Legal Update Article

Preliminary Injunction Against Florida's Individual Freedom (or Stop W.O.K.E.) Act Upheld

By Samia M. Kirmani, Michael D. Thomas, Stephanie L. Adler-Paindiris, Amanda A. Simpson & Jennifer E. Burgess

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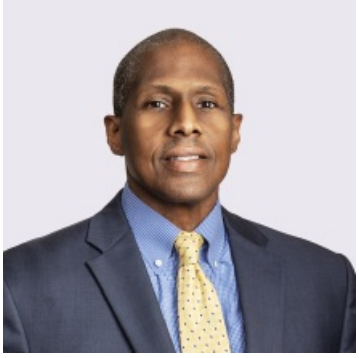
Meet the Authors

Samia M. Kirmani
Principal
(617) 367-0025
Samia.Kirmani@jacksonlewis.com



Michael D. Thomas
Principal
(949) 885-5240
Michael.Thomas@jacksonlewis.com

Stephanie L. Adler-

A unanimous three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit has upheld a preliminary injunction blocking enforcement of Florida's Individual Freedom Act. *Honeyfund.Com Inc, et al. v. Governor, State of Florida, et al*, No. 22-13135 (Mar. 4, 2024).

The Act prohibits employers from requiring attendance at any training that "espouses, promotes, advances, inculcates, or compels the employee to believe" certain concepts related to race, color, sex, or national origin that legislators find offensive.

The U.S. District Court for the Northern District of Florida halted enforcement of the Act on Aug. 18, 2022, finding the Act in violation of the First Amendment of the U.S. Constitution. The Eleventh Circuit panel agreed.

Background

The Act, nicknamed the "Stop W.O.K.E. Act" (which stands for "Stop the Wrongs to Our Kids and Employees") expanded an employer's civil liability for discriminatory employment practices under the Florida Civil Rights Act by making it unlawful discrimination to require employees to attend trainings that endorse any of these eight 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

Paindiris
(Pain-DEAR-is • She/Her)
Principal
(407) 246-8409
Stephanie.Adler-Paindiris@jacksonlewis.com

Amanda A. Simpson
Office Managing Principal
(407) 246-8408
Amanda.Simpson@jacksonlewis.com

Jennifer E. Burgess
(BER-jis • She/Her • Jen)
KM Attorney
312-442-6104
Jennifer.Burgess@jacksonlewis.com

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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 went into effect on July 1, 2022.

The plaintiffs include employers and consultants who wish to provide workplace trainings on bias and other issues central to diversity, equity, and inclusion (DEI) principles. They moved to enjoin Florida officials from enforcing this section of the Act. Comparing Florida to a distorted parallel dimension from science fiction, the district court granted the motion. *Honeyfund.com Inc. v. Ron DeSantis, et al.,* No. 4:22-cv-00227 (N.D. Fla. Aug. 18, 2022). The court called the Act "a naked viewpoint-based regulation on speech that does not pass strict scrutiny." Defendants appealed.

Eleventh Circuit: No Abuse of Discretion

Because the only issue on appeal was whether the district court abused its discretion in granting the plaintiffs' motion for a preliminary injunction, this decision does not definitively settle whether the Act is unconstitutional. However, the court was required to evaluate whether the lawsuit has "a substantial likelihood of success on the merits," which provides insight into how the court would rule on the merits. In this case, the court's view of the statute was clear.

In conducting this merits analysis, the court considered whether the Act permissibly regulates conduct or impermissibly regulates speech. The court summarized the appropriate analytical framework as determining "whether the message matters, or just the action."

Florida argued that the Act does not violate the First Amendment because it bars the conduct of requiring attendance at meetings. Employers may discuss the prohibited topics, Florida asserted, but not in mandatory trainings. While calling this argument "a clever framing rather than a lawful restriction," the court held the Act was "a textbook regulation of core speech protected by the First Amendment."

Having concluded the Act regulates speech, and not conduct, the court applied the strict scrutiny analysis to the statute to determine whether the Act is narrowly tailored to serve a compelling state interest. The court rejected Florida's contention that the Act serves the state's compelling interest of protecting individuals from discrimination in the form of speech that falls under the umbrella of the eight prohibited concepts. Whether the ideas articulated in the Act are offensive to some listeners is irrelevant, the court held, but Florida "has no compelling interest in creating a per se rule that some speech, regardless of its context or the effect it has on the listener, is offensive and discriminatory."

The court also described the Act as "doomed" by its breadth and scope in that it bans speech on diverse political viewpoints.

The court closed with parting wisdom: “Intellectual and cultural tumult do not last forever, and our Constitution is unique in its commitment to letting the people, rather than the government, find the right equilibrium.”

What’s Next

Following this decision, state officials may not enforce the Act against employers. Florida has 14 days from the entry of the Eleventh Circuit’s decision to petition for a rehearing by the full circuit. In a statement, the Florida governor’s office said the state is reviewing all options for a potential appeal. It did not offer any insight into the state’s next steps.

The outcome of this case may signal challenges ahead for similar laws pending in other states. Several other states have pending legislation that prohibits public employers from espousing, promoting, or affirming identically worded concepts or that prohibits state education systems from including these eight concepts in their curriculum. The Florida law is singular in its broad application to private employers and its prohibition of mandatory meetings.

Employers should continue to review employee training and other inclusion measures for compliance with applicable law. Jackson Lewis attorneys will follow developments on the Florida law (and be on the watch for similar legislation around the country) and are available for questions.