What the Individual Freedom Act Means for Your Nonprofit & Diversity Training

Scott T. Silverman - September 14, 2022

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The Act

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The Florida Civil Rights Act

- The Florida Civil Rights Act of 1992 (FCRA) secures for employees within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap or marital status ("protected class").
- The Individual Freedom Act provides that it is discrimination based on race, color, sex, or national origin under the FCRA to subject an individual, as a condition of employment, to training, instruction or any other required activity that espouses, promotes, advances, inculcates, or compels such individual to believe specified concepts.
- It was nicknamed the "Stop W.O.K.E. Act" by Governor DeSantis- Stope the Wrongs to our Kids and Employees.
- The IFA went into effect on July 1, 2022. We will discuss the federal court order enjoining the IFA.

Prohibited Concepts

- Members of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin.
- An individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
- 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
- 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

Prohibited Concepts

- 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.
- 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.
- 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.
- 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.

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Exception

- The Act does not prohibit discussion of these concepts as part of a course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts.

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Important Points

- The training, instruction, or other activity **must be required as a condition of employment**.
- Note the verbs- **promotes, advances, inculcates, or compels**
- Promote- Further the progress of a cause; support or actively encourage.
- Advance-To bring forward for acceptance
- Inculcate- To teach and impress by frequent repetitions or admonitions
- Compel- To cause to do or occur by overwhelming pressure
- Note the restriction **to 8 concepts**.

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Covered Employers/Adverse Action

- The FCRA applies to an employer of 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of such a person.
- The FCRA provides that it is unlawful for an employer to discharge or otherwise discriminate against a person with respect to compensation, terms, conditions, or privileges of employment, because of membership in a protected class.
- It is unlawful for an employer to limit, segregate, or classify employees in any way which would deprive or tend to deprive a person of employment opportunities, or adversely affect a person's status as an employee, because of membership in a protected class.

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FCRA Procedure/Remedies

- A person aggrieved by the violation of the FCRA may file a complaint with the Florida Commission on Human Relations within 365 days of the alleged violation, naming the responsible party ("respondent") and describing the violation and the relief sought.
- Within 25 days, the respondent must file an answer.
- The FCHR must investigate the allegations and determine if there is reasonable cause to believe that a discriminatory practice occurred within 180 days.
- If the FCHR determines that there is reasonable cause, the aggrieved person may bring a civil action against the respondent or request an administrative hearing within 35 days. If the determination is no cause, then only an administrative hearing is available.
- A civil action must be brought within 1 year of the reasonable cause determination or final agency determination of cause. The Court may award affirmative relief (including backpay and reinstatement/front pay), unlimited compensatory damages, up to $100,00 in punitive damages, and attorney's fees and costs. Compensatory and punitive damages are not available in an administrative hearing.

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FCRA Procedure/Remedies

- If FCHR does not determine cause within 180 days, the aggrieved person may proceed as if reasonable cause was determined.
- The FCHR must notify the aggrieved person of the failure, which must list the options and inform the aggrieved person that a civil action must be brought within 1 year.
- Because these claims are not covered by Title VII, complaints under this Act are not subject to dual-filing with EEOC and would only fall under the FCRA procedures.
- 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 IFA.

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Compliance

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Possible Responses

- Review EEO policies and procedures to ensure that your employee handbook and orientation materials do not transgress the prohibited concepts.
- Make DEI training and programming and optional. Tell employees in writing that they may opt-out and have all employees sign their understanding that training is not required.
- Use professional DEI Trainers. While companies may be cognizant of the law, review the material in advance to ensure compliance. To avoid issues with discussions going into prohibited areas, consider pre-recorded presentations.
- Consider indemnification provisions for outside trainers, whereby the trainers must indemnify the company for any liability.
- Preserve all materials, recordings, and slides of any mandatory training.
- Provide written disclaimers that the training does not endorse any of the prohibited concepts and that the training is not intended any individual to believe or support any of the prohibited concepts.
- Do not stop training! This risks loss of an affirmative defense to harassment.

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The Federal Court Order

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Honeyfund.Com, Inc. v. DeSantis

- Comparing Florida to the "upside down" in *Stranger Things*, the United States District Court for the Northern District of Florida granted a preliminary injunction to enjoin Government officials from enforcing portions of the IFA. The Court found that the IFA is a "naked viewpoint-based regulation on speech that does not pass strict scrutiny."
- Plaintiffs were employers who wished to mandate prohibited trainings and a diversity and inclusion consultant who provides such trainings. Defendants were Governor DeSantis, Attorney General Ashley Moody, and the Commissioners of the FCHR.
- The Employers wanted to provide training on "advancing women in business" "understanding gender expansiveness", "understanding institutional racism", "dominant group", "racial bias", and "white man's privilege and guilt", and "systemic racism".

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Decision

- The Court found that the IFA regulates speech by only targeting required training, instruction or any other required activity that espouses, promotes, advances, inculcates, or compels such individual to believe specified concepts. It does not ban required training, instruction or other activity that condemns or takes no position.
- By targeting the content of required activity, the IFA does not only have an incidental burden of speech. Thus, by prohibiting speech based on the viewpoint, it is subject to strict scrutiny.
- Defendants argued that the law must pass strict scrutiny, as Title VII would also be unlawful if the IFA were so. But, the Court held that Title VII only targets conduct and incidentally burdens speech. The IFA directly targets and restricts speech and incidentally burdens conduct.

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Strict Scrutiny

- Laws that constitute a viewpoint-based regulation on speech must be narrowly tailored to serve a compelling state interest.
- The Stated has no interest to censor speech it finds "repugnant" no matter how captive the audience.
- In addition, it is not narrowly tailored, as the FCRA already prohibits discrimination and harassment. For instance, mandatory training could be so offensive and hostile to white employees that it creates a hostile environment. The IFA "sweeps up an enormous amount of protected speech to ban a sliver of offensive conduct."
- Further, the IFA is unconstitutionally vague under the Fourteenth Amendment. The Court pointed to Concepts 1 and 4 and the qualifier.

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Next Steps

- The decision is expected to be appealed to the Eleventh Circuit Court of Appeals.
- For the moment, the preliminary injunction halted any enforcement of the IFA against Florida employers by the Attorney General Moody and the FCHR. **It does not definitively prevent private actions by individuals**. This is because an employee who brings a charge will not get FCHR action within 180 days, as the FCHR is enjoined from taking any action. Thus, the employee could go to court under the FCRA. Of course, the court would be able to make the same ruling.
- Nevertheless, employers should continue to review employee training and other diversity measures. Even without the statutory presumption that the topics constitutes discrimination on the basis of a protected category, nothing would prevent an individual to advocate that the FCRA should be interpreted so as to allow a cause of action by someone who was adversely impacted by such training.

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Questions?

Thank You For Your Attention

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