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Challenging Divisive Concepts Legislation

Your state just passed a so-called divisive concepts law? “Divisive concepts” legislation (in effect, educational gag orders) refers to a wave of politically motivated laws passed or proposed in several states across the United States that aim to limit how certain concepts are taught in K-12 schools, and sometimes even in higher education and workplace training. While claiming to defend free speech, these laws are purposely designed to censor the teaching and discussion of subjects that some deem controversial or “anti-American,” such as critical race theory.

While their exact wording differs, these laws typically prohibit the teaching of:

- The continuities and systemic nature of racism;
- The idea that individuals, because of their race or sex, are inherently oppressive;
- Suggestions that individuals bear responsibility for actions committed in the past by members of their race or sex; and
- Content that might make students feel “discomfort, guilt, anguish, or any other form of psychological distress” because of their race or sex.

Divisive concept legislation creates a chilling effect on how educators teach critical and nuanced topics in the classroom, such as racism, sexism, identity, and history, by threatening educators with loss of job security and licensing credentials. Such legislation may very well be unconstitutional on several grounds. Below is a summary of issues to look for that could be the basis of a legal challenge if your state passes a divisive concepts law. For further guidance regarding the legality of pending or active legislation, you should consult your local AFT affiliate and an experienced attorney. Please note that the information contained herein does not constitute legal advice.

1. Vagueness and overbreadth:

- **Violation of due process:** These laws often use broad and ambiguous terms that do not clearly state what might be prohibited and what may not be coupled with grave sanctions, such as the loss of professional licenses and livelihoods. The 14th Amendment’s vagueness doctrine requires that legislation clearly defines what “conduct is sanctionable and what is not” under the law.¹ This requirement serves due process concerns by requiring that those subject to the law be given “a reasonable opportunity to know what is prohibited.”² The vagueness of the divisive concepts legislation makes it difficult for educators to

¹ *Sessions v. Dimaya*, 584 U.S. 148, 156 (2018).

² *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

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understand what is permissible, creating a chilling effect on speech and violating their due process rights under the 14th Amendment.

- **Unconstitutional restriction of speech:** The laws' vague language can encompass a wide range of speech that cannot be censored, such as extracurricular speech, leading to an overbroad restriction on protected speech under the First Amendment.

2. First Amendment and academic freedom violations: Educators in higher education enjoy First Amendment and academic freedom protections at work.

- **Viewpoint discrimination:** Divisive concept laws affecting higher education often target specific perspectives on issues like race, gender, and history, discriminating against certain viewpoints and violating the First Amendment's prohibition of viewpoint-based restrictions on speech.
- **Compelled speech:** By prohibiting certain ideas, these laws can effectively compel educators to endorse or avoid particular viewpoints, interfering with their academic freedom and First Amendment rights.

Examples of successful legal challenges:

- **Oklahoma (*Black Emergency Response Team v. O'Connor*):** A federal judge issued a preliminary injunction against some provisions of a divisive concepts law, holding that the provisions were so vague educators could not know with any reasonable certainty what material they cover.
- **New Hampshire (*AFT-New Hampshire v. Commissioner, N.H. Department of Education*):** A federal judge struck down New Hampshire's divisive concepts law, holding that the law unconstitutionally restricted what teachers can teach. The order in favor of AFT-N.H. and its co-plaintiffs said that the challenged provisions are: "viewpoint-based restrictions on speech that do not provide either fair warning to educators of what they prohibit or sufficient standards for law enforcement to prevent arbitrary and discriminatory enforcement. Thus, the Amendments violate the Fourteenth Amendment to the U.S. Constitution."
- **Florida (*Pernell v. Florida Board of Governors of the State University System*):** A federal judge issued a preliminary injunction against Florida's divisive concepts legislation, finding that it violates the First and 14th Amendments. The order explained, "The law officially bans professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of the opposite viewpoints. Defendants argue that, under this Act, professors enjoy 'academic freedom' so long as they express only those viewpoints of which the State approves. This is positively dystopian. It should be understood that '[i]f liberty means anything at all it means the right to tell people what they do not want to hear.'" The 11th U.S. Circuit Court of Appeals upheld the lower court's injunction.

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