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DEI Task Force Update (May 22, 2024)

Diversity | May 22, 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:

American Alliance for Equal Rights (AAER) filed a complaint against Southwest Airlines on May 20, 2024 asserting claims under Title VI and Section 1981. *See AAER v. Southwest Airlines Co.*, No. 3:24-cv-01209-D (N.D. Tex. 2024). Specifically, AAER alleges that Southwest's ¡Latanzé! Travel Award Program, which awards free flights to students who "identify direct or parental ties to a specific country" of Hispanic origin, improperly discriminates based on race. AAER claims that two potential participants, anonymized as Members A and B, tried to apply to the most recent round of the program, including writing the required essays and meeting all other program criteria, but did not submit their applications once they realized they would need to "agree" to the program rules requiring all applicants to be "verifiably Hispanic." AAER seeks a declaratory judgment that the program violates Section 1981 and Title VI, a temporary restraining order barring Southwest from closing the next application period, and a permanent injunction barring enforcement of the program's ethnic eligibility criteria. The docket does not reflect that Southwest Airlines has been served. And potentially forecasting litigation against other airlines, America First Legal (AFL) posted to X (formerly Twitter) on May 10, 2024, soliciting "current and future pilots" and asking "Are you a white man who was denied acceptance into American Airlines' Cadet Academy? We want to hear from you!"

On May 17, 2024, Plaintiffs Werner Jack Becker and Dana Guida filed a putative class action against Citigroup, alleging that Citigroup has "an express policy of charging customers different ATM fees based on race" in violation of Section 1981 and California's Unruh Civil Rights Act. *See Becker v. Citigroup*, 0:24-cv-60834-AHS (S.D. Fla. 2024). The plaintiffs allege that, under its ATM Community Network program, Citigroup waives out-of-network fees for people who bank at institutions that are "minority owned." The named plaintiffs do not bank with Citigroup but allege that they paid out-of-network fees at Citigroup ATMs because they were not clients of a minority-owned bank. The complaint alleges that the bank adopted the policy for financial reasons, in order to attract customers who are interested in supporting DEI programs. They seek to represent a nationwide class of "[a]ll persons in the United States who paid ATM fees at a Citi branch location in the last four years," and a California class of "[a]ll persons in California who paid ATM fees at a Citi branch location in the last three years." The complaint alleges that "the Classes [consist] of at least thousands of customers that Citibank charged ATM fees under its racially discriminatory [p]rogram." The docket does not reflect that Citigroup has been served.

On May 15, 2024, AAER filed a complaint against Minnesota Governor Tim Walz, challenging a state law that requires Governor Walz to ensure that five members of the Minnesota Board of Social Work are from a "community of color" or "an underrepresented community." *See American Alliance for Equal Rights v. Walz*, 24-cv-1748-PJS-JFD (D.

Related People

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Minn. 2024). The fifteen-member Board, comprised of ten professionally licensed social workers and five public member positions, has three currently open seats and will have an additional six open seats in January 2025. AAER claims that two of its white female members are "qualified, ready, willing and able to be appointed to the board," but that they will not be given equal consideration. AAER seeks a permanent injunction and a declaration that the law violates the Equal Protection Clause of the Fourteenth Amendment. The docket does not reflect that Governor Walz has been served.

On May 14, 2024, the Fifth Circuit heard oral argument *en banc* in *Alliance for Fair Board Recruitment v. SEC*, No. 21-60626 (5th Cir.), in which plaintiffs are challenging Nasdaq's Board Diversity Rules and the SEC's approval of those rules. Several judges questioned whether the SEC has the authority to require corporations to disclose board diversity information under the 1934 Securities Exchange Act, and what information could be required to be disclosed. Judge Engelhardt pressed the SEC as to how the agency will "draw the line" on what issues are relevant for disclosure, suggesting that "if the answer is 'investors wanted it,' that's not really a line at all." Several judges posed hypotheticals probing the kinds of disclosures that might be permissible, including TikTok use or position on abortion (Judge Smith), position on the war in Gaza (Judge Duncan), and whether they liked Taylor Swift (Judge Eldrod). Appearing for Nasdaq, which intervened in the case, Gibson Dunn partner Allyson Ho, co-chair of our Appellate Practice Group, argued that the SEC had reasonably approved Nasdaq's rule, which met a three-prong standard requiring investor demand, a link between the information disclosed and corporate performance and governance, and substantial evidentiary support in the record. She observed that studies had demonstrated the impact of diverse board membership on corporate performance, noting, "when we look at the numbers of women on corporate boards, we find improvements and differences particularly with respect to . . . investor protection issues." After the petitioners argued that the SEC's approval of Nasdaq's board diversity rule constituted discriminatory state action, Ho urged the Fifth Circuit to "reject petitioner's attempt to turn the exchange's private action, which the Constitution protects, into government action, which the Constitution constrains."

On May 9, 2024, King & Spalding was named in a suit alleging discrimination on the basis of race, color, and sex in violation of Title VII of the Civil Rights Act of 1964, and discrimination based on race in violation of 42 U.S.C. § 1981. *See Spitalnick v. King & Spalding, LLP*, No. 24-cv-01367-JKB (D. Md. 2024). The plaintiff alleges that when she was a first-year law student at the University of Baltimore School of Law, she came across an advertisement for King & Spalding's Leadership Council Legal Diversity Program, a summer associate program for students who "have an ethnically or culturally diverse background" or are "member[s] of the LGBT community." Although the plaintiff alleges that she was both interested in and academically qualified for the position, she did not apply because she believed it would have been futile. After the plaintiff filed a charge of discrimination with the EEOC, the Commission found reasonable cause to believe that the plaintiff was discriminated against, and issued a right to sue. The docket does not reflect that King & Spalding has been served.

Speaking at an event held by Jackson Lewis PC on May 8, 2024, EEOC Commissioner Andrea Lucas discussed her perspective on the implications of the Supreme Court's decision in *Muldrow v. City of St. Louis*. The decision held that employees need only show "some injury" rather than "significant" harm from a job transfer to maintain a discrimination suit under Title VII. Lucas opined that, after *Muldrow*, social workplace groups and groups geared towards mentorship or training could be construed as "privileges" of employment. She described such groups that restrict membership based on race or sex as DEI "blind spots." Lucas also criticized the EEOC's new harassment guidance, which stated that Title VII could be triggered by repeatedly misgendering a coworker or by denying an employee access to a bathroom or other workplace facility that is consistent with their gender identity. Lucas disagrees that such conduct is harassment and emphasized the value of single-sex spaces.

On May 8, 2024, a white male former employee sued Red Hat, Inc., a subsidiary of IBM in

Wood v. Red Hat, Inc., No. 24-cv-237-REP (D. Idaho 2024). In his complaint, the plaintiff alleges that his role was terminated "as a direct result of Red Hat's DEI policies and efforts to diversify the workforce" and claims that, of the group of employees who were terminated at the same time, "21 of the total 22 individuals were white, and 21 were male." The plaintiff alleges that he was retaliated against for opposing his employer's stated goals of increasing diversity, which included setting hiring quotas of 30% female employees globally and 30% employees of color in the United States by 2028. The plaintiff brought claims under Title VII, Section 1981, and the Family and Medical Leave Act (FMLA). Red Hat was served on May 10, 2024, and its response is due May 31, 2024.

Media Coverage and Commentary:

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

- Washington Post, "DEI is getting a new name. Can it dump the political baggage?" (May 5): The *Washington Post*'s Taylor Telford and Julian Mark report on how companies' DEI tactics are evolving in response to mounting legal and political pressure. Telford and Mark highlight how, in March 2024, Starbucks secured shareholder approval to replace "representation" goals with "talent" performance for executive bonus incentives; Molson Coors replaced environmental, social and governance (ESG) goals with "People & Planet" metrics; and Eli Lilly omitted the DEI acronym from its 2024 annual shareholders letter after using it 48 times in 2023. Telford and Mark report that companies are also renaming diversity programs, overhauling internal DEI teams, and moving away from overt racial and gender considerations in hiring and promotion. Telford and Mark highlight a linguistic shift as well, with some companies now referring to DEI as "Inclusion, Equity and Diversity" (IED) or "Leadership and Inclusion" (L&I). Despite the uncertain legal landscape, many companies continue to support DEI initiatives, albeit with a keen focus on aligning their programs and communications with evolving legal standards.
- Manhattan Institute, "Affirmative 'Re-Action': How Major American and New York Bar Associations Are Responding to Students for Fair Admissions" (May 9): Renu Mukherjee, a Paulson Policy Analyst at the Manhattan Institute, critiques post-SFFA efforts aimed at increasing racial diversity within the legal profession. Specifically, Mukherjee examines the recommendations made by the American Bar Association (ABA), New York State Bar Association (NYSBA), and New York City Bar Association (NYCBA) on how law schools, law firms, and lower courts should respond to the SFFA decision. Mukherjee notes that the NYSBA advised law schools in the state to continue considering applicants' racial identities and experiences in the admissions process by tying those features to "a non-racial goal or value being pursued by the university." The NYSBA also advised New York law firms to reassert their commitment to DEI principles by actively collecting, tracking, managing, and utilizing DEI-related data and consulting with outside counsel to identify potential risks and mitigation strategies. Mukherjee also discusses the collective endorsement of pipeline programs by the ABA, NYSBA, and NYCBA, which aim to facilitate the entry of underrepresented minority students into the legal profession through avenues such as free academic tutoring, standardized test prep, and career development opportunities. Mukherjee criticizes these recommendations and instead advocates for the implementation of race-neutral pipeline programs targeting students from low- and middle-income backgrounds, claiming this is a more viable approach for fostering diversity within legal institutions while ensuring SFFA-compliant concepts of fairness and equity.

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:

- ***Do No Harm v. Gianforte***, No. 6:24-cv-00024 (D. Mont. 2024): On March 12, 2024, Do No Harm filed a complaint on behalf of a white female dermatologist in Montana, alleging that a Montana law violates the Equal Protection Clause by requiring the governor to "take positive action to attain gender balance and proportional representation of minorities resident in Montana to the greatest extent possible" when making appointments to the twelve-member Medical Board. Do No Harm further alleges that since the ten filled seats are currently held by six women and four men, Montana law requires that the remaining two seats be filled by men, which would preclude the anonymous female dermatologist identified only as "Member A" from holding the seat.
    - **Latest update:** On May 3, 2024, Governor Gianforte moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that Do No Harm lacks standing. Gianforte argues that "Member A" has not been harmed by the challenged law because she has not applied for or been denied any position.
- ***Suhr v. Dietrich***, No. 2:23-cv-01697-SCD (E.D. Wis. 2023): On December 19, 2023, a dues-paying member of the Wisconsin State 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 the Supreme Court's decision in *SFFA*, 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:** On April 2, the plaintiff reached a partial settlement agreement with the Bar to make the criteria for the Diversity Clerkship Program race neutral. On April 30, 2024, the plaintiff filed an Amended Complaint, challenging three mentorship and leadership programs that allegedly discriminate based on race, which are funded by mandatory dues paid to the State Bar.
- ***Beneker v. CBS Studios***, No. 2:24-cv-01659 (C.D. Cal. 2024): On February 29, 2024, a straight, white, male writer sued CBS, alleging that the network's de facto hiring policy discriminated against him on the bases of sex, race, and sexual orientation. CBS declined to hire the plaintiff as a staff writer multiple times, but did hire several black writers, female writers, and a lesbian writer. The plaintiff requested a permanent injunction against the de facto policy, a staff writer position, and damages.
    - **Latest update:** On April 30, 2024, the plaintiff voluntarily dismissed one of the CBS entities, CBS Entertainment Group, LLC, as a defendant. On May 13, 2024, he filed an amended complaint against the remaining defendants, CBS Studios, Inc. and Paramount Global, re-alleging that they discriminated against him by denying him employment based on his race, sex, and sexual orientation in favor of less qualified applicants who were members of "more preferred groups."
- ***Californians for Equal Rights Foundation v. City of San Diego***, No. 3:24-cv-00484 (S.D. Cal. 2024): On March 12, 2024, the Californians for Equal Rights Foundation filed a complaint on behalf of members who are "ready, willing and able" to purchase a home in San Diego, but ineligible for a grant or loan under the City's BIPOC First-Time Homebuyer Program. Plaintiffs allege that the program discriminates on the basis of race in violation of the Equal Protection Clause.
    - **Latest update:** On May 1, 2024, the City of San Diego, Housing Authority

of San Diego, and San Diego Housing Commission answered the complaint, denying the allegations of unconstitutional race discrimination.

- ***Khatibi v. Hawkins***, No. 23-cv-06195 (C.D. Cal. 2023), on appeal No. 24-3108 (9th Cir. 2024): On August 1, 2023, doctors Azadeh Khatibi and Marilyn M. Singelton, along with Do No Harm, sued officials of the Medical Board of California, alleging that the Board was unconstitutionally compelling their speech in violation of the First Amendment. Plaintiffs challenged a California law that, since January 1, 2022, has required all Continuing Medical Education (CME) courses to "contain curriculum that includes the understanding of implicit bias." Khatibi and Singelton allege that, were it not for this law, they would never include implicit bias training in their medical curriculum because it is unrelated to the contents of their course. On October 10, 2023, the defendants filed a motion to dismiss, arguing that the CME curriculum is government speech, not private speech, and therefore the requirements do not compel any private speech in contravention of the First Amendment. And, even if the speech were not government speech, the plaintiffs' constitutional claims would fail because the speech is not "readily associated with" them.
    - **Latest update:** On May 2, 2024, the Court granted the defendants' motion to dismiss without leave to amend, adopting their argument that teaching CME courses is government speech because it is part of a state licensing scheme, and that, much like in a state-mandated public school curriculum, the doctor-educators are not associated with the contents of their course. On May 15, 2024, the plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit. Their opening brief is due on June 24, 2024.

2. Employment discrimination and related claims:

- ***Sacks v. Texas Southern University et al.***, No. 23-891, No. 23-1031 (U.S.): Deana Pollard Sacks, a white female law professor, brought two suits against Texas Southern University (TSU) and several employees, alleging that TSU, which is a historically Black university, had violated Title VII, the Equal Pay Act, and 42 U.S.C. Section 1983 by discriminating against her on the bases of race and sex. Sacks claimed that she was harassed, underpaid, and forced to resign after she complained that TSU had a gender pay gap. The claims in Sacks' first suit were dismissed, except for the Equal Pay Act claim, on which she lost at trial. The second suit was dismissed for failure to state a claim. On October 3, 2023, the Fifth Circuit affirmed both motions to dismiss and the jury verdict.
    - **Latest update:** In February and March of 2023, Sacks filed two petitions for a writ of certiorari. On May 13, 2024, the Supreme Court denied both petitions.

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 has 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. On March 19, 2024, the district court denied AAER's motion for a temporary restraining order and preliminary injunction and ordered AAER to confidentially disclose the identity of Member A, the anonymous member of AAER who asserted an injury. On March 27, AAER moved to vacate that order because it

no longer sought to keep Member A's identity confidential. On March 29, 2024, Governor Ivey answered the complaint, admitting that the AREAB quota is unconstitutional and will not be enforced.

- **Latest update:** On April 26, 2024, the Alabama Association of Real Estate Brokers (AAREB), a trade association and civil rights organization for Black real estate professionals, moved to intervene to "oppos[e] the parties' position that the race-based provisions are unconstitutional." On May 3, 2024, both AAER and Governor Ivey filed oppositions to the motion to intervene, but on May 7, 2024, the court granted AAREB's motion. On May 14, 2024, AAREB answered the complaint, seeking a declaration that the challenged law is valid and enforceable.

DEI Legislation:

Below is a list of legislative developments relating to DEI:

- On May 9, 2024, Iowa Governor Kim Reynolds signed into law SF 2435, an education funding bill with broad prohibitions on DEI in state universities. The bill forbids offices, programming, and trainings with "reference to race, color, ethnicity, gender identity, or sexual orientation," and requires funds previously allocated for DEI initiatives to be reallocated after 2025 to the Iowa workforce grant and incentive program. Representative Adam Zabner (D-Iowa City) condemned the bill as an "embarrassment" for "woefully underfunding" education while promoting "fearmongering" about DEI. The bill will take effect July 1, 2025.
- On May 14, 2024, Colorado's Worker Freedom Act (HB 1260) was sent to Governor Jared Polis for his signature. The Act would forbid employers from disciplining employees who refuse to participate in employer meetings, while carving out DEI trainings. The bill seeks to prevent "captive audience meetings"—mandatory meetings used by employers as a tactic to interfere with union organizing. However, the bill does not protect from discipline employees who opt out of certain meetings, including state-mandated harassment training and DEI training. Governor Polis has thirty days to sign or veto the bill before it will automatically become law on June 13, 2024.

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, Jenna Voronov, 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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Related Capabilities

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