

The top section of the document features a dark background with the text 'GIBSON DUNN' in white, bold, sans-serif font. To the right of the text is a large, abstract graphic consisting of overlapping, curved, translucent shapes in shades of blue, green, and purple, creating a tunnel-like effect.

# GIBSON DUNN

## DEI Task Force Update

September 26, 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 September 5, the Office of Federal Contract Compliance Programs (OFCCP) held an informal compliance [conference](#) with Sanofi Pasteur, Inc. to address a [complaint](#) made by America First Legal (AFL). AFL alleged that the Sanofi violated the Constitution by implementing in its contracts with the federal government a “Diverse Slate Policy,” which required Sanofi’s talent acquisition team to hire a certain percentage of women and people of color for leadership roles. AFL also filed a [complaint](#) with the EEOC, alleging that the “Diverse Slate Policy” violated Title VII of the Civil Rights Act of 1964. During the compliance conference with the OFCCP, Sanofi agreed that placement goals, utilization goals, and hiring benchmarks should “not be interpreted as a ceiling or floor for the employment of particular groups of persons,” but rather, should serve as benchmarks to measure representation in its workforce. Sanofi also agreed to assess its employment practices and remedy any potential discrimination.

The Sanofi logo is displayed in a bold, black, lowercase sans-serif font. A small purple dot is positioned above the letter 'i'.

On September 9, the Congressional Black Caucus (CBC) released a [corporate accountability report](#) focused on Fortune 500 companies' commitments to DEI and racial equity investments. The report found that most of the Fortune 500 companies that submitted responses to the CBC's questions remain committed to, and have made progress on, their goals regarding workplace diversity and racial equity, despite recent attacks in the wake of the *SFFA* decision. The report outlines 12 best practices and approaches implemented by various companies to promote DEI in their workplaces, which the CBC hopes will become standard practice across industries. The report was published almost a year after the CBC issued a corporate accountability letter, addressing attacks on DEI initiatives in the private sector and urging Fortune 500 companies to make public statements affirming their commitments to such initiatives.



On September 23, 2024, U.S. District Judge Gregory F. Van Tatenhove of the Eastern District of Kentucky issued a preliminary injunction against the U.S. Department of Transportation's Disadvantaged Business Enterprise ("DBE") program. Represented by the Wisconsin Institute for Law & Liberty, two non-minority contractors sued the Department of Transportation in October 2023, challenging the DBE program's purpose of directing at least 10% of federal transportation infrastructure funding to contracting firms owned by women and minorities. The DBE program is meant to combat statistical disparities and to remedy past and ongoing discrimination in the federally assisted transportation contracting market. The plaintiffs allege that the DBE program's race- and gender-based preferences violate the Constitution's equal protection guarantees. The court held that the plaintiffs would "likely win on the merits of their constitutional claims," and granted a partial preliminary injunction, preventing the Department of Transportation from using race- and gender-based criteria for contracts on which the two plaintiffs bid. The DBE program is the latest in a series of government affirmative action programs that have been enjoined on constitutional grounds.

### Media Coverage and Commentary:

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

- [Bloomberg Law, "Employer Cutbacks to Worker Diversity Groups Pose Legal Risks" \(September 10\)](#): Rebecca Klar of Bloomberg Law discusses the legal risks posed by the employers' decisions to restructure employee resource groups (ERGs) in response to backlash from anti-DEI activists including Robby Starbuck and America First Legal. Klar interviewed the former acting chair of the EEOC, Victoria Lipnic, who explained that the legality of ERGs likely depends "on how they were created, who is invited to join, and what is being offered." And while "most companies have been sophisticated" in their approach to ERGs, including making sure to welcome allies regardless of characteristics like race or sex, Lipnic says that companies thinking about restructuring their ERGs should "not lose sight that real discrimination still happens every day in the workplace" and should ensure the workplace is one of equal opportunity and free from discrimination.



- [Bloomberg Law, “Investors Push Deere to Explain DEI Rollbacks With New Bid” \(September 13\)](#): Bloomberg Law’s David Hood reports on shareholder advocacy group As You Sow’s recent proposal to John Deere in the wake of the company’s recent public rollback of certain of its DEI commitments. Hood says that Deere’s decision came on the heels of an aggressive media campaign by anti-DEI activist Robby Starbuck, who has used his social media platform to criticize corporations for their DEI efforts. As You Sow’s proposal asks Deere to provide “data about its recruitment, retention, and promotion” of its employees categorized by “ethnicity, gender and race.” With that information, the proposal says, investors can “assess and compare the effectiveness of companies’ efforts to ensure meritocratic workplaces through DEI efforts.”





- [The New York Times, “Yale, Princeton and Duke Are Questioned Over Decline in Asian Students” \(September 17\)](#): Writing for The New York Times, Anemona Hartocollis reports on Edward Blum’s recent threat of further litigation challenging race-based university admissions. Hartocollis says that Blum is now targeting institutions including Princeton, Duke, and Yale, which all reported a decline in the admission of Asian students in the past year. Blum claims that, “[b]ased on S.F.F.A.’s extensive experience,” the “racial numbers” at these top universities “are not possible under true neutrality” and warned that these universities “are now on notice” that more suits would soon follow. Princeton spokeswoman Jennifer Morrill stated that the university has “carefully adhered to the requirements set out by the Supreme Court,” while representatives from Yale and Duke did not comment. Professor William Jacobson of Cornell Law School predicts that Blum’s fight will now transition “away from policies to what is happening in admissions offices.”
- [AP News, “Major companies abandon an LGBTQ+ rights report card after facing anti-diversity backlash” \(September 17\)](#): AP News’s Cathy Bussewitz reports on companies’ recent decisions to no longer participate in the Human Rights Campaign’s Corporate Equality Index, which is a scorecard that grades corporate efforts to ensure “that gay lesbian, bisexual, transgender and queer employees did not face discrimination in hiring and on the job.” Bussewitz says that most companies’ decision to end their participation in the Index stems from “conservative activists who have threatened boycotts and firms such as the Wisconsin Institute for Law & Liberty that have challenged DEI programs.”

Jason Schwartz, co-chair of the Labor and Employment practice group at Gibson Dunn, observed that the “opponents to [DEI] efforts are winning the war of words, and they’ve got a lot of momentum in the courtroom, so I do think it’s a serious threat that needs to be responded to in a thoughtful way.”

- [BNN Bloomberg, “US Companies Nix Career Programs for Women Amid DEI Backslide” \(September 17\)](#): Writing for BNN Bloomberg, Kelsey Butler and Emily Chang report on studies from LeanIn and McKinsey, finding that companies’ “formal mentorship programs for women” have decreased from 48% in 2022 to 37% in 2024. Butler and Chang attribute the decline to the concerted efforts by conservative activists, including Robby Starbuck, Edward Blum, and Stephen Miller. According to Rachel Thomas, co-founder and CEO of LeanIn, “the pullback in commitments” is “one of the more concerning findings” from their studies, as DEI is “at a moment where companies have momentum in many areas and we need them to keep going.” To that end, Butler and Chang note that “there has been progress in representation of women in the highest rungs of corporate America,” with women now comprising “29% of C-suite positions, up from 17% in 2015.” But the authors of the studies believe this progress is fragile and call for companies to remain steadfast in their desire to ensure women have the support needed to climb the corporate ladder.
- [Bloomberg Law, “Caterpillar Joins Ford, Lowe’s in Diversity Rethink as Backlash Grows” \(September 19\)](#): Bloomberg Law’s Jeff Green and Sana Pashankar report on Caterpillar’s decision to pull back on certain diversity policies in response to anti-DEI social media campaigns by conservative activist Robby Starbuck. Green and Pashankar report that Caterpillar is “introducing new guidelines on external sponsorships and donations as part of a review of some of its DEI initiatives.” A company spokesperson, Joan Cetera, confirmed that Caterpillar met with Starbuck prior to announcing these changes. But Cetera clarified that certain measures, like the company’s withdrawal from the Human Rights Campaign’s Corporate Equality Index, were already in place before Starbuck set his sights on the corporation. Green and Pashankar note that Caterpillar’s “tweaks fall short of some of the more substantial changes made by companies like Tractor Supply Co.”
- [Fortune, “How Robby Starbuck is Taking Aim at DEI Programs of Fortune 500 Companies” \(September 19\)](#): Fortune’s Lila MacLellan reports on Robby Starbuck’s activism against “woke” workplace culture, including his campaigns against Tractor Supply, John Deere, Harley Davidson, and other companies. MacLellan notes that several of these companies have pulled back their support for the Human Rights Campaign’s Corporate Equality Index and events like Pride parades, and also have “dropp[ed] supplier diversity goals and chang[ed] the focus of their employee resource groups.” While Starbuck has claimed credit for changes to DEI policies at these companies, MacLellan says that many of them were planning to make these changes prior to any outreach from Starbuck. As Alphonso David, CEO of the Global Black Economic Forum, noted, “[W]e should be careful not to assume that [Starbuck’s] efforts are actually directly responsible for these changes.” MacLellan also reports on efforts to counteract Starbuck’s influence: for example, As You Sow, a nonprofit that promotes corporate responsibility through shareholder advocacy, has drafted a shareholder

proposal about John Deere's "ambiguous and inconsistent shift in policies and practices" regarding DEI.

## Case Updates:

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

### 1. Employment discrimination and related claims:

- ***Missouri v. Int'l Bus. Machs. Corp., No. 24SL-CC02837 (Cir. Ct. of St. Louis Cty. 2024)***: 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. 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.
  - **Latest update**: On September 13, 2024, IBM moved to dismiss the suit, arguing that the "plus" bonus is not a "rigid racial quota," but a lawful means of encouraging "permissible diversity goals." IBM also argued that the State failed to assert sufficient facts to show that the "plus" bonus influenced any employment decisions in Missouri. The State's opposition is due October 4, 2024.
- ***Diemert v. City of Seattle, et al., No. 2:22-cv-01640 (W.D. Wash. 2022)***: On November 16, 2022, the plaintiff, a white male, sued his former employer, the City of Seattle. The plaintiff alleged that the City's diversity initiatives, which allegedly included mandatory diversity trainings involving critical race theory and encouraging participation in "race-based affinity groups, caucuses, and employee resource groups," amounted to racial discrimination in violation of Title VII and the Fourteenth Amendment. The plaintiff also alleged that he had been subjected to a hostile work environment. On August 16, 2024, the City filed a motion for summary judgment, arguing that the plaintiff had "resigned voluntarily because he had already moved to Texas and did not wish to return to in-person work." The City further argued that while it required employees to complete two diversity activities per year, it did not penalize employees who did not fulfill the requirement.
  - **Latest update**: On September 7, 2024, the plaintiff filed his opposition to the motion for summary judgment, arguing that he experienced discrimination that the



City failed to remediate. On September 13, 2024, the City replied, contending that the plaintiff relied on allegations outside the record, experienced no adverse actions, and ignored the facts demonstrating the City's lack of discriminatory intent and efforts to support the plaintiff.

## 2. Actions against Educational Institutions:

- ***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 the 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 preference to “women, racial minorities, homosexuals, and transgender people when selecting their members and editors,” and when selecting articles to publish. FASORP is seeking to enjoin Northwestern from (1) considering race, sex, sexual orientation, or gender identity in the appointment, promotion, retention, or compensation of its law school 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 law school faculty candidates or applicants for the Law Review. FASORP also asked the court to order Northwestern to establish a new policy for selecting law school faculty and Law Review articles, editors, and members, and to appoint a court monitor to oversee all related decisions.
  - **Latest update**: On September 9, 2024, the university moved to dismiss the complaint for lack of standing and failure to state a claim. The university argues that FASORP lacks standing because it does not allege that any members are qualified and took steps to join the Law School's faculty, are qualified and took steps to submit articles to the Law Review, or are or were ever Northwestern students. The university also argues that even if FASORP has standing, the claims are outside the ambit of Title VI and Title IX, and the Section 1981-based claims are vague and conclusory. A telephonic hearing on the motion to dismiss is set for January 28, 2025.
- ***Sullivan v. Howard University, No. 1:24-cv-01924 (D.D.C. 2024)***: On July 1, 2024, a male administrator at Howard University who was transferred to another department filed suit against the university, bringing claims of sex discrimination and retaliation in violation of Section 1981, and sex discrimination, retaliation, and a hostile work environment in violation of the D.C. Human Rights Act (DCHRA).
  - **Latest update**: On September 16, 2024, Howard University filed a partial motion to dismiss, arguing for the dismissal of both claims brought under Section 1981 because it does not protect against sex-based discrimination, and the hostile work environment claim because the alleged conduct was not severe, pervasive, or even linked to the plaintiff's sex. The motion did not address the sex discrimination and retaliation claims brought under the DCHRA.
- ***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, claiming 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. On July 16, the court dismissed the individual defendants based on evidence showing they were not involved in the investigation or termination.

- **Latest update:** On September 12, 2024, the court granted the university's motion for summary judgment on the plaintiff's claims for wrongful termination and emotional distress, but otherwise denied the parties' cross-motions for summary judgment. The court determined that issues of material fact exist concerning plaintiff's claims for breach of contract, retaliation, defamation, and false light, which will proceed to a jury trial.

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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