

Client Alert: State Anti-DEI Initiatives Are Gaining Momentum: What Does It Mean for Your Organization?

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As universities and corporations across America have expanded their diversity, equity, and inclusion (DEI) efforts in recent years, some states are pushing back. Florida and its governor, Ron DeSantis, have led this push-back, but they are not alone.^[1] With the anti-DEI movement gaining momentum and spreading to other states, the consequences are mounting not just for educational institutions but also for private companies and their employment practices. Below, we describe the latest developments and what they mean for protecting and defending DEI initiatives.

Florida's Anti-DEI Actions

This month, Florida Governor DeSantis announced legislation that would prohibit public institutions of higher education from using any funding—whether public or private—to support DEI initiatives.^[2] This legislation is part of a major reform package to the state's higher education system that also bans the teaching of “critical race theory” (CRT), forbids the use of “DEI statements” in hiring processes, and overhauls hiring and retention decisions to eliminate “interference from unions and faculty committees.”^[3]

Governor DeSantis's push to eliminate DEI initiatives builds upon previous efforts targeting DEI programs. Last year, Governor DeSantis signed into law HB 7—known as the Individual Freedom Act or the “Stop W.O.K.E Act.”^[4] The Act sought to restrict the teaching of certain DEI-related concepts in schools.^[5] Notably, the law also impacted private businesses, prohibiting Florida-based employers from requiring workers in Florida to attend DEI trainings if such trainings “espouse[], promote[], advance[], inculcate[], or compel[]” specified DEI concepts.^[6] A federal judge has temporarily blocked several provisions of the law as “naked viewpoint-based regulation on speech” and as unconstitutionally vague.^[7] But the state has appealed and doubled down on its anti-DEI agenda while the legal battle continues.

Many of the state's recent efforts target educational institutions in particular. For example, Governor DeSantis recently appointed six new board members to the New College of Florida, including conservative activist and DEI critic Christopher Rufo.^[8] Notably, Mr. Rufo is the co-author of model state legislation aimed at reversing what he calls "the illiberal takeover of higher education through [DEI] offices."^[9] With the addition of these six new members, the College's board voted to replace the school's president and directed its staff to eliminate the school's diversity offices and DEI programs.^[10] In addition, the Governor's Executive Office recently required all state universities to provide financial information and a comprehensive list of all staff, programs, and campus activities related to DEI.^[11] After receiving the initial figures, Governor DeSantis's office declared that the survey "revealed an extraordinary misuse of taxpayer dollars" and that "the self-reported figures from state universities were significantly misreported and under-reported."^[12] Governor DeSantis then used this information to justify his latest legislative proposal to eliminate all funding for DEI programs.^[13]

In another high-profile move related to high schools, the Florida Department of Education blocked a new Advanced Placement course on African American studies, alleging that the course "significantly lacks educational value" and violates state law.^[14] After receiving heavy criticism from Governor DeSantis, the College Board amended the course's curriculum, making optional some topics that were previously required (such as Black Lives Matter) and adding some new possible research projects (such as Black conservatism).^[15] Officials in Arkansas, Virginia, North Dakota, and Mississippi have since announced that they will review the new African American studies course to determine if it conflicts with state laws or policies.^[16] Governor DeSantis has also suggested that Florida might drop Advanced Placement classes from its schools altogether or expand alternatives such as the International Baccalaureate.^[17]

Strategies Spreading to Other States and Industries

Following Florida's lead, other states have launched attacks on DEI initiatives at the local and state levels. For instance, in December 2022, Representative Carl Tepper (R) of Texas introduced HB 1006, which would require Texas's institutions of higher education to implement policies prohibiting the funding, promotion, sponsorship, or support of "any office of diversity, equity and inclusion" or any office that operates under another name that supports the DEI goals.^[18]

And, like in Florida, lawmakers in South Carolina, Oklahoma, and Kansas have recently requested information concerning their universities' spending on DEI programs, trainings, and activities.^[19] Specifically, Oklahoma Secretary of Education Ryan Walters ordered the state's top higher education official to account for "every dollar" spent on DEI over the last 10 years.^[20] Meanwhile, the South Carolina request asked for information from the state's public colleges and universities concerning their spending on all activities "targeted toward people based on their race, ethnicity, or sexual

orientation.”^[21] And the chairman of the Kansas House’s Higher Education Budget Committee sent a letter to all state-supported colleges and universities, demanding information on their DEI initiatives, including a comprehensive list of all staff, programs, and campus activities related to DEI and the total spending to support those initiatives.^[22] It seems increasingly likely that similar efforts to limit DEI initiatives in higher education will be on the legislative agenda in a growing number of states, particularly after the Supreme Court rules later this year on the race-conscious admissions cases.

States have also recently attempted similar anti-DEI efforts outside the educational arena. Earlier this month, for instance, Texas Governor Greg Abbott’s (R) office issued a memorandum to state agency leaders cautioning that it is “inconsistent with the law” for Texas state agencies to use DEI initiatives in hiring, which might include setting diversity goals or interview targets to ensure that candidates of diverse backgrounds are considered.^[23] The memorandum instructed agency leaders that using such initiatives violates federal and state employment laws and that hiring cannot be based on factors “other than merit.”^[24] At present, the precise scope of the memorandum remains unclear—including, importantly, whether it applies to the state’s government contractors, as with a similar executive order that former President Trump signed in 2020.

Meanwhile, Kansas lawmakers recently advanced a provision in the budget for the state’s Behavioral Sciences Regulatory Board, prohibiting the Board from using any of its budget “for fiscal years 2024 and 2025 to require licensees or permit holders to go through training or education on ‘diversity, equity, inclusion, ... or other related topics.’”^[25] The Behavioral Sciences Regulatory Board oversees the licensing of a number of professions in Kansas, including psychologists, social workers, marriage and family therapists, and addiction counselors.

Takeaways

As these anti-DEI attacks continue to gain momentum, educational institutions and private companies alike should track them closely to consider how they might impact operations. They should also prepare to protect and defend their own DEI initiatives if they come into the crosshairs.

Here are three actions we encourage all educational institutions and private companies to take in this shifting landscape:

First, take stock of existing DEI programs and their funding sources. It is crucial to understand what programs are currently offered, how they are structured and operated, and where they receive funding. This information will put the organization in the best position to understand whether and how state-level directives may affect their operations.

Second, be prepared to make the case for the importance of DEI programs. If defunding efforts or other attacks intensify, it will be important to be able to articulate the return on investment in concrete ways—not only with respect to enhanced diversity at the organization, but also the impact on the bottom line through increased collaboration, better decision-making, and more.

Third, proactively and regularly assess state regulatory exposure. Organizations in the states discussed above should carefully consider the reach of state-level initiatives and whether and how they affect operations. And organizations that operate across state lines should survey the laws, regulations, and other directives in each jurisdiction to consider how they may limit operations in specific states or across the organization.

Jenner & Block has a deep commitment to diversity, equity, and inclusion as well as extensive experience supporting our clients' DEI efforts through litigation, investigations, and strategic counseling. In light of this commitment and experience, the firm has launched a task force—composed of leading lawyers serving a wide variety of industries—to develop creative, strategic, and tailored solutions for clients across industries to accomplish their DEI goals while minimizing legal risk. If you are interested in learning more about our work in this area, please contact Task Force Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), and Katie Wynbrandt (kwynbrandt@jenner.com).

Footnotes

[1] Tim Craig, *GOP Lawmakers Follow Florida's Lead with DeSantis Copycat Bills*, Wash. Post (Feb. 9, 2023), <https://www.washingtonpost.com/nation/2023/02/09/ron-desantis-florida-governor-bills/>.

[2] Press Release, Florida Exec. Off., Governor DeSantis Elevates Civil Discourse and Intellectual Freedom in Higher Education (Jan. 31, 2023), <https://www.flgov.com/2023/01/31/governor-desantis-elevates-civil-discourse-and-intellectual-freedom-in-higher-education/>.

[3] *Id.*

[4] HB 7, Fla. Stat. § 1000.05(4) (2022).

[5] *Id.*

[6] *Id.*

[7] *Honeyfund.com, Inc. v. DeSantis*, No. 22-cv-227, 2022 WL 3486962, at *1, *12-14 (N.D. Fla. Aug. 18, 2022), *appeal docketed*, No. 22-13135 (11th Cir. Sept. 19, 2022). *See also Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No. 22cv304, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022).

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[13] *Id.*

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[23] Costello *supra* note 18.

[24] Kate McGee, *Gov. Greg Abbott Tells State Agencies to Stop Considering Diversity in Hiring*, Tex. Trib. (Feb. 7, 2023), <https://www.texastribune.org/2023/02/07/greg-abbott-diversity-equity-inclusion-illegal/>.

[25] Tidd *supra* note 19.

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