DEI Task Force Update

January 4, 2024

Gibson Dunn has formed a Workplace DEI Task Force, bringing to bear the Firm's experience in employment, appellate and Constitutional law, DEI programs, securities and corporate governance, and government contracts 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 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. *Suhr v. Dietrich*, No. 2:23-cv-01697-SCD (E.D. Wis. 2023). 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 after *SFFA*, 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 freedom of association in violation of the First Amendment.

In December 2023, America First Legal ("AFL") filed FOIA requests with two federal agencies, seeking records related to the agencies' DEI practices and decision making. On December 13,

2023, AFL sent a FOIA request to the Federal Housing Finance Agency ("FHFA") in connection with a proposed rule that uses "past discrimination" as a factor to be considered in determining whether a community is "underserved." AFL's FOIA request seeks all records showing the FHFA's definition of the term "equity" as used in the proposed rule, as well as all records of communications and meetings with the Office of General Counsel relating to the proposed rule. Five days later, AFL filed another FOIA request, this time with the EEOC, in response to a recent Bloomberg Law News article about EEOC Commissioner Kalpana Kotagal, who recently made a statement that "[t]here are three commissioners who feel that DEIA programs' continued implementation in the workplace are important." AFL's FOIA request seeks all records containing several words and phrases related to DEI and the *SFFA* case since January 1, 2023 from all EEOC commissioners and the General Counsel.

On December 12, 2023, AFL sent a letter to the EEOC, calling for the Commission to investigate IBM for discrimination in violation of Title VII. The letter describes a video leaked to X (formerly Twitter), in which IBM CEO Arvind Krishna appears to answer a question asked during an internal company meeting about the company's commitment to DEI goals. Krishna remarked that executives "have to move forward by 1% on both underrepresented minorities," which AFL construed to refer to goals for hiring women and racial minorities. In the video, Krishna also stated that executives' bonuses depend in part on meeting these goals, and Paul Cormier, the chairman of IBM subsidiary Red Hat, added that Red Hat executives had been terminated for failing to meet company standards for diverse hiring. AFL asserts that these statements represent IBM's enforcement of unlawful racial and national origin quotas. AFL sent a similar letter to IBM's Board of Directors, claiming that IBM has violated Section 1981 by allocating set percentages of its spending to Black-owned businesses and has breached its fiduciary duty to shareholders by "necessarily pass[ing] over some of the most qualified candidates."

On December 19, 2023, AFL sent the EEOC letters alleging that Hasbro's and Mattel's hiring and recruitment programs violate Title VII. The letters focus on data from the companies' Form 10-K SEC filings and published DEI reports and allege that Hasbro and Mattel have unlawfully set goals for the hiring and advancement of women and racially diverse employees. AFL also sent letters to each company's Board of Directors, making the same allegations. In the letter to the Mattel board, AFL claims that the company is damaging its goodwill and brand in breach of its fiduciary obligations by alienating parents through its sale of a children's book that discusses gender as separate from biological sex.

On December 13, 2023, Hello Alice and Progressive Insurance filed their motions to dismiss in *Roberts & Freedom Truck Dispatch v. Progressive Preferred Ins. Co.*, No. 23-cv-1597 (N.D. Ohio 2023). Hello Alice argued that the plaintiffs failed to state a claim because the challenged grant was not a "contract" under Ohio contract law, and because applying Section 1981 to Hello Alice's grant program would violate the First Amendment since donating money qualifies as expressive conduct. Hello Alice also argued that the program is a permissible private voluntary affirmative action program as supported by Supreme Court precedent. Progressive Insurance echoed Hello Alice's arguments and also argued that the plaintiffs did not have standing because (1) they did not show that they would have received the grant but for their race, and (2) the program concluded months

before the plaintiffs filed their complaint. The plaintiff's responses to the motions are due on February 14, 2024.

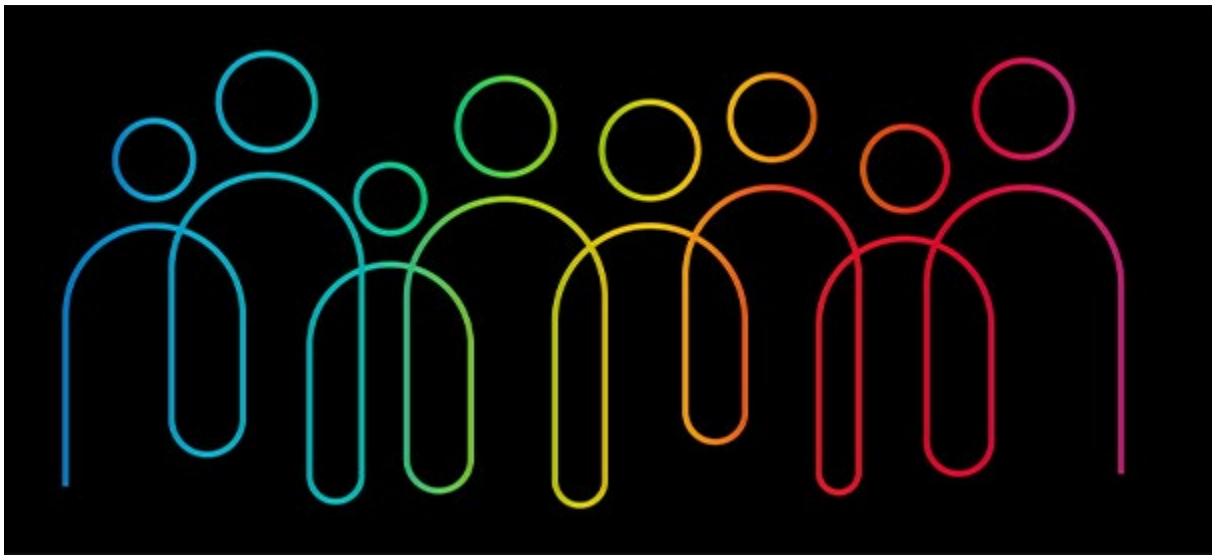
Media Coverage and Commentary:

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

- The Guardian, "Oklahoma governor signs order effectively banning diversity programs at public colleges" (December 14): The Guardian's Adria R. Walker reports on the executive order signed by Oklahoma governor Kevin Stitt on December 13, 2023, which prohibits state agencies and public colleges and universities from using state funds, property, or resources to support DEI programming. The order directs state entities to review all DEI positions and initiatives and to "restructure" or "eliminate" those not essential to accreditation or university-wide student support. University of Oklahoma president Joseph Harrosz, Jr. released a statement in response to the governor's order, indicating that the institution would comply with the order but confirming the university's "unwavering" commitment to "access and opportunity for all of those with the talent and tenacity to succeed; being a place of belonging for all who attend; dedication to free speech and inquiry; and civility in our treatment of each other," calling these "values [that] transcend political ideology."

- Forbes, "Elon Musk Says DEI 'Must Die' And Criticizes Diversity Schemes as 'Discrimination'" (December 15): Forbes' Robert Hart reports on anti-DEI comments made by Elon Musk on his social media platform X. On December 15, Musk opined that, although DEI is intended to "end discrimination," it instead "replace[s] it with different discrimination." Hart notes that, only days earlier, Musk also commented on video footage of statements by IBM leaders interpreted by AFL and others as tying IBM executive bonuses to meeting diverse hiring quotas; Musk called the practice "[e]xtremely concerning and obviously illegal."

- The Hill, "Congressional Black Caucus urges corporate America to recommit to diversity, equity and inclusion" (December 15): The Hill's Cheyanne M. Daniels reports on the December 15 open letter sent by the Congressional Black Caucus (CBC) to corporate leaders, requesting that, by January 31, 2024, those leaders "reaffirm their commitments to diversity, equity, and inclusion, update [the CBC] on their racial equity investments, and work with the [CBC] to create legislative solutions that will help close the racial wealth gap." In support of its request, the CBC cites several studies showing the lack of representation of racial and ethnic minorities on corporate boards and in corporate management, including a 2023 study by Deloitte and the Alliance for Board Diversity and a 2021 report by McKinsey. In its letter, the CBC also signals the forthcoming release of "an equity scorecard," measuring diversity-related progress—or lack thereof—by major U.S. companies.



- Reuters, "Some companies alter diversity policies after conservatives' lawsuit threat" (December 18): According to Jody Godoy and Disha Raychaudhuri of Reuters, at least six major U.S. companies have changed the descriptions for their DEI initiatives in response to shareholder letters from AFL and the American Civil Rights Project complaining that the initiatives constitute reverse discrimination. Godoy and Raychaudhuri report that at least twenty-five companies received similar letters over the last two years. The authors identify that the changes made to these companies' DEI initiatives primarily involve removing language that said certain programs were for underrepresented groups or modifying executives' goals for increased racial representation in the work force.

- Bloomberg Law, "Contested Nasdaq Board Diversity Rules Take Effect: Explained" (December 21): Bloomberg Law's Andrew Ramonas reports that, as of December 31, 2023, most companies listed on Nasdaq will need to comply with its recent rules requiring diverse board members or an explanation for why the company does not meet this requirement. Since 2022, listed companies have had to disclose demographic data that board members voluntarily self-report. The new requirements have gone into effect despite two pending petitions for rehearing of the Fifth Circuit's October decision upholding the rules in *Alliance for Fair Board Recruitment v. SEC*.

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:

- ***Alexandre v. Amazon.com, Inc.***, No. 3:22-cv-1459 (S.D. Cal. 2022): White, Asian, and Native Hawaiian plaintiffs, on behalf of a putative class of past and future Amazon "delivery service partner" program (DSP) applicants, challenged a DEI program that provides a $10,000 grant to qualifying delivery service providers who are "Black, Latinx, and Native American entrepreneurs." Plaintiffs alleged violations of Section 1981 and California state civil rights law prohibiting discrimination.

    - **Latest update**: On December 6, 2023, Amazon filed its motion to dismiss the amended complaint. Amazon argued the plaintiffs lack standing because the grant program is only available to DSPs and the plaintiffs are not DSPs and have never applied to become DSPs. Amazon also argued that the plaintiffs failed to state a claim under Section 1981 because they did not allege that Amazon impaired an existing contract or prevented plaintiffs from making a new one on account of race; the fact that the plaintiffs may have been deterred from contracting is not actionable under Section 1981. Additionally, Amazon argued that California civil rights law is inapplicable because it applies to the "proprietor/customer" relationship, not to business-to-business relationships. Finally, Amazon argued that California civil rights law actually allows diversity programs like Amazon's because it is not invidious discrimination and instead promotes diversity.

- ***Harker v. Meta Platforms, Inc. et al.***, No. 23-cv-7865 (S.D.N.Y. 2023): A lighting technician who worked on a set where a Meta commercial was produced sued Meta and a film producers association, alleging that Meta and the association violated Title VII, Sections 1981 and 1985, and New York law through a diversity initiative called Double the Line (DTL). Plaintiff also claims that he was retaliated against after raising questions about the qualifications of a coworker hired under the program.

    - **Latest update**: On December 19, 2023, the defendants filed their motions to dismiss in response to the plaintiff's first amended complaint. Meta and other defendants who operated the program but did not employ the production workers argued first that the plaintiff lacked standing because he did not apply to the position and was not eligible because the program was designed for candidates with less experience. Additionally, they argued that the plaintiff failed to state a Section 1981 claim because he had no contractual or employment relationship with them. And they argued that the plaintiff could not show that race was the but-for cause of his failure to be hired. Something Ideal, the production company that employed the plaintiff, additionally argued that the plaintiff failed to state a retaliation claim because merely asking questions about the DTL program was not protected activity, and he did not actually plead that he had attempted to be re-hired.

- ***Landscape Consultants of Texas, Inc. v. City of Houston***, No. 4:23-cv-3516 (S.D. Tex. 2023): Plaintiff landscaping companies owned by white individuals challenged Houston's government contracting set-aside program for "minority business enterprises" that are owned by members of racial and ethnic minority groups. The companies claim the program violates the Fourteenth Amendment and Section 1981.

- **Latest update**: On December 13, 2023, defendant Midtown Management District, a political subdivision of Houston that implements the minority business enterprise program, filed its motion to dismiss. Midtown argued that, as a procedural matter, the plaintiffs' Section 1981 claims should be dismissed because they were not alleged through Section 1983, which Midtown argues provides the relevant cause of action for relief against a local government entity. Midtown also argued that the plaintiffs failed to state a claim under Section 1981 because, under Fifth Circuit law, plaintiffs must demonstrate an actual loss of a contractual interest, and the plaintiffs never alleged they had ever bid on, negotiated, or attempted to secure a contract. Finally, Midtown argued that the plaintiffs failed to state a claim for an Equal Protection violation because they did not make specific factual allegations of disparate treatment or discriminatory intent.

- ***Mid-America Milling Company v. U.S. Dep't of Transportation***, No. 3:23-cv-00072-GFVT (E.D. Ky. 2023): Two plaintiff construction companies sued the Department of Transportation, asking the court to enjoin the DOT's Disadvantaged Business Enterprise Program (DBE), an affirmative action program that awards contracts to minority-owned and women-owned small businesses in DOT-funded construction projects with the statutory aim of granting 10% of certain DOT-funded contracts to these businesses nationally. Plaintiffs allege that the program constitutes unconstitutional race discrimination in violation of the Fifth Amendment.

    - **Latest update**: On December 15, 2023, the plaintiffs filed a motion for a preliminary injunction, requesting that the court prohibit the defendants from implementing or enforcing the DBE program's race and gender requirements and its goals of minority participation. The plaintiffs reiterated their assertion that the DBE program discriminates based on race and gender and fails to meet the requirements of both strict and intermediate scrutiny, because it only targets general "societal" discrimination, rather than specific past episodes of governmental discrimination. As to the preliminary injunction factors, the plaintiffs asserted that their irreparable injury should be presumed because the program allegedly threatened constitutional rights, and that the public interest would be supported by enjoining the allegedly unconstitutional program.

- ***Do No Harm v. Vituity***, No. 3:23-cv-24746-TKW-HTC (N.D. Fla. 2023): On December 8, 2023, Do No Harm, an advocacy group representing doctors and healthcare professionals, sued a nationwide physician partnership, claiming its Bridge to Brilliance Incentive Program—a DEI and recruitment program which advertises a sign-on bonus and benefits specifically to qualified Black physicians—violates Section 1981 and Section 1557 of the Affordable Care Act, which prohibits discrimination by healthcare providers receiving federal financial assistance. Do No Harm sought a temporary restraining order (TRO) and preliminary injunction, barring the defendant from closing the application period on December 17, 2023.

    - **Latest update**: On December 14, 2023, the court denied the plaintiff's motion for a TRO, on the ground that the plaintiff misunderstood the deadline for applications to the program; it also rejected the plaintiff's request to treat the

motion for a TRO as a motion for a preliminary injunction against filling the roles. The court expressed doubt that the plaintiff had standing on the basis of a single member's declaration. However, in a footnote, the judge stated that "it appears to be undisputed that the challenged program discriminates based on race" and found it noteworthy that the defendants defended the program as permissible under pre-*SFFA* precedents.

2. Employment discrimination under Title VII and other statutory law:

- ***Langan v. Starbucks Corporation***, No. 3:23-cv-05056 (D.N.J. 2023): On August 18, 2023, a white female former employee of Starbucks sued Starbucks, claiming she was wrongfully accused of racism and terminated when Starbucks unsuccessfully attempted to deliver T-shirts supporting the "Black Lives Matter" movement to her store, and accused the plaintiff of rejecting the delivery out of her alleged political opposition to the movement. The plaintiff alleged that she was discriminated and retaliated against on the basis of her race and disability as part of a programmatic favoring of non-white employees, in violation of Title VII, Section 1981, New Jersey antidiscrimination law, the ADA, the ADEA, and alleged state tort claims for emotional distress and negligent hiring.
    - **Latest update**: Starbucks filed its motion to dismiss on December 8, 2023. Starbucks argued that the plaintiff's New Jersey antidiscrimination and retaliation claims are barred by the statute of limitations because she failed to file within two years of bringing an administrative charge. Starbucks also argued that the plaintiff's state common law tort claims are barred by the statute of limitations and that she did not plead sufficient facts to make out her claim of emotional distress. Finally, Starbucks argued that the plaintiff failed to plead a Section 1981 claim because she did not plead facts distinct from those supporting her Title VII claims and did not show that race was the but-for cause of the loss of a contractual interest.

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 challenges to Nasdaq's Board Diversity Rules and the SEC's approval of those rules. Petitioners Alliance for Fair Board Recruitment and National Center for Public Policy Research sought review of the SEC's approval of Nasdaq's Board Diversity Rules, which require companies that have contracted to list their shares on Nasdaq's exchange to (1) disclose aggregated information about their board members' voluntarily self-identified diversity characteristics (including race, gender, and sexual orientation), and (2) provide an explanation if fewer than two board members are diverse. The SEC approved the rules after determining that they were consistent with the Exchange Act. Petitioners challenged the rules on constitutional and statutory grounds. Gibson Dunn represents Nasdaq, which intervened to defend its rules.
    - **Latest update**: On December 18, 2023, the SEC and Nasdaq filed responses in opposition to the plaintiff's petition for en banc rehearing. The SEC argued that, because Nasdaq is a private entity, its actions can be challenged as

unconstitutional only if they are "fairly attributable" to the government. However, the fact that the Commission approved Nasdaq's rule does not make the rule attributable to the government, the SEC argued, because the Securities Exchange Act requires the Commission to approve all rules not inconsistent with the statute. The SEC also argued that the private non-delegation doctrine—which states that regulatory authority may not be delegated to a private entity—was inapplicable. Nasdaq, which is represented by Gibson Dunn, argued that the panel decision correctly held that under Supreme Court and Fifth Circuit precedent Nasdaq is not a state actor, and the Commission's "yes-or-no" approval process was insufficient to make the action attributable to the SEC. Nasdaq also argued that its rules were consistent with statutory requirements of Section 6(b)(5) of the Exchange Act because they would provide information that would contribute to investors' investment and proxy voting decisions.

- ***Palsgaard v. Christian et al.***, No. 1:23-cv-01228-SAB (E.D. Cal. 2023): On August 17, 2023, community college professors in California filed suit, challenging the adoption of the state's new DEI-related evaluation competencies and corresponding language in the faculty union contract for their local community college district. The plaintiffs allege that the regulations and contract language require them to endorse the state's views on DEI concepts, and they challenge the regulations and language as compelled speech in violation of the First and Fourteenth Amendments. The plaintiffs sued officials of both the state board that adopted the competencies and the local community college district that negotiated the contract.
    - **Latest update**: On December 25, 2023, the defendants filed their motions to dismiss. The State defendants first argued that the plaintiffs lack standing to sue because the regulations do not apply to the plaintiff professors but rather to the community colleges, which have discretion to implement them through policy and collective bargaining. Relatedly, the State defendants argued that the mere possibility that community colleges might implement the regulations did not sufficiently threaten a risk of harm that would give rise to an Article III injury. They also argued that the plaintiffs failed to state a First Amendment claim because the regulations express the Board's view and do not include any enforcement mechanisms that would penalize the plaintiffs. Separately, the community college district defendants argued that the plaintiffs lacked standing to assert a pre-enforcement challenge to the regulations. They also argued that the plaintiffs' collective bargaining agreement waived First Amendment challenges to the provisions at issue. To the extent that they were not waived, the community college district defendants argued that the policies did not violate the First Amendment because regulating plaintiffs' teaching practices and measuring their proficiencies was not equivalent to regulating speech, and that teachers' speech in their work capacity is within the realm of permissible regulation.

4. Board of Director or Stockholder Actions:

- ***Ardalan v. Wells Fargo***, No. 3:22-cv-03811 (N.D. Cal. 2022): On June 28, 2022, a putative class of Wells Fargo stockholders brought a class action against the bank related to an internal policy requiring that half of the candidates interviewed for positions that paid

more than $100,000 per year be from an underrepresented group. The plaintiffs alleged that the bank conducted sham job interviews to create the appearance of compliance with this policy and that this was part of a fraudulent scheme to suggest to shareholders and the market that Wells Fargo was dedicated to DEI principles. The plaintiffs argued that this alleged practice constituted fraudulent misstatements in violation of Sections 10(b) and 20(a) of the Exchange Act in an attempt to maintain artificially high stock prices.

- **Latest update**: On April 4, 2023, Wells Fargo filed its motion to dismiss, arguing that the plaintiffs failed to state a claim, and, in the alternative, that they failed to adequately plead that Wells Fargo acted knowingly or with deliberate recklessness. On August 18, 2023, the district court granted the motion to dismiss, finding that the plaintiffs did not meet the pleading standards for their fraud claim. The plaintiffs filed an amended complaint on September 8, 2023, which Wells Fargo moved to dismiss on October 23, 2023, reiterating the arguments made in its prior motion.

5. Educational Institutions and Admissions (Fifth Amendment, Fourteenth Amendment, Title VI, Title IX):

- ***Students for Fair Admissions v. United States Naval Academy***, No. 1:23-cv-02699-ABA (D. Md. 2023): On October 5, 2023, SFFA sued the U.S. Naval Academy, arguing that consideration of race in its admissions process violates the Fifth Amendment.

  - **Latest update**: On December 14, 2023, the district court heard oral argument on the plaintiff's preliminary injunction motion and denied the motion from the bench. On December 20, the court issued an opinion, holding that SFFA did not show that it would succeed on the merits of its Equal Protection claim. The court found that SFFA failed to show that the defendants' justification for race-conscious admissions policies did not satisfy strict scrutiny. Noting that *SFFA v. Harvard* excluded military academies from its ruling, the court stated that "compelling government interests may justify affirmative action at military academies." The court also found that as part of the military, the defendants deserved deference that courts traditionally give the military regarding personnel decisions, in contrast to civilian institutions. The court found that the defendants' use of race was narrowly tailored, as it appeared to be limited and never determinative, and there was evidence the Naval Academy had considered race-neutral alternatives that were ineffective. In denying preliminary relief, however, the court rejected defendants' contention that SFFA's reliance on unnamed plaintiffs failed to demonstrate organizational standing, reasoning that protecting members' anonymity is a core purpose of the organizational standing doctrine.

- ***Boston Parent Coalition for Acad. Excellence Corp. v. The School Committee of the City of Boston***, No. 1:21-cv-10330-WGY (D. Mass. Apr. 15, 2021), on appeal at No. 21-1303 (1st Cir. 2021): In an attempt to increase diversity in admissions to three prestigious public schools in the wake of COVID-19, the Boston School Committee adopted an admissions plan for these schools that considered both the students' grades and the median income of their home zip code. The plaintiff, an organization representing white and Asian students, sued the School Committee, claiming that the plan violated the Equal

Protection Clause of the Fourteenth Amendment and Massachusetts state law. In April 2021, the district court found the plan to be constitutional. The plaintiff, who had sought a preliminary injunction, appealed the denial of that motion to the First Circuit, which denied the appeal. After discovering allegedly racist statements by School Committee members, the plaintiff moved for reconsideration of the district court's judgment, which was denied. The plaintiff appealed again to the First Circuit, again challenging the program as unconstitutional.

- **Latest update**: On December 19, 2023, the First Circuit affirmed the denial of the reconsideration motion and again affirmed that Boston's admissions policy for the schools was constitutional. In response to the plaintiffs' claims that the policy disparately impacted white and Asian students, the First Circuit observed that the new policy "created less disparate impact, not more" than the schools' previous admission policy, which solely ranked students by grades. Thus, Boston could not be liable under a theory of disparate impact for choosing "between equally valid, facially neutral selection criteria." The First Circuit also held that, even if the intent of some of the policymakers may have been to increase diversity in the student population, the use of indicators like zip code and income was facially neutral and did not trigger strict scrutiny without more evidence of clearly race-conscious policies. The First Circuit grounded its reasoning in the language of *SFFA v. Harvard*, which, it found, "identified use of socio-economic status indicators" as a permissible tool for increasing racial diversity.

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, Teddy Rube,* Alana Bevan, Janice Jiang,* Marquan Robertson,* and Elizabeth Penava.*

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:

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)

Mylan L. Denerstein – Partner & Co-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)

Blaine H. Evanson – Partner, Appellate & Constitutional Law Group
Orange County (+1 949-451-3805, bevanson@gibsondunn.com)

*Teddy Rube, Janice Jiang, Marquan Robertson, and Elizabeth Penava are associates working in the firm's Washington, D.C. office who are not yet admitted to practice law.