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Client Alert: Elusive Litigants, Extraordinary Relief: How Unorthodox Litigation Tactics Endanger DEI Initiatives

Publications

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Threats to DEI initiatives are not new, but the types of litigants and lawsuits underlying these threats are evolving. As discussed in previous client alerts, the coordinated attack on DEI programs already extends well beyond university admissions policies, encompassing efforts to build diverse workforces, increase representation on corporate boards, and support women- and minority-owned businesses.[1] Recent challenges to such programs reveal two notable shifts in litigation strategies. First, suits are being brought by cause-based organizations on behalf of their members, not by the allegedly injured individuals themselves. What's more, they are being brought through causes of action that historically have not been applied in this context. These unorthodox tactics enable plaintiffs to target a wider array of initiatives, but they also render plaintiffs vulnerable to various legal defenses. Below we explore these recent trends and present key takeaways for defending DEI programs in this changing legal landscape.

The Litigants: Actually Injured or Simply Indignant?

In the past few years, attacks on DEI efforts increasingly have come not from individuals, but from newly formed membership organizations that seek to advance a particular cause. While their mission statements and constituencies may vary, all broadly profess to protect civil rights or civil liberties, and all file suit on behalf of their members. In their filings, however, many of these groups make only vague references to their members' identities and interests.[2] Some groups have even refused to name the members affected by the allegedly discriminatory policy.[3] According to these groups, anonymity is necessary to protect their members, who may not wish to publicize their identities for fear of retaliation. Publicly challenging DEI initiatives, the argument goes, could damage individuals' reputations and prejudice evaluation of their applications for admission or employment. Disallowing anonymity could thereby deter injured individuals from pursuing litigation, one group cautioned.[4]

But such indefinite and generic allegations pose a conspicuous legal problem. Before a court can consider the merits of a plaintiff's claims, the plaintiff must establish that it has individually suffered harm as a result of the opposing party's conduct—a concept known as standing. A membership organization has standing to bring suit on behalf of its members—i.e., associational standing—only if it can show that at least one of its members would have standing to sue.[5] This raises a serious problem: How can courts determine whether an organization's member has a personal stake in the litigation when courts do not even know who that member is?

Recognizing this problem, multiple courts have held that a membership organization lacks associational standing where it fails to identify at least one injured member by name.[6] For example, in a case decided last year, a membership organization challenged a pharmaceutical company's diversity fellowship program, which was open to applicants who possessed certain qualifications and "met the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic, and Native Americans." To establish standing, the organization had to show that at least one of its members satisfied the eligibility criteria and was "able and ready" to apply. Standing therefore turned on a fact-intensive analysis. The organization alleged that two of its members had standing, but it did not identify those members by name. Without that information, the district court reasoned, it could not verify the facts on which standing depended. Accordingly, the court ruled that the organization lacked standing and dismissed the case.[7] The case is currently on appeal.[8]

The Lawsuits: Atypical Actions Seeking Exceptional Relief

The type of plaintiffs challenging DEI initiatives is not the only recent development. The challenges these plaintiffs pursue increasingly invoke non-traditional causes of action. Claims under Title VI of the 1964 Civil Rights Act and Section 1981 of the 1866 Civil Rights Act have especially become more prevalent, notably in cases alleging employment discrimination that are typically pursued under Title VII or state analogues.[9]

Title VI prohibits discrimination on the basis of race, color, and national origin in programs and activities that receive federal financial assistance. The statute explicitly restricts claims of employment discrimination to instances where "a primary objective" of the financial assistance is "to provide employment."[10] Absent that condition, employment discrimination claims must be brought under Title VII.

Nevertheless, plaintiffs have invoked Title VI to attack a host of DEI programs and policies, such as fellowships designed to recruit diverse talent and faculty hiring practices.[11] One need look no further than the plaintiffs' prayer for relief to understand why. Whereas Title VII remedies tend to focus on the individual harmed by discrimination, relief under Title VI is aimed at the discriminatory "program or activity" as a whole. Consequently, successful plaintiffs in Title VI suits walk away with an injunction against the challenged initiative as a whole. In addition, litigating under Title VI is often more convenient for plaintiffs. Plaintiffs need not demonstrate that the employer took an adverse

employment action, nor must they obtain authorization to file suit from the relevant agency—both of which are required under Title VII.

Section 1981 provides another avenue for attacking DEI initiatives. This law prohibits discrimination on the basis of race, color, and ethnicity when making and enforcing contracts, including employment agreements. Like Title VI, it offers several legal and practical advantages over Title VII, and it too has been used in unconventional settings—namely, to sue public institutions that are more accustomed to facing constitutional claims in this context.[12]

The Takeaways: New Strategies to Confront New Challenges

This recent wave of litigation underscores the legal risk that many types of organizations face when they endeavor to create a more diverse and inclusive environment. To safeguard these efforts, private and public entities alike should consider taking proactive steps to fortify their DEI programs, assess their litigation risk, and mount strong defenses to ambitious lawsuits advancing unorthodox claims.

Specify Qualifications for Employment and Apply a Broad Definition of Diversity. When a plaintiff claims that a defendant's policy prevents them from competing for a particular benefit on an equal basis, the plaintiff must show that they were "able and ready" to apply for the benefit, and would have done so but for the alleged discrimination. Several recent decisions addressing standing turned on whether the plaintiff had adequately alleged these critical facts.[13] In the employment context, for example, did the plaintiff meet the minimum qualifications, and did they have a concrete plan to apply? Thus, including specific eligibility criteria in position descriptions places a greater burden on challengers to show that they were actually "able and ready"—not just that they disagreed with the program as a policy matter. On the flip side, organizations should be cautious about defining eligibility based on protected characteristics. Holistic processes that assess candidates as individuals are far less vulnerable to challenge. Organizations should therefore consider using evaluation and selection criteria that prioritize diversity along the full range of human experiences. Attention to factors such as a demonstrated commitment to diversity, experience working with diverse populations and stakeholders, and past involvement in DEI programs could also be helpful to achieving DEI objectives while protecting against allegations that the organization is making decisions solely based on race, gender, or another protected characteristic.

Conduct a Litigation Risk Assessment. Forewarned is forearmed, as the saying goes. First: Identify. What DEI programs exist? How do they work? What is the organization saying about them? Next: Evaluate. What programs are actually being used? Do descriptions of these programs match reality? Are the programs achieving the intended results? Finally: Analyze. Examine the benefits and risks of retaining and redesigning the programs, then consider potential alternatives. The recent rise in Title VI litigation poses a distinct risk, as entities receiving federal financial assistance will face heightened scrutiny. Consequently, when conducting risk analyses, these entities should perform a full accounting of all federal financial assistance received and what it is used for. The Supreme

Court's forthcoming decisions in the affirmative action cases should also be incorporated into any litigation risk assessment. Because those cases contain Title VI claims, the Court's rulings could implicate a wide array of DEI initiatives, as detailed in a previous client alert.[14] Now that Title VI is increasingly being invoked in employment discrimination cases, the Court's rulings may prove particularly impactful in that context.

Consider Standing Arguments as Part of Any Litigation Strategy. To defend against lawsuits, businesses and universities should consider raising the standing arguments discussed above. These arguments are not necessarily fatal to plaintiffs' claims, as plaintiffs are generally free to amend their complaints to cure such deficiencies. That said, standing arguments hold membership organizations to account by pressing them to substantiate actual injury from the challenged program or policy. This, in turn, can yield valuable information about who is really behind these grievances and what factual and legal vulnerabilities that person's circumstances might present as litigation proceeds.

Jenner & Block has a deep commitment to diversity, equity, and inclusion as well as extensive experience supporting our clients' DEI efforts through litigation, investigations, and strategic counseling. In light of this commitment and experience, the firm has launched a task force—composed of leading attorneys serving a wide variety of industries—to develop creative, strategic, and tailored solutions for clients across industries to accomplish their DEI goals while minimizing legal risk. If you are interested in learning more about our work in this area, please contact Task Force Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), and Katie Wynbrandt (kwynbrandt@jenner.com).

Footnotes

[1] Client Alert: *SFFA v. UNC and SFFA v. Harvard: Navigating the Impact Across All Industries* (Oct. 21, 2022), https://www.jenner.com/en/news-insights/publications/Client-Alert-SFFA-v-UNC-and-SFFA-v-Harvard-Navigating-the-Impact-Across-All-Industries; Client Alert: *Board Diversity Efforts: Factors for Companies to Consider Given Growing Scrutiny* (Dec. 15, 2022), https://www.jenner.com/en/news-insights/publications/client-alert-board-diversity-efforts-factors-for-companies-to-consider-given-growing-scrutiny.

[2] *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 261 F.Supp.3d 99, 105-06 (D. Mass 2017), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (No. 20-1199) (argued Oct. 31, 2022); *Do No Harm v. Pfizer, Inc.*, No. 1:22-cv-07908, 2022 WL 17740157, at *1, *3-4 (S.D.N.Y. Dec. 16, 2022); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1114 (11th Cir. 2022).

[3] *Do No Harm*, 2022 WL 17740157, at *3-4; *Speech First, Inc.*, 32 F.4th at 1114.

[4] Plaintiff Do No Harm's Reply in Support of Its Motion for Preliminary Injunction at 4, *Do No Harm*, 2022 WL 17740157 (No. 1:22-cv-07908).

[5] *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

[6] *See Do No Harm*, 2022 WL 17740157, at *7-8, *10 (holding that at least one member must be named to establish associational standing and collecting cases).

[7] *Do No Harm*, 2022 WL 17740157, at *1-2, *6-10.

[8] Plaintiff Do No Harm's Notice of Appeal, *Do No Harm*, 2022 WL 17740157 (No. 1:22-cv-07908), *appeal docketed*, No. 23-15 (2d Cir. Jan. 4, 2023).

[9] 42 U.S.C. § 2000d et seq. (Title VI); 42 U.S.C. § 1981 (Section 1981); 42 U.S.C. § 2000e et seq. (Title VII).

[10] 42 U.S.C. § 2000d-3.

[11] *See, e.g.*, *Do No Harm*, 2022 WL 17740157, at *2-3; First Amended Class-Action Complaint at 1, *Lowery v. Texas A&M Univ.*, No. 4:22-cv-03091 (S.D. Tex. Dec. 23, 2022).

[12] *See, e.g.*, First Amended Class-Action Complaint at 12-13, *Lowery*, No. 4:22-cv-03091 (S.D. Tex. Dec. 23, 2022); Class-Action Complaint at 19-21, *Stewart v. Texas Tech Univ. Health Scis. Ctr.*, No. 5:23-cv-00007 (N.D. Tex. Jan. 10, 2023).

[13] *See, e.g.*, *Do No Harm*, 2022 WL 17740157, at *10-12 (holding that the associational plaintiff lacked standing because it failed to show that at least one identifiable member was "able and ready" to apply for the challenged fellowship program); *Correll v. Amazon.com, Inc.*, No. 3:21-cv-01833, 2022 WL 5264496, at *2-4 (S.D. Cal. Oct. 6, 2022) (holding that the individual plaintiff lacked standing to challenge Amazon's supplier diversity initiatives because he failed to show that he was "able and ready" to sell a product on Amazon).

[14] Client Alert: *Affirmative Action: What Did We Learn from the Oral Argument and What's Next?* (Nov. 1, 2022), https://www.jenner.com/en/news-insights/publications/Client-Alert-Affirmative-Action-What-Did-We-Learn-from-the-Oral-Argument-and-Whats-Next.

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