

The logo for Gibson Dunn, featuring the name in a bold, white, sans-serif font against a dark background.

DEI Task Force Update

October 25, 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 October 15, 2024, Do No Harm filed a [complaint](#) against the University of Washington School of Medicine and various school officials, challenging the university’s networking directory that permits medical students who are “Black, Indigenous, or People of Color” to access a database of BIPOC physicians. Do No Harm claims that the directory improperly excludes white students and white physicians in violation of the 14th Amendment, Title VI, and the Affordable Care Act. Do No Harm is seeking a declaratory judgment, permanent injunction, and reasonable costs and expenses of the litigation.

On October 15, 2024, the American Alliance for Equal Rights (AAER) filed a Section 1981 complaint against Jopwell, a recruiting and job-posting platform that is allegedly open to “Black, Latinx, and Native American students and professionals.” The complaint alleges that the platform includes companies like Google and Blackrock and exists to create a “pipeline” of diverse talent for top employers. AAER filed suit on behalf of an anonymous college student who claims to meet all the

The logo for UW Medicine, featuring the text "UW Medicine" in a white serif font, with "UW SCHOOL OF MEDICINE" in a smaller white sans-serif font below it, all on a dark purple background.The logo for Jopwell, featuring the name "JOPWELL" in a bold, white, sans-serif font on a dark blue background.

nonracial eligibility criteria but says he could not access the full Jopwell platform after he identified himself as white and Asian during the registration process. AAER is seeking an injunction, declaratory judgment, and attorney's fees and costs.

On October 15, 2024, U.S. District Court Judge Reed O'Connor of the Northern District of Texas ordered supplemental briefing on the parties' request to approve a plea agreement in *U.S. v. The Boeing Company*, 4:21-cr-00005-O (N.D. Tex. Oct. 15, 2024), a case related to the 737 Max. The agreement provides that the government will appoint an independent compliance monitor. In his order, Judge O'Connor questioned a provision allowing the government to select a monitor with input from Boeing and "in keeping with the Department's commitment to diversity and inclusion." Judge O'Connor asked the government to elaborate on the definitions of "diversity" and "inclusion," and noted that both the DOJ and Boeing have publicly acknowledged their commitment to advance DEI. In his order, Judge O'Connor stated that Boeing has "aspirations" to "advance equity and diversity" that "include racial quotas," and that Boeing "ties executive compensation to achieving DEI goals." Judge O'Connor ordered the government and Boeing to submit supplemental briefing describing how the diversity provision in the plea agreement promotes safety and compliance efforts, what role Boeing's internal focus on DEI plays in its compliance and ethics obligations, and how the government and Boeing will use the diversity provision to appoint the monitor.

On October 22, 2024, AAER filed a complaint under Section 1983 against Jay Pritzker, the Governor of Illinois, and Kevin Huber, the Chairman of the Illinois Student Assistance Commission, alleging that the state's Minority Teachers of Illinois Scholarship Program violates the Equal Protection Clause by excluding non-minority students from the application and selection processes. AAER alleges the scholarship program, which defines "minority students" as "American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, or Native Hawaiian or Other Pacific Islander," is unconstitutional because the exclusion of potential applicants who are not racial minorities is not narrowly tailored to a compelling governmental interest. AAER is seeking an injunction, declaratory judgment, and attorney's fees and costs.



Media Coverage and Commentary:

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

- [Wall Street Journal, "Companies are Scrapping or Rolling Back DEI Grants" \(October 11\)](#): Ruth Simon and Theo Francis of *The Wall Street Journal* report that large companies are shrinking or winding down grant and other aid programs previously designed to help Black- and Hispanic-owned small businesses. While numerous aid programs had launched or expanded in 2020, many are now pulling back amid high-profile public pressure campaigns and legal threats. Of 60+ small-business grant programs that aid racial and ethnic minorities, the authors identified more than 40% that no longer exist, and another 27% that no longer consider race or ethnicity when making awards. Simon and Francis report that the change has been most prominent for programs supported by large

companies. Simon and Francis say that the funding gap may hit Black- and Hispanic-owned businesses especially hard, as data from the Federal Reserve shows that only a third of Black- or Hispanic-owned small businesses received the full amount of financing they applied for, compared to more than half of white business owners.

- [Washington Post, “Racism was called a health threat. Then came the DEI backlash.” \(October 11\)](#): *The Washington Post’s* Akilah Johnson reports that university researchers are being targeted for their work researching and teaching about the nexus between racism and health. Johnson says that these researchers, including at Tulane University School of Tropical Health and Medicine and University of Minnesota, initially experienced an outpouring of support for anti-racism research centers and programs in 2020, as racism was declared a public health threat. However, anti-DEI activists have criticized those same programs, including filing civil rights complaints targeted at programs such as the Minority Stroke Program and Minority Men’s Health Center at the Cleveland Clinic.
- [ABC News, “When DEI is gone: A look at the fallout at one Texas university” \(October 13\)](#): Kiara Alfonseca of *ABC News* reports on the impact of SB 17, a piece of legislation in Texas that bars DEI offices and programming at public higher education institutions. Alfonseca reports that DEI offices at University of Texas-Austin have been closed, staff have been terminated, and previously available resources have been discontinued. Texas Governor Greg Abbott previously stated the legislation was intended to prevent universities from using DEI offices to “advance political agendas and exclude conservative viewpoints on college campuses.” In response to SB 17, Alfonseca says that UT Austin terminated over 60 employees and eliminated targeted programming, such as support for undocumented students. According to Alfonseca, student organizations at UT Austin are trying to fill the gap and offer resources to their fellow Longhorns.
- [The New York Times Magazine, “The University of Michigan Doubled Down on DEI. What Went Wrong?” \(October 16\)](#): Nicholas Confessore of *The New York Times* reports on the frustration among students and faculty over the University of Michigan’s extensive DEI initiatives. Confessore interviewed more than 60 individuals connected with the university to understand the impact of its decade-long quarter-billion-dollar investment in DEI academic training, programming, and incorporation across disciplines, which it now calls its “DEI 1.0” strategy. Confessore says that the campus community criticized these efforts as lacking depth and failing to address specific issues, such as the low enrollment of Black students (just 5%), in a state where 14% of residents are Black. Students and faculty also expressed that the programming seems to create a framework for grievances rather than fostering genuine interaction and understanding among different groups. Nonetheless, amidst a national backlash against DEI initiatives, Confessore reports that Michigan is pushing forward with its “DEI 2.0” strategy, announced a year ago and instituted when school began this August.
- [AP News, “Members of Congress call on companies to retain DEI programs as court cases grind on” \(October 15\)](#): Cathy Bussewitz of *AP News* reports that a group of 49 House Democrats sent a letter to the leaders of the Fortune 1000, urging the businesses to retain their DEI programs in the face of recent DEI backlash. Bussewitz says that the letter was sent in response to several companies recently pulling back on their DEI initiatives in response to pressure from anti-DEI activists. According to Bussewitz,

corporations are also concerned about the growing number of reverse discrimination suits, and will be closely watching the Supreme Court's deliberations in *Ames v. Ohio Department of Youth Services*, where the plaintiff claims she was subject to employment discrimination because she is heterosexual. "The Supreme Court's interest in that case signals some potential that they're going to lower the bar," according to Jason Schwartz, co-chair of Gibson Dunn's Labor & Employment practice, who also notes that "[w]e already see a really massive uptick in these reverse discrimination cases."

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:

- ***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 30, 2024, FASORP filed an amended complaint, adding detailed allegations of plagiarism among candidates who were selected for Law School faculty positions and more comprehensive allegations of the Law Review's discrimination, which include details on the editor selection process based on personal statements, an article selection process based on author identity, and plagiarism in published articles. FASORP also added detail about three unnamed members who were allegedly wronged by the university. Finally, FASORP added a demand that the court enjoin Northwestern University from accepting any federal funds until it has ceased all alleged discriminatory practices.

2. Employment discrimination and related claims:

- ***Bradley, et al. v. Gannett Co. Inc.*, 1:23-cv-01100 (E.D. Va. 2023)**: On August 18, 2023, white plaintiffs sued Gannett over its alleged “Reverse Race Discrimination Policy,” claiming Gannett’s expressed commitment to having its staff demographics reflect the communities it covers violates Section 1981. On August 21, 2024, the court granted Gannett’s motion to dismiss, holding that Gannett’s diversity policy alone did not establish disparate treatment, since it did not define any specific goals or quotas. The court also held that each of the named plaintiffs had failed to state a claim for individual relief pursuant to Section 1981, and dismissed the class allegations because the class was not ascertainable and lacked commonality. On September 19, 2024, the plaintiffs filed a second amended complaint.
 - **Latest update**: On October 3, 2024, Gannett moved to dismiss the second amended complaint for failure to state a claim and a moved to dismiss or strike the class allegations. Gannett argued that because the plaintiffs did not amend any of their dismissed class allegations, the proposed class could not be certified for the reasons previously determined by the Court. Furthermore, the company argued that the plaintiffs’ allegations were again conclusory and simply recited the elements of the claim without providing any details about the allegedly discriminatory policy. The court set a hearing for November 6, 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, 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:

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