

CLIENT ALERT

Executive Order on Combating Race and Sex Stereotyping Bans Some Diversity Training, Raises Significant Constitutional and Other Questions for Contractors

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With just six weeks remaining before the presidential election, President Donald Trump has issued an [“Executive Order on Combating Race and Sex Stereotyping,”](#) which bans federal contractors from utilizing training that “inculcates in its employees any form of race or sex stereotyping,” which is defined as “ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.” The September 22, 2020 Executive Order (“EO”) similarly prohibits “race or sex scapegoating,” meaning – according to the EO – “assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex,” and “encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.” The key clauses, described below, are to be included in new federal contracts entered into 60 days after the date of the EO, or November 21, 2020.

The EO follows a [letter](#) sent to Federal Agencies earlier this month that bans training of government workers on “critical race theory,” “white privilege,” or other undefined “divisive, un-American propaganda training sessions.”

Banned Trainings

The EO includes the following examples of the concepts it aims to ban from trainings:

- one race or sex is inherently superior to another race or sex;
- an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- an individual’s moral character is necessarily determined by his or her race or sex;
- an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
- meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

The EO also lists several anecdotal examples of training materials that the administration believes are objectionable and would fall within the scope of banned trainings:

- Training materials from a Federal entity “stated that racism ‘is interwoven into every fabric of America’ and described statements like ‘color blindness’ and the ‘meritocracy’ as ‘actions of bias.’”
- Materials from another Federal entity,, “for non-minority males stated that an emphasis on ‘rationality over emotionality’ was a characteristic of ‘white male[s],’ and asked those present to ‘acknowledge’ their ‘privilege’ to each other.”
- A federal museum graphic “recently claimed that concepts like ‘[o]bjective, rational linear thinking,’ ‘[h]ard work’ being ‘the key to success,’ the ‘nuclear family,’ and belief in a single god are not values that unite Americans of all races but are instead ‘aspects and assumptions of whiteness.’ The museum also stated that ‘[f]acing your whiteness is hard and can result in feelings of guilt, sadness, confusion, defensiveness, or fear.’”

Enactment and Enforcement

- The EO requires the Office of Federal Contract Compliance Programs (“OFCCP”) to publish, within 30 days, in the Federal Register a Request for Information “seeking information from Federal contractors, Federal subcontractors, and employees of Federal contractors and subcontractors regarding the training, workshops, or similar programming provided to employees” that includes copies of the trainings.
- The EO requires OFCCP “to establish a hotline and investigate complaints received under both this order as well as Executive Order 11246 alleging that a Federal contractor is utilizing such training programs in violation of the contractor’s obligations under those orders.”
- The provisions of the EO must be flowed down to all subcontracts and undefined “purchase orders” entered into beginning 60 days after the date of the EO – November 21, 2020.
- All federal agencies that issue grants must submit a report, also within 60 days of the EO, identifying “programs for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use Federal funds to promote the concepts that” run afoul of the EO.
- By a date uncertain, the Director of the Office of Personnel Management shall propose regulations giving agency officials authority to “pursue a performance-based adverse action proceeding” against employees who authorize or approve “training that promotes the divisive concepts” banned by the EO.
- The Attorney General is charged with determining the extent to which workplace training “that teaches the divisive concepts” banned by the EO, may contribute to a hostile work environment and give rise to claims under Title VII of the Civil Rights Act, and, if appropriate, will issue guidance to assist employers “in better promoting diversity and inclusive workplaces consistent with Title VII.”
- Penalties for non-compliance may include contract suspension or cancellation, or debarment, as well as investigation by the Attorney General for Title VII violations.

Takeaways for Federal Contractors

The EO is sure to face legal challenge in the near term, likely on Constitutional grounds and based on possible conflicts with existing civil rights laws. Federal contractors and subcontractors should closely monitor legal developments regarding the EO. The parameters of the prohibitions are not clear, and some in the federal contracting community are concerned that implementation of the EO may compromise existing Diversity and Inclusion programs or enhance the legal risk of discrimination

and harassment complaints brought by employees. Federal contractors, subcontractors, and their vendors should stay tuned for future legal developments.

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