

Client Alert: State Legislators Target Diversity Statements in Latest Effort to Dismantle DEI Initiatives

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As a growing number of state legislatures across the country advance anti-DEI initiatives before the end of their respective legislative sessions, diversity statements are in the crosshairs. Diversity statements began expanding in popularity a decade ago as a way of inviting job applicants to provide information about their contributions to DEI work.^[1] At present, these statements can take different forms – some prompt applicants (whether for employment or admission to an academic program) to provide details about their work to promote diversity, others invite the sharing of personal experiences – and organizations that request them have different approaches for considering these statements in their review and selection processes.^[2]

Critics have likened diversity statements to “loyalty oaths,” and more than a dozen states have considered or are considering bills that would restrain the use of these statements. In addition, two conservative think tanks have published model legislation that would bar universities from soliciting or requiring diversity statements in hiring and admissions processes.^[3] While some state government and federal actors have taken steps in response to strengthen diversity initiatives, the intensifying attacks against diversity statements in particular mean that organizations of all kinds should be tracking legislative developments and considering the potential impact of these proposals on their existing DEI efforts.

How and Why States Are Restricting Diversity Statements

Thirteen states have proposed legislation this year that directly or indirectly restricts the use of diversity statements by colleges and universities. The proposals are varied, but some key patterns have emerged. For instance:

- **Race/Ethnicity.** While some of the proposals restrict statements from applicants about the general concepts of “diversity, equity, and inclusion,”^[4] many proposals specifically restrict statements reflecting beliefs, opinions, or experiences as to various individual identity

characteristics. Of the proposals falling into this latter category, all of them specifically impose limitations on statements regarding race and ethnicity.^[5]

- **Additional Characteristics.** Many of the proposals impose restrictions on statements concerning a broad range of individual identity characteristics, such as national origin,^[6] sex,^[7] gender identity,^[8] sexual orientation,^[9] and religion.^[10]
- **Reporting Requirements.** Some of the bills include requirements that the institutions report their compliance with the provisions to their state.^[11]
- **Private Right of Action.** A number of the proposals explicitly provide for a private right of action.^[12] This would allow applicants who believe an institution is violating the legislation – such as by soliciting a prohibited diversity statement – to bring a legal claim against the organization themselves, rather than needing to rely on government enforcement.

Earlier this week, North Dakota became the first state to enact a restriction on diversity statements. The provision, which the State Governor signed into law on Monday, prevents state higher education institutions from requiring students or employees “to endorse or oppose a specific ideology or political viewpoint” and bars adverse treatment if they refuse to “support” or “assent to” numerous concepts, including that individuals are “inherently privileged, racist, sexist or oppressive, whether conscious or subconsciously” due to their race or sex.^[13] In addition, Kansas’ legislature approved a last-minute amendment to the state budget bill earlier this month which would have barred institutions of higher education from using state funds to “[c]ompel, require, induce or solicit, encourage or coerce” an applicant, student, or employee to “provide a statement articulating their experience, commitment to, or expertise in diversity, equity or inclusion.”^[14] The State’s Governor vetoed the provision on April 20, saying it limits universities’ ability to “find a skilled workforce that prepares our students for an ever-changing economy, and limits their ability to support students from all backgrounds.”^[15] The legislature failed to override the Governor’s veto on Wednesday.^[16] Proposals remain pending in nine other states.^[17]

Proponents of these legislative efforts argue that diversity statements are intended to weed out candidates with particular ideological or political beliefs, particularly with respect to academic jobs – though this rhetoric does not necessarily match the sweeping restrictions proposed in many states. For instance, the Academic Freedom Alliance urged institutions to refrain from requiring diversity statements because they allegedly threaten to “penalize[e] expressions of DEI skepticism” and pressure applicants “to say things that accommodate the perceived ideological preferences of an institution.”^[18] The groups that introduced model legislation curtailing diversity statements earlier this year likewise likened such statements to “political coercion” designed “to exclude applicants who don’t adhere to critical race theory and other radical beliefs.”^[19] The Kansan lawmaker who introduced that state’s bill told supporters that diversity statements were “used to specifically

exclude applicants who believe all people should be treated equally” and promote “perpetual victimhood, resentment and division.”^[20] The proponent of Ohio’s bill said he wanted to “mak[e] sure students are exposed to different theories.”^[21] And a Missouri lawmaker said diversity statements are a “loyalty oath” that request endorsement of “discriminatory ideology.”^[22]

Yet many of the proposals introduced restrict not just statements asking about individuals’ beliefs or professional work with respect to diversity and related concepts, but more broadly limit consideration of statements recounting applicants’ own personal experiences and identities. Kansas’ bill would have prohibited soliciting statements from applicants “articulating their experience . . . in diversity, equity or inclusion”;^[23] Missouri’s bill would ban soliciting applicant statements regarding their “[r]ace, color, religion, sex, gender, ethnicity, national origin, or ancestry” or their “experience with,” among other things, diversity, marginalized groups, or intersectionality;^[24] South Carolina’s bill prohibits soliciting statements wherein the applicant discusses their “race, sex, color, ethnicity, gender identity, or sexual orientation”;^[25] and Texas’s bill would prohibit institutions from soliciting statements about the applicant’s “race, color, ethnicity, or national origin” or their “experience with,” among other things, diversity, equity, and inclusion, and marginalized groups.^[26] Perhaps the breadth of these bills is a signal that the push to constrain the use of diversity statements is the next frontier of the affirmative action debate. Indeed, some critics posit that diversity statements are an end-run around limitations on affirmative action programs^[27] – which could make them a particularly attractive target to legislatures looking ahead to the Supreme Court’s upcoming decision in the affirmative action cases it heard this term.

Key Takeaways

As the efforts deepen across the country to restrict the use of diversity statements, here are the actions we advise organizations take:

First, closely monitor this quickly evolving legal landscape. Organizations, including those outside of higher education, should monitor legislative efforts in the states in which they operate to determine whether there are burgeoning risks for their businesses with respect to the use of diversity statements. While the risk is currently concentrated on higher education institutions, recent trends suggest some state legislatures are interested in regulating diversity initiatives more broadly. For instance, last year Florida enacted a law – currently enjoined pending resolution by the courts^[28] – which made it unlawful to require as a condition of employment training on a range of topics, including that individuals were “morally superior” or “inherently racist, sexist, or oppressive, whether consciously or unconsciously,” or “privileged or oppressed” by virtue of their race, color, sex, or national origin.^[29] The Montana legislature considered a similar bill this year.^[30] To the extent organizations use diversity statements in hiring – even in narrowly defined circumstances, like for diversity fellowships – the expansion of these proposals may present a risk, and organizations should vigilantly monitor bills that may impact their operations.

Second, review the use of diversity statements within your organization and assess how requests are phrased and how the statements are evaluated. For instance, some state legislatures are considering prohibitions on *required* statements but may permit *optional* statements, while others have prohibitions on even *soliciting* or providing *preferential consideration* for certain statements. In addition, certain state proposals are focused on statements that purport to request that an individual express loyalty to specific ideological beliefs. Organizations should assess their applications and requests for diversity statements to determine if they fall within the particular ambit of a state prohibition.

Third, weigh the potential strength of a First Amendment challenge to legislative proposals barring the use and consideration of diversity statements. These legislative proposals arguably impose a direct limitation on individuals' freedom of speech. To the extent these restrictions are imposed not on a particular subject matter but instead on a particular point of view, the restriction may be subject to additional scrutiny.^[31] As the American Council on Education argued in an amicus brief before the Supreme Court in the affirmative action cases this term, prohibiting consideration of statements regarding individuals' experiences with respect to race or ethnicity imposes a chilling effect on this type of speech, preventing those individuals from sharing their stories at all, in a manner that may conflict with First Amendment principles.^[32] The strength of a First Amendment challenge will of course vary depending on the prohibition, and organizations that use diversity statements should assess the viability of such a defense.

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), Marcus Childress (mchildress@jenner.com), Katie Wynbrandt (kwynbrandt@jenner.com), or Erica Turret (eturret@jenner.com).

Footnotes

[1] Megan Zahneis, *Diversity Statements Are Under Fire. Here's What They Are and How They're Used*, The Chronicle of Higher Education (Mar. 7, 2023), <https://www.chronicle.com/article/diversity-statements-are-under-fire-heres-what-they-are-and-how-theyre-used>; *American Universities are Hiring Based on Devotion to Diversity*, The Economist (Feb. 4, 2023), <https://www.economist.com/united-states/2023/02/04/american-universities-are-hiring-based-on-devotion-to-diversity>.

[2] Megan Zahneis, *Diversity Statements Are Under Fire. Here's What They Are and How They're Used*, The Chronicle of Higher Education (Mar. 7, 2023), <https://www.chronicle.com/article/diversity-statements-are-under-fire-heres-what-they-are-and-how-theyre-used>.

- [3] Ilya Shapiro & Christopher F. Rufo, *State Lawmakers Can Reform Higher Ed*, Wall Street Journal (Jan. 17, 2023), <https://www.wsj.com/articles/state-lawmakers-can-reform-higher-ed-critical-race-theory-diversity-statements-bureaucracies-11673978891>.
- [4] See H.B. No. 2184, Legis. Sess. (Kan. 2023); S.B. 83, Legis. Sess. (Ohio 2023).
- [5] See, e.g., S.B. 261, Legis. Sess. (Ga. 2023); S.B. 958, Legis. Sess. (Fla. 2023); S.B. 1008, Legis. Sess. (Okla. 2023).
- [6] H.B. 7, Legis. Sess. (Ala. 2023); S.B. 680, Legis. Sess. (Mo. 2023); S.B. 571, Legis. Sess. (Tenn. 2023); H.B. No. 5127, Legis. Sess. (Tex. 2023); H.B. 451, Legis. Sess. (Utah 2023).
- [7] H.B. 7, Legis. Sess. (Ala. 2023); S.B. 680, Legis. Sess. (Mo. 2023); S.B. 2247, Legis. Sess. (N.D. 2023); H.B. 4290, Legis. Sess. (S.C. 2023); H.B. 451, Legis. Sess. (Utah 2023); H.B. 3503 (W. Va. 2023).
- [8] H.B. 7, Legis. Sess. (Ala. 2023); S.B. 680, Legis. Sess. (Mo. 2023); H.B. 4290, Legis. Sess. (S.C. 2023); H.B. 571, Legis. Sess. (Tenn. 2023); H.B. 3503 (W. Va. 2023).
- [9] H.B. 4290, Legis. Sess. (S.C. 2023); H.B. 571, Legis. Sess. (Tenn. 2023); H.B. 3503 (W. Va. 2023).
- [10] H.B. 7, Legis. Sess. (Ala. 2023); S.B. 680, Legis. Sess. (Mo. 2023); S.B. 2247, Legis. Sess. (N.D. 2023); H.B. 571, Legis. Sess. (Tenn. 2023).
- [11] See, e.g., H.B. No. 2184, Legis. Sess. (Kan. 2023); H.B. 571, Legis. Sess. (Tenn. 2023); H.B. No. 5127, Legis. Sess. (Tex. 2023); H.B. No. 3503, Legis. Sess. (W. Va. 2023).
- [12] See, e.g., H.B. No. 2460, Legis. Sess. (Kan. 2023); S.B. 680, Legis. Sess. (Mo. 2023); S.B. No. 2247 (N.D. 2023); H.B. 571, Legis. Sess. (Tenn. 2023).
- [13] N.D. Cent. Code § 15-10.6-02; S.B. No. 2247, Legis. Sess. (N.D. 2023).
- [14] H.B. No. 2184, Legis. Sess. (Kan. 2023).
- [15] Gov. Laura Kelly, *Message from the Governor Regarding House Bill 2184* (April 20, 2023).
- [16] Kansas City New Service Staff, *Kansas Governor's Vetoes of Flat Tax and Transgender Care Ban Stand, But Not on Abortion Restrictions*, NPR KCUR (Apr. 26, 2023), <https://www.kcur.org/news/2023-04-26/kansas-governors-vetoes-stand-killing-a-flat-tax-and-squashing-a-ban-on-transgender-care-for-kids/>.
- [17] H.B. No. 4290, Legis. Sess. (S.C. 2023); H.B. No. 5127, Legis. Sess. (Tex. 2023); S.B. No. 83, Legis. Sess. (Ohio 2023); H.B. No. 7, Legis. Sess. (Ala. 2023); S.B. No. 958, Legis. Sess. (Fla. 2023); S.B. No. 680, Legis. Sess. (Mo. 2023); S.B. No. 2247, Legis. Sess. (N.D. 2023); S.B. No. 1008, Legis. Sess. (Okla. 2023); H.B. No. 571, Legis. Sess. (Tenn. 2023). Proposals failed to advance in Georgia, Utah, and West Virginia. See S.B. 261, Legis. Sess. (Ga. 2023); H.B. 451, Legis. Sess. (Utah 2023); H.B. 3503 (W. Va. 2023).
- [18] Press Release, Academic Freedom Alliance (Aug. 22, 2022), <https://academicfreedom.org/wp-content/uploads/2022/08/AFA-DEI-Statement-081822.pdf>.
- [19] Ilya Shapiro & Christopher F. Rufo, *State Lawmakers Can Reform Higher Ed*, Wall Street Journal (Jan. 17, 2023), <https://www.wsj.com/articles/state-lawmakers-can-reform-higher-ed-critical-race-theory-diversity-statements-bureaucracies-11673978891>.
- [20] Sen. J.R. Claeys, *Weekly Update from the Kansas Statehouse* (Feb. 27 – Mar. 3, 2023), <https://mailchi.mp/claeys/legislative-update-week-5384822>.
- [21] Anna Staver & Laura A. Bischoff, *Ohio May Prohibit Employees at Public Universities, Colleges from Striking*, Columbus Dispatch (Mar. 14, 2023), <https://www.dispatch.com/story/news/politics/2023/03/14/higher-ed-bill-takes-aim-at-tenure-labor-unions-diversity-mandates/70008509007/>.
- [22] Anthony Morabith, *Republican House Member Likens Diversity Statements to Loyalty Oaths*, MissouriNet (Mar. 8, 2023), <https://www.missourinet.com/2023/03/08/republican-house-member-likens-diversity-statements-to-loyalty-oaths/>.

[23] H.B. No. 2184, Legis. Sess. (Kan. 2023).

[24] S.B. 680, Legis. Sess. (Mo. 2023).

[25] H.B. 4290, Legis. Sess. (S.C. 2023).

[26] H.B. No. 5127, Legis. Sess. (Tex. 2023).

[27] *American Universities are Hiring Based on Devotion to Diversity*, The Economist (Feb. 4, 2023),

<https://www.economist.com/united-states/2023/02/04/american-universities-are-hiring-based-on-devotion-to-diversity>; Jeremiah

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<https://reason.com/volokh/2022/11/08/goodbye-race-checkbox-hello-diversity-sentence/>.

[28] *Honeyfund.com, Inc. v. DeSantis*, No. 22-cv-227, 2022 WL 3486962 (N.D. Fla. Aug. 18, 2022), *appeal docketed*, No. 22-13135

(11th Cir. Sept. 19, 2022).

[29] Fla. Stat. 760.10(8).

[30] S.B. 222, Legis. Sess. (Mont. 2023).

[31] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 US 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

[32] Amicus Brief of Am. Council on Educ. and 39 Other Higher Educ. Ass'ns, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, Nos. 20-1199 & 21-707, 2022 WL 3130689, *29 (Aug. 1, 2022).

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