

Is the 2nd Circuit's Pfizer Decision Enough to Rescue DEI Initiatives?

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We have previously discussed the impact of the Supreme Court's June 2023 decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)* on diversity, equity and inclusion in the employment context. The SFFA decision struck down race-conscious admissions programs from Harvard University and The University of North Carolina at Chapel Hill.

While the decision remains—at least technically—restricted to the field of higher education, we undoubtedly observed a ripple effect throughout the private sector, both in the court of public opinion and actual court system. Following the decision, organized, well-funded, committed activist/political advocacy groups started to attack DEI programs. Efforts by groups like the American Alliance for Equal Rights (AAER) and America First Legal Foundation (AFL) included urging the Equal Employment Opportunity Commission to investigate DEI initiatives at top 100 companies and challenging initiatives at law firms and airlines in federal court. As a result, Revelio Labs estimated that the amount of DEI jobs shrunk by 8% throughout early 2024.

There remain several open questions regarding what organizations can do to protect against attacks on their DEI initiatives. On March 6, 2024, the Second Circuit presented one potential avenue to challenge the standing of organizations like the AAER or AFL. In *Do No Harm v. Pfizer, Inc.*, the court rejected a challenge to Pfizer's diversity fellowship program by Do No Harm (DNH), a group with the stated purpose of removing division and discrimination from healthcare professions. DNH claimed that Pfizer's fellowship program—which seeks "to advance students and early career colleagues of Black/African American, Latino/Hispanic, and Native American descent"—discriminated against white and Asian-American applicants in violation of New York state and federal law. The court held that DNH lacked legal standing and dismissed the challenge to Pfizer's diversity program.

The Second Circuit's decision creates a potential roadblock for challenges levied by organizations against DEI initiatives. We will analyze the language of the opinion, evaluate the impact of the decision, and provide guidance for organizations that wish to continue to protect against attacks on their diversity, equity and inclusion initiatives.

Do No Harm v. Pfizer

In *Do No Harm v. Pfizer, Inc.*, the Second Circuit majority held that DNH failed to establish standing to sue in the context of a motion for a preliminary injunction because it failed to identify by name any individual who was injured by Pfizer's alleged discriminatory fellowship program. In its motion for a preliminary injunction, DNH alleged that two anonymous members met the eligibility requirements of Pfizer's diversity fellowship, but did not apply because they identified as white and/or Asian-

American. According to the allegations, the members felt that they were excluded from the fellowship because of their race and would be ready and able to apply if Pfizer eliminated its allegedly discriminatory criteria.

The Court rejected DNH's standing to sue on behalf of the anonymous members. While the Court noted associations are allowed to sue on behalf of their members when those members would otherwise have standing to sue on their own, DNH was required to identify the actual names of the members harmed by the challenged program. The submission of two anonymous declarations was insufficient. Without actually naming members that were harmed by Pfizer's diversity fellowship, DNH could not establish standing to sue under Article III of the Constitution. Without standing to file its motion for preliminary injunction, the Court dismissed both the motion and DNH's complaint against Pfizer.

The Second Circuit carefully noted that it would not reach a determination of whether at the pleading stage DNH was required to identify its members to establish standing. The fact that DNH failed to establish standing for its motion for preliminary injunction was sufficient to dismiss all claims against Pfizer. But, the decision now presents a road map for companies to protect their diversity initiatives against organizations like AAER and AFL who cannot advance the interests of members shrouded in anonymity.

Impact on Other Circuit Courts

Prior to the Second Circuit's decision in *Do No Harm v. Pfizer*, there were few cases tackling the issue of whether organizations need to identify their members by name to establish standing. In *American Alliance for Equal Rights v. Fearless Fund Mgm't, LLC*, the Eleventh Circuit held that AAER had established standing on behalf of its members to bring forth a lawsuit against a venture capital firm focused on funding businesses that were majority-owned by Black women. Despite AAER not providing names of actual members, the Court noted it was inappropriate to require specific names at the motion to dismiss stage.

Notably, attorneys for Fearless Fund Management have already informed the Eleventh Circuit of the decision in *Do No Harm v. Pfizer* and noted that AAER failed to identify allegedly injured members by name. Fearless Fund Management requested that the Eleventh Circuit come to the same conclusion as the Second Circuit, and deny AAER's standing to sue for a preliminary injunction because AAER failed to identify affected members and failed to corroborate boilerplate statements that the anonymous members are ready to apply for a grant.

The Eleventh Circuit's decision will determine whether there is uniformity in evaluating standing issues for a preliminary injunction or whether a circuit split will have to be decided by the Supreme Court.

What Comes Next?

Do No Harm v. Pfizer presents a viable roadblock against veiled attacks by organizations seeking to challenge private sector DEI initiatives. In jurisdictions that follow the Second Circuit's decision, companies can attack organizational standing in motions to enjoin diversity programs in an effort to dismiss the entire lawsuit. However, until the Eleventh Circuit, and potentially the Supreme Court, weighs in on the challenges to standing, there remain open questions about how reliable the defense will be. Courts will further have to opine on whether the standing challenge only applies to the enhanced requirements at the preliminary injunction stage or if the rationale can be transferred to

the more lenient pleading stage analysis. For now, DEI programs are still lawful and employers who value diversity should remain diligent in checking updates to the legal landscape on how to best enact and protect their programs or initiatives.

If you have questions or would like to discuss your company's DEI program and initiatives, please reach out to a member of Kelley Drye's [labor and employment team](#).