
# DEI Task Force Update

July 3, 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 27, Tractor Supply issued a statement saying that it would "[e]liminate DEI roles and retire [its] current DEI goals," along with ceasing support for Pride festivals and withdrawing its carbon emission goals. The statement came in response to a public pressure campaign waged against Tractor Supply by Robby Starbuck, a conservative activist and social media personality, who criticized Tractor Supply for its DEI commitments, support for Pride Month celebrations, contributions to the Democratic Party, and carbon emission goals, among other things. Starbuck urged his followers to boycott Tractor Supply and to send complaints to Tractor Supply's corporate offices. After three weeks of public pressure, and a reduction in its stock price, Tractor Supply acceded to Starbuck's demands. Starbuck immediately claimed victory following Tractor Supply's announcement, saying that it "was the start of

something big" and threatening to "expose a new company next week." In response to Tractor Supply's announcement, the National Black Farmers Association called on Tractor Supply's president and CEO to step down, and threatened a boycott of its own.

On June 20, the State of Missouri filed a complaint against IBM in state court, alleging that the company is violating the Missouri Human Rights Act by using race and gender quotas in its hiring and basing employee compensation on participation in allegedly discriminatory DEI practices. *See Missouri v. IBM*, No. 24SL–CC02837 (Cir. Ct. of St. Louis Cty.). The complaint cites a leaked video in which IBM's Chief Executive Officer and Board Chairman, Arvind Krishna, allegedly stated that all executives must increase representation of ethnic minorities in their teams by 1% each year in order to receive a "plus" on their bonus. The complaint also alleges that employees at IBM have been fired or suffered adverse employment actions because they failed to meet or exceed these targets. The Missouri Attorney General is seeking to permanently enjoin IBM and its officers from utilizing quotas in hiring and compensation decisions.

On July 1, a suit was filed against CBS Broadcasting by former Los Angeles news anchor Jeff Vaughn, alleging that CBS terminated his employment because he is "an older, white, heterosexual male." *See Vaughn v. CBS Broadcasting*, No. 2:24-cv-05570 (C.D. Cal. 2024). Vaughn claims that CBS replaced him with a "younger minority news anchor" in violation of Section 1981, Title VII, and the Age Discrimination in Employment Act. The complaint points to public statements by CBS expressing its commitment to diversity, including statements discussing various representation goals. Vaughn, who is represented by America First Legal, is seeking over $5,000,000 in damages.

In a statement issued on June 28, the U.S. Department of Commerce said that it would not appeal the district court's ruling in *Nuziard v. Minority Business Development Agency*, No. 4:23-cv-00278 (N.D. Tex. 2024). The court held that the racial presumption used by the Minority Business Development Agency (MBDA) in apportioning federal funds for minority business assistance violates the Fifth Amendment's equal protection guarantee. The decision extended the Supreme Court's reasoning in *SFFA* to federal agencies administering grant programs, holding that "[t]hough *SFFA* concerned college admissions, nothing in the decision indicates that the Court's holding should be constrained to that context." For a more detailed discussion of the *Nuziard* decision, see our prior update here. The Commerce Department's statement said that while the Department "strongly disagree[s]" with the court's ruling, its "primary goal is to ensure MBDA can continue to meet its mission to promote the growth and global competitiveness of minority business enterprises," and it believes that the injunction imposed by the district court "does not currently prevent MBDA from continuing to fulfill its mission."

On June 27, EEOC Commissioner Kalpana Kotagal encouraged workers' rights attorneys to continue advocating for lawful DEI initiatives, including data collection aimed at ensuring equal employment opportunities. Kotagal's address took place at the National Employment Lawyers Association's annual conference in Philadelphia and followed panel discussions of conservative legal activists' anti-DEI efforts. Kotagal commented on the "bleak" landscape but urged the audience not to give up, emphasizing that Title VII standards have not changed and citing "misinformation" and "scare tactics" as having blurred employers' understanding of the legality of DEI programming. Kotagal acknowledged the litany of reverse-discrimination suits being brought by white employees in the wake of *SFFA* but insisted that "there's a huge difference" between quotas, on the one hand, and "measuring and understanding the demographics of your workforce with an eye to breaking down barriers and equal opportunity," on the other. She stated that employers can legally engage in "remedial and temporary affirmative action plans" and the key is ensuring that "individual decisions are not based on race."

On June 27, a split Ninth Circuit panel reinstated a proposed class action in which the plaintiffs allege that Meta unlawfully favors visa holders over citizens when making hiring decisions in *Rajaram v. Meta Platforms, Inc.*, No. 22-16870 (9th Cir. 2024). The plaintiff alleged that, despite being qualified, he was discriminatorily rejected by Meta for several jobs because he is as U.S. citizen and Meta prefers to hire noncitizens holding H1B visas because it can pay them lower wages. U.S. Magistrate Judge Laurel Beeler in the Northern District of California had dismissed the complaint, finding that U.S. citizens are not a protected class under Section 1981. The Ninth Circuit reversed. The majority noted that while race discrimination is different from citizenship discrimination, "it is not different in any way that is relevant to the text of 1981." Judge VanDyke dissented, writing that "discrimination because of citizenship is not covered by Section 1981 because citizens inherently possess the rights enjoyed by citizens, even when noncitizens are preferenced over them."

On June 24, the Equal Protection Project (EPP) filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR) against Indiana University Columbus (IUC). The complaint alleges that IUC partners with the African American Fund Bartholomew County (AAFBC) to administer a scholarship that is restricted to African American students in violation of Title VI and the Equal Protection Clause of the Fourteenth Amendment. EPP contends that because IUC is a public institution receiving federal financial assistance, it cannot intentionally discriminate on the basis of race in any "program or activity," regardless of any good intention. EPP requests that OCR initiate a formal investigation into IUC's role in creating and promoting the scholarship and asks that it impose appropriate remedial relief.

On June 20, Illinois Attorney General Kwame Raoul and 18 other Democrat state attorneys general issued a public letter to the American Bar Association (ABA) defending the current criteria used in ABA accreditation, in response to a June 3 letter from Republican state AGs urging the ABA to remove this criteria from its accreditation process. The letter from the Democrat AGs argues that *SFFA* does not bar higher education institutions from encouraging a diverse applicant pool or creating non-hostile educational environments for underrepresented groups. The ABA is currently considering revisions to Standard 206 for accreditation, which governs diversity and inclusion within law schools. The letter was also addressed to "Fortune 100 CEOs and other organizations unfairly targeted for their commitment to diversity, equity, and inclusion," noting that *SFFA*'s "narrow holding did not change the law for private businesses."

On June 20, Do No Harm filed a complaint against the American Association of University Women (AAUW), alleging that the organization is violating Section 1981 by providing Focus Group Professions Fellowships only to "women from ethnic minority groups historically underrepresented in certain fields within the United States: Black or African American, Hispanic or Latino/a, American Indian or Alaskan Native, Asian, and Native Hawaiian or Other Pacific Islander." *See Do No Harm v. American Association of University Women*, No. 1:24-cv-01782 (D.D.C. 2024). Do No Harm is proceeding on behalf of its medical student-members, who allegedly meet all of the other application requirements for the AAUW fellowship but "are ineligible to apply to the fellowship because of their race." Do No Harm is seeking a preliminary injunction prohibiting AAUW from closing the application window, and a permanent injunction prohibiting AAUW from considering race when selecting grant recipients.

On June 20, a three-judge panel of the Michigan Court of Appeals issued an unpublished per curiam decision dismissing the appeal of two former General Motors employees who contended that they faced discrimination and were terminated because they are white. *See Bittner v. General Motors*, LLC, No. 366160 (Mich. Ct. App. 2024). As noted in the court's opinion, GM terminated the plaintiffs' employment after corroborating complaints from other employees claiming that the plaintiffs routinely used sexually derogatory, homophobic, and transphobic language. The plaintiffs asserted state-law claims of disparate treatment, disparate impact, hostile work environment, and civil conspiracy, but the trial court granted GM's motion for summary disposition. The Court of Appeals affirmed, rejecting the plaintiffs' assertion that a supervisor's request that they remain respectful during a Juneteenth moment of silence was "direct evidence" of discrimination. Nor was the Court convinced by the plaintiffs' purported circumstantial evidence of disparate treatment.

## Media Coverage and Commentary:

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

- The Washington Post, "DEI Programs toppled amid a surge of conservative lawsuits" (June 27): *The Washington Post*'s Peter Whoriskey and Julian Mark report that right-leaning legal groups filed more than 100 lawsuits challenging racial preferences and other efforts by corporations and the government to "address demographic disparities in business, government and education." Following *SFFA*, according to Jason Schwartz, Gibson Dunn partner and co-chair of the firm's Labor & Employment group, "[t]he cases are going pretty quickly and decisively against the government programs" because "[government] cases are harder to defend." Whoriskey and Mark say that private companies have "more legal leeway to implement diversity programs," but that recent litigation also has had a chilling effect on private companies, with many reconsidering their own diversity programs as a defensive measure to reduce litigation risk.

- The Wall Street Journal, "Tractor Supply Retreats from DEI Amid Conservative Backlash" (June 27): Sarah Nassauer and Sabela Ojea of *The Wall Street Journal* report that Tractor Supply Company, a rural retailer best known for its animal feed and workwear sales, is abandoning its DEI and environmental initiatives in response to weeks of social media criticism from Robby Starbuck, a prominent conservative political commentator. Starbuck encouraged his followers to boycott Tractor Supply because of its stated political, diversity, and environmental goals. Nassauer and Ojea report that the company announced it would eliminative jobs focused on DEI, stop sponsoring LGBTQ+ pride festivals, and no longer submit data to LGBTQ+ advocacy group the Human Rights Campaign. Nassauer and Ojea note that "Tractor Supply's core customer base is more rural and male than general big-box retailers," with "customers in regions that tend to vote for more conservative political candidates." In a statement, Tractor Supply said that it had

"heard from customers that we have disappointed them," and it had "taken this feedback to heart."

- The Associated Press, "Black farmers' association calls for Tractor Supply CEO's resignation after company cuts DEI efforts" (July 2): Wyatte Grantham-Philips and Haleluya Hadero of the Associated Press report on calls from the National Black Farmers Association (NBFA) for Tractor Supply's CEO Hal Lawton to step down. Grantham-Philips and Hadero say that the calls for Lawton's resignation come in response to Tractor Supply's recent announcement that it would stop most of its corporate diversity and climate advocacy efforts. Tractor Supply announced the changes following a pressure campaign from conservative activists who took issue with what Grantham-Philips and Hadero call "the company's work to be more socially inclusive and to curb climate change." John Boyd Jr., president and founder of the NBFA, said that he was "appalled" by Tractor Supply's decision, and warned that "Black farmers are going to start fighting back," including by considering calling for a boycott of Tractor Supply. Indeed, Grantham-Philips and Hadero report that some customers have "already decided to take their business elsewhere," deciding that they can "no longer support Tractor Supply if its announcement reflected its beliefs."

- *The Wall Street Journal*, "Banks, Law and Consulting Firms are Watering Down Their Diversity Recruiting Programs" (June 20): The Wall Street Journal's Kailyn Rhone reports that "white-collar companies," once champions of programs to recruit diverse employees, are now quietly downplaying these programs. Rhone says that these changes include minimizing use of terminology like "DEI," opening diversity programs to all applicants, and omitting references to DEI programs from annual reports. Rhone cites accounting firm PricewaterhouseCoopers as an example, noting that it recently altered the eligibility criteria for its Start internship, shifting the focus from "traditionally underrepresented" minority applicants to students of "diverse backgrounds" generally. Similarly, Rhone notes that JPMorgan Chase clarified that its Black and Hispanic & Latino fellowship programs are available to all students, regardless of race. And, Rhone says, consulting firm McKinsey & Co. also recently removed the requirement that candidates for its summer business analyst program "self-identify as a member of a historically underrepresented group." According to Rhone, some minority job seekers worry that the changes "could erode a path for diverse candidates to find internships and entry-level roles."

- The Dallas Morning News, “131 college scholarships put on hold or modified due to Texas DEI ban, documents show” (June 17): Marcela Rodrigues and Philip Jankowski of *The Dallas Morning News* report that a new Texas law banning DEI programs at public universities has frozen or modified over 130 college scholarships state-wide. Known as SB 17, the law prohibits Texas public colleges from administering programs designed for students of specific races or genders. Many of the scholarships affected are administered by the schools but funded through private donations. According to officials at public universities across Texas, SB 17 has triggered review of thousands of scholarships, in some cases leading to the alteration or elimination of gender and racial eligibility requirements.

- The Washington Post, “Most Americans approve of DEI, according to Post-Ipsos poll” (June 18): *The Washington Post*’s Taylor Telford, Emmanuel Felton, and Emily Guskin report on a recent poll finding that the majority of Americans believe DEI programs are “a good thing.” The poll indicated that support is even higher for certain types of programming, like internships for underrepresented groups and anti-bias trainings, and that respondents expressed greater support for DEI programs after they were given a detailed description of them. The authors note that “one effort was universally unpopular: financial incentives for managers who achieve diversity goals.” Joelle Emerson, chief executive of Paradigm, a DEI consultancy, said that she believes “that the vast majority of peoples’ values align with what this work actually entails,” but that the concept of DEI might need some rebranding.

- Law360 Employment Authority, "A Year After Justices Scrap Affirmative Action, DEI Rebounds" (June 28): Law360's Anne Cullen reports that DEI consultants are seeing a gradual resurgence in corporate interest regarding DEI initiatives. Cullen acknowledges that, although DEI advocates have had some notable wins in the courts, lawsuits filed by conservative groups have had a dramatic chilling effect on corporate programs—including an outsized effect on small businesses and organizations without the financial capacity to mount a defense. But experts in the field say that the tide may be turning, with some noticing "a bottoming out, and some new entrants" to the corporate diversity field. Other consultants report observing "resurging interest" from corporate clients who "want to roll their sleeves up and do the work." Experts recommend that companies be willing "to adapt and pivot," including rebranding their programs to move away from the "DEI" label.

## 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:**

- ***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 are 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 June 18, 2024, the City of San Diego filed a motion for judgment on the pleadings. The City argued that the complaint does not include any allegations against the City, and instead alleges a "fictitious [agency] relationship" with the other defendants, the Housing Authority of the City of San Diego and the San Diego Housing Commission. The City also argued that even if the Plaintiff's agency allegations were accepted as true, its claim against the Housing Authority and City still fails because "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents."

- ***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" (SEE) applicants, which the plaintiff claims violate the Fourteenth Amendment's Equal Protection Clause and Section 1983. On March 13, 2024, the plaintiff 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, arguing that even without the contested policy the plaintiff would not have received the license due to their low "position in the queue."

    - **Latest update:** On June 20, 2024, the defendants filed a reply in support of their motion to dismiss. The defendants argued that the plaintiff lacks standing because its microbusiness license will be reviewed in the November queue under a recently adopted board resolution. Moreover, the defendants asserted that there is no risk of injury because "the Board and Office have interpreted the Cannabis Law and implementing regulations to be satisfied by front-end measures to aid [minority] SEE applicants such as community outreach, low-burden applications, and assistance if an application is found to be defective," and that the plaintiff has not demonstrated that the defendants will deviate from this interpretation. The defendants also noted that they have submitted affidavits indicating that "applications are being reviewed solely for completeness and correctness, and thus that the race and gender of an applicant will play no role in whether an application is approved."

**2. Employment discrimination and related claims:**

- ***Sullivan v. Howard Univ.*, No. 1:24-cv-01924 (D.D.C. 2024):** On July 1, 2024, a male administrator at Howard University filed suit against the university, claiming that he

experienced sex discrimination and retaliation when he was transferred to another department.

    - **Latest Update:** The docket does not reflect that Howard University has been served.

- ***Gerber v. Ohio Northern Univ.*, No. 2023-1107-CVH (Ohio. Ct. Common Pleas Hardin Cty. 2024):** On June 30, 2023, a law professor sued his former employer, Ohio Northern University, for terminating his employment after an internal investigation determined that he bullied and harassed other faculty members. On January 23, 2024, the plaintiff, now represented by America First Legal, filed an amended complaint. The plaintiff claims that his firing was actually in retaliation for his vocal and public opposition to the university's stated DEI principles and race-conscious hiring, which he believed were illegal. The plaintiff alleged that the investigation and his termination breached his employment contract, violated Ohio civil rights statutes, and constituted various torts, including defamation, false light, conversion, infliction of emotional distress, and wrongful termination in violation of public policy.

    - **Latest update:** On June 17, 2024, both parties filed motions for summary judgment. The defendants argued that the court should grant summary judgment because plaintiff's claims of retaliation for expressing his views on DEI policies are not backed by evidence, including because he "advanced through the ranks at ONU" while making prolific remarks against DEI and affirmative action since at least 2005. The plaintiff moved for summary judgment on his breach-of-contract and defamation 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 25, the court granted the parties' joint stipulation for dismissal and the claim was dismissed with prejudice.

- ***DiBenedetto v. AT&T Servs.*, Inc., No. 21-cv-4527 (N.D. Ga. 2021):** On November 2, 2021, the plaintiff, a white male former executive, brought claims against AT&T under Title VII, Section 1981, and the Age Discrimination in Employment Act (ADEA), alleging that he was wrongfully terminated due to his race, gender, and age.

    - **Latest update:** On June 26, the parties jointly stipulated and agreed to the dismissal with prejudice of all claims in this action.

- ***Newman v. Elk Grove Educ. Ass'n.*, No. 2:24-cv-01487-DB (E.D. Cal. 2024):** On May 24, 2024, a white teacher at the Elk Grove Unified School District in Sacramento, California, sued the teachers' union after it created an executive board position called the "BIPOC At-Large Director" open only to those who "self-identify" as "African American (Black), Native American, Alaska Native, Native Hawai'ian, Pacific Islander, Latino (including Puerto Rican), Asian, Arab, and Middle Eastern." The plaintiff alleges that he is a union member who "wants to run for union office to address the District's recent adoption of what he believes to be aggressive and unnecessary Diversity, Equity & Inclusion ('DEI') policies," but is ineligible for this board seat because of his race. The plaintiff alleges that he therefore has fewer opportunities to obtain a board seat than non-white union members. He has brought claims against the union under Title VII of the Civil Rights Act of 1964 and the California Fair Employment and Housing Act.

    - **Latest update:** The defendant's response to the complaint is due on August 26, 2024.

- ***Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) v. Northwestern University*, No. 1:24-cv-05558 (N.D. Ill. 2024):** A nonprofit advocacy group filed suit against Northwestern University, alleging that Northwestern University is violating Title VI, Title IX, and Section 1981 by considering race and sex in law school faculty hiring decisions. The suit also claims that student editors of the Northwestern University Law Review give discriminatory preferences to "women, racial minorities, homosexuals, and transgender people when selecting their members and edits," as well as when choosing articles to include in the Law Review. The plaintiff is seeking to enjoin Northwestern from (1) considering race, sex, sexual orientation, or gender identity in the appointment, promotion, retention, or compensation of its faculty or the selection of articles, editors, and members of the Northwestern University Law Review, and (2) soliciting any information about the race, sex, sexual orientation, or gender identity of faculty candidates or applicants for the Law Review. The plaintiff is also asking the court to order Northwestern to establish a new policy for selecting faculty and Law Review articles, editors, and members, and to appoint a court monitor to oversee all related decisions.

- **Latest update:** The docket does not reflect that the defendant has been served.

**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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