

White House ‘Combating Race and Sex Stereotyping’ Executive Order Limits Training

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The “[Executive Order on Combating Race and Sex Stereotyping](#)” (EO) covers government contractors and certain grant recipients and seeks to severely limit and curtail the diversity and inclusion, sexual harassment, and related equal employment opportunity (EEO) training contractors and recipients are allowed to provide their employees.

The EO was signed by President Donald Trump on September 22, 2020.

The EO covers all federal contractors and subcontractors. It requires contracting agencies to insert a contract clause in contracts (presumably, from the language of the EO, new contracts only), entered into 60 days from September 22 (November 21, 2020), a requirement that the contractor not use any workplace training that “inculcates in its employees” any form of race or sex stereotyping or any form of race or sex “scapegoating.” These include the concepts that:

- (a) One race or sex is inherently superior to another race or sex;
- (b) An individual, by virtue of their race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- (c) An individual should be discriminated against or receive adverse treatment solely or partly because of their race or sex;
- (d) Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- (e) An individual’s moral character is necessarily determined by their race or sex;
- (f) An individual, by virtue of their race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- (g) Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of their race or sex; or
- (h) 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 contract clause also will require that contractors and subcontractors post a notice (to be provided by contracting agencies), to be seen by employees and applicants, regarding the contractor’s commitments under the EO. The notice must be provided to any labor union with which the contractor has a collective bargaining agreement.

In addition, the EO requires all heads of federal agencies to review their grant programs and identify in a report to be provided to the Director of the Office of Management and Budget (OMB) within 60 days of issuance of September 22 (November 21, 2020) any programs that the agency determines, as a condition of receiving grant monies, that the recipient certify that it will not use federal funds to “promote the concepts” identified above with respect to federal government contractor prohibitions in training and related materials.

The EO does not include a provision that regulations be issued to implement its requirements, although it is unclear how the federal contractor clause requirement can be implemented for contracts subject to the Federal Acquisition Regulation (FAR) without regulatory action by the FAR Council.

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However, the Director of the Office of Federal Contract Compliance Programs (OFCCP) is required to publish a request for information within 30 days of September 22 (October 22, 2020) seeking from federal contractors and subcontractors and their employees information regarding training, workshops, or "similar programming" provided to employees. This includes copies of materials related to such trainings, including diversity and inclusion, and information about the expense, frequency, duration of the trainings. The EO does not discuss what the OFCCP should do, or will do, once it collects the information. The OFCCP is the enforcement agency for these new requirements.

Violators of the EO's requirements can be subject to contract suspension or termination and the contractor may be subject to suspension or debarment.

If fully implemented, these new requirements may mean significant changes in some of the content of training on race and sex, including diversity and inclusion and unconscious bias, that have become the mainstay for many employers. Some of this training is or may be required by other federal or state laws and requirements. Legal challenges to the EO are likely.

Jackson Lewis attorneys will monitor and report further developments. Please contact a Jackson Lewis attorney if you have questions.

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