

Combating Race and Sex Stereotyping for Federal Contractors

September 25, 2020

Employment, Government Contracts

On September 22, 2020, President Trump issued the [Executive Order on Combating Race and Sex Stereotyping](#) (“EO”) establishing requirements aimed at “promoting unity in the Federal workforce,” by prohibiting workplace training on “divisive concepts,” including “race or sex stereotyping” and “race or sex scapegoating” as newly-defined in the EO. The EO is broadly applicable to executive departments and agencies, Uniformed Services, Federal contractors, and Federal grant recipients. The EO expands on a [letter](#) issued in early September by the Director of the Office of Management and Budget (“OMB”) that directed all agencies to begin to identify contracts or other agency spending on trainings that include “critical race theory,” “white privilege,” or “un-American propaganda,” in an effort to ensure “fair and equal treatment of all individuals in the United States.”

Following the EO, on September 28, 2020, OMB issued a [Memorandum for the Heads of Executive Departments and Agencies](#) (the “Memo”) with additional guidance aimed at assisting agencies in identifying diversity and inclusion trainings for agency employees that may be subject to the EO. The Memo suggests that agencies conduct keyword searches of training materials for specific terms, such as “intersectionality,” “systemic racism,” and “unconscious bias.” Although the Memo primarily explains the terms of the EO, it also provides additional insight concerning the breadth of agency trainings that may ultimately be considered to violate the terms of the EO, which are described below.

Although the EO is likely to be subject to legal challenge (as more fully discussed below), federal contractors, including subcontractors and vendors, could be subject to the compliance requirements outlined below as soon as November 21, 2020.

Prohibition on Teaching “Divisive Concepts” in Workplace Training

- The EO prohibits inclusion of “divisive concepts” in U.S. Uniformed Services training and Federal agency or Government contractor workplace training. Federal grant funds are also prohibited from being used to promote such concepts.
- “Divisive concepts” include the following list of concepts, as well as “any other form” of race or sex stereotyping or race or sex scapegoating (separately defined below):
 - a. one race or sex is inherently superior to another race or sex;
 - b. the United States is fundamentally racist or sexist;
 - c. an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

- d. an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
 - e. members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
 - f. an individual's moral character is necessarily determined by his or her race or sex;
 - g. 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;
 - h. any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
 - i. 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 defines "race or sex stereotyping" and "race or sex scapegoating."
 - a. "Race or sex stereotyping' means 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."
 - b. "'Race or sex scapegoating' means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly 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."

New Requirements for Federal Contractors and EO Implementation Timeline

If the EO is implemented on schedule, all Government contracts entered into 60 days after September 22, 2020 (November 21, 2020), with the limited exception for contracts with religious entities exempt from certain nondiscrimination requirements, must contain a prescribed clause that the contractor will not use any workplace training that includes divisive concepts. Unless a Department of Labor ("DOL") exemption applies, contractors must also flow down and potentially enforce these new requirements for subcontractors and vendors. Contractors must conspicuously post, where it will be seen by employees and applicants for employment, a notice provided by the relevant agency contracting officer of the contractor's commitments under this EO. Further, contractors must distribute this notice to each labor union or representative of workers with which the contractor has a collective bargaining or any other agreement.

Potential penalties for noncompliance include that the contract may be canceled, terminated, or suspended, in whole or in part. Further, if violations are found, the contractor may be subject to agency conciliation negotiations or administrative enforcement proceedings, or to suspension or debarment proceedings subject to agency discretion. The EO does not appear to be retroactive; however, agency reporting requirements discussed below for FY 2020 funds may implicate contracts currently in effect.

EO-Prescribed Agency Actions Relevant to Federal Contractors

- The Office of Personnel Management ("OPM") must review all diversity and inclusion training programs for agency employees prior to implementation. If a contractor provides

training to agency employees that would include divisive concepts, the contractor would be subject to penalties under the EO, including debarment.

- By November 21, 2020, each agency head must report to the Director of OMB a list of any respective grant recipients that may be required to certify that the recipient will not use federal grant funds to promote divisive concepts. By December 21, 2020, all agencies must report all FY 2020 spending on federal employee diversity and inclusion training programs, both conducted internally by the agency and by contractors. Agency reports must include aggregate spending totals and delineate awards to each individual contractor.
- DOL's Office of Federal Contract Compliance Programs ("OFCCP") must establish a hotline and investigate complaints that a federal contractor is using training programs prohibited by the EO. Within 30 days of the EO (by October 22, 2020), the Director of OFCCP will publish a request for information seeking submissions of workplace diversity and inclusion training information and materials from federal contractors, federal subcontractors, and employees of federal contractors and subcontractors.

Potential Challenges

The EO represents an unprecedented effort to influence speech in the workplace and is likely to draw a number of challenges. In particular, the EO may conflict with federal or state requirements to provide trainings on the topics of race and sex discrimination. Further, the EO's breadth as drafted—including the requirements for contractors and certain grant recipients to restrict the content of their trainings, send notices to labor unions, and post copies of the notice in conspicuous places for employees and applicants—also presents a number of constitutional concerns that may lead to challenges, especially once agencies begin applying its requirements to federal contractors. Contractors could view these requirements as extending beyond defining the contours of a spending program (which is generally constitutionally permissible) to coercing or restricting private speech, for example. Similarly, the requirements could be viewed as restricting or compelling corporate speech (as opposed to requiring or defining privately-subsidized government speech) in violation of the First Amendment. Apart from the EO's effects on speech, the EO and agency actions implementing it may draw challenges based on the Administrative Procedure Act, the Federal Property and Administrative Services Act, and other statutes.

Considerations for Employers

The EO applies specifically to "training", and not policies or other documents that employers may publish as part of diversity and inclusion programs. If the EO is fully implemented, its terms could trigger significant modifications to diversity and inclusion trainings, including how concepts such as unconscious bias and meritocracy are addressed. If it remains in effect, employers will want to begin gathering their various trainings together to prepare for a review of the language used and concepts covered to ensure compliance with the EO. For the most part, sophisticated trainings likely do not stray into the territory prohibited by the EO, but ambiguity in the language may cause difficult analysis. Employers need not discontinue specific training modules immediately, but should carefully monitor the progress of this EO toward implementation.

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