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DEI in the Crosshairs: Reflections On 2023 And Predictions For 2024

Client Alerts

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From the classroom to the boardroom, attacks on diversity, equity, and inclusion (DEI) gained significant momentum in 2023. Bolstered by their victory at the Supreme Court in the *Students for Fair Admissions* (*SFFA*) cases, opponents of DEI took the fight to corporate America, targeting a wide range of programs and initiatives for employees, vendors, and more.[1] We reflect on how the DEI landscape changed over the past year—and what to expect in 2024 as educational institutions and business organizations work to advance their DEI commitment consistent with the mounting risk from private litigation, enforcement action, political pressure, and more.

Reflections on 2023:

- ***Proliferation of Anti-DEI Advocacy Groups.*** The case that toppled race-conscious college and university admissions was brought not by disappointed applicants but by an advocacy organization founded by Edward Blum called "Students for Fair Admissions." Blum stood up several other advocacy organizations to threaten and file litigation against companies in other sectors—including Do No Harm, the Alliance for Fair Board Recruitment, and the American Alliance for Equal Rights. In post-*SFFA* litigation, these groups argue that they have standing to sue because their anonymous members might be excluded from the DEI programs that their lawsuits target. The defendants in these cases have challenged standing, which we expect to remain a key threshold issue as these suits continue to be prosecuted by advocacy groups rather than aggrieved individuals.[2]

- ***Focus on Law Firm Diversity Programs.*** In the immediate aftermath of the *SFFA* decision, Blum turned his attention to DEI at major law firms. One of his advocacy groups sent letters to several law firms threatening suit unless they ended or modified their diversity programs, and that group followed through on its threats by filing lawsuits in federal court against three firms.[3] Each lawsuit challenged programs for law students that, according to the allegations, afforded racial preferences to certain applicants. All three lawsuits were resolved by stipulation after the firms made certain modifications to the eligibility criteria for their programs and Blum subsequently declared that, for now, he is finished with suing law firms.[4]

- ***Weaponization of Section 1981.*** Lawsuits challenging affirmative action in higher education have relied on constitutional and statutory provisions that generally do not apply to private companies. The most popular vehicle for lawsuits against such companies has become Section 1981 of the Civil Rights Act of 1866, a Reconstruction Era statute that gave all people the same right to make and enforce contracts "as is enjoyed by white citizens."[5] DEI opponents have now weaponized the statute, which was intended to address persistent discrimination after the Civil War, to challenge programs that benefit members of traditionally underrepresented groups. For example, each of the lawsuits against law firms involved claims under Section 1981. But groups and individuals have also used this cause of action to challenge a wide range of other DEI initiatives—including webpages featuring sellers who are members of certain identity groups,[6] grant contests or programs that utilize race-based eligibility criteria,[7] and sign-on bonuses for professionals of certain underrepresented racial backgrounds.[8]

- ***Deluge of Reverse-Discrimination EEOC Complaints.*** Blum's groups are not the only organizations challenging DEI efforts. Stephen Miller's America First Legal (AFL) has also joined the cause, filing numerous complaints with the U.S. Equal Employment Opportunity Commission (EEOC) as a prerequisite to bringing lawsuits alleging employment discrimination under Title VII of the Civil Rights Act of 1964.[9] In September 2023, upon receiving a right to sue letter from the EEOC, AFL brought claims in federal court against Meta and other entities, alleging that a program aimed at increasing diversity among production crews unlawfully discriminates on the basis of race.[10] By bringing both Title VII and Section 1981 claims on behalf of specific and named individuals, AFL's actions may be attempting to sidestep some of the standing challenges that Blum's groups have faced as they try to get their lawsuits off the ground.

- ***Proactive Risk Assessments.*** The past year has illustrated that companies cannot ignore the legal risks that now attend DEI programs. A growing number of companies have engaged in inventories, audits, and other forms of risk assessments to take stock of their existing initiatives, understand how they operate in practice, and make modifications to better manage legal and reputational risk while at the same time honoring DEI commitments.

Looking Ahead to 2024:

- ***Pending Cases with Major Consequences.*** The flurry of litigation activity in 2023 has teed up major decisions for 2024 on a host of issues related to anti-DEI attacks:

    - ***U.S. Supreme Court.*** In December, the Supreme Court heard oral argument in *Muldrow v. City of St. Louis*,[11] a case that could expand the types of employment practices that are actionable under Title VII. During oral argument, several justices signaled that they were open to expanding Title VII's reach, which could theoretically sweep in various types of DEI

programs that are not presently covered by the statute. Furthermore, multiple justices reiterated their view that racial classifications by themselves constitute legally cognizable harm, without the need to demonstrate any additional or specific injury—a rationale that DEI opponents could use to sidestep standing arguments. In addition to *Muldrow*, the Supreme Court is currently considering two cert petitions that, if granted, would impact DEI issues. The first, *Coalition for TJ v. Fairfax County*,[12] poses the question of whether a competitive school can consider race-neutral factors in order to promote diversity, without violating the Equal Protection Clause. The second, *Speech First v. Sands*,[13] concerns whether a campus initiative to combat bias-related incidents runs afoul of the First Amendment.

- ***Federal Courts of Appeals.*** Multiple cases by Blum-backed organizations are pending in the federal courts of appeals. *American Alliance for Equal Rights v. Fearless Fund* will be argued before the U.S. Court of Appeals for the Eleventh Circuit later this month.[14] The case challenges under Section 1981 the Fearless Foundation's grant contest for Black-women-owned businesses.[15] The district court denied AAER's motion to preliminarily enjoin the contest, but the Eleventh Circuit granted that relief pending appeal, finding that the contest "is substantially likely to violate" Section 1981.[16] Its decision—expected later this year—could have important ramifications for a range of issues central to anti-DEI litigation, including the correct interpretation of Section 1981 and its reach, the standing issues implicated by Blum's litigation strategy, and the potential First Amendment defenses. At the same time, the U.S. Court of Appeals for the Second Circuit is considering an appeal in Do No Harm's challenge to a Pfizer diversity fellowship program.[17] There, the district court denied Do No Harm's motion for a preliminary injunction and subsequently dismissed the lawsuit for lack of standing. But at oral argument in October, Do No Harm contended that the standing decision was erroneous and insisted that advocacy groups need not identify specific members harmed by DEI programs in order to challenge them. Either decision could alter the trajectory of anti-DEI litigation.

- ***Shift to New Industries.*** There is little doubt that Blum will take his playbook from litigating against law firms and apply it to new sectors. After Blum agreed to drop his lawsuits against law firms, he warned "[i]t is likely that other corporate entities with similar racially discriminatory policies will be sued in the coming weeks."[18] For example, that same month, Do No Harm filed a new lawsuit against a physician partnership for its program offering sign-on bonuses for Black physicians.[19] In his attacks on law firm DEI programs, he walked away after the law firms made changes to their eligibility criteria. It remains unclear whether Blum will be satisfied with similar changes as he targets other sectors, or whether he will continue to fight in an effort to win court decisions that reflect his view of the law.

- ***Ever-More Legal Challenges.*** While 2023 was a record year for anti-DEI litigation, the number of legal challenges is expected to grow in 2024. These challenges will likely include more lawsuits by advocacy groups under Section 1981, additional reverse-discrimination cases under Title VII, new legal challenges to government programs that award preferences on the basis of race, and the next generation of lawsuits brought against colleges and universities targeting their efforts to maintain diversity after the *SFFA.*

- ***Election Year Attention.*** Finally, with the presidential election later this year, and continued congressional oversight of universities, we are likely to see a political spotlight on DEI issues. Last year, conservative lawmakers were the primary voices expressing their views of DEI in the wake of *SFFA*. But right before the new year, leaders from the Congressional Black Caucus publicly announced their expectations regarding DEI, expressly stating that companies should "reaffirm their commitments to DEI and reiterate their dedication to upholding these values in their daily decision-making processes."[20] Considering that lawmakers on both sides of the aisle view DEI as an important issue, state or congressional investigations related to DEI issues may appear more politically advantageous in an election year, causing companies to publicly describe their goals and approaches.

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 launched a task force—composed of leading lawyers 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. We are currently working with clients, including institutions of higher education and corporations, on ways to maintain diversity in the evolving legal landscape. 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), Marcus Childress (mchildress@jenner.com), or Erica Turret (eturret@jenner.com).

Footnotes

[1] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA*"), 600 U.S. 181 (2023).

[2] *See, e.g.*, *Do No Harm v. Pfizer Inc.*, 646 F. Supp. 3d 490 (S.D.N.Y. 2022), *appeal docketed*, No. 23-15 (2d Cir. Jan. 4, 2023) (dismissing Do No Harm's challenge to a Pfizer diversity fellowship program for lack of standing).

[3] *Am. All. for Equal Rts. v. Perkins Coie LLP*, No. 3:23-cv-01877 (N.D. Tex. filed Aug. 22, 2023); Am. All. for Equal Rts. v. Morrison & Foerster LLP, No. 1:23-cv-23189 (S.D. Fla. filed Aug. 22, 2023); Am. All. for Equal Rts. v. Winston & Strawn LLP, No. 4:23-cv-04113 (S.D. Tex. filed Oct. 30, 2023). Jenner and Block LLP was counsel of record for Perkins Coie LLP and Winston & Strawn LLP.

[4] Dan Roe, *Is Edward Blum Done Suing Law Firms?* The Am. Lawyer (Dec. 21, 2023), https://www.law.com/americanlawyer/2023/12/21/is-edward-blum-done-suing-law-

firms/#:~:text=After%20Blum%20dropped%20a%20recent,he%20was%20done%20for%20now.

[5] 42 U.S.C. § 1981.

[6] *Correll v. Amazon.com*, Inc., No. 3:21-cv-01833, 2023 WL 6131080 (S.D. Cal. Sept. 19, 2023).

[7] *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 23-13138, 2023 WL 6520763 (11th Cir. Sept. 30, 2023) (grant contest); Moses v. Comcast Cable Commc'ns Mgmt., LLC, No. 1:21-cv-00665, 2022 WL 2046345 (S.D. Ind. June 7, 2022) (grant program).

[8] *Do No Harm v. Vituity*, No. 3:23-cv-24746 (N.D. Fla. filed Dec. 8, 2023).

[9] List of Federal Civil Rights Complaints that America First Legal Has Filed with the EEOC, Am. First Legal, https://aflegal.org/woke-corporations/.

[10] *Harker v. Meta Platforms*, Inc., No. 1:23-cv-07865 (S.D.N.Y. filed Sept. 5, 2023).

[11] *Muldrow v. City of St. Louis*, No. 22-193, 2023 WL 4278441 (U.S. June 30, 2023) (granting cert in part).

[12] *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 871 (4th Cir. 2023) (cert petition filed Aug. 21, 2023).

[13] *Speech First, Inc. v. Sands*, 69 F.4th 184, 188 (4th Cir. 2023) (cert petition filed Aug. 4, 2023).

[14] A*m. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 23-13138, 2023 WL 6520763, at *1 (11th Cir. Sept. 30, 2023) (granting AAER's motion for a preliminary injunction pending appeal). AAER's three lawsuits against law firms were all dismissed pursuant to a stipulated dismissal.

[15] *Id.*

[16] *Id.*

[17] *Do No Harm v. Pfizer Inc.*, 646 F. Supp. 3d 490, 494 (S.D.N.Y. 2022).

[18] Julian Mark & Taylor Telford, *Conservatives Are Suing Law Firms Over Diversity Efforts. It's Working.* Wash. Post (Dec. 9, 2023), https://www.washingtonpost.com/business/2023/12/09/conservatives-sue-law-firms-dei/.

[19] *Do No Harm v. Vituity*, No. 3:23-cv-24746 (N.D. Fla. filed Dec. 8, 2023).

[20] Letter from Cong. Black Caucus to Corporate Leaders (Dec. 15, 2023), https://cbc.house.gov/uploadedfiles/congressional_black_caucus_letter_re_corporate_accountability.pdf.

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