DEI Task Force Update

September 13, 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 August 29, 2024, America First Legal Foundation (AFL), the conservative organization founded and run by former Trump policy advisor Stephen Miller, sent a letter to Jeremy Gosch, CEO of Hy-Vee, Inc., demanding that the supermarket chain terminate its "Hy-Vee OpportUNITY Inclusive Business Summit's Pitch Competition," through which Hy-Vee pledged to give $50,000 to local minority and women-owned businesses in Iowa and the surrounding states. The competition is open to businesses with "at least 51% ownership, operation and control by the [] diversity classifications defined by the Small Business Administration[, including] minority, women, and/or other disadvantaged populations." AFL alleges that the program unlawfully limits eligibility by race and gender and precludes "white and/or male" individuals from participating, in violation of 42 U.S.C. § 1981.

On September 3, 2024, AFL announced that it had filed a federal civil rights complaint with the EEOC against Williams-Sonoma, Inc., alleging that the company sets diversity goals for hiring and promotion based on race and sex, in violation of Title VII. AFL also sent a letter to Williams Sonoma's board of directors demanding that the company end its allegedly discriminatory practices. The complaint references the company's 2024 Annual Report, which states that its Equity Action Plan has led to approximately 68.1% of the workforce identifying as female and about 41.1% identifying as a member of an ethnic minority group. AFL contends that the Equity Action Plan illegally tracks and sets goals for diversity among employees and board members. The complaint also criticizes statements on the company's website, including a goal to "consciously increase Black representation among our vendors, partners, and collaborators." Williams Sonoma has yet to respond to AFL's complaint.

Several elite colleges and universities in the United States have reported a decline in enrollment of minority students following the Supreme Court's *SFFA* decision striking down affirmative action in college admissions. Harvard University, Amherst College, Tufts University, and the Massachusetts Institute of Technology (MIT) all reported a decrease in the percentage in enrollment of Black students. At MIT, for example, the percentage of incoming Black students dropped from 15% to 5%. In addition, the percentage of Latino students decreased from 16% to 11%, while the percentages of white and Asian American students increased.

Media Coverage and Commentary:

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

- Washington Post, "Fearless Fund settles with DEI foes, ends grant program for Black women" (September 11): The Washington Post's Julian Mark and Taylor Telford report on the settlement between Fearless Fund, a venture capital firm started by Black women to invest in businesses owned by women of color (represented by Gibson Dunn, among others), and the American Alliance for Equal Rights (AAER), a conservative nonprofit organization. Mark and Telford say that, as part of the agreement, Fearless Foundation has decided to permanently close its Fearless Strivers grant contest, which previously awarded $20,000 grants to Black female-owned businesses. AAER, led by conservative activist Edward Blum, sued Fearless Fund on August 2, 2023, alleging discrimination against non-Black businesspeople. Alphonso David, one of Fearless Fund's attorneys, described the settlement as "narrow," and said that Fearless Fund's intent was to limit the case's impact to the Eleventh Circuit. Civil rights activist Reverend Al Sharpton, who has supported Fearless Fund since the outset, described the settlement as a "sacrifice," commenting that "if we had fought, and Blum and them wanted to go all the way to the Supreme Court, we'd have lost the fight for generations."

- Wall Street Journal, "Fearless Fund Shuts Down Grant Program for Black Founders After Legal Settlement; The outcome of a legal battle with Edward Blum's organization is a setback for diversity efforts in venture capital" (September 11): Yuliya Chernova of The

Wall Street Journal reports on the closure of Fearless Foundation's grant program for Black female entrepreneurs, which comes as part of a legal settlement with the American Alliance for Equal Rights. Chernova notes that the settlement has prompted concerns about the potential impact on other initiatives aimed at diversifying the venture capital industry. According to Chernova, venture-backed startups remain predominantly led by white men, and U.S. companies with at least one female founder have secured just 22.6% of all venture funding. Edward Blum, president of AAER, commented that "race-exclusive programs like the one the Fearless Fund promoted are divisive and illegal. Opening grant programs to all applicants, regardless of their race, is enshrined in our nation's civil rights laws and supported by significant majorities of all Americans." In response, Arian Simone, CEO of Fearless Fund, affirmed that her organizations will continue their efforts to help under-resourced entrepreneurs despite the program's closure.

- Financial Times, "Meet Robby Starbuck, the anti-woke activist who is shaking up boardrooms" (September 6): Taylor Nicole Rogers of The Financial Times reports on conservative activist Robby Starbuck's recent campaigns against corporate DEI initiatives. Known for his social media campaigns against a number of companies, Starbuck has now turned his focus to Molson Coors, the maker of Coors Light and Miller beers. As a result of his efforts, Rogers says that Molson Coors announced that it would no longer participate in the Human Rights Campaign's scoring system, which rates companies based on LGBTQ+ inclusion in the workspace, and that the company will eliminate its supplier-diversity goals. Rogers reports that Starbuck, who engages his 600,000 followers on X and employs two staff members to research companies' diversity efforts, has shifted his focus from companies with conservative customer bases to those with more neutral or diverse audiences. According to Starbuck, "The situation these companies are facing is a very different new world where I have a direct line to a sizeable portion of their customers. These customers are engaged and they now understand something very important: their wallets are a weapon."

- Bloomberg, “Investors Craft Counterattacks After Influencer’s Anti-DEI Blitz” (September 6): Bloomberg’s David Hood reports on the efforts by shareholder groups to reinstate DEI commitments at companies that have been targeted by conservative activist Robby Starbuck. Hood says that these groups are exploring a range of strategies—from proxy proposals to litigation—to restore DEI polices at companies attacked by Starbuck. Andy Behar, CEO of shareholder advocacy group As You Sow, indicated that his organization is considering helping investors launch campaigns to replace board members at companies that reversed course on DEI. Additionally, Brad Lander, New York City’s Comptroller, who oversees funds totaling nearly $500 million across seven companies targeted by Starbuck, stated that companies yielding to Starbucks’s demands should be “on notice” and warned that “we’re not going to stand by as folks with no track record in investing try to roll back proven strategies for advancing diversity of companies across the economy in effective ways.”

- Wall Street Journal, “Molson Coors Rolls Back DEI Initiatives” (September 3): The Wall Street Journal’s Joseph Pisani reports that Molson Coors, the maker of Coors Light and Miller beers, has decided to pull back on its diversity policies and initiatives. The company announced that it would no longer participate in the Human Rights Campaign’s scoring system, which rates companies based on LGBTQ+ inclusion in the workspace. Additionally, Pisani reports that Molson Coors will eliminate its supplier-diversity goals. Conservative activist Robby Starbuck claimed responsibility for the changes at Molson Coors, stating that he messaged company executives the week before the announcement. Molson Coors representatives indicated that this shift is intended to broaden its DEI efforts to ensure that all employees feel welcomed.

- CalMatters, “California may ban legacy admissions at colleges. The end of affirmative action is a reason why” (August 29): Mikhail Zinshteyn of CalMatters, a nonprofit news organization that covers California state politics and policies, reports that California’s legislature passed a bill on August 28, 2024, barring the state’s private nonprofit colleges from making admissions decisions based on whether family members of students donated money to the school or had attended the school themselves. If signed by Governor Newsom, California would join Illinois, Maryland, Virginia, and Colorado in banning legacy

preferences in admissions at either public or private institutions. Currently, only six private colleges in California use legacy as a factor in admissions, while no public colleges in the state do. If the bill becomes law, schools will be prohibited from considering an applicant's legacy or donor connections in admissions decisions starting September 1, 2025. Zinshteyn reports that the bill is intended to serve as "a necessary corrective" to the Supreme Court's ruling that banned colleges from using race as a factor in admissions. According to Democratic Assemblymember Phillip Ting, the bill is intended to "make sure that everyone's getting in because of their own merit, because of their grades, their test scores, what they provide to that institution, not because of their pocketbooks, of their parents or their family members."

- Forbes, "Chicago Bears Settle Lawsuit Over 'Legal Diversity Fellow' Role" (August 28): Forbes' Chris Deubert reports that the Chicago Bears have confidentially settled a lawsuit filed by Jonathan Bresser, a law student at DePaul University College of Law. Bresser challenged the constitutionality of the team's "Legal Diversity Fellow" program, which provided opportunities for local law students to work with the Bears' legal team and DEI department on various goals and initiatives. Deubert reports that the fellowship was open only to law students who are women or persons of color. Bresser, who is a white male, applied for the fellowship in November 2023 but was not selected. He subsequently filed a lawsuit in the U.S. District Court for the Northern District of Illinois, alleging that the Bears and several of its employees violated Title VII and its Illinois equivalent by not hiring him based on his race and gender. According to the court records, the matter was settled on August 27, 2024.

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:

- ***American Alliance for Equal Rights v. Southwest Airlines Co.,*** No. 24-cv-01209 (N.D. Tex. 2024): On May 20, 2024, American Alliance for Equal Rights (AAER) filed a complaint against Southwest Airlines, alleging that the company's ¡Latanzé! Travel Award Program, which awards free flights to students who "identify direct or parental ties to a specific country" of Hispanic origin, improperly discriminates based on race. AAER is seeking a declaratory judgment that the program violates Section 1981 and Title VI, a temporary restraining order barring Southwest from closing the next application period (set to open in March 2025), and a permanent injunction barring enforcement of the of the program's ethnic eligibility criteria.
    - **Latest update**: On August 22, 2024, Southwest filed a motion to dismiss, arguing that the case was moot because the company had signed a covenant with AAER that eliminated the challenged provisions from any and all future program

application cycles. The program is now open to students who are "enrolled at a college/university located at least 200 miles from a student's home" and is "not limited by race, ethnicity, or national origin." On August 29, 2024, the court stayed proceedings in the case, pending resolution of Southwest's motion to dismiss. Oral argument on the motion is scheduled for November 12, 2024.

2. Employment discrimination and related claims:

- ***Newman v. Elk Grove Education Association,*** No. 2:24-cv-01487 (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 under Title VII and California law, after the District 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.

    - **Latest update**: On August 26, 2024, the defendant filed a motion to dismiss, arguing that the plaintiff's claims are moot because the union "no longer has any position with any eligibility criteria that is based on race" and has replaced the BIPOC At-Large Director position with a new Racial Equity Director At-Large position that is open to all members regardless of race. The defendant also moved to dismiss the plaintiff's claims for punitive damages, arguing that he had not pled any facts sufficient to show malice, reckless indifference, or oppression. Oral argument on the hearing is scheduled for October 15, 2024.

- ***Harker v. Meta Platforms, Inc.,*** No. 23-cv-7865 (S.D.N.Y. 2023): A lighting technician who worked on a set where a Meta commercial was produced sued Meta and a film producers association, alleging that their diversity initiative Double the Line (DTL) violated Title VII, Sections 1981 and 1985, and New York law. The plaintiff also claimed that he was retaliated against after raising questions about the qualifications of a coworker hired pursuant to the DTL initiative. On December 19, 2023, the defendants moved to dismiss the plaintiff's first amended complaint. On January 25, 2024, the plaintiff filed his opposition to Meta's motion.

    - **Latest update**: On August 29, 2024, the court granted the defendants' motions to dismiss for lack of standing. The court reasoned that because the plaintiff did not apply, attempt to apply, or even express interest in applying for, a lighting technician position under the DTL program, he had not alleged any injury-in-fact sufficient to establish standing. The court further denied leave to amend the complaint and entered judgment closing the case.

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,

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 August 8, 2024, the court granted Governor Lee's motion to dismiss and entered judgment in the case, holding that Do No Harm had not demonstrated injury in fact.

    - **Latest update**: On August 30, 2024, Do No Harm appealed the district court's decision to the Sixth Circuit.

- ***Young Americans for Freedom v. United States Department of Education,*** No. 3:24-cv-00163 (D.N.D. 2024): On August 27, 2024, the University of North Dakota Chapter of Young Americans for Freedom (YAF) sued the U.S. Department of Education (DOE) over its McNair Post-Baccalaureate Achievement Program, a research and graduate studies grant program that supports incoming graduate students who are either low-income first-generation college students or "member[s] of a group that is underrepresented in graduate education." Relevant federal regulations define these underrepresented groups as "Black (non-Hispanic), Hispanic, American Indian, Alaskan Native, Native Hawaiians, and Native American Pacific Islanders." YAF alleges that the McNair program violates the Equal Protection Clause by restricting admission based on race, and violates the Administrative Procedure Act as an agency action that is "contrary to a constitutional right." See 5 U.S.C. § 706(2)(B). YAF requests, among other things, a preliminary injunction enjoining the DOE from enforcing all race-based qualifications for the McNair program.

    - **Latest update**: On September 4, 2024, YAF filed a motion for preliminary injunction, requesting that the court prevent the DOE from enforcing the racial and ethnic qualifications of the McNair program, and requiring the DOE to notify all participating institutions of higher education that they cannot impose or rely upon such classifications. YAF argues that the racial eligibility criteria fails the strict scrutiny test for affirmative action policies because the government did not have evidence of discrimination when it started the McNair program. The docket does not reflect that the DOE has been served.

4. Actions against Educational Institutions:

- ***Students for Fair Admissions v. United States Naval Academy***, No. 1:23-cv-02699 (D. Md. 2023): On October 5, 2023, Students for Fair Admissions (SFFA) sued the U.S. Naval Academy, arguing that consideration of race in its admissions process violates the Fifth Amendment. On December 20, 2023, the district court denied SFFA's preliminary injunction motion, holding that SFFA did not show that it would succeed on the merits of its Equal Protection claim because it failed to show that the defendants' justifications for their policies did not satisfy strict scrutiny.

    - **Latest update**: On August 15, 2024, SFFA filed a motion for partial summary judgment on the issue of standing, arguing that the four anonymous SFFA members, each of whom applied for admission at the Naval Academy but were denied, would have standing to sue in their own right. SFFA argued that each

member sustained an injury of being denied the opportunity to compete for admission to the Naval Academy on an equal basis and is "ready to apply" if the court redresses the issue. On August 23, 2024, the Naval Academy opposed the motion, urging the court to consider the issue of standing after trial because there are disputed issues of material fact as to whether SFFA members are "able and ready" to apply. On August 28, 2024, SFFA replied, arguing that the disputes over their members' "ability and readiness to apply" are not material or genuine, and therefore should not be a bar to granting partial summary judgment ahead of trial. A pretrial conference and hearing on motions in limine was held on September 5, 2024, and a bench trial is scheduled for September 16–27, 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.

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