August 18, 2023

Pressure on DEI Initiatives Continues to Mount

In the wake of the Supreme Court's decision in *SFFA* v. *Harvard* (as discussed in our prior memos), diversity, equity and inclusion (DEI) programs have attracted increased scrutiny from longtime critics. Many high-profile U.S. companies have already fielded letters addressed to boards, senior management and the U.S. Equal Employment Opportunity Commission questioning the legality of their DEI initiatives. Others have been named in lawsuits and federal civil rights complaints alleging violations of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, state civil rights laws, and federal securities laws in connection with their DEI initiatives.

This recent wave of litigation is focused on (1) corporate pledges seeking to increase diversity in the workforce and among suppliers, which plaintiffs analogize to illegal quotas, (2) claims that such actions constitute breaches of fiduciary duty, and (3) DEI programs that exclusively serve diverse groups, which plaintiffs characterize as reverse discrimination. Incentive compensation tied to DEI metrics has also attracted scrutiny, with plaintiffs claiming that such policies promote discriminatory practices. Some of these pending suits assert securities fraud, claiming share prices were impacted by misstatements related to DEI initiatives.

Last week, in one of the first cases to reach decision, the U.S. District Court for the Eastern District of Washington dismissed claims brought against Starbucks, in an oral decision reaffirming the right of boards to make their own determinations regarding DEI strategy and policies. In rendering his judgment, Judge Bastian noted that "[t]he plaintiffs have ignored the fundamental rules of corporate law, including the business judgment rule. Courts of law have no business involving themselves with legitimate and legal decisions made by the board of directors of public corporations." Judge Bastian added that "[w]hether DEI policies . . . are good public policy is something for our politicians to decide. It's something for corporations to decide. It is not something for this court to be involved with."

As we have noted previously, boards and management may consider and determine — as part of an informed and deliberate exercise of business judgement — that certain DEI initiatives and strategies advance the company's mission and operational success. Such strategies may include the adoption of policies and initiatives that aim to eliminate bias across the workforce and supply chain. Setting DEI goals is not *per se* illegal, provided that the means by which such objectives are

pursued do not utilize protected categories such as race, gender or religion to determine employment outcomes. Programs that cultivate diverse talent and promote equal employment opportunities for underrepresented groups, including outreach efforts, remain legal and should not be conflated with "affirmative action."

While the law with respect to DEI programs has not changed, scrutiny will likely continue. Companies need to be prepared to face potential claims, in the court of law and in other public arenas, regardless of the merits of the claims. The recent *Starbucks* decision is an important and helpful reminder of the need to ground assessments of DEI programs in an informed and deliberate exercise of business judgment.

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