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DEI Task Force Update

December 4, 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 November 25, Walmart confirmed to the Associate Press plans to rework its DEI policies in response to a threatened boycott campaign by Robby Starbuck, an anti-DEI activist. Walmart confirmed that it would remove the term "DEI" from internal communications and replace it with "belonging." The retailer also confirmed that it will discontinue DEI training offered by the Racial Equity Institute; will not consider race and gender when choosing suppliers; and will put guardrails on which community events, such as drag shows and Pride events, it supports through grants. Walmart will also end its participation in the Human Rights Campaign's Corporate Equality Index, which surveys corporate practices related to the LGBTQ+ community. While Starbuck claimed credit for these policy changes, a company spokesperson said that the changes have been in progress for a while. Addressing these changes, the company said in a statement, "We've been on a journey and know we aren't perfect, but every decision comes from a place of wanting to foster a sense of belonging, to open doors to opportunities for all our associates, customers and suppliers and to be a Walmart for everyone."

On November 20, a shareholder brought a derivative action against athletic apparel brand Lululemon in the U.S. District Court for the Southern District of New York, claiming that the company's leadership concealed inventory allocation problems and made false statements about the company's new "Inclusion, Diversity, Equity, and Action" (IDEA) program that artificially inflated the stock price. *Shane Kanaly v. Calvin McDonald et al.*, No. 1:24-cv-08839 (S.D.N.Y 2024). Lululemon announced the IDEA program in October 2020, saying the company would aim to reflect "the diversity of the communities the company serves and operates in around the world by 2025." The complaint alleges that, in reality, the IDEA program was not structured to combat discrimination within Lululemon in any meaningful way, with employees of color continuing to experience harmful bias at work. The complaint refers to a November 2023 news article containing interviews with more than a dozen former Lululemon employees who said the company's corporate culture is hostile to Black employees. The complaint also alleges that the company's eleven-person board never had more than two racially diverse members during the relevant period and that the company's financial statements were silent on racial diversity goals.

On November 18, a former employee of the Federal Reserve Board sued the Chair of the Federal Reserve, the Chief Operating Officer, and four Federal Reserve supervision officials, alleging he faced discrimination on the basis of his religion, race, gender, and sexual orientation in violation of his rights under Title VII of the Civil Rights Act and under the Age Discrimination in Employment Act. *Bobowicz v. Powell et al.*, No. 5:24-cv-00246 (W.D.N.C. 2024). The plaintiff claims he was discriminated against due to his religious beliefs, which precluded him from receiving the COVID-19 vaccination. He further alleges he became "a target for termination" because he was "a heterosexual, white, male who was the oldest employee in both his local and national [teams]." In addition to damages, reinstatement, and front and back pay, the plaintiff seeks a declaration that the Federal Reserve's diversity initiatives violate the Fourteenth Amendment's equal protection clause.

On November 13, an Austin-based aerospace staffing agency sued Texas Governor Greg Abbott and Texas Comptroller Glenn Hegar in the U.S. District Court for the Western District of Texas, alleging that the state's Historically Underutilized Business (HUB) Program violates the Equal Protection Clause of the Fourteenth Amendment and Section 1981. *Aerospace Solutions LLC v. Abbott et al.*, No. 1:24-cv-01383 (W.D. Tex. 2024). The HUB Program designates that a percentage of the state's contract budget will be awarded to minority-owned businesses, which are defined as companies that are at least 51% owned by individuals from certain designated minority groups. The staffing agency alleges that this unconstitutionally prevents non-minority businesses from submitting competitive bids for certain contracts. The staffing agency is seeking a declaration that the HUB Program is unconstitutional and an injunction preventing its operation, along with attorneys' fees and costs.

On October 1, the advisory firm Teneo released a report on the evolution of corporate DEI disclosures, based on a review of DEI-related disclosures in 250 sustainability reports published by S&P 500 companies between January and June of 2024. Teneo found that 43% of companies included quantitative DEI goals in their sustainability reports. These quantitative goals included representation goals (present in 33% of company disclosures) and supplier diversity goals (present in 14% of company disclosures). Twenty-three percent of reports also include other DEI goals such as goals for hiring from Historically Black Colleges and Universities and for investing in underrepresented communities.

Media Coverage and Commentary:

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

- Associated Press, "Walmart's DEI rollback signals a profound shift in the wake of Trump's election victory" (November 26): Alexandra Olson and Cathy Bussewitz write that Walmart has announced changes to some of its DEI initiatives following scrutiny by anti-DEI activist Robby Starbuck, whose public criticisms of corporate diversity initiatives have garnered increasing media attention in recent months. Olson and Bussewitz report that on Monday, Starbuck posted on X (formerly Twitter), claiming that he told Walmart executives last week that he was "doing a story on wokeness there" and that the company agreed to several changes to its programming to avoid the ensuing public scrutiny. In a statement, Walmart confirmed the changes to its programming but said these changes were underway before discussions with Starbuck occurred. Jason Schwartz, co-chair of Gibson Dunn's Labor & Employment practice group, says the upcoming change in administration will likely cause more companies to revisit their DEI initiatives. "The impact of the election on DEI policies is huge. It can't be overstated," said Schwartz. "Companies are trying to strike the right balance to make clear they've got an inclusive workplace where everyone is welcome, and they want to get the best talent, while at the same time trying not to alienate various parts of their employees and customer base who might feel one way or the other. It's a virtually impossible dilemma."

- USA Today, “RIP DEI? The war on ‘woke’ America has a new commander-in-chief” (November 22): USA Today’s Jessica Guynn reports that the Trump administration and Republican majorities will put DEI programs “on the chopping block.” Guynn describes the recent election as a “DEI referendum,” as corporate diversity efforts face increasing scrutiny from right-wing entities. Guynn says that conservative think tanks—including the Heritage Foundation in its Project 2025 roadmap—have recommended a host of anti-DEI measures, from removing DEI terms from federal legislation, rules, contracts, and grants, to directing the Justice Department to investigate diversity programs. According to Guynn, public sentiment has also shifted. A November 2024 Pew Research Center survey shows a decline in support for DEI among workers: 52% of those surveyed view DEI positively, down from 56% last year, while those viewing it negatively rose from 16% to 21%. Joelle Emerson, CEO of diversity strategy and consulting firm Paradigm, believes the impact of the election and a second Trump presidency remains to be seen. Emerson noted that while corporations may publicly distance themselves from the DEI debate, most continue to pursue diversity-based efforts, including expanding candidate pools and developing mentorship and coaching programs accessible to all.

- Wall Street Journal, “Christopher Rufo Has Trump’s Ear and Wants to End DEI for Good” (November 25): The Wall Street Journal’s Douglas Belkin profiles Christopher Rufo, a documentary filmmaker and writer who opposes DEI efforts in schools, businesses, and government. Belkin says that President-elect Trump has invited Rufo to Mar-a-Lago to present a plan to “geld American universities” into dropping DEI programs. “It’s time to really put the hammer to these institutions and to start withdrawing potentially billions of dollars in funding until they follow the law,” Rufo told Belkin, concluding that organizations “can prioritize excellence or diversity, but not both simultaneously.” According to Belkin, this is not the first time Donald Trump has called on Rufo for guidance: in 2020, Rufo advised Trump on an executive order banning race or sex stereotyping in the federal government.

- Law360, “Cruz Calls Digital Equity Program Rules ‘Unlawful’” (November 25): Law360’s Christopher Cole reports that Senator Ted Cruz (R-Texas) sent two letters to Alan Davidson, chief of the National Telecommunications and Information Administration (NTIA), a branch of the Commerce Department responsible for pass-through internet access grants to the states. Cruz, incoming chair of the Senate Commerce Committee, criticized NTIA’s administration of two grant programs—both created under the bipartisan Infrastructure Investment and Jobs Act—that aim to increase access to broadband service to underserved areas. Cole says that Cruz is challenging the grant programs as unlawfully discriminatory because they require funds be used to serve members of “covered populations,” a term defined to include racial and ethnic minorities. A spokesperson for the Affordable Broadband Campaign says Cruz has “ignored” that the

grant programs also cover veterans, aging and disabled individuals, and people in rural areas, and that Texas will soon receive $55 million in funding for its own digital equity program.

- Harvard Business Review, "What Trump's Second Term Could Mean for DEI" (November 14): New York University's Kenji Yoshino, David Glasgow, and Christina Joseph discuss the anticipated effect of the upcoming Trump Administration on DEI initiatives. According to the authors, the incoming administration is expected to employ various strategies to dismantle DEI initiatives, including issuing executive orders to eliminate programs that promote DEI. Project 2025's anti-DEI agenda includes abolishing DEI offices within the federal government and amending anti-discrimination laws to remove "disparate impact" liability. The authors suggest that companies seeking to continue advancing LGBTQ+ diversity and inclusion "in this daunting environment" can adopt one of three approaches depending on their risk tolerance: (a) adhering their policies to local norms and laws, even if that causes them to somewhat dilute their DEI efforts, (b) adopting pro-LGBTQ+ policies internally to create a "safe haven" in the workplace, but without pushing for wider change in society, or (c) using their influence to shift norms and laws in their community in a pro-LGBTQ+ direction.

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:

- ***Strickland et al. v. United States Department of Agriculture et al.*, 2:24-cv-00060-Z (N.D. Tx 2024):** On March 3, 2024, plaintiff farm owners sued the USDA over the administration of relief programs that allegedly allocated funds based on race or sex. The plaintiffs alleged that only a limited class of socially disadvantaged farmers, including certain races and women, qualify for funds under these programs. On June 7, 2024, the court granted in part the plaintiff's motion for a preliminary injunction. The court enjoined the defendants from making relief payments based directly on race or sex. However, the court allowed defendants to continue to apply their method of appropriating money, if done without regard to the race or sex of the relief recipient.
    - **Latest update:** On November 14, 2024, the USDA filed a motion for summary judgment. The USDA made two primary arguments: 1) its method of appropriating money is race and sex neutral; and 2) where it has directly taken into account race or sex, it has permissibly done so in order to remedy the lingering effects of historical discrimination, which would satisfy strict scrutiny.

2. 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, 2024, the State of Missouri filed a complaint against IBM in state court, alleging that the company violates the Missouri Human Rights Act by using race and gender quotas in its hiring and by 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 to receive a "plus" on their bonus. The complaint also alleges that employees at IBM have been fired or otherwise suffered adverse employment actions because they failed to meet or exceed these targets. The Missouri Attorney General seeks to permanently enjoin IBM and its officers from utilizing quotas in hiring and compensation decisions. 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 Missouri failed to assert sufficient facts to show that the "plus" bonus influenced any employment decisions in the state.
    - **Latest update:** On November 8, 2024, the State of Missouri filed a "Suggestions in Opposition" to IBM's motion to dismiss. Missouri first argued that IBM's arguments are merits questions that cannot yet be addressed at the motion to dismiss stage. Missouri then argued that if the court considers the merits questions, it should hold that IBM's racial quotas are unlawful in light of the Missouri Human Rights Act and the Supreme Court decision in *Students for Fair Admissions*.

- ***Haltigan v. Drake*, No. 5:23-cv-02437-EJD (N.D. Cal. 2023):** A white male psychologist sued the University of California Santa Cruz, arguing that the school imposed a "loyalty oath" on prospective faculty candidates in violation of the First Amendment by requiring them to submit statements explaining their views on DEI. The plaintiff claimed that because he is "committed to colorblindness and viewpoint diversity"—which he alleged contradicts the University's position on DEI—the University would compel him to alter his political views in order to obtain a faculty position. The plaintiff sought a declaration that the University's DEI statement requirement violates the First Amendment and a permanent injunction against the enforcement of the requirement. On January 12, 2024, the district court granted UC Santa Cruz's motion to dismiss with leave to amend. On March 1, 2024, the defendant moved to dismiss the plaintiff's second amended complaint, arguing that the plaintiff lacks standing and failed to state claims of either First Amendment viewpoint discrimination or compelled speech.
    - **Latest update:** On November 15, 2024, the district court granted UC Santa Cruz's motion to dismiss the second amended complaint with leave to amend, finding that the plaintiff failed to cure the deficiencies identified in the court's previous order. First, the court rejected the plaintiff's claim that he had "competitor standing" because he failed to allege that he undertook any preparations specifically in anticipation of applying for the position or any other employment at UC Santa Cruz. Second, the court reaffirmed its initial finding that the plaintiff had not sufficiently alleged that it would be futile to apply without a DEI statement because the plaintiff's own allegations demonstrated that the University could have advanced plaintiff's application based on his academic and research accomplishments. Finally, the court found that the plaintiff's argument that the University will inevitably post another opening that plaintiff is qualified for was speculative and insufficient to show an imminent injury.
- ***Langan v. Starbucks Corporation*, No. 3:23-cv-05056 (D.N.J. 2023):** On August 18, 2023, a white, female former store manager sued Starbucks, claiming she was wrongfully accused of racism and terminated after she rejected Starbucks' attempt to deliver "Black Lives Matter" T-shirts to her store. The plaintiff alleged that she was discriminated and retaliated against based on her race and disability as part of a company policy of favoritism toward non-white employees. On July 30, 2024, the district court granted Starbucks' motion to dismiss, agreeing that the plaintiff's claims under the New Jersey Law Against Discrimination were untimely and that she failed to sufficiently plead her tort or Section 1981 claims. The court found that she failed to allege that her termination was based on anything other than her "egregious" discriminatory comments and her violation of the company's anti-harassment policy. On August 11, 2024, the plaintiff filed an amended complaint. On November 8, 2024, the defendant moved to dismiss the amended complaint, arguing that the additional facts alleged to explain plaintiff's untimeliness—specifically, her difficulty obtaining a right to sue letter—were insufficient to state a claim.
    - **Latest update:** The plaintiff filed her opposition to the motion to dismiss on November 25, 2024, arguing that her claims are timely under the doctrine of equitable tolling. Plaintiff also argued that she sufficiently alleged facts to support

her claims of intentional infliction of emotional distress, racial discrimination, retaliation, and negligent retention, supervision, and hiring.

- ***Dill v. International Business Machines, Corp.*, No. 1:24-cv-00852 (W.D. Mich. 2024):** On August 20, 2024, America First Legal filed a reverse discrimination suit against IBM on behalf of a former IBM employee, alleging violations of Title VII and Section 1981. The plaintiff claims that IBM placed him on a performance improvement plan as a "pretext to force him out of [IBM] due to [its] stated quotas related to sex and race." The plaintiff seeks back pay, damages for emotional distress, and a declaratory judgment that IBM's policies violate Title VII and Section 1981. The complaint cites to a leaked video in which IBM's Chief Executive Officer and Board Chairman, Arvind Krishna, allegedly states that all executives must increase representation of underrepresented minorities on their teams by 1% each year to receive a "plus" on their bonuses.
    - **Latest update:** On November 20, 2024, Dill responded to IBM's motion to dismiss, arguing that he sufficiently pled both direct and circumstantial evidence of improper termination and discrimination. Dill further argued that IBM relied on an unnecessarily burdensome pleading standard in their motion to dismiss.
- ***Detillion v. Ohio Dep't of Rehab. & Corr.*, No. 24-3347 (6th Cir. 2024):** In July 2022, Lynn Detillion, a white woman, sued her union, the Ohio Civil Service Employees Association, and former employer, the Ohio Department of Rehabilitation and Correction, for violations of Title VII and Ohio discrimination law. Detillion alleged that the union discriminated against her based on her race and sex by declining to advocate on her behalf while advocating for a Black male union member and, similarly, that the department discriminated against her by reinstating the Black male guard, but not her. The district court granted summary judgment against her on all claims. She appealed.
    - **Latest update:** On November 21, 2024, the Sixth Circuit upheld the district court's finding that Detillion's claims lacked merit.
- ***EEOC v. Battleground Restaurants*, No. 1:24-cv-00792 (M.D.N.C. 2024):** On September 25, 2024, the U.S. Equal Employment Opportunity Commission (EEOC) filed a lawsuit against a sports bar chain, Battleground Restaurants, in federal district court in North Carolina. The lawsuit alleges that the chain refused to hire men for its front-of-house positions, such as server or bartender jobs, in violation of Title VII. This is one of over 50 lawsuits the EEOC filed in the last week of September, prior to the end of its fiscal year on September 30, 2024.
    - **Latest update:** On November 25, 2024, Battleground Restaurants moved to dismiss or strike an improperly named defendant. Battleground Restaurants argued that the EEOC's pattern or practice claims are "insufficiently pled, conclusory, and not plausible on their face," and that the EEOC failed to conduct a "reasonable investigation" or give "adequate notice" to Battleground Restaurants.
- ***Spitalnick v. King & Spalding, LLP*, No. 24-cv-01367-JKB (D. Md. 2024):** On May 9, 2024, Sarah Spitalnick, a white, heterosexual female, sued King & Spalding, alleging that

the firm violated Title VII and Section 1981 by deterring her from applying to its Leadership Counsel Legal Diversity internship program. Spitalnick alleged that she believed she could not apply after seeing an advertisement that stated that candidates "must have an ethnically or culturally diverse background or be a member of the LGBT community." On September 19, 2024, King & Spalding moved to dismiss, arguing that Spitalnick failed to state a claim, her claims were time-barred, and she lacked standing because she never applied to the program.

    - **Latest update:** On November 8, 2024, Spitalnick responded to the firm's motion to dismiss, arguing that her claim was not time-barred and that being deterred from applying was sufficient to confer standing.

- ***Paul Fowler v. Emory University*, No. 1:24-cv-05353 (N.D. Ga. 2024):** On November 21, 2024, a former Emory University employee sued the university alleging that the Vice Provost for Career and Professional Development discriminated against white employees in investigations, discipline, hiring, and promotions. The plaintiff asserts employment discrimination claims arising from "unlawful race, gender, and age discrimination and retaliation" in violation of Title VII, the Age Discrimination in Employment Act, and Section 1981.

    - **Latest update:** The docket does not yet reflect that the defendant has been served.

3. Challenges to agency rules, laws and regulatory decisions

- ***Nat'l Ctr for Pub. Policy Research, et al. v. SEC*, No. 23-60230 (5th Cir. 2023):** The petitioners, Kroger shareholders, previously sought to require that Kroger Company include in its proxy materials a proposal requiring Kroger to issue a report detailing risks associated with omitting "viewpoint" and "ideology" from the list of protected characteristics in its equal opportunity policy. The SEC concluded that Kroger could exclude the proposal from its proxy materials. In April 2023, the petitioners sought judicial review of the SEC's decision in the Fifth Circuit.

    - **Latest update:** On November 14, 2024, the Fifth Circuit denied the petitioner's motion for stay pending appeal and granted the SEC's motion to dismiss for lack of jurisdiction and mootness. The court found that Kroger chose to include the challenged measure in its proxy materials, which extinguished any live controversy on appeal. The court also held that it lacked authority to resolve the dispute because the SEC failed to issue an order concerning this matter, final or otherwise.

4. Actions against educational institutions:

- ***Chu, et al. v. Rosa*, No. 1:24-cv-75 (N.D.N.Y. 2024):** On January 17, 2024, plaintiffs—a minor child represented by her mother, and three non-profit organizations—sued the commissioner of the New York State Education Department, which administers the STEP program. The STEP program is designed to "assist eligible students in acquiring the skills, attitudes and abilities necessary to pursue professional study in post-secondary

degree programs in scientific, technical and health-related fields." The plaintiffs alleged that the STEP program is unconstitutional because it subjects Asian American students to different eligibility requirements than applicants of other races; specifically, Asian American applicants must show that they are economically disadvantaged to apply.

- **Latest update:** On November 22, 2024, the court denied the defendant's motion to dismiss for lack of subject matter jurisdiction. The court held that the plaintiffs plausibly alleged an injury in fact under the "government erected barrier theory." Under this theory, a plaintiff demonstrates an injury in fact if: 1) there exists a reasonable likelihood that the plaintiff is in a disadvantaged group, 2) there exists a government-erected barrier, and 3) the barrier causes members of that group to be treated differently from members of another group. Here, the court held that the plaintiffs were Asian Americans purportedly disadvantaged by the STEP program's unique eligibility requirements for Asian Americans.

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, 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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