

Executive Order Prohibits Inclusion of “Divisive” Concepts in Workplace Training

October 20, 2020

By [Susan Gross Sholinsky](#), [Robert J. O’Hara](#), [Peter M. Stein](#), [Dean R. Singewald II](#),
[Kathleen M. Williams](#), and [Constance A. Wilkinson](#)

On September 22, 2020, President Trump issued Executive Order [13950](#), “Combating Race and Sex Stereotyping” (the “Order”), prohibiting federal government contractors (“Contractors”), as well as federal agencies and the military, from using a workplace training program that “inculcates in [their] employees any form of race or sex stereotyping or any form of race or sex scapegoating.” The Order applies to any applicable contract entered into on or after November 21, 2020. Further, the Order requires that, as of that date, new contracts with the federal government contain a clause prohibiting Contractors from incorporating certain “divisive” concepts into diversity and awareness training programs, including concepts that are sometimes found in unconscious bias and societal privilege training. The Order also directs the heads of all federal agencies to review their respective grant programs and “identify 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” prohibited by the Order.¹

The rationale given for the Order is that a “malign ideology” has taken root “in the pernicious and false belief that America is an irredeemably racist and sexist country,” and that “[i]nstructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country, even in components of the Federal Government and among Federal contractors.”

Scope of the Order

Specifically, the Order prohibits Contractors from training on the following “divisive” concepts:

- one race or sex is inherently superior to another race or sex;

¹ A “grant recipient” is a non-federal entity that receives a federal award directly from a federal awarding agency to carry out an activity under a federal program. The term “recipient” does not include subrecipients.

- 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.²

The Order defines “race or sex stereotyping” 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.” “Race or sex scapegoating” is defined 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. 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.”

Although the Order identifies the prohibited concepts and sets forth definitions, the determination of whether a particular topic of training is prohibited is uncertain and, arguably, subjective. The Order provides that the federal government must always be committed to the fair and equal treatment of all individuals before the law, and that training employees to create an inclusive workplace is appropriate and beneficial. That said, workplace training programs that appear to support the existence of concepts such as implicit bias, systemic racism, white privilege, male privilege, and the idea that the United States is a racist country may be considered noncompliant with the Order. The Order does not outright prohibit all training that addresses these concepts, but rather only training that “inculcates” a particular viewpoint.

² While the Order defines “divisive concepts” to include, along with the eight list above, the concept that “the United States is fundamentally racist or sexist,” this provision is not included in the sections of the Order applicable to government contractors and federal grants.

OFCCP Guidance

Following the publication of the Order, the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") issued [guidance](#) on October 7, 2020, stating that "[u]nconscious or implicit bias training is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously." Training, however, is not prohibited "if it is designed to inform workers, or foster discussion, about pre-conceptions, opinions, or stereotypes that people—regardless of their race or sex—may have regarding people who are different, which could influence a worker's conduct or speech and be perceived by others as offensive." Commenting on the Order, OFCCP Director Craig Leen stated that unconscious-bias training is "perfectly fine," as long as it "teaches that everyone, based on the human condition, has unconscious biases" and doesn't specifically call out a particular race or sex as being inherently biased.

As part of the Order, Contractors are required to notify the labor unions representing their employees of their commitments under the Order, and to post that notice in conspicuous places where other labor and employment-related postings are maintained. They also are required to include the applicable provisions of the Order in every subcontract and purchase order, thereby binding subcontractors and vendors to the Order's mandates.

The Order charges the OFCCP with establishing a complaint hotline (which it [set up](#) on September 28, 2020), and investigating complaints received under both the Order and Executive Order 11246³ that allege that a Contractor is presenting training programs that violate the Contractor's obligations under the Order. If Contractors fail to comply with the Order's requirements, the OFCCP is directed to take appropriate enforcement action up to and including canceling, terminating, or suspending government contracts; declaring Contractors ineligible for further government contracts; and providing remedial relief, as appropriate.

The OFCCP has also been tasked with gathering data from Contractors on current training programs. Specifically, within 30 days of the date of the Order, the Director of the OFCCP must publish in the *Federal Register* a request for information seeking data from federal contractors, subcontractors, and their employees regarding the training, workshops, or similar programming provided to employees, including requesting copies of any training, workshop, or similar program having to do with diversity and inclusion, and the duration, frequency, and cost of such activities.

Importantly, while the Order focuses on contracts entered into on or after November 21, 2020, the OFCCP reminds all Contractors that they could be subject to complaints prior to November 21 if the training programs and other initiatives violate their existing obligations under Executive Order 11246. This reminder effectively sweeps all Contractors into reviewing their training materials for race and sex stereotyping or scapegoating regardless of the November 21 contract date. Further details on the scope

³ Executive Order 11246 prohibits discrimination "against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin."

of the Contractors' review will be available when the data collection notice is published later this month.

Of note, the Order suggests that some form of related action may be in the offing with respect to private employers, as it directs the U.S. Attorney General to "continue to assess the extent to which workplace training that teaches the divisive concepts set forth in [the Order] may contribute to a hostile work environment and give rise to potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*" The Order further instructs: "If appropriate, the Attorney General and the Equal Employment Opportunity Commission shall issue publicly available guidance to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII."

Whether this Order "has legs" may depend on whether it is challenged in the courts and, more imminently, whether there is a change in administrations on January 20, 2021.

What Employers Should Do Now

While we will continue to monitor developments and provide updates as they become available, we encourage Contractors to do the following:

- Determine whether you will be considered a government contractor that is subject to the Order.⁴
- Closely scrutinize workplace training programs that appear to support the existence of concepts such as implicit bias, systemic racism, white privilege, male privilege and the idea that the United States is a racist country.
- Document your efforts to comply with the Order.

For more information about this Advisory, please contact:

Susan Gross Sholinsky

New York
212-351-4789
sgross@ebglaw.com

Robert J. O'Hara

New York
212-351-3708
rohara@ebglaw.com

Peter M. Stein

Stamford
203-326-7420
pstein@ebglaw.com

Dean R. Singewald II

Stamford
203-326-7410
dsingewald@ebglaw.com

Kathleen M. Williams

Washington, DC
202-861-1871
kwilliams@ebglaw.com

Constance A. Wilkinson

Washington, DC
202-861-1378
cwilkinson@ebglaw.com

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific

⁴ Note that federal grant recipients could eventually become subject to these restrictions as well.

situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in locations throughout the United States and supporting domestic and multinational clients, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebqlaw.com.

© 2020 Epstein Becker & Green, P.C.

Attorney Advertising