non-curatorial art museum careers. AAER claimed that the program constitutes race discrimination in violation of the Fifth Amendment because the Museum allegedly considers the race of applicants in choosing interns and purportedly refuses to hire non-Latino applicants. AAER had asked for an injunction to prevent the Museum from closing the application window on April 1, or selecting interns for the program (currently scheduled to begin in late April).
    - **Latest update:** On March 26, AAER filed a notice of settlement and stipulation of dismissal. In the settlement agreement, the Smithsonian agreed to add the following statement to the text of the scoring rubric before the application window for the undergraduate internship closes: "The Undergraduate Internship is equally open to students of all races and ethnicities. Reviewers should not give preference or restrict selection based on race or ethnicity."
- ***Bradley, et al. v. Gannett Co. Inc.***, 1:23-cv-01100 (E.D.V.A. 2023): On August 18, 2023, white plaintiffs sued Gannett over its alleged "Reverse Race Discrimination Policy," claiming that Gannett's expressed commitment to having its staff demographics reflect the communities it covers violates Section 1981. On November 24, 2023 Gannett moved to dismiss and to strike the plaintiffs' class action allegations. On February 8, 2024, the plaintiffs moved for a preliminary injunction and for class certification. Gannett filed a motion to stay briefing on the plaintiffs' motions pending a ruling on Gannett's motion to dismiss, arguing that it may moot any need for class certification or a preliminary injunction.
    - **Latest update:** On March 20, Gannett filed a notice of supplemental authority in support of its motion to dismiss, bringing the court's attention to the recent Fourth Circuit opinion in *Duvall v. Novant Health, Inc.*, No. 22-2142 (4th Cir. Mar. 12, 2024), which Gannett contends stands for the proposition that DEI programs are not per se unlawful, as long as they do not entail "a system wide decision making process" for employment based on DEI metrics.
- ***Alexandre v. Amazon, Inc.***, No. 3:22-cv-1459 (S.D. Cal. 2022): White, Asian, and Native Hawaiian entrepreneur plaintiffs, on behalf of a putative class of past and future Amazon "delivery service partner" (DSP) program applicants, challenged a DEI program that provides $10,000 grants to qualifying delivery service providers who are "Black, Latinx, and Native American entrepreneurs." The plaintiffs allege

violations of California state civil rights laws prohibiting discrimination. On December 6, 2023, Amazon moved to dismiss, and the plaintiffs opposed the motion on February 16, 2024.

  - **Latest update:** On March 20, Amazon filed a reply in support of its motion to dismiss, arguing that the plaintiffs lack standing because only a person who was already an Amazon DSP could suffer the injury of being denied a DSP diversity grant, and the plaintiffs are neither current DSPs nor applicants to become DSPs. Amazon further argued that the plaintiffs waived their claims under Section 1981 (because they did not respond to Amazon's argument to dismiss that claim) and Section 51.5 of the Unruh Act (because they had already conceded that Section 51 does not apply). On March 26, 2024, the court announced that it would not hold oral argument on the motion.

- ***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 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." Do No Harm alleged that the criteria violate Section 1981, Title VI of 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 Do No Harm 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.

  - **Latest update:** On March 20, Do No Harm petitioned the court for a rehearing en banc, arguing that the panel's opinion splits with at least two circuits and creates "an irreconcilable line of intracircuit precedent," and predicting that the panel's opinion would "deter associations from representing vulnerable members in court." Do No Harm also moved to supplement the record on appeal with three additional anonymous declarations from potential applicants to the Pfizer Breakthrough Fellowship Program.

2. Employment discrimination and related claims:

- ***Kascsak v. Expedia Inc.***, 1:23-cv-01373-DII (W.D. Tex. 2023): On November 9, 2023, a white man sued Expedia and a top executive for reverse discrimination in relation to the hiring process for a leadership role. The plaintiff claimed he was passed over in favor of a "diverse" candidate, a Black woman. The plaintiff claimed he was the victim of discrimination on the bases of race and sex in violation of Title VII, Section 1981, and the Texas Labor Code. On January 22, 2024, the defendants moved to dismiss, arguing that (1) the plaintiff lacked personal jurisdiction over the Expedia executive, and (2) the plaintiff failed to sufficiently plead a Section 1981 claim because race was not the sole but-for cause of the adverse hiring decision. The plaintiff opposed the motion on January 29, 2024, and the defendants replied on February 5.

  - **Latest update:** On March 25, the court dismissed all claims against the individual executive defendant for lack of personal jurisdiction. The court denied the motion to dismiss as to Expedia, holding that Section 1981 permits claims where race is not the single but-for cause of an adverse contracting action.

- ***Haltigan v. Drake***, No. 5:23-cv-02437-EJD (N.D. Cal. 2023): A white male

psychologist sued the University of California Santa Cruz, arguing that a requirement that prospective faculty candidates submit and be evaluated in part on the basis of statements explaining their views and understanding of DEI principles functioned as a loyalty oath that violated his First Amendment rights. The plaintiff claimed that because he is "committed to colorblindness and viewpoint diversity"—which he alleged was contrary to UC Santa Cruz's position on DEI—he would be compelled to alter his political views to be a viable candidate for the position. The plaintiff sought a declaration that the University's DEI statement requirement violated the First Amendment and a permanent injunction against the enforcement of the requirement. On January 12, 2024, the district court granted UC Santa Cruz's motion to dismiss with leave to amend.

  - **Latest update:** On March 1, the defendant moved to dismiss the plaintiff's second amended complaint, arguing that the plaintiff lacks standing and failed to state claims of First Amendment viewpoint discrimination or compelled speech. On March 29, the plaintiff filed an opposition, arguing that he has standing because he was "as ready and able to apply [for the faculty position] as anyone could be." The plaintiff also argued that the DEI statement is viewpoint discrimination because it is a "political litmus test," and an unconstitutional condition rather than speech subject to *Pickering* balancing.

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

- ***American Alliance for Equal Rights v. Ivey***, No. 2:24-cv-00104-RAH-JTA (M.D. Ala. 2024): On February 13, 2024, AAER filed a complaint against Alabama Governor Kay Ivey, challenging a state law that requires Governor Ivey to ensure there are no fewer than two individuals "of a minority race" on the Alabama Real Estate Appraisers Board (AREAB). The AREAB consists of nine seats, including one for a member of the public with no real estate background (the at-large seat), which has been unfilled for years. Because there was only one minority member among the Board at the time of filing, AAER asserts that state law will require that the open seat go to a minority. AAER states that one of its members applied for this final seat, but was denied purely on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment.
  - **Latest update:** On March 19, the district court denied AAER's motion for a temporary restraining order/preliminary injunction. The court ordered AAER to confidentially disclose of the identity of Member A, the anonymous member of AAER who asserted an injury. It also ordered the parties to submit briefing, due in early April, on why Member A should be allowed to proceed anonymously in the case.

The following Gibson Dunn attorneys assisted in preparing this client update: Jason Schwartz, Mylan Denerstein, Blaine Evanson, Molly Senger, Zakiyyah Salim-Williams, Matt Gregory, Zoë Klein, Mollie Reiss, Alana Bevan, Marquan Robertson, Janice Jiang, Elizabeth Penava, Skylar Drefcinski, Mary Lindsay Krebs, David Offit, Lauren Meyer, Kameron Mitchell, Maura Carey, and Jayee Malwankar.

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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