

CLIENT ALERT

EO 13950 Continues to Make Headlines: Agencies Issue Class Deviations and Lawsuits Challenging the EO are Pending

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The Trump administration continues to pursue enforcement of its [Executive Order 13950](#) (the EO), while lawsuits filed by two civil rights groups' work their way through federal courts. The EO 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."

On November 20, 2020, both the National Aeronautics and Space Administration (NASA) and the Department of Defense (DoD) issued class deviations requiring that contracting officers incorporate the EO. Both class deviations require that contracts which will include the clause at Federal Acquisition Regulation (FAR) 52.222-26, Equal Opportunity, also include language implementing the EO. The deviations will apply to DoD solicitations issued on or after November 20, 2020, and NASA solicitations issued on or after November 21, 2020.

At the same time, two pending lawsuits recently filed – [one by the NAACP](#) on behalf of the National Urban League and the National Fair Housing Alliance in the United States District Court for the District of Columbia, and [one by a group of LGBTQ civil rights organizations](#) in the Northern District of California – present serious challenges to the EO.

No significant action has occurred regarding the NAACP's suit since it was filed in federal court in Washington, D.C., on October 29. However, Plaintiffs in the litigation filed in the Northern District of California [have moved for a preliminary injunction](#), claiming that the EO violates the First and Fifth Amendments and arguing that the EO has "silenced Plaintiffs' advocacy" by cutting Plaintiffs off from federal funding through grants and contracts and by preventing them from providing diversity training to recipients of such grants and contracts. The motion for preliminary injunction will be heard by Judge Beth Labson Freeman on December 10, 2020. Briefing on Plaintiffs' motion is well underway; [Defendants' Opposition](#) was filed on November 25, 2020 and Plaintiffs' Reply is due December 1. Eight Institutions of Higher Education, including Stanford, Tufts, Brandeis, Boston University, the University of Michigan, and three Ivy League universities, are expected to file *amicus* briefs in support of Plaintiffs' motion for preliminary injunction. A [proposed brief](#) previews the universities' argument that the EO is antithetical to First Amendment free speech principals and "risks chilling the activity that is the very lifeblood of American higher education."

Opposition to the EO has been raised on Capitol Hill as well. On October 16, Rep. Joyce Beatty (D-OH) introduced H.R. 8595, which would nullify EO 13950. As of this writing, H.R. 8595 has 51 co-sponsors and has been introduced in three House committees: Oversight and Reform, Education and Labor, and Armed Services. If the House were to pass the bill, its chances of success in the Republican-controlled Senate are slim; slimmer still are the odds that President Trump would sign the bill into law.

Concern regarding the long-term effects of the EO may be moot as many observers expect that President-elect Biden will rescind the EO relatively early in his term. We will keep clients apprised of further developments on this topic of broad and great concern.

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