

"Divisive Concepts" Legislation Training

Prepared by the ETSU Office of University Counsel & Compliance



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Introduction to the Tennessee Divisive Concepts Act



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Introduction

In 2022, the Tennessee General Assembly enacted Public Chapter 818, now codified as Tenn. Code Ann. § 49-7-1901 *et seq.*, which is colloquially known as the “Divisive Concepts Act.”

Among other things, the Act identified fourteen “divisive concepts,” prohibited state colleges and universities from taking certain actions related to them, and created a cause of action for individuals aggrieved by any state action contrary to the Act.

The Act also protects freedom of speech and academic freedom and requires compliance with other federal and state laws, rules, and regulations.

In 2023, the General Assembly amended the Divisive Concepts Act with Public Chapter 268, codified as amendments to Tenn. Code Ann. § 49-7-1901. This Act is known as the Tennessee Higher Education Freedom of Expression and Transparency Act.

This Act added four new provisions, each of which will be reviewed here. Importantly, the Act added a requirement to the Divisive Concepts Act that requires colleges and institutions to provide employee training to ensure compliance with the Act.

This training is being offered to comply with that requirement.

The General Assembly's reasons for enacting the Tennessee Divisive Concepts Act



The Reasons for the "Divisive Concepts Act"

The General Assembly enacted the Divisive Concepts Act because it concluded that the divisive concepts identified in the Act, which we will review next, “***exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, and other criteria in ways contrary to the unity of the United States of America and the well-being of this state and its citizens.***”

What concepts are “Divisive Concepts” under the Tennessee statute?



A Divisive Concept is an idea, belief, or opinion that:

- A. One race or sex is inherently superior or inferior to another race or sex;
- B. An individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously;
- C. An individual should be discriminated against or receive adverse treatment because of the individual's race or sex;

- D. An individual's moral character is determined by the individual's race or sex; An individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- E. An individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex;
- F. A meritocracy is inherently racist or sexist, or designed by a particular race or sex to oppress another race or sex;

- G. This state or the United States is fundamentally or irredeemably racist or sexist;
- H. Promotes or advocates the violent overthrow of the United States government;
- I. Promotes division between, or resentment of, a race, sex, religion, creed, nonviolent political affiliation, social class, or class of people;
- J. Ascribes character traits, values, moral or ethical codes, privileges, or beliefs to a race or sex, or to an individual because of the individual's race or sex;

- K. The rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups;
- L. All Americans are not created equal and are not endowed by their Creator with certain unalienable rights, including, life, liberty, and the pursuit of happiness;
- M. Governments should deny to any person within the government's jurisdiction the equal protection of the law;
- N. Includes race or sex stereotyping; or
- O. Includes race or sex scapegoating;

What protections does the Divisive Concepts Act provide for students and employees?



1. A student or employee of a public institution of higher education shall not be penalized, discriminated against, or treated adversely due to the student's or employee's refusal to support, believe, endorse, embrace, confess, act upon, or otherwise assent to one or more divisive concepts.
2. A student or employee of a public institution of higher education shall not be required to endorse a specific ideology or political viewpoint to be eligible for hiring, tenure, promotion, or graduation, and institutions shall not ask the ideological or political viewpoint of a student, job applicant, job candidate, or candidate for promotion or tenure.



3. A public institution of higher education shall not require an applicant for employment or admission to submit a personal diversity statement or to affirm the applicant's agreement with an institutional diversity statement as part of the application or admissions process.



What academic conduct is
protected by the Divisive Concepts
Act?



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1. The Act does not prohibit public institutions of higher education from training students or employees on the non-discrimination requirements of federal or state law;
2. The Act does not infringe on the rights of freedom of speech protected by the First Amendment to the United States Constitution;
3. The Act does not infringe on the rights of academic freedom of faculty in public institutions of higher education;

4. The Act does not require an employee to:
 - a. Violate any federal or state law, rule, or regulation; or
 - b. Violate any applicable academic accreditation requirement;
5. The Act does not prohibit an individual who provides training from responding to questions regarding one or more divisive concepts, so long as the response does not endorse or advocate for divisive concepts; or

6. The Act does not prohibit public institutions of higher education from promoting diversity, equity, and inclusion; provided, that such efforts are consistent with the provisions of this part.
7. The Act does not prohibit any mandatory training of students or employees if the training includes one or more divisive concepts;
8. The Act does not prohibit the use of training programs or training materials for students or employees, if the program or material includes one or more divisive concepts; or

9. Using state-appropriated funds to incentivize, beyond payment of regular salary or other regular compensation, a faculty member to incorporate one or more divisive concepts into academic curricula.
10. Approving or using state funds for fees, dues, subscriptions, or travel in conjunction with the membership, meetings, or activities of an organization if participation in such organization requires an individual, or an individual's employer, to endorse or promote a divisive concept.

What legal remedies does the
Divisive Concepts Act provide for
those aggrieved by the university's
conduct?



A current student or prospective student, or an employee or a job applicant, who believes that they:

- a. Have been penalized, discriminated against, or treated adversely due to his or her refusal to support, believe, endorse, embrace, confess, act upon, or otherwise assent to one or more divisive concepts; or
- b. Have been required to endorse a specific ideology or political viewpoint to be eligible for hiring, tenure, promotion, or graduation, and institutions shall not ask the ideological or political viewpoint of a student, job applicant, job candidate, or candidate for promotion or tenure.
- c. Have been required to submit a personal diversity statement or to affirm the applicant's agreement with an institutional diversity statement as part of the application or admissions process

may pursue all equitable or legal remedies that may be available to the individual in a court of competent jurisdiction.

What internal procedure does the
Divisive Concepts Act provide for
students and employees aggrieved by a
violation of the Act?



The Divisive Concepts Act requires the University to Investigate violations of the Divisive Concepts Act and take Remedial Action

In accordance with T.C.A. § 49-7-1907, a student or employee who believes that a violation of the Divisive Concepts Act has occurred may file a report.

To file a report please visit the ETSU University Compliance :
<https://www.etsu.edu/universitycounsel/compliance/>