Legislation Creates Chilling Effect for Diversity, Equity, and Inclusion Instruction for Businesses, K-12 Schools, and Florida's College and University Systems

Overview

On March 10, 2022, the Florida Senate passed the so-called "Stop WOKE" Act (CS/HB 7) along party lines and subsequently sent the bill to Gov. Ron DeSantis to be signed. For civil rights and education advocates, concerns are high. The bill's provisions, which grant individuals the right to sue and receive damages over the content of school instruction and employee trainings, will reduce the quantity and quality of diversity, equity, and inclusion trainings and instruction for all Floridians and directly and indirectly restrict free speech for employers, educators, and students.

The act has three main functions:

1) **New employer liabilities.** Creates a new category of legal discrimination for employers and labor groups, which creates new financial and legal liabilities for Florida businesses, nonprofits, labor groups, and government entities. Employees and other individuals will be able to sue for damages over mandatory diversity trainings that include certain topics related to discrimination (See the callout boxes).
2) **New public school liabilities.** Creates a new category of legal discrimination for K-12 schools and the Florida College System (FCS), which creates new financial and legal liabilities for Florida's school districts and FCS. (It is also important to note that the State University System will be at risk of losing funds as well because of budget conforming language tying university performance funding to CS/HB 7 compliance.) Students, parents, and other individuals will be able to sue for damages over instruction or trainings that include certain topics related to discrimination (See the callout boxes).
3) **Curriculum changes.** Details specific concepts related to discrimination that all K-12 instruction and materials must adhere to; expands upon the types of discussions related to race, discrimination, and history that Florida's K-12 teachers *may* facilitate; adds or makes changes to curriculum related to Black history, mental health, civics, and character development; and creates professional development requirements to reflect curriculum changes in CS/HB 7.

The "principles" and "concepts" enumerated in CS/HB 7 closely mirror the "divisive concepts" enumerated in then-President Donald Trump's executive order (EO) on diversity.[1] A federal judge preliminarily halted the EO by injunction in December 2020, citing First Amendment considerations,[2] and President Joe Biden withdrew the EO in January 2021. In anticipation of legal actions, lawmakers included language in CS/HB 7 making its provisions separable — in other words, if a judge strikes down one part, then the parts of CS/HB 7 that were outside the domain of the lawsuit will remain intact.

Section-by-Section Breakdown of CS/HB 7

Section 1

Makes changes to Florida's Civil Rights Act (FCRA) of 1992 to restrict employers' ability to require trainings for employees that "espouse" any of the eight specified concepts outlined in the callout boxes, while stipulating that "discussion of the concepts" is allowed as long as "instruction is given in an objective manner without endorsement of the concept." While on their face the listed concepts seem innocuous, by banning these concepts altogether the state risks banning discussion of valuable concepts for citizens to understand. By banning Concept #3, for example, the state discourages the examination of societal privileges (wherein society treats members of different races, sexes, nationalities, and disability statuses differently, thereby conferring a privilege to certain groups).

Concepts That Will be Banned from Mandatory Employer Trainings and K-12 and Florida College System Instruction Under CS/HB 7 (Part 1 of 2)

1. Members of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin.

2. An individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.

3. An individual's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin.

4. Members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.

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By making this change to FCRA, employers, unions, credentialling and licensing organizations, and others are at risk of litigation and financial damages if they mandate participation in trainings that include any of the delineated concepts. The threat of lawsuits has the potential to create a "chilling" effect wherein companies refrain from engaging in trainings around diversity, equity, and inclusion altogether out of fear of being sued and being liable for damages.

Of note, in addition to individual employees bringing complaints to the Florida Commission on Human Relations, the Attorney General's office can independently bring civil action for damages, with penalties not exceeding $10,000 per violation of FCRA.

Section 2

This section makes changes to the Florida Educational Equity Act (FEEA) that prohibit teaching of the same eight concepts specified in the callout boxes in K-12 public schools and the Florida College System, while stipulating that "discussion of the concepts" is allowed as long as "instruction is given in an objective manner without endorsement of the concept." This section states that subjecting students or employees to trainings or instruction that includes any of the eight delineated concepts will constitute discrimination on the basis of race, color, national origin or sex on the part of the public school or FCS institution. An aggrieved individual, who finds that a school has run afoul of the new provisions in the FEEA, can sue, as spelled out in FEEA: "A person aggrieved by a violation of this section or a violation of a rule adopted under this section has a right of action for such equitable relief as the court may determine. The court may also award reasonable attorney's fees and court costs to a prevailing party."[3]

Section 2, in addition to other sections, makes changes to FEEA so that it reads "sex" instead of "gender," and "color" instead of "ethnicity," the stated reason of which is to match the nomenclature in FCRA.

Section 3

This section expands instructional requirements for K-12 schools around teaching Black history and makes changes to the state's requirements for health, civic, and character development curriculum. It also dictates that "instruction and supporting materials on the topics enumerated in this section must be consistent with the following principles of individual freedom:"

a) No person is inherently racist, sexist, or oppressive whether consciously or unconsciously, solely by virtue of his or her race or sex.

b) No race is inherently superior to another race.

c) No person should be discriminated against or receive adverse treatment solely or partly on the basis of race, color, national origin, religion, disability, or sex.

d) Meritocracy or traits such as a hard work ethic are not racist but fundamental to the right to pursue happiness and be rewarded for industry.

e) A person, by virtue of his or her race or sex, does not bear responsibility for actions committed in the past by other members of the same race or sex.

f) A person should not be instructed that he or she must feel guilt, anguish, or other forms of psychological distress for actions, in which he or she played no part, committed in the past by other members of the same race or sex."[4]

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5. An individual, by virtue of his or her race, color, sex, or national origin, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin.

6. An individual, by virtue of his or her race, color, sex, or national origin, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.

7. An individual, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin.

8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, sex, or national origin to oppress members of another race, color, sex, or national origin.

Issues to consider regarding the "principles" of Section 3

With regard to a): the intent of the inclusion of this concept is to restrict the discussion of the concept of implicit bias. A wide body of scientific research has explored the psychological phenomena of implicit or unconscious bias and its detrimental effects on human interactions and subsequent effects on institutional behavior and macro-level disparities by race, sex, national origin, disability, and other characteristics.[5] **For**

example, one landmark labor market study found that résumés with white-sounding names received 50 percent more job application callbacks from employers than résumés with Black-sounding names did, even with the rest of the résumé being identical.[6]

With regards to d): the term "meritocracy" originated from the book "Rise of the Meritocracy," authored by Michael Young in 1958. **The book satirizes the concept of meritocracy — the idea that people who find wealth and success do so because of personal merit alone and not at all because of circumstances inherent in social structures.** To enshrine "meritocracy" as a central principle upon which Florida's school curriculum must be based, students will miss out on understanding the nuances of America's economy, including the evolution of tax law and wealth and income inequality.

Section 3 also stipulates that "instructional personnel *may* facilitate discussions and use curricula to address, in an age-appropriate manner, how the freedoms of persons have been infringed upon by sexism, slavery, racial oppression, racial segregation, and racial discrimination, including topics relating to the enactment of and enforcement of laws resulting in sexism, racial oppression, racial segregation, and racial discrimination, including how recognition of these freedoms have overturned these unjust laws. However, classroom instruction and curriculum may not be used to indoctrinate or persuade students to a particular point of view inconsistent with the principles of this subsection or state academic standards." By including the word *may* instead of *shall*, the bill leaves these concepts as options for instruction rather than requirements. **Additionally, CS/HB 7 does not define "age-appropriate" for these provisions. This lack of clarity leaves implementation details to individual interpretation and subject to lawsuits.**

Section 4

This section requires evaluators of instructional materials for K-12 public schools to comply with concepts outlined in Section 3 for material selection.

Section 5

This section says that each school district must update its professional development system to be in compliance with the act.

Section 6 & Section 7

These sections change two existing statutes' numbers so that they reflect the new numbering of 1003.42(5) related to curriculum included in CS/HB 7.

Section 8

Provides an effective date of July 1, 2022.

Fiscal Implications

Committee staff summaries for CS/HB 7 identified expanded liability exposure for the state, local governments, and businesses; however, they did not estimate a specific fiscal impact. In terms of the implementation of the mandates of CS/HB 7 by the Florida Department of Education, the General Appropriation Act (GAA) for the state's 2022-23 budget includes $2 million for CS/HB 7 implementation (line 135 of the GAA). This may include the cost of litigation.

Budget Conforming Bill SB 2524, CS/HB 7, and Universities' Performance Funding

The education conforming bill (SB 2524) for the state budget includes a provision that bars a university from receiving performance funding (which totals more than $500 million annually) if they run afoul of the mandates of CS/HB 7. Notably, the state's universities had been absent from CS/HB 7 bill language, but these late additions to the conforming language binds them to the mandates of CS/HB 7 as well.[7]

A concerning provision in the conforming bill makes legislative committees one of the bodies that can be petitioned to disqualify a university from receipt of performance funding based on perceived infractions of CS/HB 7. Specifically, the provision states that "if any institution is found to have a substantiated violation of s.1000.05(4)(a), the institution shall be ineligible to receive performance funding during the next fiscal year following the year in which the violation is substantiated. Substantiated findings are those as determined by a court of law, a standing committee of the Legislature, or the Board of Governors." This raises the potential for dampening the freedom of speech interests protected among institutions of higher education.

For more info:

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[1] Executive Order on Combating Race and Sex Stereotyping, https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/.
[2] Jessica Guynn, "Donald Trump executive order banning diversity training blocked by federal judge," *USA Today*, Dec. 23, 2020, https://www.usatoday.com/story/money/2020/12/23/trump-diversity-training-ban-executive-order-blocked-federal-judge/4033590001/.
[3] S. 1000.05(8), F.S.
[4] CS/HB 7, lines 504 to 523
[5] J.T Jost et al, "The existence of implicit bias is beyond reasonable doubt: A refutation of ideological and methodological objections and executive summary of ten studies that no manager should ignore," *Research in Organizational Behavior, 29*, 39-69, 2009.
[6] Marianne Bertrand and Sendhil Mullainathan, "Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination." *American Economic Review*, 94 (4): 991-1013, 2004.
[7] SB 2524, lines 659 to 672.