Turn Down the Radio: How Florida's Stop WOKE Act Silences EEO & DE&I Efforts

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What do Michael Jackson, Aretha Franklin, and Lady Gaga have in common? Other than being successful musicians, their messages are all to encourage R-E-S-P-E-C-T, whether it be through announcing that it doesn't matter if you're "Black or White" or encouraging us all to be happy with ourselves because, baby, you were "Born This Way." While this music is immensely popular, the Individual Freedom Act ("IFA") (also referred to as the "Stop W.O.K.E. Act") would arguably make discussion of the concepts promoted by these famous singers illegal if endorsed by a Florida employer.

The IFA prohibits teaching of the Critical Race Theory ("CRT") and was officially signed into law by Florida Governor Ron DeSantis on April 22, 2022. The Act has dual purposes– it amends both the Florida Educational Equity Act and the Florida Civil Rights Act ("FCRA"). Specifically, the IFA limits employer-driven or employer-endorsed discussions of "implicit bias" or systemic racism in the workplace, including discussion of the CRT. The IFA is currently scheduled to go into effect on July 1, 2022. However, its future remains uncertain as pending litigation seeks to enjoin the IFA from taking effect based on constitutional challenges it is vague and violates free

speech and due process protections. Regardless, employers who provide any form of equal employment opportunity ("EEO"), implicit bias, or diversity and inclusion training ("DE&I") to Florida employees should take a hard look at their current training materials and presentations, be aware of the potential legal risks that may be associated with the same, and strategize now how best to safely navigate the IFA's newly-created hurdles.

What is Prohibited?

On its face, the Act makes it unlawful for Florida employers with 15 or more employees company-wide to subject any Florida employee (as a condition of employment) to ***training, instruction or any other required activity*** that "***espouses, promotes, advances, inculcates or compels***" the employee to believe that eight specifically-enumerated concepts, i.e. "prohibited concepts," constitute discrimination based on race, color, sex, or national origin. The eight prohibited concepts are:

1) that members of one race, color, sex, or national origin are morally superior to members of a different race, color, sex, or national origin; (i.e. moral superiority);

2) that an individual is inherently racist, sexist, or oppressive, whether consciously or unconsciously because of their race or sex; (i.e. conscious or implicit bias);

3) that an individual's moral character or status as either privileged or oppressed is necessarily determined by their race, color, sex, or national origin; (i.e. inherent morality traits);

4) that individuals cannot claim to treat others in a color/race/sex/national origin-blind manner;

5) that an individual, by virtue of their 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) that an individual, by virtue of their race, color, sex, or national origin, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion; (i.e. forms of affirmative action);

7) that an individual, by virtue of their race, color, sex, or national origin, bears personal responsibility for and must feel guilt because of actions in which the individual played no part, which were committed in the past by other members of their same race, color, sex, or national origin; (i.e. historical social injustice); and

8) that virtues such as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist.

Florida initially issued press releases expressing its intent the IFA limit or prohibit discussion and endorsement of "CRT" based concepts. The final language, however, seems confusing and could, arguably, be read in a manner that fails to prohibit anything. Further, the IFA includes an acknowledgement that employers do not commit an unlawful employment practice by allowing the prohibited concepts to be discussed in an "objective" manner without endorsement of any specific concept.

Given the vague and broad language in the IFA and the lack of clarity as to what is an "objective manner without endorsement of the concepts," the IFA is already having a chilling effect on employers' EEO and D&I efforts. Indeed, should an employer halt all EEO and D&I training initiatives it undermines employer's long-standing commitment to diversity and inclusion and employers risk losing liability defenses to future claims of race and other forms of harassment

How Will the IFA Be Enforced as to Employers?

Because the IFA amends the FCRA, the same prerequisites to suit and rights and remedies will apply to a violation of the IFA. Thus, an employee must first exhaust all administrative remedies by filing a charge of discrimination within one year of the alleged misconduct. The Florida Commission on Human Relations ("FCHR") will investigate and the state can decide to pursue its own claim seeking injunctive relief and civil penalties not to exceed $10,000 per violation. Additionally, if cause is found, an alleged aggrieved individual can pursue a private lawsuit seeking actual and compensatory damages, reasonable attorneys' fees and costs, and punitive damages up to $100,000.

Legal Challenges to the IFA

The IFA is expected to take effect July 1, 2022. However, legal challenges were imminent even before the law was signed, and a lawsuit was filed in the United States District Court for the Northern District of Florida seeking a preliminary injunction approximately 10 minutes after the IFA was signed into law. The demand for injunctive relief argues the IFA restricts free expression by suppressing viewpoints for the sole reason conservative lawmakers disagree with them, which, they assert, is not a legitimate government interest. Generally, where legislation restricts individuals' fundamental rights, such as free speech, the government must demonstrate a specific state interest in the restriction. Further, because the IFA is content-based (and viewpoint-based), the plaintiffs argue Florida will be required to show that the legislation furthers a "compelling" state interest that is "narrowly tailored" to achieve that interest, which the IFA does not have.

Additionally, the plaintiffs argue key provisions of the new law are unconstitutionally vague and overbroad because the Act requires Florida employees to conform with sweeping general prohibitions that are "so vague that they fail to put a reasonable person on notice of what is prohibited." The argument suggests the IFA "would cause people of common intelligence to guess at its meaning and differ as to its application." In addition to being

unconstitutionally vague, the request for injunction argues such imprecision invites arbitrary and discriminatory enforcement and, therefore, violates the 14th Amendment's guarantee of due process.

These arguments are set to be heard and potentially decided on June 21. While there is a good chance an injunction will be issued, this will certainly not end the inquiry as we fully expect any ruling on the injunction to be appealed and, thus, will likely continue to lack finality for months, if not years, thereafter.

How Should Employers Proceed?

Employers with employees in Florida are undoubtedly placed between a rock and a hard place. As noted above, some employers have already opted to end or at least pause mandatory DE&I trainings until further guidance is provided either by a court or the FCHR. Other employers are unwilling to pull back on long-standing DE&I trainings and commitments. While there is clearly no one-size-fits-all solution, employers with mandatory EEO, DE&I, implicit bias, or "respect in the workplace" initiatives should review their training materials to assess whether any portion of a training may potentially violate the IFA. Further, in-person trainings may be changed to pre-recorded trainings so that spur of the moment discussions which may touch on the "prohibited concepts" can more easily be minimized. Certainly,

the most risk-averse approach is to schedule any trainings to be completed before the new law goes into effect on July 1, 2022 and then wait for more guidance. Unfortunately though, completely pausing all EEO training also comes with its own risk, as employers will have to re-consider typical approaches, such as sensitivity training, that are often utilized to mitigate risk and create affirmative defenses to harassment or hostile work environment claims.

More risk-tolerant employers may want to continue training but take proactive measures to ensure the training is conducted in an objective manner that cannot be construed as compelling, promoting, or advancing certain beliefs tied to prohibited concepts under the Act. Similarly, we recommend considering disclaimers. Given the impact on corporate culture image, employers with concerns about the IFA should consult with employment counsel of their choice to assist in deciding, as the Clash suggested, "Should I Stay or Should I Go," with my current DE&I initiatives. Whatever path an employer goes down will certainly be full of land mines that we will all be navigating together.