DEI Task Force Update

June 19, 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 June 17, America First Legal (AFL) filed complaints with the EEOC and the Virginia Attorney General against Smithfield Foods, Inc., alleging that the pork processor deprives white males of employment opportunities based on sex and race in violation of Title VII and Section 1981. AFL cites several statements from Smithfield's website and 2023 Sustainability Report, claiming that they demonstrate that Smithfield "uses numerical race and sex-based quotas for hiring, training, and promotion." AFL asks that the EEOC and the Virginia AG initiate investigations into Smithfield's employment practices.

On June 6, AFL filed complaints with the EEOC and the New York Department of Labor, requesting that they investigate the office of Manhattan District Attorney Alvin Bragg for race-based employment discrimination in violation of federal and state law. In both letters, AFL points to quotes from the office's website, including its stated commitment to "the recruitment, hiring,

retention, and promotion of a diverse staff," and notes that the office's application for a Law Clerk position requires disclosure of race, ethnicity, and gender. Citing statements by EEOC Commissioner Andrea Lucas about the purported illegality of using "race-motivated actions to maintain a demographically 'balanced' workforce," AFL argues that the EEOC should investigate the District Attorney's office for using race as a motivating factor in its employment practices in violation of Title VII. In its letter to the New York Department of Labor, AFL argued that the office's practices violate the New York Human Rights Law's prohibitions on discrimination and publishing discriminatory statements.

On June 4, a former employee sued Ally Financial Inc., asserting violations of Title VII and Section 1981, in *Smith v. Ally Financial Inc.*, 3:24-cv-00529 (W.D.N.C. 2024). The plaintiff claims that Ally did not promote him three times, instead promoting a white woman, a Black woman, and a Black man. The suit claims that Ally executives unlawfully considered race and gender when making promotion and hiring decisions, pointing to the company's website that describes a goal to achieve "a collective environment of different voices and perspectives." The plaintiff also alleges that he was treated worse than his colleagues when he disagreed with his boss's assessment that white supremacy groups who opposed the company's DEI efforts posed the largest security risk to Ally. The docket does not reflect that Ally has been served with the complaint.

On June 3, twenty-one state attorneys general urged the Council of the American Bar Association (ABA) to revise Standard 206 of the Standards and Rules of Procedure for Approval of Law Schools, citing the *SFFA* decision. Standard 206 requires law schools to ensure opportunities for "members of underrepresented groups, particularly racial and ethnic minorities." Law schools must also demonstrate a commitment to having a student body and faculty that is diverse with respect to gender, race, and ethnicity. Led by Tennessee AG Jonathan Skrmetti, the AGs argue that Standard 206 directs law school administrators to violate the Constitution and Title VII by considering race and ethnicity in admissions and hiring. The AGs acknowledge that the ABA recently proposed revisions that would expand the enumerated list of characteristics in the Standard's text, but argue that the proposed revisions still make unconstitutional demands of administrators and do not adequately clarify how they can comply without violating the law.

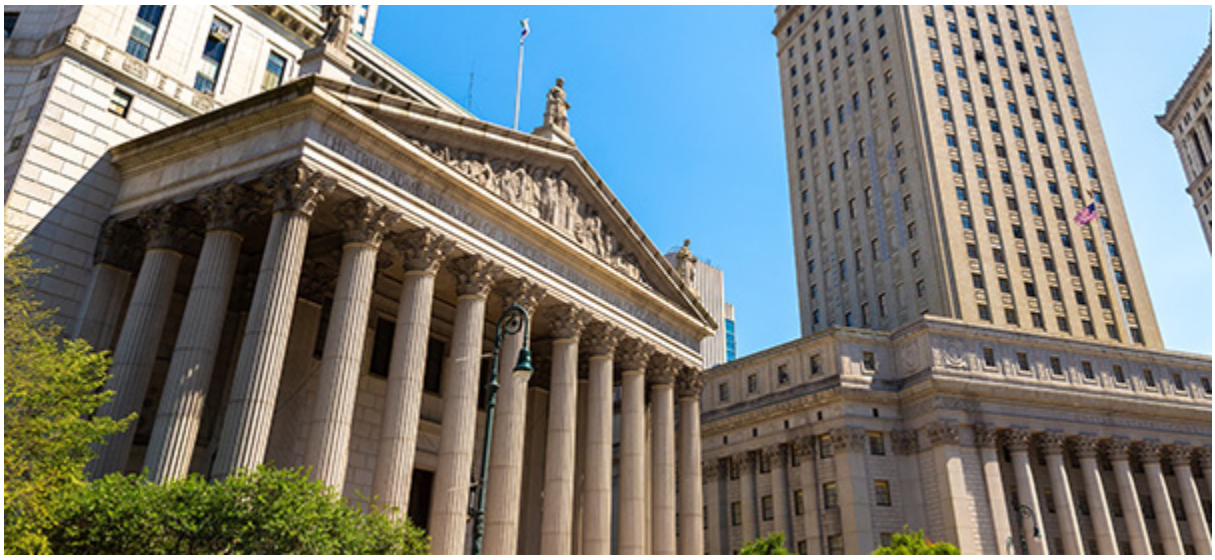
On May 29, AFL filed complaints and letters with the Department of Justice's Immigrant and Employee Rights Section, the EEOC, and the Iowa Civil Rights Commission against Tyson Foods, alleging that the company's employment and contracting practices constitute potential illegal discrimination on the basis of sex, citizenship, and race. AFL bases its complaints on Tyson's website and public statements aimed at promoting "a culture of DE&I." AFL also alleges that Tyson has long favored noncitizen workers over American citizens throughout its labor supply chain, pointing to the fact that more than a third of the company's workforce is comprised of noncitizens and that the company has joined a program to help connect refugees to work. AFL also sent a cease-and-desist letter to Tyson's CEO and Board of Directors, demanding compliance with employment, immigration, and civil rights laws.

On May 20, the nonprofit Equal Protection Project filed a civil rights complaint with the U.S. Department of Education's Office for Civil Rights (OCR) against the Massachusetts Institute of

Technology (MIT). The complaint alleges that MIT's undergraduate "Creative Regal Women of Knowledge" program violates Title VI and Title IX of the 1964 Civil Rights Act. The program is designed to provide academic and professional development assistance to women of color at MIT, including by giving students access to networking and mentoring opportunities as well as financial assistance. The complaint notes that the program's application form requires applicants to state whether they are "Hispanic or Latino" and specify their race and gender identity. The complaint alleges that MIT violates federal anti-discrimination laws because the program's eligibility requirements amount to intentional discrimination on the basis of race and sex, and asks that the OCR initiate an investigation and take appropriate enforcement action.

Media Coverage and Commentary:

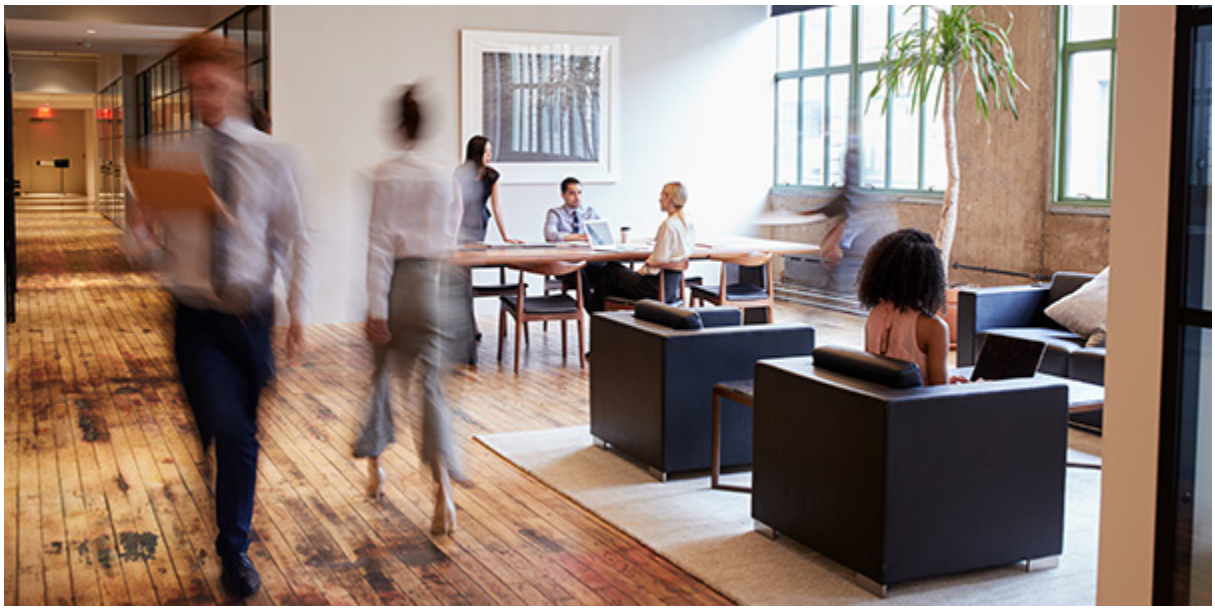
Below is a selection of recent media coverage and commentary on these issues:



- Bloomberg Law, "Conservative Duo Fights Against DEI One Bias Claim at a Time" (June 5): Bloomberg's Riddhi Setty and Tatyana Monnay profile AFL and American Alliance for Equal Rights (AAER), two organizations at the helm of the anti-DEI legal movement. Setty and Monnay report that AFL, led by former Trump advisor Stephen Miller, has "filed at last 15 lawsuits and sent over 30 letters" to the EEOC, alleging that corporate diversity programs violate Title VII of the 1964 Civil Rights Act. Setty and Monnay say that AFL identifies potential defendants by soliciting tips from insiders and scrutinizing company websites. In an interview with Bloomberg, AFL Vice President Gene Hamilton emphasized that "[t]here is a unique opportunity, given what the Supreme Court said last year in [*SFFA v. Harvard*], for us to push the accelerator even further down in the fight for more Americans and to bring more cases, more lawsuits, file more complaints." Setty and Monnay report that AAER, led by legal activist Edward Blum, favors claims brought under Section 1981 of the 1866 Civil Rights Act, and, like AFL, AAER relies on tips to identify potential defendants. Setty and Monnay note that Gibson Dunn "is defending many of the litigation targets of Blum's group," including nonprofits Fearless Fund, Hidden Star, and Founders First Community Development Corporation. Mylan Denerstein, Gibson Dunn

partner and co-chair of the firm's Public Policy practice group, told Bloomberg that defending these clients "has been a tremendous part of the firm's work."

- The Washington Post, "Federal judge halts disaster aid program for minority farmers" (June 10): The Post's Julian Mark and Aaron Gregg report on a decision by a federal judge in Texas, blocking an Agriculture Department disaster relief program from giving preferences to minority and female farmers, agreeing with plaintiffs who argued that the program illegally discriminates against white male farmers. The Justice Department argued these preferences constitute justified remedial action for "structural biases in federal farm programs," but the court found that the program lacked justification, was not narrowly tailored to remedy past and ongoing discrimination, and likely violated equal-protection rights. The authors note that this decision follows a line of similar litigation, including a June 2021 decision enjoining a program that provided debt relief to farmers of color (Congress later altered that program to grant relief based on economic need instead of race).



- U.S. Law Week, "Workplace DEI Breaks Down Barriers With Flexible Benchmarks" (June 10): EEOC Commissioner Kalpana Kotagal, appointed to the Commission by President Biden in 2023, writes about the importance of maintaining corporate commitment to lawful diversity, equity, inclusion, and accessibility efforts. Although *SFFA* has caused "a lot of confusion" in corporate circles, writes Kotagal, the decision did not actually "change the law about employer efforts to foster diverse and inclusive workforces or engage the talents of all qualified workers." Kotagal says that unlike academic affirmative action programs that use protected characteristics as explicit factors in admissions decisions, lawful corporate diversity programs are "forward-looking, proactive ways to remove barriers, reduce risk of discrimination, and create open and inclusive workplaces" but do ***not*** involve the consideration of protected characteristics in making employment decisions. Kotagal recommends that corporate leaders focus on examining current practices for bias and barriers and collecting data to identify success and room for growth. Lawful options for improving diversity may include diversifying applicant pools

through networking with minority-led institutions, and use of skills-based rather than credential-based hiring. And companies may enhance retention and development of current employees through affinity groups and mentorship opportunities that are open to all with an interest. This "iterative" and "ongoing" work, Kotagal says, will "lay the groundwork for a stronger and more prosperous nation in the long term," where "all workers have the opportunity to thrive."

- U.S. Law Week, "New Paradigm Shifts DEI From Box-Checking to Mindset-Building" (June 11): New York University School of Law professors Kenji Yoshino and David Glasgow suggest strategies to promote diversity goals despite post-*SFFA* legal challenges to "cohort-specific" programs—i.e., those that "aim to advance members of some demographic group while excluding others." Yoshino and Glasgow write that these challenges have caused "understandable frustration in all sorts of organizations, even beyond the lengthy list that have been sued," as *SFFA* "has made the most common-sense tools to redress marginalization more perilous." But the authors encourage "DEI champions" not to give up on realizing their diversity goals, emphasizing three "promising pathways forward": (1) shift from cohort-based eligibility to content-based eligibility based on individuals' commitment to DEI-related objectives or missions; (2) select candidates based on individual character and experience rather than membership in a given cohort; and (3) make achievement of DEI goals a priority for all employees. Although the authors "recognize that moving away from cohort-specific programs involves real loss," Yoshino and Glasgow encourage proponents of diversity programming not to see this as "an era of retreat," focusing instead on the "opportunities" offered by "a more universalist approach to DEI."

Case Updates:

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

1. Contracting claims under Section 1981, the U.S. Constitution, and other statutes:

- ***Suhr v. Dietrich***, No. 2:23-cv-01697-SCD (E.D. Wis. 2023): On December 19, 2023, a dues-paying member of the Wisconsin 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. After reaching a partial settlement agreement with the Bar to make the criteria for the program race-neutral, 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 Bar.

    - **Latest update:** On May 31, the Bar moved to dismiss the amended complaint for failure to state a claim, arguing that (1) facial challenges to the constitutionality of mandatory membership in a state bar had been struck down in numerous previous cases, (2) the Bar is entitled to immunity under the Eleventh Amendment, (3) some of the claims were time-barred, and (4) any Bar activities "not germane to the constitutional purpose" were not funded by compulsory dues.

- ***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 "Member A," 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 alleges that since the ten already-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 Member A from holding the seat. On May 3, 2024, Governor Gianforte moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that Do No Harm lacks standing because Member A has not applied for or been denied any position. On May 24, 2024, Do No Harm filed an amended complaint, describing additional Members B, C, and D, who are each "qualified, ready, willing, and able to be appointed" to the board.

    - **Latest update:** On June 7, Governor Gianforte moved to dismiss the amended complaint for lack of jurisdiction, arguing that the case is not ripe, and Members A, B, C, and D lack standing because they do not allege a concrete, actual, or imminent harm. Governor Gianforte contended that the Members have not applied for the open seats and some appear currently ineligible, and that compliance with the statute at issue is "aspirational" rather than mandatory. The Governor emphasized that his "sole priority is highly qualified appointees" because he "opposes the ideological tenets of [DEI], quotas, and affirmative action."

- ***Valencia AG, LLC v. New York State Off. of Cannabis Mgmt. et al.***, No. 5:24-cv-116-GTS (N.D.N.Y. 2024): On January 24, 2024, Valencia AG, a cannabis company owned by white men, sued the New York State Office of Cannabis Management for discrimination, alleging that New York's Cannabis Law and regulations favored minority-owned and women-owned businesses. The regulations include goals to promote "social & economic equity" applicants, which the plaintiff claims violate the Fourteenth Amendment's Equal Protection Clause and Section 1983. On March 13, 2024, the plaintiff's new counsel, Pacific Legal Foundation, filed an amended complaint, naming only two New York state officials as defendants in their official capacity. The plaintiff sought a permanent injunction against the regulations and a declaration that the use of race and sex in the New York Cannabis Law violates the Fourteenth Amendment. On April 24, 2024, the defendants moved to dismiss the amended complaint for lack of standing and failure to state an Equal Protection Clause claim. The defendants argued

that even without the contested policy the plaintiff would not have received the license due to its low "position in the queue."

    - **Latest update:** On May 29, the plaintiff opposed the defendant's motion to dismiss, asserting that the categorization of applicants as "priority" or "non-priority," which will remain in every ensuing application cycle, is unconstitutional. The plaintiff further argues that the Cannabis Law and regulations mandate discrimination by facially categorizing people based on race and sex.

2. Employment discrimination and related claims:

- ***Weitzman v. Fred Hutchinson Cancer Center***, No. 2:24-cv-00071-TLF (W.D. Wash. 2024): On January 16, 2024, a white Jewish female former employee sued the medical center where she used to work, alleging that she was terminated for expressing her discomfort with DEI-related content shared in the workplace by coworkers, objecting to DEI-related training, and expressing her political opposition to DEI-aligned ideologies. She also claimed that her employer failed to act when she was allegedly discriminated against because of her religion and race by other coworkers. The plaintiff alleged that her employer's conduct constituted racial discrimination, a hostile work environment, and retaliation in violation of the Washington Law Against Discrimination and Section 1981; discrimination and retaliation on the basis of political ideology in violation of the Seattle Municipal Code; and intentional infliction of emotional distress and wrongful termination in violation of public policy under common law.

    - **Latest update:** On June 5, the parties notified the court that they had reached a settlement of all claims but requested time to determine the language of stipulations for dismissal. On June 7, the plaintiff and the individual defendants jointly requested voluntary dismissal of the case with prejudice against the individual defendants only, which the court approved on June 10.

- ***Arsenault v. HP Inc.***, No. 3:24-cv-00943 (D. Conn. May 29, 2024): On May 29, a white former employee of HP Inc. filed suit, alleging that his termination violated Title VII and 42 U.S.C. § 1981. The complaint alleges that during a review meeting in August 2022, the plaintiff voiced agreement with the opinion of another team member that the company was spending too much time on DEI practices, and as a result, his managers accused him of racism. The complaint also alleges that the plaintiff was verbally abused by a co-worker, but the company took no action after he complained. The plaintiff was terminated in March 2023, and while the reason for his termination was a workforce reduction, the complaint alleges that no one else in the plaintiff's department was laid off, and that the firing was thus pretextual.

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. The Board 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 29, 2024, Governor Ivey answered the complaint, admitting that the Board quota is unconstitutional and will not be enforced. On May 7, 2024, the court granted a motion to intervene by the Alabama Association of Real Estate Brokers (AAREB), a trade association and civil rights organization for Black real estate professionals, who moved to intervene to "oppos[e] the parties' position that the race-based provisions are unconstitutional." On May 14, 2024, AAREB answered the complaint, seeking a declaration that the challenged law is valid and enforceable. On May 20, 2024, AAER moved for judgment on the pleadings, arguing that the racial requirement for appointments to the Board is unconstitutional and there are no unresolved questions of material fact.

    - **Latest update:** On June 10, Governor Ivey responded in support of AAER's motion for judgment on the pleadings, arguing that it is indisputable that the challenged law cannot survive strict scrutiny because the legislature that enacted it did not "clearly identify discrimination as the basis for [it]." Intervenor AAREB opposed the motion, arguing that there are contested material factual allegations, and the court must examine the facts to determine whether the challenged law withstands strict scrutiny.

4. Actions against educational institutions

- ***Chu, et al. v. Rosa***, No. 1:24-cv-75 (N.D.N.Y. 2024): On January 17, 2024, a coalition of education groups sued the Education Commissioner of New York, Dr. Betty A. Rosa, alleging that the state's free summer program discriminates on the bases of race and ethnicity in violation of the Equal Protection Clause of the Fourteenth Amendment. The Science and Technology Entry Program (STEP) permits students who are Black, Hispanic, Native American, and Alaskan Native to apply regardless of their family income level, but all other students, including Asian and white students, must demonstrate "economically disadvantaged status." On April 19, 2024, Rosa moved to dismiss the amended complaint for lack of subject-matter jurisdiction, arguing that neither the organizational plaintiffs (groups of parents) nor the named plaintiff, also a parent, have suffered any personal or individual injury, and that the plaintiffs cannot sue for alleged violations of members' rights as prospective STEP applicants. Plaintiffs opposed the motion, arguing that the plaintiffs do not need to apply for the STEP program as a prerequisite for standing because their "injury is the inability to compete on an equal footing," not whether they can secure a spot in the STEP program.

    - **Latest update:** On May 31, Rosa filed a reply in support of her motion to dismiss, reiterating the argument that the plaintiffs lacked standing and a cognizable injury. Rosa also contended that, even if the contested clause of STEP were eliminated, the plaintiffs still would not qualify for the program because they cannot demonstrate that they are "economically disadvantaged" and so and cannot show

that it is likely that their alleged injury would be “redressed by a favorable decision.”

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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