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Healthcare Industry Emerges as the New Front for Anti-DEI Attacks

Client Alerts

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Anti-DEI litigants have zeroed in on the healthcare industry in their growing number of legal challenges to diversity, equity, and inclusion (DEI) initiatives. While some of these challenges began before the U.S. Supreme Court's decision in the *Students for Fair Admissions* cases,[1] these efforts, and the groups behind them, have gained momentum in the wake of that ruling.

One such group is Do No Harm, a nonprofit organization formed in April 2022. With a stated mission to "highlight and counteract divisive trends in medicine,"[2] the organization has targeted DEI efforts across the healthcare industry, including medical education, hiring, and policymaking. Edward Blum, who founded Students for Fair Admissions, reportedly serves on Do No Harm's board of directors.[3] Like Students for Fair Admissions, Do No Harm attempts to bring cases on behalf of its members, and focuses on a single industry that receives significant federal funding.

Do No Harm has brought nearly a dozen lawsuits since its founding, including five filed after *SFFA*. While many of those cases rely on familiar causes of action for discrimination claims, the group also relies on the Affordable Care Act's nondiscrimination provision, using that healthcare-specific statute as a unique statutory hook to target healthcare companies and providers. This additional cause of action, not available to plaintiffs challenging DEI programs in other industries, may help to explain why healthcare has emerged as a top target.

A Unique Statutory Hook

Several of Do No Harm's cases have included a statutory basis for liability specific to the healthcare industry: Section 1557 of the Affordable Care Act (ACA).

Section 1557 is the primary non-discrimination provision of the ACA. It provides "an individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving federal financial assistance," on the basis of protected characteristics including race, ethnicity, language, disability, age, and sex.[4] The U.S. Department of Health and Human Services defines "health program or activity" as "all of the operations of entities principally engaged in the business of providing

healthcare that receive Federal financial assistance."[5] The language in Section 1557 tracks closely with that of Title VI of the Civil Rights Act of 1964, which similarly provides that no person, on account of "race, color, or national origin," may be "excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[6]

Do No Harm is now attempting to weaponize Section 1557 to attack DEI efforts in healthcare. In *Do No Harm v. Pfizer Inc.*, for example, Do No Harm brought a Section 1557 claim (in addition to numerous other federal, state, and local law claims) challenging Pfizer's Breakthrough Fellowship Program, which, at the time the lawsuit was filed, required that applicants "meet the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic and Native Americans."[7] According to Do No Harm, this requirement "categorically excludes white and Asian-American applicants from applying."[8] The Section 1557 claim was based on the allegation that Pfizer, "a company principally engaged in healthcare," receives federal financial assistance "as a whole" through Medicare and Medicaid reimbursements, federal healthcare programs, and participation in public-private partnerships sponsored by the National Institute of Health.[9] Therefore, Do No Harm argued all of Pfizer's operations—including the Breakthrough Fellowship Program—are covered by Section 1557.

The district court rejected this sweeping argument, finding Do No Harm's allegations insufficient to bring a Section 1557 claim against Pfizer. The court reasoned that Pfizer does not receive federal financial assistance "for the primary purpose of providing employment," as is required for Title VI and, by extension, Section 1557 claims that challenge employment practices.[10] Pfizer is also not "principally engaged in the business of providing healthcare," because it does not provide medical treatment or "direct assistance to patients," and it does not receive federal financial assistance "to operate its business as a whole."[11] The district court thus dismissed Do No Harm's Section 1557 claim, concluding in part that Do No Harm lacks "statutory standing" to bring it.[12]

The district court also dismissed the remainder of Do No Harm's complaint on various grounds, including lack of associational standing, leading to an appeal before the U.S. Court of Appeals for the Second Circuit. Although Do No Harm's briefing touched upon the merits of its Section 1557 claim, the Second Circuit, in recently affirming the district court's dismissal of the case, did not address the ACA issues at all.[13]

Another example is *Do No Harm v. Vituity*, where the organization brought a Section 1557 claim against Vituity, a physician-owned partnership, with respect to a hiring incentive program that was allegedly "only open to black physicians."[14] The program's webpage states "Vituity is offering a leadership incentive for Black physicians, with a sign-on bonus of up to $100,000."[15] To invoke the ACA, Do No Harm alleged that Vituity is "principally engaged in the business of providing healthcare"

because its partner physicians "provide healthcare services to patients" and it "receives federal financial assistance" through Medicare reimbursements.[16] The *Vituity* case settled less than a month after it was filed, and the challenged incentive program no longer exists.[17] The district court never commented on the Section 1557 claim before the case settled.

A Familiar Theory of—and Obstacle to—Liability

Many of Do No Harm's lawsuits in the healthcare space also raise familiar reverse discrimination claims under Section 1981 of the Civil Rights Act of 1866,[18] which prohibits discrimination in making and enforcing contracts. These claims have often run into the obstacle of Article III standing, the requirement that plaintiffs identify a legally cognizable injury before proceeding to the merits.

The *Pfizer* case, for example, also included a Section 1981 claim challenging the Breakthrough Fellowship Program. In affirming the district court's dismissal of the complaint, the Second Circuit weighed in on the standing debate, joining the First Circuit in holding that an organization must identify at least one injured member *by name* in order to establish associational standing under the summary judgment standard applicable to a preliminary injunction motion.[19] The Second Circuit reasoned that this conclusion "best aligns" with the Supreme Court's precedent in *Summers v. Earth Island Institute*, which held that plaintiffs claiming associational standing must "identify members who have suffered the requisite harm."[20] The court further noted that, "[a]lthough a name on its own is insufficient to confer standing," the disclosure of "real names" shows that injured members are "genuinely ready and able to apply" for the fellowship program, rather than "enabling the organization to lodge a hypothetical legal challenge."[21] This holding is an important win for DEI advocates, as it bolsters the standing obstacle that anti-DEI organizations must clear before moving on to the merits of any of their claims.

Another example of standing issues with respect to a Section 1981 claim is *Do No Harm v. National Association of Emergency Medical Technicians* ("*NAEMT*"), where Do No Harm challenges a diversity scholarship program for students interested in emergency medical services that allegedly "awards money only to students of color."[22] Do No Harm brings this allegation based on the program's webpage, which states "[t]his scholarship will be awarded to students of color who are not currently certificated as an EMS practitioner, based on the following criteria: [1] Commitment to entering the EMS profession; [2] Financial need; [3] Service to their community; and [4] Ability to serve as a positive ambassador for the EMS profession."[23] The only cause of action in this lawsuit is the Section 1981 claim.

The district court in *NAEMT* denied Do No Harm's request for a temporary restraining order based on a determination that the organization lacked standing.[24] Without much elaboration, the court found that, despite the program's statement about "students of color," there was no "explicit bar against white applicants."[25] The court further relied upon the plaintiff's representation that she

satisfies all four of the listed selection criteria and was prepared to assemble and submit the application materials.[26] The court thus concluded that the plaintiff was not "actually prevented . . . from entering into a contract," even if she might have been deterred from applying.[27]

Similarly, Do No Harm also brought a Section 1981 claim in the *Vituity* case and again faced potential standing problems. Before the case settled, the district court weighed in through two separate orders, noting that, while the complaint makes a "compelling argument" that the incentive program "blatantly violates various federal laws,"[28] the court had "serious doubts" as to Do No Harm's standing.[29] In particular, the court reasoned that the complaint's anonymous "Doctor A" would only suffer a concrete injury if he applied to work for Vituity, was hired by Vituity, completed the credentialing process, and did not qualify for any of Vituity's specialty-based incentives.[30] "That is a lot of 'ifs,'" the court observed, likely making the injury more speculative than real.[31]

Other Legal Challenges

Do No Harm has also brought lawsuits against government actors, challenging state boards of medical examiners that consider race in selecting board members.[32] These lawsuits bring claims under the Equal Protection Clause of the Fourteenth Amendment.

In addition, Do No Harm is challenging a California law that mandates implicit bias training for healthcare professionals.[33] Do No Harm argues that required implicit bias training constitutes compelled speech for the educators who teach continuing medical education courses in violation of their First Amendment rights.

Key Takeaways

Based on this litigation activity, there are three key takeaways for organizations and stakeholders in the healthcare industry:

- **Expect a wide range of programs and entities to be targeted.** Do No Harm's litigation efforts to date implicate numerous targets in the healthcare industry, from professional associations to multinational corporations. The organization and others like it will likely continue seeking opportunities to test theories of liability against DEI efforts across medical education, research, and practice.

- **Assess potential for liability under Section 1557 of ACA.** Do No Harm's usage of Section 1557 is nascent but concerning. While Section 1557 contains broad anti-discrimination protections, it is also limited in the types of entities it covers, as demonstrated by the district court's opinion in *Pfizer*. Understanding the parameters of the statute's applicability will help members of the healthcare industry determine whether they are vulnerable to future attacks.

- **Review eligibility requirements and public-facing statements for DEI programs.** Across claims, Article III standing continues to be the biggest obstacle for Do No Harm's anti-DEI efforts, partly due to the difficulty in alleging a concrete injury for anonymous plaintiffs who have yet to apply—and be rejected from—diversity programs in healthcare. The group's ability to establish standing in a particular case is highly dependent on the details of program eligibility. A review can help put your organization in the best position in the event of a lawsuit.

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), Kathryn Wynbrandt (kwynbrandt@jenner.com), or Erica Turret (eturret@jenner.com).

Footnotes

[1] 600 U.S. 181 (2023).

[2] *About Us*, Do No Harm, https://donoharmmedicine.org/about.

[3] *See* Alison Frankel, *Pfizer Defends Fellowships Challenged by Law Firm Working to End Affirmative Action*, Reuters (Oct. 26, 2022), https://www.reuters.com/legal/government/pfizer-defends-fellowships-challenged-by-law-firm-working-end-affirmative-action-2022-10-26/.

[4] 42 U.S.C. § 18116(a).

[5] 45 C.F.R. § 92.3(b).

[6] 42 U.S.C. § 2000d.

[7] Compl. ¶ 45, *Do No Harm v. Pfizer Inc.*, No. 22-cv-7908 (S.D.N.Y. Sept. 15, 2022). The lawsuit also includes claims under Section 1981, Title VI, and the New York State and City Human Rights Laws.

[8] *Id.* ¶ 31.

[9] *Id.* ¶¶ 89-97.

[10] *Do No Harm v. Pfizer Inc.*, 646 F. Supp. 3d 490, 510 (S.D.N.Y. 2022). As the district court explained, a plaintiff may not bring a Title VI claim "with respect to any employment practice . . . except where a primary objective of the Federal financial assistance is

to provide employment," and courts have construed that statutory language as a "threshold requirement . . . that the employer be the recipient of federal funds aimed primarily at providing employment." *Id.* (quoting 42 U.S.C. § 2000d-3). Section 1557, in turn, adopts the same "enforcement mechanisms provided for and available under such title VI." 42 U.S.C. § 18116(a). The court therefore concluded that "[u]nder Section 1557's plain language, the same threshold requirements under Title VI apply to race discrimination claims under Section 1557." *Id.* at 511.

[11] *Id.* at 510, 514-16.

[12] *Id.* at 500. Statutory standing, as opposed to Article III standing, refers to whether the plaintiff "has a cause of action under the [applicable] statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014). The Supreme Court has noted that the term "statutory standing" is a bit misleading, because it is not exactly a question of jurisdiction. but rather a question of statutory interpretation. *See id.*

[13] *Do No Harm v. Pfizer Inc.*, ---F.4th---, 2024 WL 949506 (2d Cir. Mar. 6, 2024).

[14] Compl. ¶ 49, *Do No Harm v. Vituity*, No. 23-CV-24746-TKW-HTC (N.D. Fla. Dec. 8, 2023).

[15] *Id.*, Ex. A.

[16] *Id.* ¶¶ 56-57.

[17] Joint Stipulation of Dismissal at 1, *Do No Harm v. Vituity*, No. 23-CV-24746-TKW-HTC (N.D. Fla. Jan. 2, 2024).

[18] 42 U.S.C. § 1981.

[19] *Pfizer*, ---F.4th---, 2024 WL 949506, at *11.

[20] *Id.* at *8 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)).

[21] *Id.*

[22] Compl. ¶ 3, *Do No Harm v. Nat'l Ass'n of Emergency Med. Technicians*, No. 24-CV-11-CWR-LGI (S.D. Miss. Jan. 10, 2024) (internal quotation marks omitted).

[23] *Id.*, Ex. A.

[24] *Do No Harm v. Nat'l Ass'n of Emergency Med. Technicians*, No. 24-CV-11-CWR-LGI, 2024 WL 245630, at *1 (S.D. Miss. Jan. 23, 2024).

[25] *Id.* at *3.

[26] *Id.* at *2.

[27] *Id.* at *3 (emphasis omitted). Do No Harm filed an amended complaint on March 4, 2024, bolstering some of its allegations with respect to the diversity scholarship program's purported exclusion of white applicants. The district court has not yet weighed in on these new allegations.

[28] Order Establishing Response Deadline at 1, *Do No Harm v. Vituity*, No. 23-CV-24746-TKW-HTC (N.D. Fla. Dec. 8, 2023).

[29] Order Denying Temporary Restraining Order at 2, *Do No Harm v. Vituity*, No. 23-CV-24746-TKW-HTC (N.D. Fla. Dec. 14, 2023).

[30] *Id.*

[31] *Id.*

[32] *See* Compl., *Do No Harm v. Edwards*, No. 24-CV-16 (W.D. La. Jan. 4, 2024); Compl., *Do No Harm v. Lee*, No. 23-CV-1175 (M.D. Tenn. Nov. 8, 2023).

[33] *See* Am. Compl., *Khatibi v. Med. Bd. of Cal.*, No. 23-CV-6195 (C.D. Cal. Dec. 22, 2023).

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