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Executive Order on Combating Race and Sex Stereotyping

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OVERVIEW

On September 22, 2020, President Trump issued an Executive Order "On Combating Race and Sex Stereotyping" ("the EO"), which prohibits government contractors from including certain so-called "divisive concepts" in employee workplace training.[1] The EO aims to curb workplace training materials "teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist." The EO follows on the heels of a September 4 Office of Management and Budget ("OMB") memorandum, which instructed federal agencies to identify contracts or agency funds being used for such trainings as a first step toward ensuring that agencies "cease and desist from using taxpayer dollars" to fund the targeted trainings.[2]

To accomplish its goal of ending the targeted trainings, the EO requires that federal contracts entered into 60 days after the EO's September 22 effective date (*i.e.*, contracts entered into on or after November 21, 2020) prohibit contractors from using workplace training that "inculcates . . . any form of race or sex stereotyping or any form of race or sex scapegoating." The EO 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." And the phrase "race or sex scapegoating" is defined to mean "assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex."

The EO further states that federal contractor workplace trainings may not "inculcate" what are described as "divisive concepts," which are defined to include that:

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

An OMB memorandum issued on September 28—while primarily focused on federal agency training requirements—reiterates that unless specifically exempted, "every

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government contract must include the provisions" required by the EO.[3]

Thus, unless exempted by rule, regulation, or order, federal contractors must include the training prohibitions in their own subcontracts or purchase orders, and they must enforce those requirements as directed by the Secretary of Labor. If a contractor is threatened with or becomes involved in litigation with a subcontractor or vendor, it may request that the federal government intervene.

Notably, while most Executive Orders include language directing the relevant agency and Federal Acquisition Regulatory Council to issue regulations implementing the Order's requirements, the EO does not specifically require the promulgation of regulations to implement this new contract clause. It is not immediately clear whether agencies will adopt regulations to implement the requirement, notwithstanding the lack of an express directive in the EO, or how agencies will consistently implement the new contract clause requirement in the absence of such regulations. In addition, neither the EO nor the September 28 OMB memorandum provide further clarity as to whether the requirement will apply only to new contracts awarded on or after November 21, as the express language of the EO seems to suggest, or whether agencies also must insert the clause into any new contract modifications or task orders issued on or after that date.

Notice Requirements

The applicable federal agency's contracting officer must provide a contractor with a notice of the new training requirements, which the contractor must post "in conspicuous places available to employees and applicants for employment." The contractor is also required to provide the notice to any labor union or worker representative with which it has a collective bargaining or similar agreement.

Penalties and Enforcement

Federal contractors failing to abide by these requirements may be subject to enforcement action by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), which is tasked with enforcing the EO. The EO directs the OFCCP to establish a hotline and investigate complaints regarding the use of prohibited trainings. On September 28, the OFCCP announced that it had established such a hotline (and an email address) to receive complaints.[4] Violations of the EO may result in cancellation, termination, or suspension of the relevant contract, as well as suspension or debarment from future federal contracts.

Within 30 days of the EO, the Director of OFCCP must publish a request for information in the Federal Register, seeking information about employee training from federal contractors, subcontractors, and their employees. While the EO states that the request should seek "copies of any training, workshop, or similar programing having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities," it provides no detail regarding how the OFCCP should use this information.

The EO instructs the Attorney General to "continue to assess the extent to which workplace training that teaches the divisive concepts set forth" in the EO "may contribute to a hostile work environment and give rise to potential liability under Title VII." It is not clear why this responsibility is assigned to the Attorney General instead of the Equal Employment Opportunity Commission ("EEOC")—the agency that is otherwise principally tasked with the enforcement of Title VII. But the EO directs the Attorney General and EEOC to jointly issue guidance "to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII" "if appropriate."

Application to Grant Recipients

The EO also directs federal agencies to identify grant programs for which the agencies

may require grant recipients to certify that their trainings comply with the EO's requirements.

IMPLICATIONS FOR FEDERAL CONTRACTORS

Assuming the EO's requirements are fully implemented in new federal contracts after 60 days, they will have a significant impact on private federal contractors' unconscious bias training, which could in some circumstances run afoul of the new prohibitions. Such trainings—which have become an increasingly popular part of companies' diversity and inclusion initiatives—focus on identifying employees' possible unconscious biases about various demographic groups and providing strategies to interrupt and reduce the role of those potential biases in decision-making and interactions in the workplace. Notably, the EO expressly states that "[n]othing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts" referenced in the EO "in an objective manner and without endorsement." Therefore, it is possible that current unconscious bias training, to the extent it might arguably be in tension with the EO, could be modified to describe unconscious bias as an academic concept in an "objective manner and without endorsement."

Companies entering new federal contracts will be required to cease any prohibited training or run the risk of contract cancellation or sanctions up to and including debarment for future contracts. Federal contractors also will be required to include the training prohibitions in new contracts with their own subcontractors and vendors and prominently post notices describing them.

The EO is likely to be subject to legal challenge, and it is possible the EO will be delayed, enjoined, or invalidated. The EO also may be revoked by an incoming Democratic administration if President Trump is not reelected.

In the interim, private entities contracting with the federal government should inform relevant personnel of the new requirements and review any unconscious bias training or other similar training with the EO in mind.

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[1] Exec. Order No. 13,950 (2020), *available at* https://tinyurl.com/y2emrxng (last visited Sept. 30, 2020).

[2] Memorandum for the Heads of Executive Departments and Agencies, M-20-34, U.S. Office of Mgmt and Budget, Training in the Federal Government (Sept 4, 2020), *available at* https://tinyurl.com/y6njnbuw (last visited Sept. 30, 2020).

[3] Memorandum for the Heads of Executive Departments and Agencies, M-20-37, U.S. Office of Mgmt and Budget, Ending Employee Trainings that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for All (Sept 28, 2020), *available at* https://tinyurl.com/yb55hm39 (last visited Sept. 30, 2020).

[4] *See* News Release, U.S. Dep't of Labor, U.S. Department of Labor Launches Hotline to Combat and Sex Stereotyping by Federal Contractors (Sept. 28, 2020), *available at* https://tinyurl.com/y975y2tj (last visited Sept. 30, 2020).

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the lawyer with whom you usually work in the firm's Labor and Employment or Government Contracts practice groups, or the authors:

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