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DEI Task Force Update

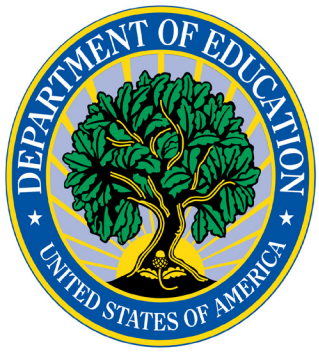
July 17, 2024

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

Following his recent attacks on Tractor Supply, social media personality Robby Starbuck launched another campaign on July 9, this time against John Deere. In a series of posts on X, Starbuck criticized John Deere for its DEI policies, workplace affinity groups, sponsorship of Pride events, and affiliation with shareholder Bill Gates. In dozens of tweets and social media posts, Starbuck characterized John Deere's policies as "woke," "creepy," "communist"-like, and "crazy," and called upon his followers to complain to John Deere's customer service office and directly to its CEO. On July 16, apparently in response to Starbuck's campaign, John Deere announced that it will no longer participate in or support "social or cultural awareness parades, festivals, or events," that it will audit training materials "to ensure the absence of socially-motivated messages," that it will "reaffirm" that the "existence of diversity quotas and pronoun identification have never been and are not company policy," and that its Business Resource Groups will focus exclusively on things like professional development, networking, and mentoring. However, John Deere said that it would "continue to track and advance the diversity of our organization." Starbuck immediately claimed victory, but called John Deere's commitments "half measures," saying that customers "want to hear that DEI

policies are entirely gone." Starbuck has said that he is planning to "expose" another company soon and that he will be targeting companies that rely on politically conservative consumers.



On June 24, 2024 and July 10, 2024, the Equal Protection Project (EPP) filed complaints with the U.S. Department of Education's Office for Civil Rights (OCR) against Ithaca College and Rochester Institute of Technology. The EPP alleges that two of Ithaca College's scholarship programs discriminate based on race and skin color in violation of Title VI because they are offered only to students of color. The EPP also alleges that Rochester Institute of Technology's "Women in STEM" scholarship, which is offered exclusively to female, female-identifying, or non-binary students, discriminates based on sex and gender identity in violation of Title IX. OCR is evaluating both of EPP's complaints.

Honeywell

On July 10, a three-judge panel for the Seventh Circuit affirmed summary judgment for Honeywell in *Charles Vavra v. Honeywell International, Inc.*, No. 23-2823 (7th Cir.). Vavra argued that Honeywell violated Title VII and Illinois law by retaliating against him for refusing to watch a training video he claimed discriminated against white people. The district court granted summary judgment on Vavra's claims last August after finding that he failed to show either that he was terminated due to bias or that the training itself was racist. Vavra appealed, and argued before the Seventh Circuit that the video crossed a line when it stated that workers carry unconscious biases. In an opinion written by Judge Kirsch, the court reasoned that Vavra could not have reasonably believed that the training video was discriminatory because he never watched it, and Vavra had failed to prove retaliatory motive..

On July 10, EEOC Vice Chair Jocelyn Samuels told attendees of an agency webinar that the Supreme Court's recent decision in *Muldrow v. City of St. Louis* should have "no impact" on "lawful and appropriate" DEI work. While some have speculated that Muldrow will result in more challenges to company DEI programs, Vice Chair Samuels maintained that most company DEI efforts will remain unaffected by the decision. "The vast majority of the kinds of DEIA initiatives that employers are undertaking are what I call race-neutral," she said, noting such programs "are carried out in ways that benefit everyone in the workplace." EEOC Commissioner Kalpana Kotagal, who also spoke during the webinar, supported Samuels' position, stating that "[a]s the case law is starting to really demonstrate, there are so many ways to lawfully implement DEIA initiatives that shouldn't be difficult to defend and support." Kotagal discussed examples of policies that she said remain lawful, such as targeted outreach to increase the diversity of applicant pools, voluntary employee affinity groups, and mentorship and training opportunities open to all applicants. "In general," she said, "these kinds of programs are not going to be problematic because there's no need to tie them to a protected class."

Media Coverage and Commentary:

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

- Wall Street Journal, "How Tractor Supply Decided to End DEI, and Fast" (June 30): The *Journal*'s Sarah Nassauer reports on Tractor Supply's June 27 decision to end its DEI programming and climate change goals, in response to a public pressure campaign launched on June 6 by "former Hollywood director turned conservative activist" Robby Starbuck. Using publicly available statements and videos, including a video of Tractor Supply Chief Executive Hal Lawton talking about the importance of company diversity and inclusion, Starbuck called upon customers to boycott the company. The "effectiveness of Starbuck's campaign," writes Nassauer, seems like a sign of "how the tide has turned" against corporate DEI programming. Nassauer suggests that companies like Tractor Supply, whose customers skew more male, rural and conservative, are increasingly seeing DEI initiatives as presenting "too much of a risk." But companies' reactions to the current DEI backlash have varied. As David Glasgow, executive director of the Meltzer Center for Diversity, Inclusion and Belonging, told Nassauer, companies favored by "liberal consumers" are largely maintaining their DEI commitments. Tractor Supply's decision, says Glasgow, represents "an illustration of the two Americas."

- Reuters, "Fearless Fund: Diversity funds and Black founders feel chill" (July 2): *Reuters*' Krystal Hu reports that the Eleventh Circuit's June 3 decision enjoining Fearless Fund's Strivers Grant Contest, which provides financial support to Black female entrepreneurs, is having "a chilling effect across the small industry of diversity-focused venture capital funds." The court's decision could affect some $200 billion committed to similar funding initiatives nationwide, writes Hu. Recent data from Crunchbase indicates that venture funding of Black entrepreneurs, which "surged in 2021," has since "plunged." Hu notes that several of Fearless Fund's financing partners have withdrawn, citing the court's decision. But Hu says that the minority venture capital community is not backing down. "People have the right to fund marginalized communities if and when racial disparities exist, and that is something needs to be protected," Arian Simone, CEO of Fearless Fund, told Hu. Shila Nieves Burney, a general partner at Zane Venture Fund, another Atlanta-based fund, told Hu that she will continue to "back diverse teams" despite the Eleventh Circuit decision. But Burney expressed concern that the already limited funding provided to Black entrepreneurs is under threat: "If Fearless Fund is not able to raise their next fund, that creates a huge gap in the ecosystem. When there's an attack on Black VCs, who's going to fill that gap?"

- Law360, "Armstrong Teasdale Resisted Diversity, Ex-DEI VP Says" (July 5): Law360's Lauren Berg reports on a lawsuit filed June 30 in Missouri state court by Armstrong Teasdale LLP's former vice president of diversity, equity and inclusion. Sonji R. Young, a Black woman hired in February 2021 to be the firm's first DEI officer, claims that she experienced sex, age, race, color, and disability discrimination, as well as retaliation and defamation. Young alleges that firm officers, partners, and staff—most of whom are white—repeatedly obstructed her efforts to improve diversity and inclusion at the firm by

refusing to train her on firm systems, denying her requests for additional staff and for funding of employee resource groups, undermining her efforts to recruit diverse talent, and otherwise withholding their support for DEI initiatives. Young also alleges that she was terminated in February 2023 after recommending certain DEI-related changes to the firm's managing partner.

- Washington Post, "Many universities are abandoning race-conscious scholarships worth millions" (July 9): The *Post*'s Danielle Douglas-Gabriel reports on the elimination of race-conscious scholarship criteria at dozens of colleges and universities. The *Post* has identified nearly 50 institutions that have "paused, ended or reconfigured hundreds of race-conscious scholarships worth . . . at least $45 million." Most of these changes are occurring at public universities in states like Wisconsin, Ohio, and Missouri, where Republican legislators have passed laws banning race-conscious financial aid. Because far more colleges and universities rely on financial aid to improve student body diversity, as opposed to race-conscious admissions policies, Douglas-Gabriel reports that higher education experts are worried that this shift will have "a more profound impact on diversity in higher education" than the *SFFA* affirmative action decision itself. Faced with legislative mandates, institutions in these states are now shifting scholarship eligibility criteria away from race and toward alternatives like household income, zip code, or first generation-student status. But even these alternatives, if too close a proxy for race, "could run afoul of the law," New York University School of Law professor Kenji Yoshino told the *Post*. Douglas-Gabriel notes that many donors are unhappy with these changes, including Mary Willis and Cynthia Willis-Esqueda, sisters who helped create a scholarship for Black, Hispanic, and Native students in honor of their father, a former professor at the University of Missouri at Kansas City. Willis and Willis-Esqueda are considering legal action of their own, expressing anger "that anybody would dare to say that we can't decide where our little bit of inheritance goes."

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. Pfizer, Inc.*, 646 F. Supp. 3d 490 (S.D.N.Y. 2022); No. 23-15 (2d Cir. 2024):** 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 which provides college seniors with summer internships, two years of employment post-graduation, mentoring, and a two-year scholarship for a full-time master's program. To be eligible, applicants must "[m]eet the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic and Native Americans." Do No Harm requested a temporary restraining order and preliminary and permanent injunctions against the program's eligibility criteria. In December 2022, the district court denied Do No Harm's motion for a preliminary injunction and dismissed the case for lack of subject matter jurisdiction, finding that Do No Harm lacked Article III standing because it did not identify at least one member by name. Do No Harm appealed to the Second Circuit, which on March 6, 2024 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. (We previously covered this decision here.) Do No Harm petitioned for rehearing en banc.
    - **Latest update:** On July 1, Pfizer filed its opposition to Do No Harm's petition for rehearing en banc, arguing that the case does not conflict with Supreme Court or Second Circuit authority, create a conflict among the circuits, or present "a question of exceptional importance."
- ***Do No Harm v. Gianforte*., No. 6:24-cv-00024-BMM-KLD (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 state's 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 June 7, Governor Gianforte moved to dismiss for lack of jurisdiction.
    - **Latest update:** On June 28, 2024, Do No Harm filed its opposition, arguing that its individual members have standing because the Supreme Court treats any statute that denies equal treatment as causing an injury in fact, regardless of whether a candidate has actually applied for a position. Further, Do No Harm argued that Governor Gianforte's promise to interpret the Montana statute without discriminating does not fix the constitutional problem, because the plain text of the law "authorizes or encourages unconstitutional consideration of race and gender."

- ***Do No Harm v. National Association of Emergency Medical Technicians*, No. 3:24-cv-11-CWR-LGI (S.D. Miss. 2024):** On January 10, 2024, Do No Harm challenged the diversity scholarship program operated by the National Association of Emergency Medical Technicians (NAEMT), an advocacy group representing paramedics, EMTs, and other emergency professionals. NAEMT awards up to four $1,250 scholarships annually to students of color hoping to become EMTs or paramedics. Do No Harm requested a temporary restraining order, preliminary injunction, and permanent injunction against the program. On January 23, 2024, the court denied Do No Harm's motion for a TRO, and NAEMT moved to dismiss Do No Harm's amended complaint on March 18.

    - **Latest update:** On June 6, 2024, Do No Harm filed a notice of supplemental authority, drawing the court's attention to the Eleventh Circuit's decision in *Fearless Fund*, which it argued supports the claim that Do No Harm has associational standing because its members are able and ready to apply for a scholarship. On June 25, the defendant submitted a response, arguing that *Fearless Fund* does not help establish injury in fact because there "was never any racial requirement" for applicants to the NAEMT scholarship, whereas *Fearless Fund* involved a diversity program that explicitly barred everyone but black females from applying.

- ***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 association in violation of the First Amendment. After reaching a partial settlement agreement with the Bar to remove the eligibility requirements concerning historically excluded backgrounds, 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. On May 31, the Bar moved to dismiss the amended complaint for failure to state a claim.

    - **Latest update:** On June 28, 2024, the plaintiff opposed the Bar's motion to dismiss, arguing that the Bar's dues-funded programs are not "germane to the constitutional purpose" of a bar association, thereby violating the First Amendment. The plaintiff also argued that his claims are not time-barred because they accrue every day that the diversity program continues.

2. Employment discrimination and related claims:

- ***Beneker v. CBS Studios*, No. 2:24-cv-01659-JFW-SSC (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 in violation of Section 1981 and Title VII. 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. On May 23, 2024, CBS Studios and parent company Paramount Global moved to dismiss.

    - **Latest update:** On June 24, 2024, the defendants filed a second motion to dismiss in light of the plaintiff's voluntary dismissal of his Title VII claims and Section 1981 claims with respect to only the white female/lesbian writers. The defendants reaffirmed their theory that the First Amendment is a "complete bar" to the plaintiff's remaining claims because CBS is an "expressive enterprise" and has the right to "select which writers are best suited" to convey its message. In the alternative, the defendants argued that two of the Section 1981 claims are time barred, in part because courts should not view discrete hiring decisions as creating "continuing violations" of Section 1981.

- ***Sobol v. DeJoy*, No. 1:22-cv-00170-MWJS-RT (D. Haw. 2022):** On April 15, 2022, a white man sued the United States Postal Service (USPS) for selecting a Black woman for a managerial role instead of him, alleging retaliation, hostile work environment, constructive discharge, and discrimination in violation of Title VII and the ADEA. On March 18, 2024, USPS moved for summary judgment.

    - **Latest update:** On July 9, 2024, the court granted USPS's motion for summary judgment, finding that the plaintiff lacked sufficient evidence that the adverse employment action was discriminatory. The court also held that, even if the plaintiff could establish a prima facie case of discrimination, the USPS had asserted a legitimate, nondiscriminatory reason for its hiring decision.

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

- ***Do No Harm v. Lee*, No. 3:23-cv-01175-WLC (M.D. Tenn. 2023):** On November 8, 2023, Do No Harm sued Tennessee Governor Bill Lee under the Equal Protection Clause of the Fourteenth Amendment, seeking to enjoin a 1988 Tennessee law requiring the governor to "strive to ensure" that at least one board member of the six-member Tennessee Board of Podiatric Medical Examiners is a racial minority. On February 2, 2024, Governor Lee moved to dismiss the complaint for lack of standing. On February 16, Do No Harm opposed, contending that it satisfied standing requirements despite relying only on anonymous members. On March 1, 2024, the Governor replied in support of his motion.

    - **Latest update:** On June 28, 2024, Do No Harm filed a notice of supplemental authority, drawing the court's attention to the Eleventh Circuit's decision in the *Fearless Fund* case and the proceedings in *American Alliance for Equal Rights v. Ivey*, No. 2:24-cv-00104-RAH-JTA (M.D. Ala. 2024)—in both cases, the courts found that plaintiffs had satisfied the standing requirements even when they were suing on behalf of individual anonymous members. Do No Harm argued that

these cases support its claim that its members individually have standing, even if they remain anonymous.

- ***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 the governor 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, 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 requires 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. 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. 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. On June 10, Governor Ivey responded in support of AAER's motion for judgment on the pleadings, but Intervenor AAREB opposed the motion.
    - **Latest update:** On June 26, 2024, AAER filed a reply brief in support of its motion for judgment on the pleadings, arguing that any "contested material factual allegations" related to standing were decided before AAREB intervened in the litigation, and that no other disputes remain outstanding.
- ***Lynn v. Goff*, No. 1:24-cv-00211-CL (D. Or. 2024):** On February 1, 2024, a white public school teacher filed a complaint against the Interim Executive Director of the Oregon Teacher Standards and Practices Commission, alleging that a state program reimbursing "diverse" teachers for the cost of obtaining or renewing their teaching licenses violated the Equal Protection Clause of the Fourteenth Amendment. In its answer, Oregon denied that it engaged in discriminatory treatment on the basis of skin color alone.
    - **Latest update:** On June 28, 2024, the parties filed a notice of joint advanced dispute resolution after Oregon issued a temporary rule to end the reimbursement program. The plaintiff agreed to voluntarily dismiss the case once the state issues a permanent rule.

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.

- **Latest update:** On June 4, 2024, the plaintiffs moved to certify a class of all people and entities who had purchased Wells Fargo stock during the period when the bank allegedly engaged in sham job interviews. The plaintiffs also sought to remove the stay on discovery in order to prove that there are issues of law and fact common to the putative class. On June 25, 2024, the defendants opposed class certification, arguing that plaintiffs had not proved that they affirmatively met the requirements due to the stay. On July 7, the court granted the parties' motion to continue certain deadlines and set a telephonic case management conference for August 1, 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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