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# DEI Task Force Update

January 8, 2025

**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 20, 2024, the Department of Justice and the EEOC filed an amicus brief before the Supreme Court in *Ames v. Ohio Department of Youth Services*, No. 23-1039. In Ames, the Supreme Court is reviewing a Sixth Circuit ruling requiring Title VII plaintiffs belonging to majority groups to show "background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Ames v. Ohio Department of Youth Services*, 87 F.4th 822 (6th Cir. 2023). The Sixth Circuit applied this heightened standard and affirmed the dismissal of a heterosexual employee's claim of bias in favor of LGBTQ workers. In their amicus brief, the EEOC and DOJ urged the Supreme Court to reject the "background circumstances" test, arguing that Title VII protects all workers equally and offers "no footing" for imposing heightened requirements for members of majority groups.

## Media Coverage and Commentary:

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

- Wall Street Journal, "Law Firms Pivot for Trump's Return" (January 7): The Wall Street Journal's Erin Mulvaney reports on anticipated shifts within the legal industry in anticipation of the second Trump presidency, noting that a "reshuffling" of federal policies and priorities may "shake up which firms have the most in-demand expertise." She points to the recent increase in demand for counseling on issues like trade, contrasting it to a predicted slowing in areas like antitrust enforcement. Mulvaney also discusses firms that have built specialty practices to help clients navigate issues in the post-election landscape. She highlights Gibson Dunn for "buil[ding] a specialty out of counseling companies that have implemented policies and programs designed to promote diversity and inclusion in the workplace" as those programs come under increased fire. Mulvaney quotes Jason Schwartz, co-leader of Gibson Dunn's labor and employment practice group, who says the firm anticipates "increased demand and opportunities" to help clients navigate these issues "in a thoughtful, practical, and legally defensible way."

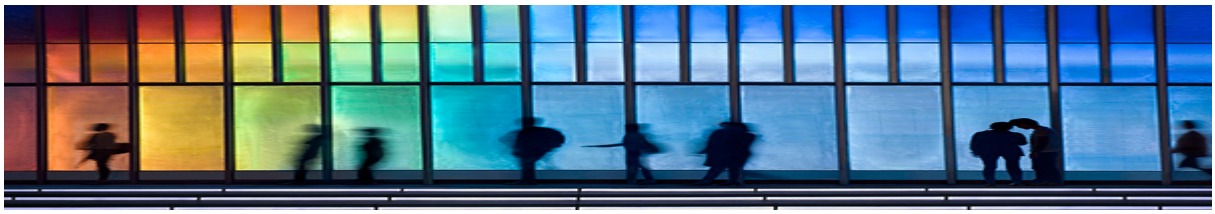
- CNN, "DEI isn't actually dead" (December 17): Nathaniel Meyersohn of CNN reports on recent changes to corporate DEI policies and the public messaging of those changes. Meyersohn argues that anti-DEI activists are largely overstating the changes companies have made to DEI policies in response to public pressure campaigns and legal threats. He cites a review of Fortune 500 companies by the Association of Law Firm Diversity Professionals, which found that just 14 companies made any public changes to their DEI teams or programs in 2024. Meyersohn describes many of these changes are "performative tweaks" designed to reduce attention from activists, including by changing the term "DEI" in company literature to "inclusion" or "belonging," decreasing external advertising of DEI efforts, and ending participation in surveys that publicly rank companies based on their DEI policies (such as the Human Rights Campaign's Corporate Equality Index). Other major companies, however, have made more substantial changes to their DEI policies in recent months, including Tractor Supply, which eliminated DEI roles for employees, and Molson Coors, which ended its supplier diversity goals. Ultimately, despite these recent changes, Meyersohn suggests that most companies will maintain their commitments to DEI because "DEI policies, fundamentally, make money" by boosting profits, reducing employee attrition and increasing employee motivation. He quotes the president of the Association of Law Firm Diversity Professionals, J. Danielle Carr, who says "DEI isn't going away. It's just changing."

- Bloomberg, "Nissan Rolls Back Diversity Policies as Activist Claims Another Win" (December 18): Bloomberg's Jeff Green reports on automaker Nissan Motor's decision to rollback diversity initiatives amid mounting pressure from anti-DEI activists, including online influencer Robby Starbuck. Starbuck said he engaged with Nissan prior to it announcing changes to its DEI policy. Jeremie Papin, the outgoing chairman of Nissan Americas, announced in a letter to employees that the company will "stop participating in surveys or activities with outside organizations that are 'heavily focused on political activism'" and will "align employee training with core business objectives" moving forward. The letter, Green observes, echoes similar moves by more than a dozen companies, such as Toyota and Walmart, that have revised their DEI policies following threats from Starbuck.

- Bloomberg, “Corporate America Hired More Black Workers. Then It Stopped” (December 20): According to a report by Bloomberg’s Jeff Green, Simone Foxman, Cedric Sam, and Cailley LaPara, the share of Black employees in U.S. public companies has declined in recent years after peaking in 2021. Bloomberg’s report analyzed race data that 84 companies in the S&P 100 provided to the EEOC, finding that the percentage of Black employees in those companies dropped from 17% in 2021 to 16.8% in 2023. The authors acknowledge that the reasons for this decline are complex, but suggest that “one likely cause is the growing backlash against corporate DEI efforts” because it has resulted in a reduced emphasis on diversity in hiring. The article also notes that because many companies rapidly expanded their percentage of employees of color in 2021, employees of color may have been disproportionately affected by recent reductions in force if companies employ a “last in, first out” approach. A tight labor market and an uncertain economic climate, the report suggests, likely also contributed to the shifts. The authors also note that the percentage of white workers dropped during the same period, from 53% in 2020 to 49.9% in 2023.

- The Wall Street Journal, "They Helped Create DEI—and Even They Say It Needs a Makeover" (December 22): Reporting for the Wall Street Journal, Callum Borchers writes that some of the "architects" of corporate DEI programs think DEI needs an overhaul "after companies turned it into a buzzword ripe for attack." Borchers reports that, according to research by Harvard sociologist Frank Dobbin, many corporate DEI efforts have turned out to be legally risky, unpopular, and ineffective at addressing racial and gender disparities. For example, Dobbin's research indicated that unconscious-bias training can be counterproductive and anger employees who feel they are being accused of bigotry. Borchers describes discussions with Fayruz Kirtzman of organizational consulting firm Korn Ferry, as well as Uber's former diversity chief Bo Young Lee, both of whom articulate the need to tie diversity goals to companies' business goals—or as Kirtzman puts it, "go back to what [DEI] was designed to do."

- CNN, "Costco Is Pushing Back – Hard – Against the Anti-DEI Movement" (December 27): CNN's Nathaniel Meyersohn reports on a recent recommendation by Costco's board of directors that shareholders vote against a proposal brought by The National Center for Public Policy Research ("NCPPR"), a conservative think tank. Meyersohn says that NCPPR's proposal "would require Costco to evaluate and issue a report on the financial risks of maintaining its diversity and inclusion goals." Meyersohn says that NCPPR criticized Costco for possible "illegal discrimination" against employees who are "white, Asian, male or straight." Costco's board recommended that shareholders vote against the proposal and stated that "[NCPPR]'s broader agenda is not reducing risk for the company but abolition of diversity initiatives." Costco stated that its hiring policies are legal and non-discriminatory.



- The Wall Street Journal, "Corporate America Drew Back From DEI. The Upheaval Isn't Over" (December 28): Theo Francis and Chip Cutter of the Wall Street Journal report on recent changes in DEI initiatives at several major U.S. corporations, catalog recent reverse-discrimination cases against large companies, and discuss the challenges to DEI likely to arise in the second Trump administration. DEI supporters spent most of 2024 on the defensive, the article says, and now are waiting for the Trump administration to take shape before deciding how to respond. Francis and Cutter say that DEI proponents are considering strategies to counter the DEI pushback, including "suing to support key programs or organizing public protests of the kind that helped lead to new diversity initiatives in 2020."

- Barron's, "BlackRock Cuts Back on Board Diversity Push in Proxy-Vote Guidelines" (December 30): Rebecca Ungarino of Barron's reports that BlackRock, which casts "tens of thousands" of votes on management and shareholder ballot proposals each year, has become less vocal in its efforts to increase corporate board diversity. Ungarino says that BlackRock had previously recommended that boards aim for "at least 30%" diversity among its members, and had defined board diversity as having at least two women directors and a director from an underrepresented group. However, Ungarino reports that BlackRock's 2025 annual report proxy-voting guidelines state only that boards should disclose "[h]ow diversity, including professional and personal characteristics, is considered in board composition, given the company's long-term strategy and business model." According to Ungarino, these changes come after BlackRock and its CEO Larry Fink came under fire by Republican lawmakers for adhering to "woke" principles.

## 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. Jopwell, Inc.*, No. 1:24-cv-01142-UNA (D. Del. 2024):** 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 AAER alleged exclusively provided services to "Black, Latinx, and Native American students and

professionals." The complaint alleged that the platform exists to create a "pipeline" of diverse talent for top employers like Google and Blackrock. AAER filed suit on behalf of an anonymous college student who claimed to meet all the nonracial eligibility criteria for the platform but says he could not access the full Jopwell platform after he identified himself as white and Asian during the registration process. AAER sought an injunction, declaratory judgment, and attorney's fees and costs. Jopwell was represented by Jason Schwartz and Gregg Costa of Gibson Dunn in this matter.

    - **Latest update:** On December 19, 2024, the court dismissed the case after the parties filed a joint stipulation of dismissal. In the stipulation, Jopwell stated that it does not, and will not, limit the availability or functionality of its platform based on a job applicant's race or ethnicity. Additionally, Jopwell agreed to revise its website to clarify that its services are available to all, regardless of race, and that providing race and ethnicity information is voluntary.

- ***Saadeh v. New Jersey State Bar Association*, No. MID-L-006023-21 (N.J. Super. Ct. 2021), on appeal at A-2201-22 (N.J. Super. Ct. App. Div. 2023):** On October 15, 2021, a Palestinian and Muslim attorney and bar member sued the New Jersey State Bar Association (NJSBA), alleging that the NJSBA's practice of reserving certain trustee and committee positions for members of "underrepresented groups" including Black, Hispanic, Asian, women, and LGBTQ attorneys, constituted racial discrimination in violation of New Jersey state civil rights laws. On November 9, 2022, the trial judge ruled that the NJSBA's practice was racially discriminatory, operating as an illegal quota rather than as a valid affirmative action program. The court ordered NJSBA to consider all attorneys in good standing eligible for the positions. The court also held that the First Amendment did not protect the NJSBA's practices. The NJSBA appealed, and on January 18, 2024, the Appellate Division of the New Jersey Superior Court heard oral argument. The NJSBA argued that the trial court applied the incorrect Supreme Court precedent and that under the correct framework, the NJSBA's practice is a valid, tailored affirmative action plan that redresses the historical underrepresentation of non-white attorneys in the positions at issue. The plaintiff argued that the practice does not address the root causes of racial imbalances and is not based on a detailed analysis of the NJSBA's membership and demographic data.

    - **Latest update:** On December 20, 2024, the Appellate Division of the New Jersey Superior Court reversed the order entering partial summary judgment on liability for the plaintiff, dissolved the prospective injunction entered against the NJSBA, and remanded for entry of summary judgment in favor of the NJSBA dismissing the complaint in its entirety with prejudice. The appellate court found that the NJSBA is an expressive association, and that compelling it to alter or eliminate its program would unconstitutionally infringe its ability to advocate for the value of diversity and inclusivity in the Association and legal profession. The court found that, although New Jersey has a compelling interest in eliminating discrimination, that interest does not justify prohibiting the NJSBA from expressing views protected by the First Amendment.

**2. Employment discrimination and related claims:**

- ***EEOC v. Battleground Restaurants*, No. 1:24-cv-00792 (M.D.N.C. 2024):** On September 25, 2024, the 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. On November 25, Battleground Restaurants moved to dismiss the case, arguing, among other things, that the EEOC failed to adequately allege that the company engaged in a pattern or practice of intentional discrimination and failed to provide sufficient notice of its investigation to the company.

    - **Latest update:** On December 30, 2024, the EEOC filed a response to Battleground Restaurant's motion to dismiss or strike an improperly named defendant. The EEOC argued that its lawsuit sufficiently pled a pattern or practice claim and provided sufficient notice to the defendant as required by Title VII.

- ***Fuzi v. Worthington Steel Co.*, No. 3:24-cv-01855-JRK (N.D. Ohio 2024):** A former employee sued Worthington Steel for religious discrimination and retaliation in violation of Title VII, claiming he was fired for opposing Worthington's DEI initiative, which required employees to use each other's preferred gender pronouns. The plaintiff claims that the policy violated his Christian beliefs, and that he was fired in retaliation for filing an EEOC charge relating to his complaints.

    - **Latest update:** On December 20, 2024, Worthington Steel filed an answer to the plaintiff's complaint, denying all claims.

- ***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. 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.

    - **Latest update:** On December 13, 2024, the plaintiff filed a notice of appeal to the Ninth Circuit appealing the November court order. On December 18, 2024, the district court dismissed the action following the plaintiff's failure to file an amended complaint.

- ***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, 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. 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. The 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.

    - **Latest update:** On December 11, 2024, Starbucks filed a reply brief in support of its motion to dismiss the amended complaint. Starbucks argued that the plaintiff's claims do not warrant equitable tolling because the plaintiff failed to file in the correct forum. Starbucks also argued that the plaintiff failed to plead sufficient facts to support claims for intentional infliction of emotional distress, racial discrimination, retaliation, and negligent retention, supervision, and hiring.

**3. Challenges to statutes, agency rules, and regulatory decisions:**

- ***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)). On December 5, 2024, Do No Harm moved for a preliminary injunction.

    - **Latest update:** On December 19, 2024, the parties filed a joint motion to stay proceedings. The parties explained that on December 18, 2024, Tennessee Attorney General Jonathan Skrmetti certified to the Speakers of the Tennessee House of Representatives and the Tennessee Senate that Tennessee could not defend the constitutionality of the laws at issue in this dispute. The parties sought to stay proceedings during the statutory thirty-day period Tennessee law provides for certifying indefensible laws to the legislature. On December 20, 2024, the court granted the motion to stay proceedings.

- ***Do No Harm v. Edwards*, No. 5:24-cv-16-JE-MLH (W.D. La. 2024):** On January 4, 2024, Do No Harm sued Governor Edwards of Louisiana over a 2018 law requiring that a certain number of "minority appointee[s]" be appointed to the State Board of Medical

Examiners. Do No Harm brought the challenge under the Equal Protection Clause and requested a permanent injunction against the law.

- **Latest update:** On December 20, 2024, Governor Edwards moved to dismiss for lack of subject matter jurisdiction. He contended that, because he signed a declaration indicating that he does not intend to enforce the challenged law, the plaintiff's claims are moot. Governor Edwards also argued that the suit is barred by sovereign immunity.

**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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