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Woke: The New Four-Letter Word

By Amber M. Rogers and Meredith Gregston

In this article, the authors examine whether diversity, equity and inclusion initiatives are dead.

While diversity, equity and inclusion (DEI) initiatives in the workplace are not a new phenomenon, these programs have become increasingly popular in recent years. While increasing diversity in the workplace is seemingly a noble endeavor, the uptick has not led to complete approval from everyone, with drastic pushback on certain brands as well as targeted state legislation aimed at mitigating or eliminating these programs. Being “woke” has become the new four-letter word and has, in some instances, started to hurt companies’ bottom lines.

LEGISLATIVE PUSH BACK

One of the more notable examples of legislatures’ push against “woke” initiatives is the “Stop W.O.K.E. (Wrong to our Kids and Employees) Act,” passed by Florida Governor Ron DeSantis in 2022.¹ The act seeks to prohibit any training, teaching, or instruction that “espouses, promotes, advances, inculcates, or compels” any individual, including students and employees, to believe any of eight named concepts within the act.² Florida has also passed several other anti-“woke” bills in recent years. Florida HB 999 and SB 266 were both enacted to prevent public institutions from funding or maintaining DEI programs in the state.³

Texas, North Dakota, and South Dakota have also enacted new laws with similar goals of curtailing allegedly unlawful DEI initiatives.⁴ The bills additionally eliminate required training for students and employees

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regarding “divisive concepts” and “specified concepts” related to race and sex.⁵

Tennessee has also enacted strict legislation in its HB 1376 to ban “divisive concepts” from teaching curriculum and allows students and employees to report professors who teach such concepts.⁶

While some states have quickly sought to pass anti-“woke” legislation, others still have pending bills that are set to prohibit DEI programming in their states.

Recently, Arizona passed Senate Bill 1694, though awaiting the governor’s signature, that would eliminate the requirement that an employee must engage with DEI programming, prevent public funds on DEI programming or goods and services, and will not allow institutions to establish nor employ a DEI office.⁷

Comparatively, proposed-Alabama House Bill 7 has gone further and prohibits public institutions from promoting or endorsing certain “divisive concepts” relating to race, sex, or religion, though the bill has been indefinitely postponed.⁸

Prior to the recent U.S. Supreme Court decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,⁹ there was a sharp increase in the number of anti-DEI bills being introduced and passed, opening the door for many states to eliminate (already illegal) affirmative action practices without the help of the Court. What remains to be seen, however, is how state legislatures will respond in the wake of the recent Court decision that has the potential to render DEI ideology and practices obsolete. Indeed, there have already been cases filed in the decision’s wake challenging allegedly unlawful DEI practices.

Between current anti-“woke” legislation and this latest decision, employers should be aware of continued and expanded state legislation attacking this issue and expect more lawsuits to come challenging allegedly unlawful DEI practices, and asserting claims for “reverse” discrimination.

WOKENESS AND THE BRANDS

Alongside the legislation that seeks to slow the “woke” initiatives across the country, some public companies are facing customer backlash and criticism for their DEI efforts. Perhaps more than ever, large public companies are showing support and dedicating initiatives towards increasing awareness of diverse groups of people and causes. According to a 2021 WorldatWork survey of 656 companies, 83% of responding organizations claimed to have taken action on DEI initiatives.¹⁰ However, these trends have at times invoked hostile large-scale public reactions, sometimes forcing companies to walk back their practices or soften their stance. Many critics and now even supporters must face the question of “is wokeness overtaking the brand?”

For instance, the National Hockey League (NHL) recently reversed their initial decision to provide all 32 teams with Pride themed jerseys

in celebration of Pride month after a number of players refused to wear the jerseys. NHL commissioner Gary Bettman claimed that the jerseys became “more of a distraction from really the essence of what the purpose of these nights are.”¹¹

Like the NHL, the Major League Baseball (MLB) faced criticism from supporters after it reverted to their original social media profile picture just one day after public condemnation for changing their profile photo for Pride month.¹²

Outside of major professional sports leagues, some of the biggest corporations in the Fortune 100, including Target, Starbucks, Ford, and other large companies such as Bud Light have all received criticism related to their DEI campaigns. Customers have voiced outrage at companies for initiating DEI practices in the first place, including diverse themed items and merchandise, and sometimes for changing course in response to the outrage.

Regarding Bud Light, the brand recently faced a loss in profits due to boycotts stemming from a partnership with transgender Tik-Tok star Dylan Mulvaney, as well as comments from Bud Light’s vice president about repositioning the brand away from an outdated “fratty” persona, both of which allegedly alienated the company’s existing customer base. Shortly after critics demanded a boycott, Bud Light sales reportedly fell about 25% over a week compared to a year ago, and Bud Light fell from its hold as the most popular U.S. beer while sales of major competitor beers like Coors Light and Miller Lite surged.¹³ Some conservative commentators have claimed that these “woke” initiatives are “anti-white, anti-American, and anti-Christian,” while others believe that “individuals will be rewarded or penalized on the basis of race, gender, or sexuality.”¹⁴

Despite pushback from right-wing critics and consumers, not everyone is against company commitment to DEI and other “woke” initiatives, and the data surrounding how the full society views these messages seems to be split. While approximately 60% of U.S. adults claim that they have seen, read, or heard about references to “woke” companies, about 36% of U.S. adults viewed that description as positive, while 35% viewed it as negative.¹⁵ Of the negative viewers however, only 26% would consider boycotting a company or brand for being “woke.”¹⁶

This split in viewpoints and some of these more moderate stances suggest that completely eliminating DEI programming is the incorrect decision, but employers should ensure their implementation and communication to employees is done effectively, thoroughly, and, most importantly, lawfully.

WHY THIS MATTERS

Now, if more than ever, employers should be focused on ensuring that their DEI initiatives, campaigns, marketing, and programs are compliant with the shifting legal landscape. Companies should consider not only

the how, but the why of the programs they implement, all while keeping the totality of their workforce and customers in mind.

Importantly, even in states that have embraced DEI initiatives, law suits are still percolating and employers should be ready to defend their programs.

Companies can increase the likelihood of success to these challenges by communicating effectively, providing training and additional employment opportunities to all without regard to any protected traits, and ensuring goals are not misinterpreted as quotas.

NOTES

1. Florida SB 148.
2. Id.
3. Florida HB 999 & SB 266.
4. See e.g., Texas HB 5127 and SB 17; South Dakota HB 1012; North Dakota SB 2247.
5. Id.
6. Tennessee HB 1376.
7. Arizona SB 1694.
8. Alabama HB 7.
9. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023).
10. More Than 80% of Organizations Have Taken Action on DEI Initiatives in 2021, Worldat work.org, <https://worldatwork.org/about/press-room/more-than-80-percent-of-organizations-have-taken-action-on-dei-initiatives-in-2021> (last visited on August 9, 2023).
11. NHL Teams Wont Wear Theme Night Jerseys, nbcnews.com, <https://www.nbcnews.com/nbc-out/out-news/nhl-teams-wont-wear-theme-night-jerseys-players-lgbtq-pride-refusals-rcna90857> (last visited August 7, 2023).
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13. <https://www.forbes.com/sites/conormurray/2023/06/14/mark-cuban-calls-going-woke-good-business-and-conservatives-and-fellow-shark-kevin-oleary-bite-back/?sh=391e3b16416e>.
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15. How Americans Really Feel About ‘Woke’ Companies, morningconsult.com, <https://pro.morningconsult.com/analysis/woke-companies-americans-data-trends> (last visited August 7, 2023).
16. Id.

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