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DEI Task Force Update

December 19, 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 December 11 and 12, 2024, Do No Harm, represented by Consovoy McCarthy PLLC, filed two new lawsuits challenging scholarship programs. Do No Harm filed a complaint against the Society of Military Orthopaedic Surgeons ("SOMOS"), the U.S. Navy, and the Department of Defense, challenging a jointly-run scholarship program that allegedly provides funding to female students and students of racial backgrounds that are "underrepresented in orthopaedics." *See Do No Harm v. Society of Military Orthopaedic Surgeons*, No. 1:24-cv-03457-RBW (D.D.C. 2024). According to Do No Harm, the program excludes white, male applicants and therefore violates Section 1981 and the equal protection component of the Fifth Amendment. Do No Harm also filed a complaint against the University of Colorado challenging its Underrepresented Minority Visiting Elective Scholarship program. *See Do No Harm v. Univ. of Colorado*, No. 1:24-cv-03441 (D. Colo. 2024). The complaint alleges that the university provides a $2,000 scholarship to visiting medical students in its Radiation Oncology Department, and claims that the scholarship violates the Equal Protection Clause and Title VI

because it is only available to students who identify as Black, Native American, Hispanic/Latino, Pacific Islander, LGBT+, or who are from a disadvantaged socioeconomic background.

On December 2, 2024, the U.S. Department of Labor sent a letter to America First Legal (AFL), confirming that the Office of Federal Compliance Programs (OFCCP) "held an informal compliance conference with Southwest Airlines" in relation to a complaint AFL filed with the agency in January 2024. AFL's complaint quotes Southwest's public announcements concerning DEI and alleges that Southwest "appears to be unlawfully considering sex, race, and color in its hiring practices." According to DOL's letter, Southwest "understands that OFCCP regulations do not permit quotas, preferences, or set asides." The DOL letter references certain federal rules and regulations, including Executive Order 11246, which "requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment." The letter states that these rules and regulations operate as "benchmark[s]," and "are not to be interpreted as a ceiling or floor for the employment of particular groups of persons." The letter also represents that Southwest agrees to "take appropriate measures" and "remedy any unlawful discrimination" if it fails to meet a utilization goal or hiring benchmark. The letter states that "such remedies may include," among other things, "broadening recruitment and outreach to increase the diversity of applicant pools, and/or instituting training and/or apprenticeship programs to increase promotion opportunities and applications from underrepresented groups." On December 13, DOL sent a nearly identical letter to AFL in response to a similar complaint AFL filed against American Airlines.

On December 9, the Wisconsin Institute for Law & Liberty (WILL) sent a letter to the board of directors for the Green Bay Area Public School District, threatening legal action if the school district does not abandon an alleged discriminatory policy "prioritizing" literacy resources for Black, Hispanic, and Native American students. WILL claims that the district's policy violates Title VI and the Fourteenth Amendment. WILL sent the letter on behalf of a mother of a white student "who suffers from dyslexia" and has allegedly received "less favorable" educational services because of the district policy.

On December 9, the U.S. Supreme Court voted 7-2 to deny a petition for review of the temporary COVID-19-era admissions policy implemented at three competitive Boston public schools. *Boston Parent Coalition for Academic Excellence Corp. v. School Comm. for the City of Boston et al.*, No. 23-1137 (2024). Under the policy, 80% of admissions spots were allocated to high-performing students in Boston zip codes with the lowest median family incomes. The policy resulted in fewer admissions for white and Asian American students, and a parent coalition sought reversal of the First Circuit's decision that the policy did not violate the Fourteenth Amendment's Equal Protection Clause. The First Circuit had affirmed the district court's finding that the Coalition failed to show any relevant disparate impact on white and Asian American students, holding that the policy considered geography, family income, and the student's GPA—not race—in selecting students for admission. Dissenting from the Court's decision not to hear the case, Justice Alito, joined by Justice Thomas, wrote that the First Circuit's decision was flawed because Boston's

policy intentionally discriminated against white and Asian students, citing evidence that the Boston School Committee "put race front and center when it came time to vote on the proposal several weeks later," including "kick[ing] off with a lengthy statement from 'anti-racist activist' Dr. Ibram X. Kendi." According to Justice Alito, the Committee Chairperson "mocked th[e] names" of three citizens who spoke at the public meeting and "whose names suggested they were of Asian descent." Justice Alito also cited a series of allegedly anti-white text messages sent by members of the school committee. Justice Gorsuch wrote separately explaining his concurrence in the Court's denial of certiorari, stating that although he shares Justice Alito's "significant concerns," Boston had already "replaced the challenged admissions policy." Justice Gorsuch stated that "lower courts facing future similar cases would do well to consider" the issues raised in Justice Alito's concurrence.

On December 10, Students for Fair Admissions (SFFA) filed a complaint against the United States Air Force Academy in the U.S. District Court for the District of Colorado, alleging that the Academy considers race in admissions decisions in violation of the equal protection component of the Fifth Amendment. *Students for Fair Admissions v. U.S. Air Force Acad.*, No. 1:24-cv-03430 (D. Colo. Dec. 10, 2024). SFFA alleges that the Academy impermissibly considers the race of applicants to achieve explicit statistical goals for the racial makeup of each incoming class. SFFA claims that the Academy's admissions decisions "treat race as a 'plus factor,'" in violation of *Students for Fair Admissions v. President & Fellows of Harvard College*. SFFA also alleges that the Academy's justifications for considering race in admissions—that prioritizing diversity assists with recruiting and retaining top talent and preserves unit cohesion and the Air Force's legitimacy—are flawed and not meaningfully furthered by the Academy's admissions policies. SFFA seeks both declaratory relief and a permanent injunction preventing the Academy from considering race in admissions.

On December 11, the Fifth Circuit, sitting *en banc*, vacated an SEC order approving Nasdaq's Board Diversity Rules, which required listed companies to disclose board diversity information and to either have at least two board members who satisfied Nasdaq's definition of "diverse" or to explain why they do not. Writing for a 9-8 majority, Judge Oldman stated that the SEC acted arbitrarily and capriciously in concluding that the Rules were consistent with disclosure requirements of Sections 6(b)(5) and 6(b)(8) of the Securities Exchange Act of 1934 (the "Act"), thus triggering approval under Section 19(b)(2)(C)(i). The *en banc* majority held that the Rule was not "related to the purposes of the Act simply because it would compel disclosure of information about exchange-listed companies" and that, instead, it must relate to the Act's primary purpose of "limiting speculation, manipulation, and fraud, and removing barriers to exchange competition." The court concluded that the Rule is satisfied only "investor demand for any and every kind of information about exchange-listed companies" and that such a purpose was "not remotely similar" to the goals of the Act. In addition, the court held that there was little support for the assertion of a link between the "racial, gender, and sexual composition of a company's board and the quality of its governance." As further support for its holding, the majority held that the major-questions doctrine foreclosed the SEC's interpretation of the Act, reasoning that the Rule involves a novel exercise of statutory power on one of the most "politically divisive issues in the Nation." In

dissent, Judge Higginson concluded that it "was not arbitrary and capricious for the SEC to allow, as consistent with the purposes of the Act, this private ordering disclosure rule about corporate leadership composition" in light of the record evidence indicating investor interest in board diversity. In a press statement, Nasdaq indicated that it will not seek further review of the Fifth Circuit's decision. Gibson Dunn represented Nasdaq in this matter.

On December 11, a South Carolina resident of Chinese, Cuban, and Spanish descent filed a complaint against Governor Henry McMaster in federal court, alleging that membership on the state's Commission for Minority Affairs is unlawfully restricted on the basis of race. Under South Carolina Code Section 1-31-10, the Governor is responsible for appointing the Commission's nine members, of whom a "majority . . . must be African American." The plaintiff, who alleges she "is ready, willing, and able to serve" on the Commission, seeks declaratory and injunctive relief on the ground that the racial quota violates the Fourteenth Amendment.

The Equal Protection Project (EPP) has filed civil rights complaints with the U.S. Department of Education's Office for Civil Rights (OCR) against three public universities. On November 14, the EPP challenged the University of Minnesota College of Design's "BIPOC Design Justice Initiative" as unlawfully discriminatory under the Fourteenth Amendment and Title VI because it allegedly "conditions eligibility for participation" on "a student's race, ethnicity, and skin color." The organization filed a similar Title VI and Fourteenth Amendment challenge against Northern Illinois University's Center for Black Studies, which sponsors and promotes the "Black Male Achievement Program" and "Black Male Initiative." And on December 11, EPP filed a complaint against the University of Rhode Island for offering 51 different scholarships that "discriminate based on race and/or sex" in alleged violation of Title VI, Title IX, and the Fourteenth Amendment.

On December 10, EPP received a letter from OCR providing notice of OCR's dismissal of EPP's complaint against Western Kentucky University. EPP had alleged that Western Kentucky's Athletics Minority Fellowship discriminated based on race and national origin, but OCR dismissed the complaint after Western Kentucky discontinued the Fellowship and removed any reference to it from the university's website.

Media Coverage and Commentary:

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

- Law360, "DEI Attacks, Hybrid Work, Paid Leave: 2024's Workplace Shifts" (December 18): Law360's Anne Cullen reports on the "major evolutions in workplaces in 2024," including a dramatic escalation in challenges to employers' diversity, equity and inclusion programs. According to Jason Schwartz, co-leader of Gibson Dunn's labor and employment practice group, "[t]here's been a huge demand for DEI-related advice and a huge uptick in DEI-related litigation." Cullen notes that Gibson Dunn's DEI Task Force is tracking 58 DEI-related cases filed in 2024 alone, and Schwartz predicts that lawsuits seeking to dismantle workplace DEI efforts "will be even more accelerated next year." Schwartz says that "[t]here's a lot of interest by clients to do audits of their DEI programs to make sure they're compliant and they're not taking on too much risk in the current

environment," but he notes that most employers "are revising their programs and communications, but not completely backing away."

- Reuters, "DOJ v. DEI: Trump's Justice Department Likely to Target Diversity Programs" (December 10): Andrew Goudsward of *Reuters* reports that President-elect Donald Trump is expected to throw the weight of the Justice Department behind challenges to DEI programs in higher education. Goudsward reports that Trump has tapped lawyer Harmeet Dhillon to oversee the DOJ's Civil Rights Division, which was created in 1957 to enforce federal antidiscrimination laws. In announcing Dhillon's nomination, Trump emphasized her past work "suing corporations who use woke policies to discriminate against their workers." Goudsward speculates that Dhillon's appointment may not have a direct effect on private entities' DEI programming, as the Division generally lacks the authority to enforce federal antidiscrimination laws against private employers. Goudsward also writes that the Equal Employment Opportunity Commission—the sole federal agency with that power—may retain a Democratic majority until 2026. However, Goudsward notes that the Division "can bring employment discrimination cases against state and local governments."

- The Guardian, "Trump Promises a Crackdown on Diversity Initiatives. Fearful Institutions Are Dialing Them Back Already" (December 5): Reporting for *The Guardian*, Alice Speri writes that institutions are bracing for an increase in threats to DEI initiatives under the incoming presidential administration. Speri says that President-elect Donald Trump and his advisors have threatened to withhold funding from universities that maintain DEI initiatives, and have "pledged to dismantle diversity offices across federal agencies, scrap diversity reporting requirements and use civil rights enforcement mechanisms to combat diversity initiatives." According to Speri, this messaging has led institutions to reevaluate their programming, with some worrying that the federal policies will have a "domino effect on other states, on foundations, [and] on individual donors." David Glasgow, the executive director of the Meltzer Center for Diversity, Inclusion, and Belonging, says that "people who do this work are nervous and anxious about what might be restricted but their commitment is still there, so it's really about trying to figure out what they're going to be able to do."

- PoliticoPro, “Companies Feel the Squeeze As Republicans Intensify Attacks on ESG, DEI” (December 10): *Politico*’s Jordan Wolman reports that companies continue to reassess and scale back DEI and environmental sustainability efforts in anticipation of increased hostility under the upcoming Trump administration and Republican Congress, as well as in response to “questions about companies’ ability to articulate clear financial justifications for such programs.” An October report from nonprofit think tank The Conference Board reveals that although companies are walking back public discussion of and support for DEI initiatives, many of their actual diversity efforts will remain in place: the study found that 60 percent of executives view the political and social climate as challenging, yet fewer than 10 percent of firms plan to reduce DEI resources over the next three years.

- National Bureau of Economic Research (NBER), “Long-Term Effects of Affirmative Action Bans” (December 1): *NBER*’s Leonardo Vasquez reports on new research on state-level bans of affirmative action in higher education. Economists Francisca M. Antman (University of Colorado), Brian Duncan (University of Colorado), and Michael Lovenheim (Cornell University) examined outcomes for underrepresented groups in four states—Texas, California, Washington, and Florida—that have implemented affirmative action bans. Antman, Duncan, and Lovenheim found the bans were correlated with reduced educational attainment for Black and Hispanic students, and some labor market consequences. For example, according to the authors, in states with bans, Hispanic women were less likely to complete college, earned less, and had lower employment rates than peers in states without bans. Black men, on the other hand, reportedly had higher employment rates and earned more relative to white men. However, the researchers cautioned that other contextual factors are at work in determining the impact of affirmative action bans on college attendance.

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:

- ***Alexandre v. Amazon.com, Inc.***, No. 3:22-cv-1459 (S.D. Cal. 2022); No. 24-3566 (9th Cir.): On September 29, 2022, white, Asian, and Native Hawaiian plaintiffs, on behalf of a putative class of past and future Amazon "delivery service partner" program applicants, challenged an Amazon program that provides $10,000 grants to qualifying delivery service providers who are "Black, Latinx, and Native American entrepreneurs." Plaintiffs alleged the program violates California state anti-discrimination laws. On May 23, 2024, Judge Michael M. Anello granted Amazon's motion to dismiss based on the plaintiffs' lack of standing and failure to state a claim. The plaintiffs appealed to the Ninth Circuit.
    - **Latest update:** On December 4, 2024, Amazon filed its answering brief arguing that the district court properly held that the plaintiffs lacked standing, and that even if they had standing, they failed to state a claim. On December 11, a coalition of organizations led by the Lawyers' Committee for Civil Rights Under Law filed an amicus brief in support of Amazon, arguing that the plaintiffs lack standing and that allowing the claims to proceed would undermine the congressional intent of Section 1981.
- ***Do No Harm v. Lee II***, No. 3:24-cv-01334 (M.D. Tenn. 2024): On November 7, 2024, Do No Harm sued Tennessee Governor Bill Lee, seeking to enjoin Tennessee laws that require the governor to consider racial minorities for appointment to the Board of Chiropractic Examiners and the Board of Medical Examiners. Do No Harm alleges that this racial consideration requirement violates the Equal Protection Clause. This case mirrors *Do No Harm v. Lee*, currently on appeal in the Sixth Circuit, which seeks to enjoin a law requiring consideration of racial minority candidates for the Board of Podiatric Medical Examiners (No. 3:23-cv-01175-WLC (M.D. Tenn. 2023)).
    - **Latest update:** On December 5, 2024, Do No Harm moved for a preliminary injunction.
- ***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, unlawfully discriminates based on race. AAER seeks 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 program's ethnic eligibility criteria. On August 22, 2024, Southwest moved to dismiss, arguing that the case was moot because the company had signed a covenant with AAER that eliminated the challenged provisions from future program application cycles.

- **Latest update**: On December 6, 2024, the court granted in part and denied in part Southwest's motion to dismiss. The court concluded that Southwest's covenant to eliminate the program rendered moot any claims for declaratory or injunctive relief. However, the court held that it had jurisdiction over the plaintiff's claims for one cent in nominal damages and allowed those claims to proceed. The court rejected Southwest's argument that Southwest mooted those claims through an "unsuccessful tender of one cent to [AAER]."

- ***Landscape Consultants of Texas, Inc. v. City of Houston***, No. 4:23-cv-3516–DH (S.D. Tex. 2023): White-owned landscaping companies challenged the City of Houston's government contracting set-aside program for "minority business enterprises" as violating the Fourteenth Amendment and Section 1981.

    - **Latest update**: On November 29, 2024, plaintiffs and Defendant Midtown Management District filed cross-motions for summary judgment. Midtown Management argued that the plaintiffs failed to show the constitutionality of the programs. The City of Houston filed its own motion for summary judgment on November 30, contending that the plaintiffs lack standing and that the programs satisfy the requirements of the Equal Protection Clause.

2. Employment discrimination and related claims:

- ***Smith v. Ally Financial Inc.***, 3:24-cv-00529 (W.D.N.C. 2024): A former employee sued Ally Financial Inc., asserting violations of Title VII and Section 1981. The plaintiff claims that Ally failed to promote him, instead promoting a white woman, a Black woman, and a Black man. The plaintiff also claims that Ally executives unlawfully considered race and gender when making promotion and hiring decisions, pointing to a statement on the company's website describing Ally's goal to achieve "a collective environment of different voices and perspectives."

    - **Latest update:** On December 10, 2024, the plaintiff filed a stipulation of voluntary dismissal of all claims based on alleged emotional injuries or pain and suffering. The plaintiff's claims for damages based on lost wages and loss of professional and career development opportunities remain pending.

3. Board of Director or Stockholder Actions:

- ***Craig v. Target Corp.***, No. 2:23-cv-00599-JLB-KCD (M.D. Fl. 2023): America First Legal sued Target and certain Target officers on behalf of a shareholder, claiming the board falsely represented that it monitored social and political risk, when instead it allegedly focused only on risks associated with not achieving ESG and DEI goals. The plaintiffs allege that Target's statements violated Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 and that Target's May 2023 Pride Month campaign triggered customer backlash and a boycott that depressed Target's stock price.

- **Latest update:** On December 4, 2024, the district court denied defendant's motion to dismiss, concluding that the plaintiffs sufficiently pleaded both their Section 10(b) and Section 14(b) claims.

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, Cate McCaffrey, Alana Bevan, Jenna Voronov, Emma Eisendrath, Felicia Reyes, Allonna Nordhavn, Janice Jiang, Laura Wang, Maya Jeyendran, Kristen Durkan, Ashley Wilson, Lauren Meyer, Kameron Mitchell, Chelsea Clayton, Albert Le, Emma Wexler, Heather Skrabak, and Godard Solomon.

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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