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The New ‘Race and Sex Stereotyping’ Executive Order Affecting Federal Contractors

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On September 22, 2020, President Donald Trump signed an executive order titled “Executive Order on Combating Race and Sex Stereotyping.” The executive order follows a September 4, 2020, memorandum from Russell Vought, director of the Office of Management and Budget, and introduces requirements for government contractors conducting diversity and inclusion (D&I) trainings. It is clear from the order that covered contracts, subcontracts, and grants with the U.S. federal government must control for specific language related to workplace trainings, but the order otherwise lacks guidance about changes covered contractors must make when training on D&I issues. Additionally, the order will almost certainly elicit constitutional and other legal challenges.

The executive order sets out to prohibit government contractors from, among other things, “stereotyping” and “scapegoating” in their workplace trainings. This language reflecting on D&I workplace trainings comes from section 4(a), “Requirements for Government Contractors,” which directs government contracting agencies to include four numbered paragraphs in non-exempt government contracts. The first numbered paragraph states,

The contractor shall 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, including the concepts that (a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her 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 his or her 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 his or her race or sex; (f) 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; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her 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 term “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, and the term “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.

Agencies are directed to include an additional three paragraphs about enforcement and procedure, including covered contractors’ affirmative obligations to include section 4(a)’s language in their subcontracts and to inform employees and applicants by posting notices of the requirements in “conspicuous places.” Unfortunately, the order is silent on the mechanism to be used to craft and implement this “flowdown” language and notice content.

Contractors—many of which have recently invested in D&I initiatives—may be unsure about how to proceed. During this period in which clear answers are unavailable, contractors with questions may wish to consider the following questions and answers.

Question 1. To which employers does the executive order apply?

Answer 1. The order covers all employers that hold qualifying contracts or subcontracts exceeding $10,000 in a 12-month period with the U.S. federal government and are thus subject to Executive Order 11246, as amended. The order does not apply to employers without government contracts or subcontracts, but it does cover employers that receive federal grants, as well as banks or other financial institutions that meet certain criteria. Note, too, that the order instructs the U.S. attorney general to assess the extent to which *private* employer training promulgates “divisive concepts” that could give rise to hostile work environment claims and liability.

Q2. Must a covered employer eliminate all discussions of privilege from workplace trainings?

A2. Unlikely. Nothing in the executive order suggests that employers are prohibited from discussing the issue of privilege altogether. Training programs may note the existence of varied privileges in society and may reinforce that privileges are not limited to race or gender.

Within the order, the term “privileges” appears in a longer list defining “race or sex stereotyping” (“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 context in which these terms appear in the executive order suggests that “privileges” may refer not to race- or sex-based privilege as such but to ascribing a particular privilege (e.g., wealth) to all people of a certain race or sex.

Section 4(a)’s use of the term “inculcate” is also noteworthy. The prohibition applies only to training that “inculcates” what is considered “race or sex stereotyping,” which entails a degree of persistence or emphasis on a specific idea or attitude. A training devoted solely to privilege may be more likely to constitute inculcation than one that covers diversity and inclusion or workplace respect generally and mentions privilege, but the order prohibits neither explicitly.

Section 10(b) also provides, that “[n]othing in th[e] order shall be construed to prohibit discussing [concepts contractors must refrain from inculcating in their employees] as part of a larger course of academic instruction … in an objective manner and without endorsement.”

Q3. Must a covered employer eliminate all discussions of implicit bias from workplace trainings?

A3. Unlikely, for similar reasons as those stated in the response to question two. Nothing in the order requires contractors to eliminate the concept of privilege from workplace trainings.

The term “bias” appears in a longer list defining “race or sex scapegoating” as “*assigning* fault, blame, or *bias* to a race or sex, or to members of a race or sex *because of* their race or sex.” (Emphasis added.) Existing trainings that explain implicit or unconscious biases should focus on the fact that all people have biases this emphasis will likely not pose a problem under the executive order’s language.

In this regard, the response to question two regarding section 4(a) generally, and section 10(b) is also relevant.

Q4. Must a covered employer refrain from mentioning historical events in its workplace trainings?

A4. Unlikely, as long as such references are fact-based and historically accurate.

The order prohibits trainings that inculcate in employees the notion that “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” or that “any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.” While there is an underlying sense that this language aims to limit references to historical events or periods that may be uncomfortable to discuss (such as slavery in the United States), there is nothing in the executive order that prohibits discussion of troubling historical events or periods while making clear that the facts are presented for the purposes of societal context and not as an accusation that training attendees are responsible for them. Nor would the order seem to prohibit objectively presented background facts about landmark employment statutes such as Title VII of the Civil Rights Act of 1964. The order itself references relevant history extensively in its introductory sections.

Q5. What constitutes a “workplace training”?

A5. The order is silent on the definition and scope of “workplace training.” The only relevant language states that contractors shall not “use any workplace training that inculcates in its employees ….” For example, it is unclear whether individualized coaching as part of remedial measures following an investigation would be considered “workplace training.”

Q6. What can covered employers glean from the order’s references to the concept of meritocracy, as it relates to trainings?

A6. Managers and supervisors should be trained on recruitment, hiring, promotion, disciplinary, and compensation practices that are uniformly and consistently applied for legitimate and nondiscriminatory business reasons. Trainers may note that the term “meritocracy,” for some people, signals that every person has equal access to opportunities—but that this belief has been challenged in academic discourse and civil rights laws. The above responses regarding discussions of historical events and Section 10(b) of the order are also relevant in this regard.

Q7. What does the executive order mean by “members of one race or sex cannot and should not attempt to treat others without respect to race or sex”?

A7. The instruction not to inculcate in employees that “members of one race or sex cannot and should not attempt to treat others without respect to race or sex” may cause confusion. It may be intended to warn employers to be careful when admonishing employees against color blindness, though this is not clear. Covered employers seeking to avoid this prohibition can emphasize commitment to equality and clarify that treating similarly situated individuals differently based on their sex or race could constitute unlawful discrimination.

Q8. Must covered employers change their existing trainings immediately?

A8. No. While the executive order is immediately effective for federal agencies, it does not become effective for non-exempt contractors until November 21 when covered employers must revise trainings that “inculcate in [their] employees” beliefs that fall within the executive order’s description of “race or sex stereotyping or scapegoating” (as discussed in the responses above). It is unlikely that most general workplace D&I or respectful workplace trainings will require complete overhaul.

Q9. How will the order’s requirements be included in nonexempt contracts and subcontracts?

A9. When the requirements of the executive order are implemented, all nonexempt government contracts and subcontracts will be required to include the language of section 4(a)—a total of four numbered paragraphs. In turn, nonexempt contractors will “flow down” these requirements to subcontractors and vendors. Unfortunately, the order does not include a provision that regulations be issued to implement its requirements, so it is unclear how the flow down clause requirement can be implemented without action of the Federal Acquisition Regulations (FAR) Council (which develops the FAR that are applicable to federal agencies and contractors in procurement activities). Until there is regulatory language to be flowed down by the FAR Council or the federal agencies, contractors do not have specific language to flow down to necessary subcontractors.

Q10. Which government contracts and subcontracts must include these representations?

A10. Section 9 makes clear that “the requirements of section 4”—which sets forth compliance representations—do not apply to contracts or subcontracts already in effect, but only “to contracts entered into 60 days after the date of this order,” i.e., on November 21, 2020, and after.

Q11. What is OFCCP’s role under the executive order?

A11. Paragraph 4(c) of section 4(a) requires the director of the Office of Federal Contract Compliance Programs (OFCCP) to publish in the *Federal Register* a request for information within 30 days of the date of the executive order (i.e., October 22, 2020), “seeking information from Federal contractors, Federal subcontractors, and employees of Federal contractors or subcontractors regarding the training, workshops, or similar programming provided to employees” and requesting “copies of any training, workshop, or similar programing [sic] having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities.” The order is unclear as to the Trump Administration’s expectations for OFCCP to use this information and it is unlikely that OFCCP can require contractors to provide this information without engaging in the rulemaking

process. Perhaps OFCCP will eventually seek to add this kind of document production to its compliance review scheduling letters and requests for documents. In any event, whether and how OFCCP uses this information is unclear.

Q12. What does the notice to be sent to unions and posted at contractor establishments contain?

A12. Section 4(a)(2) requires that a contractor notify its unions of the order's requirements and post a notice about the order "in conspicuous places available to employees and applicants for employment." The order does not include a sample notice to unions or a notice to be posted in non-exempt contractor workplaces. Presumably, the FAR Council will weigh in on this; contractors are not required to craft their own notices.

Q13. What disputes, enforcement actions, or other future developments might covered contractors expect?

A13. Constitutional and statutory challenges to the order are likely forthcoming. If the workplace-training obligations become effective as currently stated in the order, covered contractors can expect employees to challenge D&I trainings if they find the messaging troubling. Additional challenges for non-exempt contractors could include contractual and other consequences if the contractor is found to be in violation of the order. The agency has not yet commented on whether it will assess training content during its routine audits, which is a possibility.

The executive order points employees to multiple avenues to challenge D&I programs, and it directs OFCCP to "establish a hotline" to receive employee complaints alleging that a federal contractor's training programs violate the order or Executive Order 11246. Contractors may anticipate training materials being offered as evidence that an employer discriminated against someone because of race or sex or that an employee was subject to a "hostile work environment" on that basis. The executive order also expressly instructs the U.S. attorney general to "continue to assess" the extent to which private employer training promulgates the "divisive concepts" prohibited by the order

If an employee initiates a complaint of noncompliance, and if OFCCP makes a finding of contractor noncompliance that is not voluntarily conciliated, the agency's finding could lead to an administrative enforcement action with sanctions including contract termination and, at the extreme end, debarment (a declaration of ineligibility for further federal contracts).

Q14. How might contractors approach existing diversity and inclusion-related trainings?

- Discussing microaggressions, microinsults, and microinvalidations by focusing on observed behaviors and how they may make other persons feel
- Cultivating self-awareness through self-reflection
- Providing examples of inclusive workplace behaviors and conduct
- Recruiting, hiring, and retaining employees to achieve diverse workforces
- Discussing equity and inclusion by focusing on positive steps to help employees feel that they belong
- Creating safe spaces and environments where employees of varied backgrounds can share and communicate their concerns
- Educating employees on how they can create allyships with coworkers of varied cultures and

backgrounds
- Teaching employees how to communicate with each other in culturally appropriate and respectful ways
- Equipping leaders with tools on how to be inclusive leaders of increasingly diverse teams

Q15. What might contractors do now in light of this executive order?

A15. There are multiple yet unanswered questions about training content and delivery that could be covered by this order, which makes the risk assessment harder to make and communication about the order more difficult. Those federal contractors with “unconscious bias” trainings, for example, that are aligned with well-known academic research are less likely to risk such content being defined as “race or sex stereotyping” or “scapegoating”—which the order is claiming to address.

Federal contractors that may be perplexed by the executive order will have to wait for future regulatory and judicial developments to provide more clarity. Contractors can review training programs for potential noncompliance now, but they may want to wait on further regulatory and legal developments before undertaking major course adjustments. Those federal contractors with a diversity and inclusion learning development or training program may be well-served to review existing training materials with experienced counsel as well as materials that will be delivered before and after November 21, 2020 to discuss what adjustments, if any, should be communicated to business leaders, trainers, and other stakeholders.

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