



2023 Enrolled Joint Resolution 15

A proposed constitutional amendment prohibiting governmental
entity discrimination

Spencer Johnson
legislative analyst



© 2024 Wisconsin Legislative Reference Bureau
One East Main Street, Suite 200, Madison, Wisconsin 53703
<http://legis.wisconsin.gov/lrb> • 608-504-5801

This work is licensed under the Creative Commons Attribution 4.0 International License.
To view a copy of this license, visit <http://creativecommons.org/licenses/by/4.0/> or send a letter to
Creative Commons, PO Box 1866, Mountain View, CA 94042, USA.

Introduction

The 2023 Wisconsin Legislature adopted on first consideration [2023 Assembly Joint Resolution 109](#), published as 2023 Enrolled Joint Resolution 15, which would amend the Wisconsin Constitution to prohibit governmental entities in the state from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, public contracting, or public administration. The assembly adopted 2023 Assembly Joint Resolution 109 on February 15, 2024, and the senate concurred in the proposal on March 12, 2024, rendering it eligible for second consideration by the 2025 Wisconsin Legislature.

Legislative passage of a constitutional amendment on first consideration is the first step in the process of amending the constitution. Under Wis. Const. art. XII, § 1, amendments to the constitution must be adopted by two successive legislatures and then ratified by the voters in a statewide referendum.¹ On first consideration, a proposed amendment to the constitution is offered as a joint resolution in either the assembly or the senate. A joint resolution, unlike a bill, need not be submitted to the governor for approval, but must pass both houses in identical form to be effective. If the assembly and the senate both adopt the joint resolution, the Legislative Reference Bureau must publish the proposed constitutional amendment on the Internet, no later than August 1 preceding the next general election.²

In the next succeeding legislature, the proposed amendment may be offered on second consideration. Once again, the proposal takes the form of a joint resolution and may be offered in either the assembly or the senate. A second consideration joint resolution proposes the identical amendment that was proposed by the first consideration joint resolution and also specifies the date of the election at which the proposed amendment will be submitted to the voters and the wording of the question that will appear on the ballot. If the assembly and the senate both adopt the joint resolution without making changes to the proposed amendment, the proposed amendment is submitted to the voters. If voters ratify the amendment, the constitution is amended.

Proposed amendment

2023 Enrolled Joint Resolution 15 proposes the creation of Wis. Const. art. I, § 27. This section would provide that “a governmental entity may not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, public contracting, or public administration.”

1. Every Wisconsin legislature convenes in January of an odd-numbered year and adjourns in January of the next succeeding odd-numbered year.

2. Wis. Stat. § [35.07](#).

The proposed Wis. Const. art. I, § 27, would define “governmental entity” to mean “the state, its political subdivisions including municipalities, the University of Wisconsin System, the Technical College System, any public college or university, any public school district, and any office, department, independent agency, board, commission, authority, institution, association, society, or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.”

However, the proposed Wis. Const. art. I, § 27, would provide for two exceptions to this prohibition. First, the section would not “prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the governmental entity.” Second, the section would not prohibit “bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, public contracting, or public administration.”

Wis. Const. art. I, § 27, would also provide that, if one or more of its parts are found to be in conflict with the U.S. Constitution or federal law, the section would be implemented to the maximum extent permitted and any provision found to be invalid would be severable from the remainder of the section.

In testifying in favor of the proposal, Representative David Murphy, one of the joint resolution’s authors, stated that the proposed constitutional amendment is based on a similar constitutional amendment in Michigan.³ In 2006, Michigan voters considered a ballot measure that sought to prohibit “public institutions from using affirmative action programs that grant preferential treatment on the basis of race or sex in employment, education, or contracting.”⁴ The Michigan electorate approved the ballot measure, resulting in the creation of Mich. Const. art. I, § 26.

The senate author of the proposal, Senator Stephen Nass, testified that the constitutional amendment would ensure that actions taken by the state, such as the hiring of state employees and the admission of students to public universities, would be based on “merit, fairness, and equality,” rather than “immutable characteristics like race, sex, color, ethnicity, national origin, and the like.”⁵ Additionally, Senator Nass cited the U.S. Supreme Court’s recent majority opinion in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023) as an impetus for adoption of the constitutional amendment.⁶

3. Wis. Legis. Council, [Hearing Materials for 2023 AJR 109](#), Testimony of State Rep. David Murphy, Assembly Comm. on Judiciary, *AJR 109: Prohibiting Governmental Entity Discrimination (First Consideration)* (Jan. 30, 2024), 1, <https://docs.legis.wisconsin.gov>.

4. Suzanne Lowe, analysis of [Proposal 06-2](#), Mich. Senate Fiscal Agency, <https://senate.mich.gov>. See also Chris Couch, [Analysis of Proposals on the Ballot November 7, 2006](#), 5, Mich. House Fiscal Agency, <https://house.mi.gov>.

5. Wis. Legis. Council, [Hearing Materials for 2023 AJR 109](#), Testimony of State Sen. Stephen Nass, Assembly Comm. on Judiciary, *AJR 109: Prohibiting Governmental Entity Discrimination (First Consideration)* (Jan. 30, 2024), 3, <https://docs.legis.wisconsin.gov>.

6. Testimony of State Sen. Stephen Nass, [Hearing Materials for 2023 AJR 109](#).

Legislators opposed to the proposal have raised concerns that the constitutional amendment would prohibit practices that seek to address and mitigate social inequalities.⁷

Other states

Currently, eight states possess laws that are similar to 2023 Enrolled Joint Resolution 15: Arizona, California, Idaho, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington.

Since 1996, five states—Arizona, California, Michigan, Nebraska, and Oklahoma—have amended their constitutions to prohibit discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.⁸ Notably, the U.S. Supreme Court upheld Michigan’s constitutional amendment in 2014, ruling that it did not violate the Fourteenth Amendment to the U.S. Constitution.⁹

In 1998, Washington voters approved Initiative 200, which amended state statutes to establish a similar prohibition.¹⁰ In 2019, the Washington Legislature passed Initiative 1000, which would have revised the general prohibition to permit certain actions so long as those actions did not use quotas or preferential treatment.¹¹ Washington voters rejected this initiative in a referendum, however, and it did not become law.¹² Governor Jay Inslee issued an executive order in 2022 that provided state agencies with guidance on how to comply with the unaltered prohibitions under state law.¹³ Governor Inslee stated that his executive order was intended to “instruct agencies on how to move forward with achieving equity while still complying with [Initiative 200],” without altering “other state and federal legal requirements related to affirmative action.”¹⁴

Two states have similar provisions enacted in their statutes rather than through a ballot initiative. A 2020 Idaho statute prohibits discriminating against, or granting preferential treatment to, an individual or group “on the basis of race, sex, color, ethnicity,

7. Baylor Spears, “[GOP’s latest proposal to eliminate DEI receives public hearing](https://wisconsinexaminer.com),” *Wisconsin Examiner*, Jan. 30, 2024, <https://wisconsinexaminer.com>.

8. Ariz. Const. art. II, § 36, Cal. Const. art. I, § 31, Mich. Const. art. I, § 26, Neb. Const. art. I, § 30, and Okla. Const. art. II, § 36A.

9. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014).

10. Wash. Rev. Code § 49.60.400.

11. *Wash. Ch. 160, Laws of 2019*. See also Wash. Office of Program Research, “[Summary of Referendum Measure No. 88](https://leg.wa.gov),” Aug. 14, 2019, <https://leg.wa.gov>.

12. Associated Press, “[Washington voters reject affirmative action referendum](https://apnews.com),” Nov. 12, 2019, <https://apnews.com>.

13. *Wash. Exec. Order 22-02*. This executive order also rescinded *Wash. Governor’s Directive No. 98-01*, which had been issued by Governor Gary Locke following the 1998 passage of Initiative 200.

14. Office of Gov. Jay Inslee, “[Inslee updates decades-old affirmative action guidance for more equity in hiring, education and contracting](https://governor.wa.gov),” news release, Jan. 17, 2022, <https://governor.wa.gov>.

or national origin in the operation of public employment or public education.”¹⁵ A New Hampshire statute prohibits a person from being appointed or promoted to, or demoted or dismissed from, a position in the classified service because of that person’s political opinions, religion, religious beliefs or affiliations, age, sex, gender identity, sexual orientation, national origin, or race. With some exceptions, this New Hampshire statute also generally prohibits preferential treatment or discrimination in recruiting, hiring, or promotion within the classified service based on a person’s race, sex, gender identity, sexual orientation, national origin, religion, or religious beliefs.¹⁶ A separate New Hampshire statute also prohibits preferential treatment or discrimination in recruiting, hiring, promotion, or admission based on race, sex, national origin, religion, or sexual orientation within its state college and university system and community college system.¹⁷

Three different Florida governors have issued executive orders with similar provisions. In 1999, Governor Jeb Bush issued an executive order that generally prohibited discrimination in government employment, state contracting, and higher education on the basis of race, gender, creed, color, or national origin.¹⁸ Governor Rick Scott issued an executive order in 2011 reaffirming the policy of nondiscrimination in government employment and contracting established by Governor Bush’s executive order.¹⁹ Most recently, in 2019, Governor Ron DeSantis issued an executive order reaffirming the previous two orders and prohibiting discrimination in government employment and state contracting on the basis of age, sex, race, color, religion, national origin, marital status, or disability.²⁰ ■

15. Idaho Code Ann. § [67-5909A](#).

16. N.H. Rev. Stat. Ann. § [21-I:52](#).

17. N.H. Rev. Stat. Ann. §§ [187-A:16-a](#) and [188-F:3-a](#).

18. [Fla. Exec. Order No. 99-281](#).

19. [Fla. Exec. Order No. 11-04](#).

20. [Fla. Exec. Order No. 19-10](#).

STATE OF WISCONSIN
RECEIVED AND FILED
MAR 19 2024
3:32 PM
OFFICE OF THE
SECRETARY OF STATE

State of Wisconsin



2023 Assembly Joint Resolution 109

ENROLLED JOINT RESOLUTION 15

To create section 27 of article I of the constitution; relating to: prohibiting governmental entity discrimination (first consideration).

Resolved by the assembly, the senate concurring, That:

SECTION 1. Section 27 of article I of the constitution is created to read:

[Article I] Section 27 (1) In this section, "governmental entity" means the state, its political subdivisions including municipalities, the University of Wisconsin System, the Technical College System, any public college or university, any public school district, and any office, department, independent agency, board, commission, authority, institution, association, society, or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.

(2) A governmental entity may not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, public contracting, or public administration.

(3) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the governmental entity.

(4) Nothing in this section prohibits bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, public contracting, or public administration.

(5) If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United

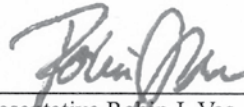
States Constitution and federal law permit. Any provision of this section held invalid shall be severable from the remaining portions of this section.

SECTION 2. Numbering of new provision. If another constitutional amendment ratified by the people creates the number of any provision created in this joint resolution, the chief of the legislative reference bureau shall determine the sequencing and the numbering of the provisions whose numbers conflict.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.



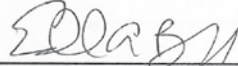
Senator Chris Kapenga
President of the Senate



Representative Robin J. Vos
Speaker of the Assembly

March 19, 2024

Date



Edward A. Blazel
Assembly Chief Clerk