Can Institutions Find Legal Workarounds for State Bans on DEI?

Blogs

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Following Donald Trump's re-election, many states have passed bans against programs and scholarships that promote diversity, equity and inclusion. According to the Chronicle of Higher Education which tracks such legislation, more than a dozen states have passed anti-DEI laws since 2024, and dozens of additional bills are pending in 30 states and the United States Congress.

While state laws vary, many ban DEI offices and staff, mandatory DEI training, diversity statements, identity-based preferences for admissions and hiring, and mandatory courses for DEI or critical race theory. As these examples illustrate, the laws run the gamut:

- New Hampshire law provides that no public school shall implement, promote, or otherwise engage in any DEI-related initiatives, programs, training or policies, nor shall state funds be expended to public schools for DEI-related activities…. N.H. Rev. Stat. §186:72 (enacted July 2025).
- Including "diversity, equity, and inclusion programs" in its definition of a "controversial belief or policy," OH R.C. 3345.0217(A)(1), Ohio law enacted in June of 2025 prohibits "any orientation or training course regarding diversity, equity, and inclusion…;" as well as the continuation or establishment of diversity, equity, and inclusion offices or departments. OH R.C. 3345.0217(B)(1)(a)(i), (ii), and (iii) (enacted June 2025). The law also prohibits state institutions from establishing an office by a different name that serves the same purpose. OH R.C. 3345.0217(B)(1)(b).
- Texas bans DEI offices that are established for the purpose of influencing hiring or other employment practices, promoting differential treatment or providing special benefits, promoting policies or procedures, or conducting training programs or activities implemented or designed on the basis of race, color, or ethnicity. V.T.C.A. Education Code § 51.3525 (a)(1)-(4) (enacted January 2024). The law does not, however, prohibit the establishment of offices whose purpose is to promote policies, procedures,

differential treatment, or special benefits on the basis of sex. *Cf:* V.T.C.A. Education Code § 51.3525(a)(2), (3).

- Arkansas, whose statute is named "Rejecting Discrimination and Indoctrination in Post-Secondary Education," prohibits school employees or teachers from compelling other employees or students to adopt beliefs in violation of federal anti-discrimination law, including that an individual should be treated adversely or advantageously because of their membership in a protected class, or should bear collective guilt or be inherently responsible for actions committed by other members of the same protected class. A.C.A. § 6-60-1604(a) (enacted August 2025). The Arkansas law does not prohibit an employee from discussing the ideas and history of these concepts for legitimate educational purposes. ACA § 6-60-1604(c)(2).

Some institutions in affected states see inherent value in these programs and practices and have sought ways to recognize that value while remaining in compliance with the law. Strategies range from rebranding "DEI" office names – which, as noted above, would be prohibited in Ohio -- to restructuring whole departments and employment roles. On the admissions side, institutions have focused on holistic processes that aim to maintain diverse student populations without explicitly prioritizing race. The legality of these changes will play out in courts over the next several years. Particularly in states where the new laws provide for private rights of action, we expect to see more private litigants testing whether institutions are complying with developing standards and whether these laws will pass federal and state constitutional challenges.

In states where no outright prohibition exists, institutions may nevertheless see challenges to their DEI initiatives even though the Supreme Court's decision in *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) does not explicitly prohibit DEI initiatives; the case was focused the plaintiffs' challenge to allegedly race-based admission practices. So far, post-*SFFA* challenges to DEI programs have been based on First Amendment claims that mandatory DEI training programs penalize continued disagreement with the views expressed, *Henderson v. Springfield* [Missouri] *R-12 School District*, 163 F.4th478 (8thCir. 2025);[1] or on Due Process grounds derived from *SFFA* that enforcement of "vague" DEI objectives threaten arbitrary and subjective enforcement. *National Education Association-New Hampshire v. NH Attorney General*, 806 F.Supp. 3d 166 (D.N.H. 2025). These and other future challenges will turn on how lower courts interpret the reach of *SFFA* beyond race-based admissions policies.

As the law continues to evolve, institutions and their legal counsel may want to consider the following:

1. Does our program seek to inform and educate our staff about varying viewpoints, rather than mandating the adoption of a specific view?
2. Does our program consider the varied experiences of individual members of minority groups rather than stereotyping the perspectives of minority groups simply on the basis of their identity?
3. Does our institution focus on concepts of inequity and bias as part of legitimate educational or pedagogical inquiry?

[1] Missouri has thus far failed to enact legislation prohibiting DEI programs at institutions of higher education.

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