

Employee Relations LAW JOURNAL

Florida “Individual Freedom Act” Makes Certain Employee Trainings Discriminatory

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The authors discuss a new Florida law that expands civil liability exposure faced by Florida employers for discriminatory employment practices, which now include mandatory trainings and instructions on certain topics relating to diversity and unconscious bias.

Employers across the country are taking note of Florida Governor Ron DeSantis’ latest piece of legislation that will have nationwide impacts. On April 22, 2022, Governor DeSantis signed into law the “Individual Freedom Act,” which amends the Florida Civil Rights Act and is scheduled to take effect on July 1, 2022. The Individual Freedom Act expands civil liability exposure faced by Florida employers for discriminatory employment practices, which now include mandatory trainings and instructions on certain topics relating to diversity and unconscious bias.

PROHIBITED MANDATORY EMPLOYEE TRAININGS

The Individual Freedom Act prohibits public employers and private employers with 15 or more employees from requiring any individual,

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as a condition of employment, to undergo training, instruction, or any other required activity that espouses, promotes, advances, inculcates, or compels (i.e., encourages) that individual to believe any of the following eight concepts:

1. Members of one race, color, sex, or national origin are morally superior to members of another.
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 phrase "any other required activity" is not defined in the Individual Freedom Act, but the language appears to contemplate all activities that employers require employees to participate in as a condition of employment. Under the Individual Freedom Act, any employer training, instruction, or other required activity that promotes any of the eight specified

concepts has the potential to constitute discrimination based on race, color, sex, or national origin.

PERMISSIBLE MANDATORY EMPLOYEE TRAININGS

The Individual Freedom Act includes a savings clause stating that employers are not prohibited from discussing any of the eight specified concepts as part of a mandatory employee training or instruction if the training or instruction is given in an objective manner without endorsement of the concepts. In other words, the Individual Freedom Act does not impose a blanket ban on employer trainings relating to the eight specified concepts, but it does prohibit employers from endorsing any of the specified concepts or requiring employees to endorse any of the specified concepts as part of a mandatory training, instruction, or other required activity.

ENFORCEMENT MECHANISMS

Under the purview of the Florida Civil Rights Act, employees who believe their rights under the Individual Freedom Act are violated will be able to file a complaint with the Florida Commission on Human Relations within 365 days of the alleged violation and then, in most cases, pursue administrative actions or civil lawsuits seeking injunctive relief, back pay, compensatory damages, and, in some cases, punitive damages (not to exceed \$100,000).

Additionally, the Florida Attorney General is empowered to bring civil actions against employers for damages, injunctive relief, and civil penalties of up to \$10,000 per violation when the attorney general has cause to believe an employer engaged in a pattern or practice of discrimination or otherwise engaged in discrimination that violates the Individual Freedom Act and raises issues of great public interest.

LEGAL CHALLENGE

Shortly after Governor DeSantis signed the Individual Freedom Act, a group of individuals filed a lawsuit challenging the constitutionality of the new law. The plaintiffs allege that the law imposes unconstitutional viewpoint-based restrictions on speech in violation of their First and Fourteenth Amendment rights. The plaintiffs are seeking a declaratory judgment that the Individual Freedom Act is unlawful, as well as an injunction prohibiting its enforcement. The case is pending in the Tallahassee Division of the U.S. District Court for the Northern District of Florida.

IMPACT ON FLORIDA EMPLOYERS

Assuming the Individual Freedom Act survives any challenges to its constitutionality, the changes described above will take effect on July 1, 2022. This means employers should start reviewing their mandatory employee trainings, especially those focused on diversity and unconscious bias. If there is any question that a particular training could be perceived as espousing, promoting, advancing, inculcating, or compelling (i.e., encouraging) participants to believe any of the eight specified concepts, then the employer should consider whether it can make that training voluntary for all employees.

Florida employers should also consider including disclaimers in all mandatory employee trainings, instructions, or other required activities stating that the employer prohibits all forms of discrimination against employees, that the training or instruction is provided to educate employees about the contents of the employer's anti-discrimination policies, that the training or instruction does not endorse any concept listed in Section 760.10(8)(a) of the Florida Statutes, and that the training or instruction is not intended to compel any employee to believe or support any of the concepts discussed.

The Individual Freedom Act may tempt employers to stop conducting employee anti-discrimination trainings altogether, but the risk of doing so should be carefully weighed. Anti-discrimination trainings can offer employers facing hostile work environment allegations a layer of protection under the *Faragher/Elzerth* defense. This affirmative defense recognizes employer efforts to prevent wrongdoing in the workplace through employee training programs. Courts have consistently found that to satisfy this defense, employers must train employees about the contents of the employer's anti-discrimination policies.

In other words, an employer who stops all anti-discrimination trainings may lose the potential benefit of the *Faragher/Elzerth* defense. This should be an important consideration for employers deciding whether to stop providing anti-discrimination training instead of modifying existing trainings and instructions to comply with the Individual Freedom Act.

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