Stop and Go:
Where Things Stand with Florida's Stop WOKE Act

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Executive Summary

Florida has made national news in the employment law sphere over the past six months with the passage, implementation, and temporary enjoinment of HB7, also called the Individual Freedom Act or "Stop WOKE Act." The Act, which restricts the content of employer-sponsored diversity, equity, and inclusion (DEI) trainings, has been challenged from its inception on First Amendment and other constitutional grounds. HB7 was only in effect for seven weeks (from July 1 to August 18, 2022) before the U.S. District Court for the Northern District of Florida issued a preliminary injunction halting enforcement—a ruling that has already been appealed to the U.S. Court of Appeals for the Eleventh Circuit. Although the injunction temporarily halts enforcement of the Act, employers should be prepared in case the injunction is lifted.

What Does the Act Say?

If the Eleventh Circuit Court of Appeals reverses the preliminary injunction, HB7 would make it an unlawful employment practice under the Florida Civil Rights Act (FCHR) to, as a condition of employment, subject any individual to training, instruction, or another required activity that "espouses, promotes, advances, inculcates, or compels" the individual to believe any of the following concepts:

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 Act provides a disclaimer that it should not be construed "to prevent discussion of these concepts … as part of a larger course of training or instruction, provided that the training or instruction is given in an objective manner without endorsement of the concepts."

Even with this disclaimer, though, the broad language of the Act makes it difficult to discern exactly what is prohibited in some cases (for example, what might be seen as causing employees to "feel guilt, anguish, or other forms of psychological distress" and what it means to "attempt to treat others without respect to race, color, sex, or national origin"). Additionally, it is unclear what it would mean to "subject" an individual to an activity and whether HB7 applies to trainings that are encouraged by management or only those that are strictly mandatory. Although the language leaves room for interpretation, HB7 is commonly understood to ban mandatory DEI trainings that include content on concepts such as unconscious bias (Prohibited Concept #2), white privilege (Prohibited Concepts #3, 5, and 7), racial colorblindness (Prohibited Concept #4), and systemic racism (Prohibited Concept #8).

Some have expressed concern that HB7 may have a chilling effect on DEI trainings because employers may fear or be hesitant to address important topics or issues that could potentially subject their businesses to legal claims—whether meritorious or not. Some Florida employers have even questioned whether they should do away with DEI trainings altogether. HB7 has left multistate employers in a unique quagmire, as they consider whether to create separate or voluntary DEI trainings for their Florida-based workforce while other employees receive mandatory, more comprehensive DEI trainings.

These employers' concern is understandable: employers who violate the law would be subject to the same legal penalties as employers who discriminate against employees on the basis of race, color, religion, sex, pregnancy, national origin, age, disability, or marital status. Employees who believe their employers have violated HB7 could file complaints with the Florida Commission on Human Relations (FCHR) within a year of

the alleged conduct, and thereafter potentially pursue an administrative or civil action against their employers under the FCRA for money damages, including attorneys' fees, compensatory damages for mental anguish, loss of dignity, and other intangible injuries, and punitive damages capped at $100,000.

First Legal Challenge: *Falls, et al. v. DeSantis, et al.*

Within minutes of Governor DeSantis signing HB7, a group of plaintiffs filed suit in the U.S. District Court for the Northern District of Florida in the case of *Falls, et al. v. DeSantis, et al.*, Case No. 4:22-cv-00166-MW-MJF, challenging the Act's constitutionality. While most of the plaintiffs challenged other portions of the Act pertaining to education, one plaintiff challenged the portions pertaining to employment. That plaintiff is the president of a consulting firm that provides training to clients in the areas of race and ethnicity, implicit bias, migroaggressions, institutional racism, anti-racism, and critical race theory. She argued that HB7 unlawfully restricts the First Amendment rights of her clients, who are Florida employers. In support of this argument, the Complaint pointed out that "the statute permits employers to offer training that disagrees with these concepts or takes a neutral position on them, however, any training that endorses those concepts now constitute[s] an unlawful employment practice." The lawsuit argued that employers are entitled to exercise their right to free expression under the First Amendment of the U.S. Constitution, and that the Act unlawfully restricts that right.

On June 27, 2022, Chief Judge Mark E. Walker (Chief Judge of the Northern District of Florida, appointed by President Obama in 2012) denied the request for a preliminary injunction from three of the plaintiffs, holding that they had not sufficiently shown that they were likely to establish standing and thus not entitled to a preliminary injunction to stop the Act from going into effect. The court did not rule on the merits of the constitutional challenges, leaving open the potential for additional lawsuits challenging HB7. Chief Judge Walker specifically noted that the court was "not determining whether the challenged regulations are constitutional, morally correct, or good policy."

Although Chief Judge Walker denied injunctive relief for most of the plaintiffs in the *Falls* case, he ended his decision with a quote from a landmark 1943 U.S. Supreme Court case (involving First Amendment rights as applied to the classroom), which he suggested was an observation intended for "those who applaud state suppression of ideas that the government finds displeasing." The quote from that U.S. Supreme Court decision ends with an ominous prediction: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *See Falls, et al. v. DeSantis, et al.*, Case No. 4:22-cv-166-MW/MJF, DE 62, p. 22 (June 27, 2022); *quoting West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (holding that the First Amendment prevents students in public schools from being forced to salute the American flag and recite the Pledge of Allegiance when their religion forbids it).

On July 8, 2022, Chief Judge Walker dismissed the claims brought by the president of the consulting firm, holding that she did not have standing to challenge the Act because she had not shown that she presently had clients who were negatively affected by HB7 and had not alleged a concrete loss of business attributable to the Act. While the *Falls* case is proceeding on some of the claims directed to the educational provisions of HB7, the remaining claims do not address the provisions affecting employers.

Second Legal Challenge: *Honeyfund.com, Inc., et al. v. DeSantis, et al.*

A second lawsuit also challenging HB7 was filed in the U.S. District Court for the Northern District of Florida on June 22, 2022, *Honeyfund.com, Inc., et al. v. DeSantis, et al.*, Case No. 4:22-cv-227. Just like the *Falls* case, this case is also pending before Chief Judge Walker. The plaintiffs in that case include two private employers and a DEI consultant and training company. The Complaint challenges the constitutionality of HB7 under the First and Fourteenth Amendments, arguing that the Act impermissibly constrains the rights of Florida private employers and DEI consultants. Specifically, the Complaint alleges that HB7 is unconstitutional because it restricts free speech and is impermissibly vague. The plaintiffs sought injunctive relief to prevent the state from enforcing the Act.

On August 18, 2022, the Court entered a preliminary injunction ordering state officials in Florida to take no steps to enforce HB7 while the court considers the merits of the case. While the opinion is not a final ruling on the constitutionality of the Act, the court made very clear that it believes HB7 is unconstitutional. In the colorful opinion authored by Chief Judge Walker, the court found that the Act "unconstitutionally discriminates on the basis of viewpoint in violation of the First Amendment and is impermissibly vague in violation of the Fourteenth Amendment." The opinion opens with this paragraph:

> In the popular television series *Stranger things*, the "upside down" describes a parallel dimension containing a distorted version of our world. *See Stranger Things* (Netflix 2022). Recently, Florida has seemed like a First Amendment upside down. Normally, the First Amendment bars the state from burdening speech, while private actors may burden speech freely. But in Florida, the First Amendment apparently bars private actors from burdening speech, while the state may burden speech freely.

Honeyfund.com, Inc., et al. v. DeSantis, Case No. 4:22-cv-227-MW/MAF, DE 55, p. 1 (N.D. Fla. Aug. 18, 2022).

On First Amendment grounds, the court found that HB7 is a "naked viewpoint-based regulation" on employers' free speech because it "targets only those viewpoints with which the State disagrees." Viewpoint-based restrictions, the court noted, are "presumptively unconstitutional." In the words of Chief Judge Walker, cases where viewpoint-based restrictions are constitutional "are few and far between," and HB7 "is no unicorn." In holding that the employers were substantially likely to succeed on the

merits, the court stated, “If Florida truly believes we live in a post-racial society, then let it make its case. But it cannot win the argument by muzzling its opponents.”

On Fourteenth Amendment grounds, the court found that HB7 is impermissibly vague. The court noted that the prohibited concepts described in HB7 are “mired in obscurity” and “bordering on unintelligible.” To illustrate, the court considered the fourth topic, which states that employers *cannot* endorse the view that “[m]embers 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.” The court noted that this description “features a rarely seen triple negative, resulting in a cacophony of confusion.” The Court stated, “The fact that the [Act] uses real words found in an English dictionary does not magically extinguish vagueness concerns … If that were true, the Due Process Clause would tolerate laws containing the most incomprehensible stream-of-consciousness word salads so long as they used actual words.” Because employers cannot understand what exactly is prohibited by HB7, the Court stated the Act is void for vagueness.

Because the plaintiffs showed that they were substantially likely to succeed on the merits and met the other factors required for a preliminary injunction, the court halted enforcement of HB7. The court ended on a cautionary note, explaining how the Act makes DEI trainings legally indistinguishable from egregious race discrimination in the workplace. To illustrate, the court recited the disturbing facts from a 2015 race discrimination from the U.S. Court of Appeals for the Fifth Circuit. In that case, in response to a Black employee complaining about a mandatory safety training scheduled on Juneteenth, a white woman in a black gorilla suit taunted the Black employee while making “Tarzan yells” and derogatory statements. The court used that case as an example of true discrimination, in juxtaposition with the trainings made unlawful by HB7:

> Telling your employees that concepts such as “normal” or “professional” are imbued with historically based racial bases is not—and it pains this Court to have to say this—the same as trapping Black employees in a room while a woman in a gorilla suit puts on a retaliatory, racially inflammatory performance the day before a holiday celebrating the end of slavery. Rather, it is speech protected by the First Amendment.

Honeyfund.com, Inc., et al. v. DeSantis, Case No. 4:22-cv-227-MW/MAF, DE 55, p. 43 (N.D. Fla. Aug. 18, 2022).

In September, Governor DeSantis appealed the decision granting the preliminary injunction to the U.S. Court of Appeals for the Eleventh Circuit. On September 30, 2022, Chief Judge Walker entered an order granting the parties’ joint motion to stay the proceedings pending resolution of defendants’ appeal. The appeal is still pending.

What Does This Mean for Florida Employers?

The court’s opinion in the *Honeyfund* case temporarily blocks the state of Florida from enforcing any alleged violation of HB7. Since the Eleventh Circuit has not yet ruled on

Governor DeSantis' appeal, HB7 is still enjoined. Since the Northern District of Florida has stayed the *Honeyfund* case pending appeal, employers will not likely have a final ruling on the case anytime soon. For now, it appears Florida employers can move forward with their DEI trainings and strategic plans without fear that employees will allege that they "espoused" or "endorsed" a prohibited concept, but employers should carefully monitor the proceedings in the *Honeyfund* case and any other cases that may be filed challenging HB7.

If you have questions about the Stop WOKE Act or its application to your company's policies, please contact Emily Chase-Sosnoff, 813-261-7853 or echase-sosnoff@fordharrison.com.

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