

THOUGHT LEADERSHIP

LEGAL UPDATES

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How President Trump's Executive Order on "Divisive" Race and Gender Concepts Affects Contractors and Grant Recipients

In light of new restrictions imposed by Executive Order 13950, federal government contractors will need to review the content of their employee diversity and related training programs. This Order, issued on September 22, 2020, follows a September 4, 2020 OMB Memorandum directing federal agencies “to begin to identify all contracts or other agency spending related to any training on critical race theory, white privilege, or any other training or propaganda effort that teaches or suggests either (1) that the U.S. is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil.” The OMB Memorandum also directs agencies to identify legal avenues to cancel any such contracts or avoid the use of federal money to support them.

Executive Order 13950 is the subject of significant controversy, likely to be rescinded if Joe Biden wins the Presidency. Importantly, enactment of regulations by the Office of Federal Contract Compliance Programs (OFCCP) would be required to conform to the Administrative Procedure Act’s notice and comment rulemaking procedures. Contractors that win new federal contracts awarded after November 21, 2020 will need to consider their strategies for meeting the requirements it imposes. A September 28, 2020 OFCCP press release suggests that the OFCCP will be interpreting the requirements broadly. Specifically, the OFCCP stated that training with the prohibited material as well as engaging in unlawful race or sex stereotyping or scapegoating in employment generally “may also violate a contractor’s obligations under the existing Executive Order 11246, which prohibits discrimination based on race, color, religion, sex, sexual orientation, gender identity, [and] national origin”

and is encouraging individuals to report these violations using a new OFCCP hotline.

1. Who is covered by Executive Order 13950?

The Order requires all federal contracts awarded after November 21, 2020 to include a contract clause specifying the restrictions on the content of the training. Unless an exemption applies, all companies receiving such contracts will be required to comply with restrictions imposed by the contract clause. The training restrictions will be mandatory flowdowns to all subcontractors and suppliers at every tier.

The training restrictions imposed by EO 13950 will also apply to recipients of federal grants, although they will not immediately go into effect.

Employers that are not federal contractors, subcontractors or grant recipients are not subject to the Order.

2. What restrictions does EO 13950 impose?

EO 13950 prohibits training that promotes or endorses “divisive concepts”. The examples provided in the EO include the following:

One race or sex is inherently superior;

The U.S. is fundamentally racist or sexist;

An individual because of race or sex is inherently racist, sexist, or oppressive;

Individuals should be discriminated against or receive adverse treatment solely or partly because of their race or sex;

Moral character is determined by race or sex;

Because of race or sex, individuals bear responsibility for past actions committed by others of the same race or sex;

Individuals should feel discomfort, guilt, anguish or other psychological distress because of their race or sex;

viii. Meritocracy, such as a hard work ethic is racist or sexist and was created to oppress another race; and

Other forms of race or sex stereotyping or scapegoating. The Order defines “sex stereotyping” as “assigning character traits, values, beliefs, privileges, status, moral or ethical codes generally or to an individual because of race or sex.” The Order defines “race or sex scapegoating” as “assigning fault or blame or bias generally or to an individual because of their race or sex, including claims of conscious or unconscious bias, sexism or racism because of race or sex.”

3. Does EO 13950 prohibit diversity training?

EO 13950 does not prohibit contractors from conducting training on diversity and inclusion. It does not prohibit discussion of “divisive concepts” as long as the discussion is handled “in an objective manner and without endorsement.”

4. What actions does the Order require contractors to take?

Avoid endorsing what the EO identifies as “divisive concepts” in workplace training

Contractors and subcontractors awarded contracts that include the clause required by EO 13950 will be prohibited from conducting any training program that “inculcates in its employees any form of race or sex stereotyping or any form of scapegoating,” which includes all of the “divisive concepts” listed in the Order. The OFCCP also has indicated that the prohibitions are not limited to workplace training programs but will be applied to employment practices, generally.

Review existing practices, including training programs, to ensure they do not constitute prohibited discrimination as defined in the Order.

Because OFCCP has stated that prohibited training and engaging in unlawful race or sex stereotyping or scapegoating may also violate a contractor’s obligations under the existing Executive Order 11246, contractors should review existing practices and programs, and encourage employees to use internal complaint procedures to raise concerns.

Provide notice to labor unions.

Contractors and subcontractors subject to the requirements of EO 13950 will be required to provide notice of the “contractor’s commitment to the order” to each labor union or representative of workers with which it has a collective bargaining agreement, contract or understanding. In addition, they will be required to post copies of the notice in a conspicuous location and available for employees and job applicants. Like many other notices to employees, the notice required by EO 13950 will be provided by the government.

Include the provision in agreements with subcontractors and suppliers.

EO 13950 provides for the contract clause that will be included in covered contracts to be a mandatory flowdown. Contractors will be required to include the clause in their subcontracts and supply agreements that provide services or supplies on the contract. Contractors will also be required to “take such action...as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance.”

5. What enforcement actions are authorized by the Order?

Contract termination and suspension or debarment.

EO 13950 provides that a contractor’s failure to comply with the training restrictions, the notice requirements, or the flow down requirements it imposes will be grounds for termination of the contract and suspension or debarment from future federal contracts.

OFCCP investigation.

Investigation and enforcement of compliance with the requirements of EO 13950 will be managed by the OFCCP. The OFCCP’s September 28 press release identifies the established hotline phone number and email address required by the Order.

6. What is the effective date of the order?

The contractor requirements imposed by EO 13950 will apply to federal contracts awarded after Saturday, November 21, 2020.

By October 22, 2020, however, EO 13950 permits OFCCP to invite federal contractors, subcontractors, and employees to provide information regarding employee diversity and inclusion training to the OFCCP.

As stated previously, contractors should also be aware that OFCCP’s September 28 press release states that OFCCP intends to enforce EO 13950 immediately using its authority under “existing Executive Order 11246.”

7. What actions should contractors take at this time?

Since the training restrictions, notice requirements, and subcontracting requirements required by EO 13950 will apply only to new contracts awarded on or after November 21, 2020, many contractors will properly adopt a wait-and-see approach. It is possible that the implementation of EO 13950 will be delayed or modified through legal challenges. If Joe Biden is elected President, contractors can reasonably anticipate that he will rescind EO 13950.

To the extent employee diversity and inclusion training programs cannot be delayed, affected contractors should understand what EO 13950 requires and what it does not. EO 13950 does not prohibit diversity and inclusion training. It permits trainers to discuss definitions and examples of race and sex stereotyping and scapegoating. It permits trainers to discuss historical events. It permits trainers to promote the benefits of racial, cultural, or ethnic diversity and inclusiveness. It permits trainers to discuss “divisive concepts” in an “objective manner and without endorsement.”

Contractors should be aware that OFCCP has stated that prohibited training and engaging in unlawful race or sex stereotyping or scapegoating may violate a contractor’s obligations under existing Executive Order 11246. The OFCCP has instructed employees to file a complaint under existing regulations using either the new hotline or the agency’s website. Contractors conducting diversity training even before November 21, 2020 are well advised to consider whether the content conflicts with the requirements of EO 13950.

Expect the OFCCP to publish an Information Collection Request (ICR) by October 22, 2020 that seeks copies of your diversity and inclusion training materials and the frequency, duration and cost of the training programs. At this time, it appears that compliance with the ICR will be voluntary, so that contractors that do not respond to the ICR will not be penalized.

The prohibitions contained in EO 13950 place contractors in the difficult position of controlling the content and discussion in diversity and inclusion programs while also complying with equal opportunity and affirmative action laws. Husch Blackwell's government contracts, labor and employment law, and OFCCP compliance practice groups can provide counsel necessary to navigate the legal and practical business issues presented by EO 13950.

Contact us

Contact Molly Kurt, Sonni Nolan, Brian Waagner or your Husch Blackwell attorney to discuss specific issues presented by EO 13950, including review of diversity and inclusion training programs offered to your employees.

Tracey Oakes O'Brien, Knowledge Manager, is a co-author of this content.