

LEGAL UPDATES

UPDATED: JANUARY 21, 2021

PUBLISHED: JANUARY 19, 2021

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Federal Judge Bars Enforcement of EO Related to Diversity Training

Update:

As we anticipated, President Biden revoked Executive Order 13950 (EO 13950), Combatting Race and Sex Stereotyping, effective immediately. Within 60 days of 1/20/21, federal agencies covered by EO 13950 are directed to consider suspending, revising or revoking agency actions arising from EO 13950, including agency actions to terminate or restrict contracts or grants pursuant to EO 13950.

Key Points:

The Court imposed a nationwide preliminary injunction on federal government agencies barring the federal government from taking any action intended to effectuate or enforce the provisions of §§ 4 and 5 of Executive Order 13950 (EO 13950) against federal contractors and federal grant recipients, as well as their federal sub-contractors and sub-grantees. EO 13950 forbids diversity and inclusion training that promotes or endorses “divisive race and gender concepts” as defined in EO 13950.

The Court’s nationwide injunction has delayed the investigative and compliance actions and enforcement actions authorized under EO 13950. In addition, it is likely that President-elect Joe Biden will overturn EO 13950 shortly after taking office on January 20, 2021. As a result, the prohibitions, compliance actions, requests for information and enforcement actions imposed on federal contractors and federal grantees under EO 13950 and by

the OFFCP are in abeyance until either the injunction is made permanent or lifted, or the executive order is overturned.

Background

On September 22, 2020, the Trump administration issued EO 13950 prohibiting federal agencies, federal grant recipients, and federal contractors from endorsing “divisive race and gender concepts” as we discussed in our commentary on October 6, 2020. EO 13950 forbids diversity and inclusion training that promotes or endorses “divisive concepts” as defined in EO 13950. On December 22, 2020, the U.S. District Court, Northern District of California granted Plaintiffs’ motion for a preliminary injunction in part and issued an Order in *Santa Cruz Lesbian and Gay Community Center, et al, v Donald J. Trump, et al.*, imposing a nationwide preliminary injunction that enjoins the federal agencies named as Defendants (federal government) from enforcing EO 13950’s provisions under § 4, directed at federal contractors, and § 5, directed at federal grant recipients. The Order is effective immediately and directs the federal government to provide notice to all federal contractors and grant recipients as well as sub-contractors and sub-grantees covered by EO 13950 of the injunction imposed by the Court’s Order.

Basis of the Court’s Order

The Plaintiffs in this class-action lawsuit are non-profit organizations and a subcontractor that provide health care and critical services to the lesbian, gay, bisexual and transgender community and people living with the human immunodeficiency virus (HIV). Plaintiffs claim that EO 13950 violates their rights under the Free Speech clause of the First Amendment because it “impermissibly chills the exercise of ... constitutionally protected speech based on the content and viewpoint of their speech” and violates their rights under the Due Process clause of the Fifth Amendment because EO 13950 infringes on their protected right to free speech and fails to provide adequate notice of “the conduct it purports to prohibit.”

The Court agreed that Plaintiffs are likely to prevail on their claim that EO 13950 violates their First Amendment rights because:

Restrictions on the freedom of federal contractors to deliver diversity training and advocacy addressing racism and discrimination to their own employees and service providers using funds unrelated to the federal contract is a violation of First Amendment rights; and

Conditioning the continued receipt of federal grant funds on grantees’ agreement to not promote “divisive concepts” as defined by the federal government even though the grant program is unrelated to such divisive concepts is a violation of grantees’ First Amendment rights.

Regarding Plaintiffs' claims of due process violations under the Fifth Amendment, the Court agreed that the vagueness of the prohibited conduct inhibits the exercise of Plaintiffs' freedom of expression and that the federal government's own interpretation of the scope of the prohibited conduct creates even more uncertainty. It concluded that the Plaintiffs established "a significant adverse impact on their organizations and clients" as a result of the loss of opportunities and income based on Plaintiffs' and their clients' "understanding of the effect of EO 13950." The Court noted that the federal government's dislike of the speech at issue, while irrelevant to the analysis, "permeated" its briefs.

EO 13950 Provisions Enjoined by Court's Order

The Order explicitly bars the federal government from taking *any* action intended to effectuate or enforce §§ 4 and 5 of EO 13950, including but not limited to the specific actions enumerated in the Court's Order. The Court's Order specifically prohibits the federal government from taking the following actions:

Workplace training: The federal government is prohibited from requiring the inclusion of express provisions in government contracts that prohibit the discussion of concepts defined as divisive race and gender concepts in workplace training programs, and from enforcing such express provisions that have been included in government contracts since the issuance of EO 13950.

Notice requirements to labor representatives and unions: All notice requirements imposed on federal contractors to labor unions or employee representatives are enjoined.

Penalties and enforcement procedures based on non-compliance: The federal government is prohibited from imposing sanctions, including but not limited to canceling, terminating or suspending a contractor's or subcontractor's federal contract in whole or in part, or declaring a contractor or subcontractor ineligible for federal contract awards.

Mandatory flow-down contract clauses: The federal government is prohibited from requiring contractors to include a contract clause prohibiting divisive race and gender concepts in subcontracts and supply agreements with subcontractors and vendors that provide services and supplies under the contract. Contractors also cannot be required to enforce such contract clauses against subcontractors and vendors.

Collecting information and investigating non-compliance: The federal government is precluded from initiating investigations, taking other agency action to implement EO 13950, and taking enforcement actions under EO 13950 and is barred from using its "hotline" to collect information regarding non-compliance with the provisions of EO 13950.

Requests for Information: The federal government is enjoined from seeking all information from any entity regarding training, workshops or programming provided to employees of government

contractors and subcontractors with respect to the provisions of EO 13950 and related regulations issued by the Office of Federal Contract Compliance Programs (OFCCP).

Requirements applicable to federal grant recipients: The federal government is proscribed from:

Requiring grant or sub-grant recipients to certify that federal funds will not be used to promote divisive race and gender concepts as described in EO 13950 and agency guidance adopted pursuant to EO 13950;

Reviewing or identifying grant programs on which restrictive conditions of EO 13950 may be imposed;

Submitting or reviewing reports previously submitted pursuant to EO 13950 regarding grant programs on which restrictive conditions may be imposed; and

Enforcing restrictions imposed under EO 13950 on grantees or sub-grantees to the extent they have been included in government grants or sub-grants subject to EO 13950.

What this means to you

The Court's nationwide injunction has delayed the investigative and compliance actions and enforcement actions authorized under EO 13950. The election of Joe Biden will likely result in President-elect Biden overturning EO 13950 shortly after taking office on January 20, 2021. As a result, the prohibitions, compliance actions, requests for information and enforcement actions imposed on federal contractors and federal grantees under EO 13950 and by the OFFCP are in abeyance until either the injunction is made permanent or lifted, or the executive order is overturned. The federal government's hotline established to receive complaints regarding violations of EO 13950, states that it is no longer accepting complaints in accordance with the Court's December 22, 2020 Order. It does allow callers to continue to leave messages and refers callers who desire to file complaints of discrimination to another phone number or to a page on their website.

Contact us

We will continue to keep you apprised of the developments in this matter. If you have questions regarding compliance or enforcement actions that your business may have been subject to as a result of the issuance of EO 13950, contact Molly Kurt, Sonni Fort Nolan, Brian Waagner or your Husch Blackwell attorney.

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