GIBSON DUNN

DEI Task Force Update

August 28, 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 August 21, 2024, the court granted Gannett's motion to dismiss in *Bradley, et al. v. Gannett Co. Inc.*, 1:23-cv-01100 (E.D. Va. 2023). Plaintiffs claimed that Gannett, one of the largest newspaper publishers in the U.S., incentivized managers and leadership to hire and promote more minority employees in order to achieve "racial and gender parity." In granting Gannett's motion to dismiss, the court held that Gannett's diversity policy alone did not establish disparate treatment, since it did not define any specific goals or quotas, and its intent was to promote "[f]air treatment for all" and ensure that everyone "has equal opportunities to thrive." The court held that each of the named plaintiffs had failed to state a claim for individual relief pursuant to Section 1981, and also dismissed the class allegations because the class was not ascertainable and lacked commonality.

On August 20, 2024, America First Legal (AFL) filed a reverse discrimination suit against IBM on behalf of a former IBM employee, alleging violations of Title VII and Section 1981. *Dill v. International Business Machines, Corp.*, No. 1:24-cv-00852 (W.D. Mich. 2024). 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 in order to receive a "plus" on their bonuses. This is the third reverse discrimination lawsuit against IBM or its affiliates in recent months, following *Missouri v. IBM*, No. 24SL–CC02837 (Cir. Ct. of St. Louis Cty.), and *Wood v. Red Hat, Inc.*, No. 2:24-cv-237-REP (D. Idaho 2024) (Red Hat is an IBM subsidiary).

On August 19, 2024, in response to a public pressure campaign by social media personality Robby Starbuck, motorcycle manufacturer Harley-Davidson announced changes to its DEI policies, including that it would no longer set spending goals to purchase from minority and women-owned suppliers and that it would no longer participate in the Human Rights Campaign's Corporate Equality Index. Starbuck declared victory following Harley-Davidson's announcement, and then quickly followed up by identifying additional companies that he says are making proactive changes to their DEI policies to avoid being the target of his next campaign. (Many companies, of course, have made changes based on ongoing post-*SFFA* reviews unrelated to Starbuck's campaigns.) Starbuck stated that he plans to continue targeting companies' DEI practices in order to bring "sanity back to corporate America."

On August 19, 2024, a male business manager sued Georgia-Pacific, a tissue, pulp and paper manufacturing company, claiming reverse discrimination. *Rowe v. Georgia-Pacific LLC*, 1:24-cv-03643 (N.D. Ga. 2024). The plaintiff argued that the company repeatedly promoted and gave raises to lesser-qualified female candidates. He also alleged that female colleagues were given flexibility to work remotely to care for their children while his request to work remotely was denied. Plaintiff is bringing claims under Title VII of the Civil Rights Act of 1964.

On August 14, 2024, the Wisconsin Institute for Law and Liberty filed a civil rights complaint on behalf of Do No Harm, a nonprofit organization that "opposes racially discriminatory programs and policies in healthcare," against the Cleveland Clinic. The complaint challenges the Cleveland Clinic's Minority Stroke Program, which is dedicated to preventing and treating strokes in racial and ethnic minorities, and the Clinic's Minority Men's Health Center, which provides health screenings and treatment for conditions that disproportionately affect minority male populations. Do No Harm alleges that these programs are racially discriminatory and violate Title VI of the Civil Rights Act and Section 1557 of the Affordable Care Act. The complaint asks that the Department of Health and Human Services open a formal investigation into these programs.

Media Coverage and Commentary:

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

- Bloomberg, "How anti-DEI Shareholders Are Attacking Corporate America's Diversity Programs" (August 12): Bloomberg's Mirande Jeyaretnam, Jeff Green, and Mathieu Benhamou report that an increasing number of anti-DEI shareholder proposals have been filed in recent years. In the first half of 2024, 42 anti-DEI proposals were filed, compared to just one in 2021. Jeyaretnam, Green, and Benhamou report that although support for the proposals has been weaker than those for pro-DEI resolutions, advocates of these anti-DEI proposals claim that the conversations the resolutions generate have "as much of an impact" as the vote itself. The National Legal Policy Center and the National Center for Public Policy Research have submitted 62% of this year's anti-DEI proposals, in what Bloomberg calls a "coordinated campaign to target certain companies."
    - For more information about trends in 2024 shareholder proposals, see our July 29, 2024 client alert.

- Washington Post, "The Movement to Diversify Silicon Valley is Crumbling Amid Attacks on DEI" (August 19): The Washington Post's Naomi Nix, Cat Zakrzewski, and Nitasha Tiku report that two nonprofits dedicated to recruiting women to the tech industry have closed in recent months, citing a drop in support for such programs among tech companies. Launched in 2007, Girls in Tech partnered with many major companies as part of a network of nonprofits and consultants that promoted race and gender representation in Silicon Valley. A similar nonprofit, Women Who Code, enjoyed the backing of major corporations. Both have had to close operations in recent months after struggling to retain funding amid a general corporate wariness related to DEI programs. Other nonprofits and consultants are attempting to rebrand in order to survive, using terms like "culture, identity, and belonging" in lieu of "diversity, equity, and inclusion."

- Axios, "Corporate Boards Brace for DEI Backlash" (August 22): Eleanor Hawkins of Axios reports that boards of public companies are preparing for attacks on their DEI policies. Hawkins says that this concern follows social media campaigns by conservative activist Robby Starbuck, an anti-DEI advocate who scrapes the social media accounts of companies, executives, and board members to find support for DEI, LGBTQ+ rights, and sustainability policies. Following targeted social media campaigns by Starbuck, Hawkins reports that Harley-Davidson, John Deere, and Tractor Supply have all walked back their support of DEI initiatives. However, Hawkins observes that retreating from DEI programs may damage a company's reputation.

- CNN, "The Right-Wing Activist Riding a Wave of Opposition to DEI in Corporate America" (August 28): CNN's Nathaniel Meyersohn reports on conservative activist Robby Starbuck's social media campaigns against corporate DEI efforts, along with programs that support LGBTQ+ causes, climate change, and other policies. Meyersohn says that Starbuck has targeted brands with politically conservative customer bases by drawing

online attention to their public policies and programming. Meyersohn notes that Starbuck's efforts have resulted in the reversal of DEI initiatives at several companies and Starbuck plans to keep up the pressure, because, he says, "[w]e're making change happen."

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:

- ***Do No Harm v. American Association of University Women***, No. 1:24-cv-01782 (D.D.C. 2024): On June 20, 2024, Do No Harm filed a complaint against the American Association of University Women (AAUW), alleging that the organization is violating Section 1981 by providing "Focus Group Professions Fellowships" to only "women from ethnic minority groups historically underrepresented in certain fields within the United States: Black or African American, Hispanic or Latino/a, American Indian or Alaskan Native, Asian, and Native Hawaiian or Other Pacific Islander." Do No Harm sought a temporary restraining order and preliminary injunction prohibiting AAUW from closing the application window for the fellowships, and a permanent injunction prohibiting AAUW from considering race when selecting grant recipients.
    - **Latest update**: On August 9, 2024, the parties filed a joint stipulation for dismissal stating that the fellowship program "will no longer require applicants to belong to historically underrepresented ethnic minority groups," and that AAUW would no longer "consider applicants' race or ethnicity" when choosing recipients for the fellowships. The case was dismissed without prejudice, and Do No Harm's motion for a TRO was denied as moot.
- ***Suhr v. Dietrich***, No. 2:23-cv-01697-SCD (E.D. Wis. 2023): On December 19, 2023, a dues-paying member of the Wisconsin State Bar filed a complaint against the Bar, seven members of the Bar's Board of Governors, and staff, challenging the Bar's "Diversity Clerkship Program," a summer hiring program for first-year law students. The program's application requirements had previously stated that eligibility was based on membership in a minority group. After the Supreme Court's decision in *SFFA*, the eligibility requirements were changed to include students with "backgrounds that have been historically excluded from the legal field." The plaintiff claims that the Bar's program is unconstitutional even with the new race-neutral language, because, in practice, the selection process is still based on the applicant's race or gender. After reaching a partial settlement agreement with the defendants to remove the eligibility requirements concerning historically excluded backgrounds, the plaintiff filed an amended complaint, adding challenges to three mentorship and leadership programs that allegedly discriminate based on race, which are funded by mandatory dues paid to the Bar.

- **Latest update**: On August 19, 2024, the court partially granted the defendants' motion to dismiss the plaintiff's amended complaint with respect to the President-Elect, Immediate Past-President, and Chairperson of the Bar Board of Governors, as they did not have "any duties related to the collection of mandatory membership dues." The court also held that the plaintiff's possible remedies would be limited to declaratory and injunctive relief because the Eleventh Amendment bars his claims for monetary damages. The court denied the defendants' attempt to dismiss the plaintiff's First Amendment claim because it found that there was a factual dispute regarding whether the challenged Bar activities were funded by mandatory dues and that an inquiry into the germaneness of those activities to the Bar's "constitutionally permitted purpose" was premature.

2. Employment discrimination and related claims:

- ***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, alleging that the City's diversity initiatives, which allegedly included mandatory diversity trainings involving critical race theory and encouraged 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.
    - **Latest update**: On August 16, 2024, the City filed a motion for summary judgment, arguing that contrary to the plaintiff's allegations of racial discrimination, he "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. The City contended that it "told Plaintiff he was not required to take any specific RSJI [Race and Social Justice Initiative] classes and would not be penalized for his failure to meet RSJI goals," so there was no evidence that he was discriminated against.
- ***Beneker v. CBS Studios, Inc., et al.***, No. 2:24-cv-01659 (C.D. Cal. 2024): On February 29, 2024, a heterosexual, white male writer represented by AFL, sued CBS, alleging that its de facto hiring policy discriminated against him on the bases of sex, race, and sexual orientation. In his complaint, the plaintiff alleges that CBS violated Section 1981 and Title VII by refusing to hire him as a staff writer on the TV show "Seal Team," instead hiring several black writers, female writers, and a lesbian writer. The plaintiff is requesting a declaratory judgment that CBS's de facto hiring policy violates Section 1981 and/or Title VII, injunctions barring CBS from continuing to violate Section 1981 and Title VII and requiring CBS to offer him a full-time job as a producer, and damages. CBS moved to dismiss on June 24, 2024, arguing that the First Amendment protects its hiring choices and that two out of three of the plaintiff's Section 1981 claims were untimely. The plaintiff opposed on July 15, 2024, arguing that the First Amendment does not protect hiring decisions, even if CBS is engaged in a creative enterprise.

- **Latest update**: On August 14, 2024, the court denied defendants' motion to dismiss in a short order finding that "the issues raised by Defendant are more appropriately resolved on a motion for summary judgment."

- ***Langan v. Starbucks Corporation***, No. 3:23-cv-05056 (D.N.J. 2023): On August 18, 2023, a white female former employee filed a complaint against 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 on the basis of her race and disability as part of a policy of favoritism toward non-white employees. On July 30, 2024, the court granted Starbucks' motion to dismiss in its entirety, agreeing that the plaintiff's claims under the New Jersey Law Against Discrimination (NJLAD) were untimely and that the plaintiff had failed to state her tort or Section 1981 claims. As to her Section 1981 claim, the court held that the plaintiff had not alleged that her termination was based on anything other than her "egregious" discriminatory comments and her violation of the company's anti-harassment policy.

    - **Latest update**: On August 11, 2024, the plaintiff filed an amended complaint, adding allegations to support her claim that her NJLAD claims should be equitably tolled because she had been prevented from asserting her rights by the New Jersey Department of Civil Rights, which she claims failed to investigate her claims.

3. Challenges to agency rules, laws and regulatory decisions:

- ***Do No Harm v. Lee***, No. 3:23-cv-01175-WLC (M.D. Tenn. 2023): On November 8, 2023, Do No Harm sued Tennessee Governor Bill Lee under the Equal Protection Clause, seeking to enjoin a 1988 Tennessee law requiring the governor to "strive to ensure" that at least one board member of the six-member Tennessee Board of Podiatric Medical Examiners is a racial minority. On February 2, 2024, Governor Lee moved to dismiss the complaint for lack of standing. On June 28, 2024, Do No Harm filed a notice of supplemental authority, arguing that a similar case, American Alliance for *Equal Rights v. Ivey*, No. 2:24-cv-00104-RAH-JTA (M.D. Ala. 2024), supports its claims that anonymous members have individual standing.

    - **Latest update**: On Aug 8, 2024, the court granted Governor Lee's motion to dismiss and entered judgment in the case. The court held that Do No Harm had not demonstrated injury in fact because there is currently at least one member of a racial minority group on the Board (and will be until at least 2027), meaning the Governor is not required to do anything at present. So, even if additional seats on the Board "become available, whether the statutes will be triggered based on the composition of the Board is unknowable."

DEI Legislation:

Below is a summary of legislative developments relating to DEI:

- On August 9, Illinois Governor J. B. Pritzker signed into law Senate Bill 2682, which will establish the Increasing Representation of Women in Technology Task Force. Housed within the Illinois Workforce Innovation Board, the task force will include the state's Chief Equity Officer and the Vice Chancellor of the University of Illinois, along with appointed representatives from the state legislature, the governor's office, labor organizations, the tech industry, advocacy organizations, and companies recognized for advancing women in technology, among others. The law charges the task force with collecting and evaluating data on the recruitment, advancement, and retention of women in technology positions; setting goals and identifying best practices; and recommending government policies to incentivize companies to hire, retain, and promote women in technology positions. The task force will also establish a plan for creating an oversight body to track companies' yearly progress on these metrics and manage incentive programs. The law's language is broad, and it does not limit the companies within the task force's purview by any specific connection to Illinois. The act takes effect January 1, 2025 and contains a sunset provision that will repeal it on January 1, 2030.

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:

Jason C. Schwartz – Partner & Co-Chair, Labor & Employment Group
Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)

Katherine V.A. Smith – Partner & Co-Chair, Labor & Employment Group
Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)

Mylan L. Denerstein – Partner & Co-Chair, Public Policy Group
New York (+1 212-351-3850, mdenerstein@gibsondunn.com)

Zakiyyah T. Salim-Williams – Partner & Chief Diversity Officer
Washington, D.C. (+1 202-955-8503, zswilliams@gibsondunn.com)

Molly T. Senger – Partner, Labor & Employment Group
Washington, D.C. (+1 202-955-8571, msenger@gibsondunn.com)

Blaine H. Evanson – Partner, Appellate & Constitutional Law Group
Orange County (+1 949-451-3805, bevanson@gibsondunn.com)