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The "STOP WOKE Act" – Florida's Attempt to Prohibit Mandatory Employee Diversity Training Put on Hold for Now

A federal court recently halted the enforcement of what has been called the "STOP WOKE Act," an amendment to Florida law that prohibits employers from mandating diversity training on certain concepts and considers training on such concepts to be discrimination. In April, Florida Governor Ron DeSantis signed into law a bill he dubbed the "STOP WOKE Act" that expanded the Florida Civil Rights Act's definition of "unlawful employment practices" to include any mandatory employer training "based on race, color, sex, or national origin." Specifically, the amendment to the statute provides that if an employer conditions its employees' employment on attending training that "espouses, promotes advances, inculcates, or compels" any of eight specified concepts, the required training would constitute discrimination under Florida law. Governor DeSantis has said that the amendment was intended to counter "pernicious ideologies" like critical race theory, which examines the role discrimination has played in shaping American history and modern society. The concepts set forth in the amendment are the following:

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.
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.

The amendment provides, however, that these concepts may be included in a course of training or instruction, as long as the training or instruction is provided "in an objective manner." Many employers who desired to implement various types of diversity training were concerned that their programs could constitute discrimination. A group of employers filed a federal court lawsuit seeking an injunction to prohibit enforcement of the statute's new section and argued that the amendment was a "viewpoint-based restriction on speech that presumptively violates the First Amendment" and that the new section is vague and overbroad. On August 18, the court agreed with the employers and enjoined the amendment to Florida's anti-

discrimination law as an unconstitutional regulation of speech in violation of the First Amendment. The court held the new section "only prohibits trainings that endorse the covered concepts" and that since "the only way [to] determine whether the [new section] bars a mandatory activity is to look to the viewpoint expressed at that activity—to look at speech," and therefore, the new section impermissibly regulates speech. The court also found that the amendment is "riddled with undefined terms" and is so vague that employers cannot determine what speech is prohibited." The vague terms include "morally superior" in concept 1, "unconsciously" and "inherently" in concept 2, "necessarily" and "privileged" in concept 3, "without respect to" in concept 4, "responsibility" in concept 5, "psychological distress" in concept 7, and "created" and "oppress" in concept 8. Without waiting for the state to request permission to enforce the statute's new section pending an appeal, the court also found there were no exceptional circumstances that would justify a stay of the injunction pending appeal. So for now, the statute's new section is not enforceable. On September 19, the State of Florida filed an appeal seeking to reinstitute the training prohibition. Although the revisions to the statute are currently not enforceable, because the State's appeal is pending, Florida employers should be aware that the issue is still not settled and should keep the statute's new section in mind when implementing mandatory trainings.

Authors

Mark A. Romance
Partner

Miami, FL | (305) 373-4048

mromance@daypitney.com

Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com

Theresa A. Kelly
Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com

Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com

Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com

Glenn W. Dowd
Partner

Hartford, CT | (860) 275-0570

gwdowd@daypitney.com

Michael J. Napoleone
Partner

West Palm Beach, FL | (561) 803-3518

mnapoleone@daypitney.com

Rosana Belen Fernandez
Associate

Miami, FL | (305) 373-4029

rbfernandez@daypitney.com