



MINTZ

DEI Legal Risks: Landscape and Trends

David Barmak, Member

Agenda

Overview

DEI in Employment Practices

Supply Chain Diversity Efforts

Investments Targeted Toward Minority-Owned Businesses

OVERVIEW

Students for Fair Admissions

- **Background:**

- Two anti-affirmative action cases brought against Harvard and the University of North Carolina for their consideration of race in the admissions process.

- **Question for the Court:**

- Should the Court overrule existing SCOTUS precedent and hold that institutes of higher learner cannot use race as a factor in admissions, or does a race-conscious process violate the Equal Protection Clause of the Fourteenth Amendment?

- **Holding:**

- In a 6-3 decision, the Court overruled existing Supreme Court precedent that allowed for affirmative action in college admissions.
- As a result, universities can no longer consider a protected characteristic in their admissions metrics.
 - Can't justify on basis of righting past wrongs or importance of diverse student body.
- The decision explicitly notes that universities can still consider in an application how race (or any other protected characteristic) impacted the applicant's life, so long as the discussion is concretely linked to a quality or unique ability that the applicant can contribute to the university.

Though *SFA* involves university admissions, DEI/affirmative action is now under attack in a variety of other contexts.

Overview

- Huge increase in the number of lawsuits against companies for compliance issues arising out of DEI initiatives.
- Outgrowth of Supreme Court decisions in *Students for Fair Admissions* cases.

“For ‘[t]he guarantee of **equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.**’ ”

C.J. Roberts wrote that the affirmative action programs “lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.”

“Permitting ‘past societal discrimination’ to serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group.” Opening that door would shutter another— ‘[t]he dream of a Nation of equal citizens . . . would be lost,’ we observed, ‘in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.’ ”

Overview

- Types of legal developments we are seeing:
 - EEOC complaints
 - 42 U.S.C. §1981 complaints
 - Shareholder derivative suits that focus on:
 1. DEI in employment decisions
 2. Supply chain diversity
 3. Venture funding for minority-owned businesses
 - Private company policies
 - New state-level laws



Cases

ESG



A temporarily closed Wells Fargo bank branch in New York, seen April 10, 2020.
Photographer: Mark Kauzlarich/Bloomberg

March 16, 2023, 11:26 AM EDT; Updated: March 16, 2023, 12:27 PM EDT

Wells Fargo Ignored Diversity Problems, Shareholders Say in Suit (1)

COURT: N.D. Cal.

TRACK DOCKET: No. 3:23-cv-01168 (Bloomberg Law subscription)

COMPANY: Wells Fargo & Co. (Bloomberg Law subscription)

Shareholders at Wells Fargo sued members of the bank's board for allegedly standing by "passively" when they were presented with diversity, equity and inclusion problems.

The stockholder derivative complaint, filed on Wednesday in the US District Court for the Northern District of California by the Asbestos Workers Philadelphia Pension Fund, accuses the board of ignoring "pervasive issues of discrimination" that have resulted in multiple scandals.

The lawsuit alleges breaches of fiduciary duties, unjust enrichment, corporate waste, and violation of federal securities laws. The shareholders say the discrimination scandals hurt Wells Fargo's reputation and harmed it financially.

BIGLAW

Lawsuit Challenges Diversity Fellowships at Perkins Coie and Morrison Foerster Following Affirmative Action Ruling



Edward Blum, a prominent figure known for his opposition to affirmative action, has launched a new legal campaign targeting law firms Perkins Coie and Morrison Foerster. Blum's organization, The American Alliance for Equal Rights, filed lawsuits against the firms, claiming that their diversity fellowships violate recent Supreme Court rulings against affirmative action.

Blum's legal action comes in response to diversity fellowships implemented by Perkins Coie and Morrison Foerster, which aim to increase hiring candidates from diverse backgrounds. Blum's lawsuit argues that these initiatives are unlawful following a recent U.S. Supreme Court decision that overturned affirmative action. The lawsuit asserts that such "rank discrimination" has never been legal, even before the Supreme Court's ruling in SFFA v. Harvard declared that race could not be considered in college admissions.

Laws at Play

Title VII

It shall be an unlawful employment practice for an employer -

1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of such individual's race, color, religion, sex, or national origin**; or
2. **to limit, segregate, or classify his employees or applicants for employment** in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, **because of such individual's race, color, religion, sex, or national origin.**

Key Points

- Can succeed on a Title VII action by proving either disparate impact or disparate treatment
- Limited to the employer-employee relationship
- Cap on non-economic damages, but may be entitled to equitable relief
- Short statute of limitations

Laws at Play

42 U.S.C §1981 – Based on Section 1 of the Civil Rights Act of 1866

a) Statement of equal rights

All persons . . . shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens. . . .

Key Points:

- Applies only to race and ethnicity, does not cover other protected categories
- Can only be proven by showing disparate treatment
- Not limited to employment context
- No cap on recovery for non-economic damages
- Long statute of limitations

Laws at Play

Company Policies

Nasdaq “Show And Tell”

Diversity rule that requires Nasdaq companies to publicly disclose the makeup of their boards

- The Fifth Circuit recently rejected a challenge to the rule, holding that because Nasdaq is a private entity – not a state actor – it is not subject to Constitutional scrutiny.

State Laws

Florida Stop W.O.K.E. (Wrongs to Our Kids and Employees) Act

Prohibits Florida based employers from requiring workers in Florida to attend DEI trainings if such trainings “espouse[], promote[], advance[], inculcate[], or compel[]” specified DEI concepts.

- Federal judge has temporarily blocked several provisions of the law as “naked viewpoint-based regulation on speech” and as unconstitutionally vague – now on appeal in the Eleventh Circuit.

California AB 979 and SB 826

Requires publicly held corporations headquartered in California to diversify their boards of directors by increasing the number of directors from “underrepresented communities” and increasing gender diversity.

- The Eastern District of California ruled that these laws violate the Equal Protection Clause of the Fourteenth Amendment and §1981.

Laws at Play

Executive Order 11246, §503 of the Rehabilitation Act of 1973, Vietnam Era Veterans' Readjustment Assistance Act of 1974

- **Affirmative Action Requirements for Government Contractors**
 - Companies with at least 50 employees and at least one contract of \$50,000 or more are required to develop Affirmative Action Programs (AAPs)
- **Affirmative Action Program Requirements**
 - Analyzing personnel-selection decisions and compensation practices
 - Establishing statistical placement targets for hiring women, minorities, persons with disabilities, and protected veterans
 - Designing equal employment opportunity policies and recruitment programs that drive and document the company's good faith efforts to recruit protected individuals
 - Implementing processes to document and comply with notification, record-keeping, and reporting obligations
 - EEO Policy Statement



LEGAL RISKS ASSOCIATED WITH DEI IN EMPLOYMENT PRACTICES

Legal Risks Associated with DEI In Employment Practices

July 17, 2023 – Tom Cotton Letters

- Senator Tom Cotton of Arkansas sent letters to 51 law firms contending that the firms themselves, *as well as their clients*, may be violating federal law with their current DEI policies and programs, following the *SFA* decision.
- “Your firm has a duty to fully inform clients of the risks they incur by making employment decisions based on race.”
- “Employers should take to heart the Supreme Court’s recent declaration that “eliminating racial discrimination means eliminating all of it.” Congress will increasingly use its oversight powers—and private individuals and organizations will increasingly use the courts—to scrutinize the proliferation of race-based employment practices.”

Legal Risks Associated with DEI In Employment Practices

- Dozens of AmLaw 100 law firms have received letters and some have been sued, in attacks on their diversity fellowship programs.

American Alliance for Equal Rights v. Perkins Coie, LLP

- Suit against the firm (and many others) under §1981 for racially discriminating through their diversity fellowship.
 - Exclusively open to minority 1L and 2L applicants
- Since the suit was filed, Perkins amended its qualifications for applicants, leading the AAER to dismiss their complaint.
- Similar suit against Morrison & Foerster, with a similar outcome

Legal Risks Associated with DEI In Employment Practices

Before – Perkins Coie DEI policies:

“Membership in a group historically underrepresented in the legal profession, **including students of color, students who identify as LGBTQ+, and students with disabilities.**”

“What does the firm consider ‘diverse’?” It reiterates that its “definition” of diversity “encompasses **students of color, students who identify as LGBTQ+, and students with disabilities.** If you feel that you are diverse in one or more of these ways, please apply.”

After – Perkins Coie DEI policies:

“All students who are in good standing in their first year at an ABA-accredited law school are eligible to apply for the Diversity & Inclusion Fellowship Program. Perkins Coie . . . welcomes applications . . . from **all eligible applicants regardless of race, color, religion, sex, age, national origin, veteran status, sexual orientation, gender identity / gender expression, disability status, or any other identity.**

We evaluate all applications for the fellowship and consider the following factors:

Academic Achievement, DEI Leadership, Resilience and Perspective”

Legal Risks Associated with DEI In Employment Practices

American Alliance for Civil Rights v. Winston & Strawn

- Winston & Strawn is the most recent firm AAER has targeted, though unlike Perkins, it has stood by its policy and appears ready to litigate . . . So far.
- W&D's 1L LCLD Scholars Program is open to members of “a disadvantaged and/or historically underrepresented group in the legal profession.”

Legal Risks Associated with DEI In Employment Practices

Winston Strawn response letter to Edward Blum

- “We are proud of the program and note that your statement that it ‘excludes certain applicants based on race’ is simply false,” Winston Chicago managing partner told Blum’s lawyer.
- “Applicants of all races, ethnicities, socio-economic orientations and all other backgrounds are eligible and encouraged to apply.”
- **“Note that your implication that the terms “disadvantaged” and “historically underrepresented” necessarily refer to race is baseless,”** Spangler added. “Winston & Strawn does not make employment decisions on the basis of race or ethnicity.”
- “Our program is appropriate, legal and compliant and it will continue,” the Winston letter added.

EEOC Complaints/Shareholder Demand Letters

Morgan Stanley

- Freshman Enhancement Program

Eligibility Requirements:

Morgan Stanley prides itself on fostering an environment that promotes diverse talents and perspectives. One way we demonstrate our commitment to diversity is through the First Year Enhancement Program. This program is an integral part of our diversity recruiting efforts helping to attract historically underrepresented groups in the financial services industry. Historically underrepresented populations in the finance industry include: Women, Hispanic, Black, Veteran, LGBTQ+ populations.

- You are pursuing an undergraduate degree with an expected graduation date between December 2025 and June 2026.
- You have an interest in financial services, excellent work ethic, and strong verbal/written communication skills
- You are analytical, results-driven, able to multi-task, and a team player with a positive attitude

- *“AFL has requested the EEOC to open an investigation into these discriminatory practices because EEOC’s mission is to stop and remedy unlawful employment discrimination by enforcing federal law.”*

EEOC Complaints/Shareholder Demand Letters

National Center for Public Policy Research v. Howard Schultz, et. al.

NCPPR sued Starbucks in a shareholder derivative suit under Title VII for, amongst other policies, their stated goals of achieving certain diversity metrics over the next 3 years.

“In October 2020, Starbucks announced its: (a) adoption of the ‘goals’ of ‘achieving BIPOC representation of at least 30% at all corporate levels and at least 40% at all retail and manufacturing roles by 2025; (b) a commitment to completion of the roll out of an analytics tool that will provide leaders with visibility to current diverse representation relative to Starbucks representation goals (c) incorporation of measurements focused on building inclusive diverse teams in to Starbucks’ executive compensation programs beginning in FY21; and (d) entry into the Board Diversity Action Alliance to act alongside peer companies as we are committed to representation of racially and ethnically diverse directors on corporate boards of directors.”

“If Plaintiff remains so concerned with Starbucks’ DEI and ESG initiatives and programs, the American version of capitalism allows them to freely reallocate their capital elsewhere.”

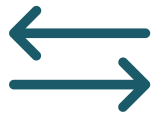
EEOC Complaints/Shareholder Demand Letters – the other side of the coin

Wells Fargo

- Plaintiffs asserted that the board “*passively stood by while being presented with DEI problems,*” noting produced books and records that allegedly demonstrate the Board and management “*were most interest[ed] in the reputation and perception of the Company’s engagement with DEI issues than actually addressing them substantively.*”
- By “conducting sham interviews to nominally fulfill a diversity-enhancing policy,” plaintiffs alleged that Wells Fargo not only *misled regulators into believing its compliance with anti-discrimination and affirmative action violations*, but also violated federal securities law “misrepresenting to investors Wells Fargo’s commitment to diversity, as well as the Company’s own internal policies.”

Key Takeaways

DEI Programs are Fraught with Litigation Risks



Can face attacks from both sides of the issue in the employment context



Potential forms:

Federal lawsuits based on
Title VII and/or §1981
Shareholder derivative suits
EEOC complaints

Key Takeaways

Mitigating Litigation Risks

- ! Use race-neutral language.
- ! Reconsider policies that prioritize the recruitment or advancement of a single particular group.
- ! Ensure all decisions are made on appropriate criteria and are well documented.
- ! Invest in employee retention through leadership and mentorship programs.
- ! Review DEI-related communications to consider removing statements that may violate the law.
- ! Train managers to make decisions based on legitimate business reasons, not protected characteristics.
- ! Identify recruitment channels that provide more exposure to diverse candidates (e.g., HBCUs, community colleges, public universities, affinity organizations).

Key Takeaways

Mitigating Litigation Risks and Complying with Federal Contractor Affirmative Action Requirements



Affirmative Action Plans can serve as a useful tool to ensure compliance in the context of *SFA*.



Create a recruitment plan in the AAP that attracts a larger, more diverse pool of qualified applicants, while ensuring any selection processes are race and gender neutral.



AAPs should focus on efforts to open the candidate pool to a more diverse set of qualified potential applicants, not on race-based or other quotas.

SUPPLY CHAIN DIVERSITY

Supply Chain Diversity



America First Legal Files Federal Civil Rights Complaint Against Unilever, Parent Company of Ben & Jerry's, for Unlawful, Racist, and Sexist Hiring Practices

May 18, 2023



WASHINGTON, D.C. – Today, as part of its initiative under the Center for Legal Equality, America First Legal (AFL) filed a federal civil rights complaint against Unilever, the parent company of Ben & Jerry's ice cream brand. The complaint asks the U.S. Equal Employment Opportunity Commission (EEOC) to investigate Unilever's systemic and discriminatory hiring, promotion, and job-training employment practices.

Supply Chain Diversity

National Center for Public Policy Research v. Howard Schultz, et. al.

NCPPR sued Starbucks in a shareholder derivative suit under §1981 for its pledge to increase spending with diverse suppliers and media companies through its Supplier Diversity and Inclusion program.

- Pledged to “increase its spend with diverse suppliers from \$800 million to 1.5 billion by 2023 and allocate 15% of their advertising budget with minority-owned and targeted media companies.”

Supply Chain Diversity

National Center for Public Policy Research v. Howard Schultz, et. al.

- The Court (E.D. WA) dismissed the suit, holding that these decisions were protected by the Business Judgment Rule, and the suit was an attempt by NCPPR to leverage their **56 of 1.15 billion shares** in Starbucks to override the authority of the Board.

"Plaintiff is apparently unhappy with its investment decisions in so-called "woke" corporations. This Court is uncertain what that term means but Plaintiff uses it repeatedly as somehow negative. This Complaint has no business being before this Court and resembles nothing more than a political platform. Whether DEI and ESG initiatives are good for addressing long simmering inequalities in American society is up for the political branches to decide. If Plaintiff remains so concerned with Starbucks' DEI and ESG initiatives and programs, the American version of capitalism allows them to freely reallocate their capital elsewhere."

Key Takeaways



The only guidance we have on this issue so far is from the Starbucks case which came out of Washington, a historically liberal state.



We do not yet know how other states and circuits will rule on the issue.



Efforts that focus on contracting with diverse suppliers are all susceptible to 1981 complaints and potential litigation.



Just as in the employment context, investments focused on protected classes are a target – consider avoiding language that prioritizes based on immutable characteristics.



INVESTMENTS TARGETED TOWARD MINORITY-OWNED BUSINESSES

Investments Targeted Toward Minority-Owned Businesses

FEARLESS **fund**



Investments Targeted Toward Minority-Owned Businesses

American Alliance for Equal Rights v. Fearless Fund

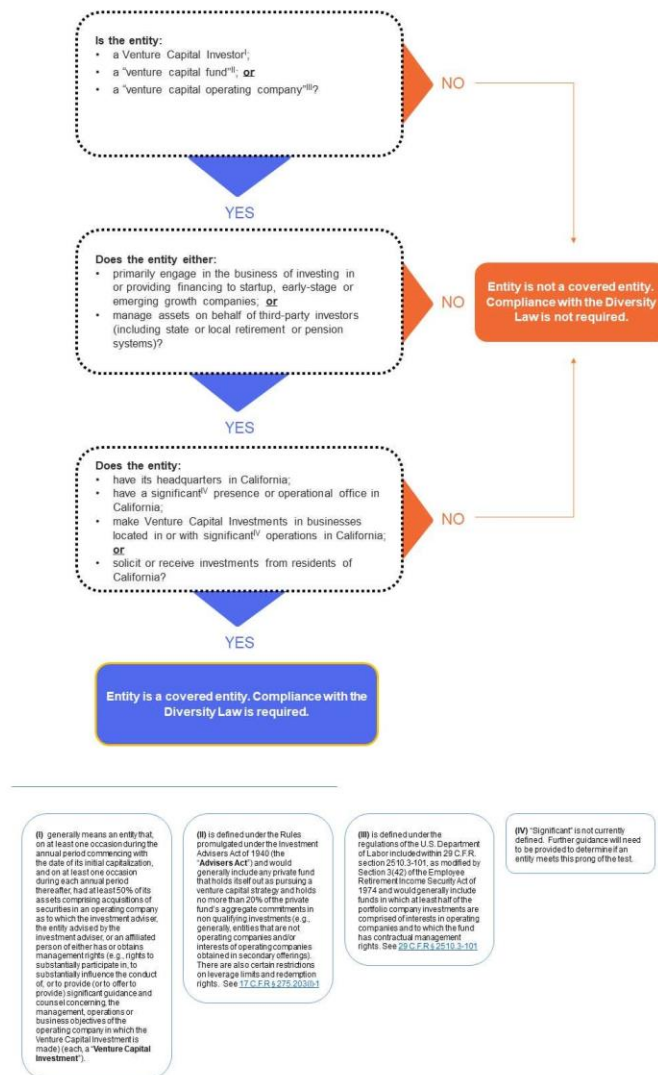
- Fearless Fund is an Atlanta-based venture capital fund founded by women of color that invests in women of color-led businesses seeking early-stage investment. Their mission is to “bridge the gap in venture capital funding for women of color founders for potential high-growth and scalable companies.”
- AAER sued Fearless in early August 2023 for violating §1981, alleging that Fearless Fund’s \$20,000 small business grant program and the associated business support services and mentorship programs were racially discriminatory because they were only for black women.
- After the district court initially denied AAER’s request to halt the grants, holding that the fund was protected under the First Amendment because it counted as charitable giving, AAER filed an emergency motion to appeal, resulting in a decision from the Eleventh Circuit to grant the preliminary injunction, temporarily blocking Fearless from making any grants as the case is litigated.
- AAER argues:
 - Fearless Fund is operating a rationally discriminatory program that violates §1981’s “guarantee of race neutrality” in making contracts.

Investments Targeted Toward Minority-Owned Businesses

California Diversity Reporting Law

Passed on October 8, 2023, and effective March 1, 2025, SB 54[1] requires certain entities with a California nexus to file an annual report detailing certain demographic data about the founding team members of businesses in which the entities made venture capital investments the prior calendar year, the total amount of money invested in such businesses, and a breakdown between diverse and non-diverse businesses and founding teams.

The data will be made publicly available on the California Civil Rights Department website.



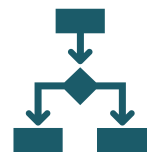
Key Takeaways



This is an area we are seeing anti-DEI activists have the most initial success



Results are heavily dependent on the courts' traditional political leanings, and we will likely see one of these cases (or one similar) rise to the Supreme Court in the coming years, in the wake of *Students for Fair Admissions*



Just as with diverse recruitment efforts and supply chain diversity, companies should be mindful of using race (or any other protected characteristic) as a determinant.

The background consists of a complex pattern of overlapping triangles in various shades of teal, blue, and green. The triangles are arranged in a way that creates a sense of depth and movement, with some triangles pointing upwards and others downwards. The colors range from dark, muted blues to lighter, brighter teals.

QUESTIONS?

Your speaker: David Barmak



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David is an experienced trial lawyer and trusted advisor to businesses and their executives on a wide range of issues, with a focus on employment law and HR matters. He has litigated hundreds of cases in federal and state courts and arbitrations nationwide. David is devoted to helping clients accomplish their compliance, risk reduction, and employee relations objectives.

As a trial lawyer, David has handled cases involving a broad range of disputes such as employment discrimination, whistleblower and other retaliation claims, noncompetition agreements and trade secret issues, wage and hour (FLSA) compliance, class and collective actions, and employment contract disputes. Clients have also regularly looked to David to litigate disputes involving a broad range of non-employment issues, including contract, partnership, shareholder, technology, and outsourcing.

As a trusted advisor, David has helped clients across many industries to reduce employment practices risks and adopt best practices, relating to wage and hour laws, employee leave laws, internal investigations, dispute resolution policies and practices, non-compete and trade secret issues, employee training, personnel and other policies, and WARN Act issues and other matters. He also is frequently involved in the negotiation and drafting of executive employment, separation, and related agreements.

David chaired the firm's Employment, Labor & Benefits Practice for more than a decade. He has been recognized as a leading lawyer by several publications including Chambers USA, in which clients interviewed had these comments about David: "a superior lawyer who is very knowledgeable and attentive" and "unbelievably responsive and timely... His advice is very, very well informed but also highly tuned to the needs of the business".

DAVID ACKNOWLEDGES THE SUBSTANTIAL CONTRIBUTIONS OF HIS COLLEAGUES AT MINTZ, ESPECIALLY TALIA WESELEY TO THESE MATERIALS

APPENDIX

Appendix

Title VII:

SEC. 2000e-2. [Section 703]

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S. Code § 1981 - Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Appendix

42 U.S. Code § 1981 - Equal rights under the law

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Appendix

Perkins Coie DEI policies

Old Policy:

Under the heading “Criteria,” Perkins states that applicants cannot apply to the 1L diversity fellowship unless they meet four requirements, including the following diversity requirement: “Membership in a group historically underrepresented in the legal profession, including students of color, students who identify as LGBTQ+, and students with disabilities.” On a FAQs page, Perkins answers the question “What does the firm consider ‘diverse’?” It reiterates that its “definition” of diversity “encompasses students of color, students who identify as LGBTQ+, and students with disabilities. If you feel that you are diverse in one or more of these ways, please apply.”

[American Alliance for Equal Rights v. Perkins Coie LLP, Docket No. 3:23-cv-01877 \(N.D. Tex. Aug 22, 2023\), Court Docket](#)

New Policy:

All students who are in good standing in their first year at an ABA-accredited law school are eligible to apply for the Diversity & Inclusion Fellowship Program. Perkins Coie is an Equal Opportunity Employer and welcomes applications for the Diversity & Inclusion Fellowship Program from all eligible applicants regardless of race, color, religion, sex, age, national origin, veteran status, sexual orientation, gender identity / gender expression, disability status, or any other identity.

We evaluate all applications for the fellowship and consider the following factors:

Academic Achievement – A demonstrated record of academic achievement and excellent writing and interpersonal skills, as well as experience that will contribute to a successful career in the legal field.

DEI Leadership – Engagement in efforts to advance diversity, equity, and inclusion within the community and/or legal profession, including during college or law school.

Resilience – Obstacles or challenges you have encountered and overcome, how you overcame those obstacles, and what you learned from doing so.

Perspective – Life experiences that have shaped your perspectives and professional goals.

Appendix

Winston Strawn response letter to Edward Blum

“We are proud of the program and note that your statement that it ‘excludes certain applicants based on race’ is simply false,” Winston Chicago managing partner Cardelle Spangler told Blum’s lawyer, Thomas McCarthy, of litigation boutique Consovoy McCarthy. “Applicants of all races, ethnicities, socio-economic orientations and all other backgrounds are eligible and encouraged to apply.”

“Note that your implication that the terms “disadvantaged” and “historically underrepresented” necessarily refer to race is baseless,” Spangler added. “Winston & Strawn does not make employment decisions on the basis of race or ethnicity.”

“Our program is appropriate, legal and compliant and it will continue,” the Winston letter added.

Starbucks decision

"Plaintiff is apparently unhappy with its investment decisions in so-called "woke" corporations. This Court is uncertain what that term means but Plaintiff uses it repeatedly as somehow negative. This Complaint has no business being before this Court and resembles nothing more than a political platform. Whether DEI and ESG initiatives are good for addressing long simmering inequalities in American society is up for the political branches to decide. If Plaintiff remains so concerned with Starbucks' DEI and ESG initiatives and programs, the American version of capitalism allows them to freely reallocate their capital elsewhere."

Appendix

MBDA

(9) MINORITY BUSINESS ENTERPRISE.—

(A) IN GENERAL.—The term “minority business enterprise” means a business enterprise—

(i) that is not less than 51 percent-owned by 1 or more socially or economically disadvantaged individuals; and

(ii) the management and daily business operations of which are controlled by 1 or more socially or economically disadvantaged individuals.

(15) SOCIALLY OR ECONOMICALLY DISADVANTAGED INDIVIDUAL.—

(A) IN GENERAL.—The term “socially or economically disadvantaged individual” means an individual who has been subjected to racial or ethnic prejudice or cultural bias (or the ability of whom to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same line of business and competitive market area) because of the identity of the individual as a member of a group, without regard to any individual quality of the individual that is unrelated to that identity.

(B) PRESUMPTION.—In carrying out this Act, the Under Secretary shall presume that the term “socially or economically disadvantaged individual” includes any individual who is—

(i) Black or African American;

(ii) Hispanic or Latino;

(iii) American Indian or Alaska Native;

(iv) Asian;

(v) Native Hawaiian or other Pacific Islander; or

(vi) a member of a group that the Agency determines under part 1400 of title 15, Code of Federal Regulations, as in effect on November 23, 1984, is a socially disadvantaged group eligible to receive assistance.