DEI Task Force Update

August 1, 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

The Northern District of Florida entered a permanent injunction on July 30 prohibiting the enforcement of Florida's Stop WOKE Act, in *Honeyfund.com Inc. v. DeSantis et al.*, No. 4:22-cv-00227 (N.D. FL. 2022). Among other things, the Stop WOKE Act would have prohibited employers from requiring employees to participate in trainings that identify certain groups of people as "privileged" or "oppressors." The order follows an opinion from the Eleventh Circuit holding that the law constituted both content and viewpoint discrimination that did not survive strict scrutiny.

On July 23, Robby Starbuck, a conservative activist and social media personality, continued his attacks on corporate DEI initiatives by targeting Harley-Davidson. Starbuck posted a video on X claiming that the company has "gone totally woke," and criticizing Harley-Davidson's sponsorship of LGBTQ+ pride events and implementation of various DEI trainings. Starbuck encouraged his viewers to complain directly to Harley-Davidson about its policies and asked them to "use [their] voices and wallets to vote [their] values."

On July 18, Do No Harm filed a complaint with the EEOC requesting that it investigate the Alliance for Regenerative Medicine (ARM) for allegedly operating a racially discriminatory internship program in violation of Title VII. Do No Harm alleged that ARM's GROW RegenMed Internship Program violates Title VII because it is only open to individuals who "identify as Black/African American." Do No Harm also challenged the program's stated goal of increasing representation of Black employees and executives at ARM member organizations. Do No Harm complained that at least one of its members who is otherwise eligible for the internship program cannot apply because he is white and that the program's hiring criteria unlawfully discriminate based on race.

On July 15, 2024, the Equal Protection Project (EPP) filed a complaint with the Office for Civil Rights (OCR) of the U.S. Department of Education against Indiana University (IU). The complaint alleged that IU administers several race-based scholarships that discriminate on the basis of race, color, and national origin, in violation of Title VI and the Equal Protection Clause of the Fourteenth Amendment. The EPP cites to 19 scholarships for the Kelley School of Business, the IU Indianapolis campus, and the McKinney School of Law that are intended for underrepresented minority students. The complaint requests that the OCR open an expedited and formal investigation into IU's scholarship practices and impose remedial relief for those who have been excluded from applying for the University's allegedly discriminatory scholarships.

Media Coverage and Commentary:

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

- Bloomberg Law, "Frustrated DEI Officers Risk Tackling Workplace Bias in Court" (July 17): Writing for Bloomberg Law, Khorri Atkinson highlights a complaint filed against Armstrong Teasdale LLP earlier this month by its former vice president of DEI, who is alleging race and sex discrimination in violation of Title VII. The plaintiff claims that Armstrong Teasdale withheld resources necessary for her to perform her job and subjected Black lawyers to a hostile work environment. Atkinson notes that other companies, including Morgan Stanley and United Airlines, have faced similar lawsuits

from their DEI professionals, and says that the cases highlight that some DEI managers feel that they lack power, financial resources, and access to top executives, which Atkinson says "undermin[es] companies' commitments to addressing inequality."

- USA Today, "DEI efforts may be under attack, but companies aren't retreating from commitments" (July 17): USA Today's Jessica Guynn reports on companies' responses to the recent string of attacks on DEI initiatives by "anti-woke" conservative groups. While most companies have remained steadfast in their commitment to DEI, Guynn observes that some have responded to the criticism by pulling back on their DEI commitments, with "some even list[ing] diversity, equity and inclusion as a 'risk factor' in regulatory filings." Joelle Emerson, co-founder and CEO of diversity strategy and consulting firm Paradigm, said that "most companies are continuing their [DEI] work, just less vocally." Despite the recent criticism, Guynn says that DEI in corporate America is more important than it's ever been, as leadership in the nation's largest companies is still "predominantly white and male."

- Law.com, "Companies Deluged With Anti-ESG Shareholder Proposals" (July 18): Law.com's Chris O'Malley reports on new data from consulting company Georgeson examining the sharp rise of anti-environmental, social and governance (ESG) proposals put to shareholder votes this year. According to O'Malley, ESG has become a "fractious issue" for many companies due to the abundance of conservative pushback on causes like diversity and LGBTQ+ rights. The Georgeson report identified 112 anti-ESG proposals between July 1, 2023 and May 17, 2024—up 19% from last year and nearly double the number of proposals from two years ago. Of these 112 anti-ESG proposals, 70% covered social matters, "such as the risks of championing racial- and gender-

equality efforts." O'Malley also highlighted some recent efforts by anti-ESG proponents, including the National Legal and Policy Center (NLPC)'s anti-ESG proposal to Mondelez International targeting Mondelez's decision to pledge $500,000 to a pro-LGBTQ group. While Mondelez received strong support from its shareholders and ultimately maintained its pledge, NLPC said its efforts still reached the company's decisionmakers, claiming that Mondelez "throttled back on its Pride marketing toward children" following NLPC's proposal.

- The Wall Street Journal, "Deere Slashes Diversity Initiatives After Backlash From Conservative Activist" (July 18): The Wall Street Journal's Victoria Albert and Bob Tita report on John Deere & Co's recent decision to dial back its diversity initiatives following scrutiny from Robby Starbuck. Starbuck's campaign against John Deere consisted of a series of social media posts and videos challenging Deere's "woke" company initiatives. Albert and Tita write that Deere is no stranger to taking up political causes, noting that the company's founder was an outspoken abolitionist and a staunch supporter of civil rights and the integration movement, as well as various environmental causes. Still, the company maintains that its decision to deprioritize its DEI initiatives will best serve its customers and employees and is simply an opportunity to prove it is "always listening to feedback and looking for opportunities to improve." Albert and Tita note that the National Black Farmers Association called for a boycott of Deere products and the immediate resignation of CEO John May in response to what the group called "the company's 'wrong direction' on diversity and inclusion."

- Law360, “4 Lessons As 7th Circ. OKs Honeywell Firing Of DEI Protester” (July 19): Writing for Law360, Vin Gurrieri examines a recent decision from the U.S. Court of Appeals for the Seventh Circuit, *Charles Vavra v. Honeywell International, Inc*. Vavra alleged that Honeywell violated Title VII of the Civil Rights Act of 1964 when it fired him in retaliation for protesting “company-mandated unconscious bias training and other DEI-related communications that he believed discriminated against white workers.” The Seventh Circuit upheld the United States District Court for the Northern District of Illinois’s ruling granting summary judgment to Honeywell on Vavra’s claims, focusing on the fact that Vavra never viewed or participated in the training programs. Gurrieri discussed some takeaways from the Seventh Circuit’s decision, including cautioning that employers should not interpret the decision as a wholesale endorsement of implicit bias trainings. According to Gurrieri, the court simply made clear that a plaintiff must experience the training or at least know its contents to sustain a lawsuit. In addition, Gurrieri advised employers and DEI supporters alike to take note of the EEOC’s supportive stance on antidiscrimination trainings, as the agency submitted an amicus brief highlighting that courts have repeatedly “rejected the theory that antidiscrimination trainings categorically violate Title VII.”

- The Wall Street Journal, “When Companies Speak Out on Hot Political Issues, They Often Get It Wrong” (July 23): Writing for The Wall Street Journal, Aviva Phillip-Muller of Simon Fraser University’s Beedie School of Business and Joseph Siev of University of Virginia’s Darden School of Business discuss corporate challenges in navigating discussions of political issues. The authors note that companies are often left with no choice but to respond to political events—such as the Black Lives Matter or #MeToo movements—because of consumer expectations. Phillip-Muller and Siev say that companies often make the mistake of trying to support both sides of an issue in an attempt to “please everyone—and offend no one.” The authors’ report finds that companies’ ambivalence on hot-button topics often results in “reduced respect from those who agreed with them while providing no benefit to those who disagreed.” Phillip-Muller and Siev conclude that the best path for some issues may be for companies to refrain from weighing in at all.

- The Wall Street Journal, “Merit, Excellence and Intelligence: An Anti-DEI Approach Catches On” (July 24): The Wall Street Journal’s Callum Borchers discusses the rise of a new framework, Merit, Excellence and Intelligence (“MEI”), meant to serve as a counter to DEI. Alexander Wang, Chief Executive at Scale AI, helped popularize the term, which he says “means hiring the best candidates for open roles without considering demographics.” MEI has found support among some business leaders, including Coinbase CEO Brian Armstrong and Sequoia Capital partner Shaun Maguire. Borchers views its rise as a direct response to “frustration with corporate diversity initiatives.” Borchers says that MEI and DEI share a common root—the belief that unconscious bias taints hiring. But to MEI proponents, “hidden biases are problematic because they can lead to bad hires, not because they can produce a nondiverse workforce.” Human Resources professionals remain skeptical of MEI, noting that it pushes the needle away from equity. If nothing else, Borchers explains, DEI initiatives force companies to ensure there is company-wide attention to biases that may end up hurting certain types of applicants. According to Borchers, should MEI become the dominant framework, harmful biases in hiring may become prominent once again.

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. On June 18, 2024, the City of San Diego and the Housing Authority of the City of San Diego filed a motion for judgment on the pleadings, arguing that the complaint does not include any allegations against it, 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.
    - **Latest update:** On July 8, the parties filed a joint motion to dismiss the City and Housing Authority of San Diego as defendants and to deny the City and Housing Authority's pending motion for the judgment on the pleadings as moot. On July 9, the court granted the joint motion.
- ***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 and seven members of the Bar's Board of Governors and staff challenging the Bar's "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. After reaching a partial settlement agreement with the defendants to remove the eligibility requirements concerning historically excluded backgrounds, the plaintiff filed an amended complaint, adding challenges to three mentorship and leadership programs that allegedly discriminate based on race, which are funded by mandatory dues paid to the Bar.
    - **Latest update:** On July 19, 2024, the defendants filed a reply in support of their motion to dismiss, arguing that the Eleventh Amendment bars all claims against the individual defendants, as well as any claim for retrospective relief. The defendants further argued that the plaintiff's claims were time-barred, and that the plaintiff had not identified "actionable non-germane activities" sufficient to state a freedom of association claim because their argument relied on the faulty premise that "any single instance of non-germane activity renders the State Bar unconstitutional." Instead, the defendants argue, non-germane activity accounts for only 3.6% of total dues revenue, and the other challenged Bar activities are germane activities.

2. Employment discrimination and related claims:

- ***Netzel v. American Express Company*, No. 23-16083 (9th Cir. 2023):** On August 23, 2022, a group of former American Express employees alleged that the company's diversity initiatives discriminated against white workers and that the company retaliated against the same workers after they complained, in violation of Title VII and Section 1981. After the district court granted American Express's motion to compel arbitration, the plaintiffs appealed to the Ninth Circuit, arguing in part that they should not be compelled to arbitrate because they seek "public injunctive relief" against alleged "racial discrimination . . . that specifically harms the general public," a right they claim is not waivable under California law.
    - **Latest update:** On July 22, 2024, the Ninth Circuit affirmed the district court's ruling, holding that New York law governs the arbitration agreements, and, under that law, the agreements were not procedurally unconscionable. The court also held, relying on American Express's representation, that the agreements permit arbitration of claims for public injunctive relief.
- ***Gerber v. Ohio Northern University*, No. 2023-1107-CVH (Ohio Ct. Common Pleas Hardin Cnty. 2023):** 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, 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. On June 17, 2024, both parties filed motions for summary judgment.
    - **Latest update:** On July 16, the court dismissed the University's Provost, VP for Financial Affairs, Secretary to the Board of Trustees, and three members of the Board of Trustees as parties to the litigation based on affidavits establishing that "none of the movants possessed investigative duties or voting authority regarding the decision to terminate Plaintiff's employment," nor were present when the decision to terminate the plaintiff was made. The plaintiff filed a motion to reconsider the dismissals on July 16, which the court denied on July 17. The cross-motions for summary judgment remain pending.
- ***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. CBS Studios and parent company Paramount Global moved to dismiss the complaint.

    - **Latest update:** On July 15, 2024, the plaintiff opposed CBS's motion to dismiss, arguing that CBS seeks to "expand the right to discriminate on the basis of race or sexual orientation when that status impinges on an organization's expressive message, to a generalized right to discriminate on the basis of status alone." The plaintiff also argued that CBS's "fraudulent concealment" of its discrimination justifies tolling the statute of limitations, since CBS's promises to promote the plaintiff delayed him recognizing that he was the victim of discrimination.

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

- ***Alliance for Fair Board Recruitment v. SEC*, No. 21-60626 (5th Cir. 2021):** In August 2021, the Alliance for Fair Board Recruitment (AFBR) filed an administrative appeal with the Fifth Circuit, seeking review of the SEC's approval of Nasdaq's Board Diversity Disclosure Rule, which requires Nasdaq-listed companies to annually report aggregated statistical information about the board's self-identified gender, racial, and LGBTQ+ characteristics. In October 2023, the court rejected plaintiff's challenge to the rule on the grounds that Nasdaq, not the SEC, created the rule. The court granted AFBR's petition for a rehearing en banc, and oral argument took place in May 2024.

    - **Latest update:** On July 18, 2024, the court issued a letter asking the parties to file supplemental briefs regarding whether the petitioners' challenge to the Board Recruiting Service Rule was moot. Nasdaq and the SEC both filed supplemental briefs taking the position that the petitioners' challenge to the Board Recruiting Service Rule is now moot. The petitioners argue that the court can and should vacate the approval order in its entirety, which would vacate the SEC's approval of the Board Recruiting Service Rule.

- ***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, 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 June 28, 2024, Do No Harm filed a notice of supplemental authority, arguing that a similar case, *American Alliance for Equal Rights v. Ivey*, No. 2:24-cv-00104-RAH-JTA (M.D. Ala. 2024), supports its claims that anonymous members have individual standing.

- **Latest update:** On July 9, Governor Lee responded to plaintiff's notice of supplemental authority, arguing that the Ivey court only found standing because the state bore a heavy burden of demonstrating mootness after standing was first established. There, at the time of the lawsuit, the governor had not yet selected the three appointees of racial minority status to the board. Here, by contrast, the quota was already filled at the time of the lawsuit, leaving the remaining seats open to applicants of any race. Thus, "at the time the suit was filed and continuing to today, Plaintiff's members have the same opportunity to be appointed to the Board as any other applicant.".

- ***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.

    - **Latest update:** On July 17th, the court denied AAER's motion for judgment on the pleadings because both Governor Ivey and AAREB denied factual allegations about AAER's member that are critical to its standing. The case is set for a bench trial on November 17, 2025.

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, Jayee Malwankar, and Heather Skrabak.

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)