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ALERT

New Executive Order Directs Constraints on Federal Contractors' and Grantees' Diversity and Inclusion Training

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WHAT: On September 22, 2020, President Trump issued an Executive Order (EO), "Combating Race and Sex Stereotyping," to bar certain topics from diversity and inclusion training provided by federal contractors and grantees. The EO prohibits many federal contractors from holding "workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating." The EO defines "race or sex stereotyping" and "race or sex scapegoating" broadly, along with providing an illustrative list of topics.

The EO directs "all Government contracting agencies" to insert a clause prohibiting such training in all prime contracts except those exempt from EO 11246, Equal Employment Opportunity. Prime contractors must in turn (a) flow down the obligations to subcontractors and vendors; (b) notify unions and other worker representatives of the restrictions; and (c) post those notices prominently for employees and employment applicants.

The EO requires the Office of Federal Contract Compliance Programs (OFCCP) to establish a hotline to receive and investigate complaints of violation of the order. The EO provides remedies of not only contract termination but also debarment and potentially claims of hostile work environments.

In addition, the EO directs agencies to identify grant programs for which grantees will be required to certify that they do not use federal funds to "promote" any in a list of "concepts" in these topical areas that could potentially arise in training or other settings.

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Practice Areas

Employment & Labor

Employment and Labor Standards Issues in Government Contracting

Government Contracts

WHEN: The requirement for a general contract clause takes effect starting with contracts entered into 60 days after the EO's date, which is (Saturday) November 21. The EO states that its other provisions take effect immediately.

WHAT DOES IT MEAN FOR INDUSTRY: The EO does not instruct contractors to cease providing diversity, inclusion, and anti-discrimination training; such training remains important for, among other reasons, compliance with equal employment opportunity requirements. Furthermore, many training efforts may have contents unaffected by the EO, though contractors should bear in mind the general trend has been towards addressing anti-bias/anti-racism principles, critical race theory, and associated topics in diversity and inclusion training. Regardless, contractors should review existing and planned training materials, along with other measures, to encourage diversity and prevent workplace discrimination in light of the EO. In conducting such review, contractors should recognize that the EO's broad definitions, subjective standards, and undefined impact into contractor organizations, leave uncertainty about the EO's impact that may not be resolved before any clauses begin appearing in late November.

Contractors should take special note if they provide diversity and inclusion training to the Government. The EO directs agencies to incorporate a contract clause requiring compliance with the EO's restrictions on "promot [ing] divisive concepts" in all agency contracts for diversity training. This provision is among those taking effect immediately, so training contractors should monitor contracts and solicitations for these types of terms—particularly because the EO requires agencies to consider debarring contractors that provide training in conflict with the EO's prohibitions.

Contract Clause Prohibitions

Unlike many executive orders affecting contractors, the September 22 EO does not call for a FAR Council rulemaking to implement the clause or to receive public input on the definitions, scope, or enforcement. Instead, the EO specifies the required clause to be included in the vast majority of federal contracts.

The clause applies these prohibitions to the "contractor." There are no limitations such as excluding commercial-item contractors, imposing minimum-dollar thresholds, or applying the prohibitions only to employees who work on government contracts. On the latter point, neither the clause nor the EO in general defines "contractor," leaving room for varying positions by enforcement personnel of how far into the contractor organization the clause's prohibition reaches.

The clause prohibits:

- Training that "inculcates" in the contractor's employees "any form of race or sex stereotyping," which is defined 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;
- Training that "inculcates" in the contractor's employees "any form of race or sex scapegoating," which 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; and

The clause's "scapegoating" definition omits, for reasons not stated, additional definition from elsewhere in the EO that "scapegoating" also "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."

The clause lists illustrative examples of "concepts" (labeled "divisive concepts" elsewhere in the EO) encompassed by these two prohibitions:

- 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; and
- Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

To be sure, the EO states that it "does not prevent . . . contractors from promoting racial, cultural, or ethnic diversity or inclusiveness." Nonetheless, these definitions and examples may make it difficult to present training compliant with both the EO and with federal, state, and local non-discrimination or affirmative-action obligations.

Contract Clause Remedies

The Executive Order and implementing clause provide that a contracting officer can cancel, terminate, or suspend a contract, in whole or in part, if a contractor violates the clause. Further, "the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 . . . ." In other words, noncompliance with the clause is now a cause for potential debarment across the entire federal government. Lastly, the clause allows further penalties and actions against the contractor in accordance with U.S. Department of Labor (DOL) regulations adopted pursuant to subpart D of Executive Order 11246. These include referring the contractor to the EEOC or U.S. Department of Justice (DOJ) for proceedings under Title VII of the Civil Rights Act of 1964 and recommending that the DOJ seek an injunction against a prohibited practice.

Contract Clause Application to Subcontracts

The clause states that it must be flowed down in all subcontracts and purchase orders, regardless of subcontract type or value, unless DOL issues rules or orders that exempt them. Reinforcing this breadth, the clause is to be binding on both "subcontractors" and "vendors." Further, DOL is to "direct" how the provision is to be enforced by prime contractors. Given the absence of any DOL regulations and the length of time required to issue any such regulations or guidance, prime contractors that have this clause inserted in their prime contracts will have to include the provision in every subcontract or purchase order issued under it.

Under an uncommon provision, if a prime contractor is sued by a subcontractor for enforcing the clause, the contractor can request that the United States intervene in that litigation "to protect the interests of the United States." It is not clear if such requests will always (or ever) be granted or how the prime contractor's costs of such litigation or any judgment would be treated.

Additional Enforcement Mechanisms

The Executive Order directs DOL, through the OFCCP, to establish a hotline and investigate complaints received that a contractor is conducting training programs that violate the order. DOL is further instructed to take enforcement action and provide remedial relief, as appropriate.

For contractors and other employers alike, the EO also directs the Attorney General to continue assessing whether training on so-called "divisive concepts" contributes to hostile workplaces and may give rise to liability under Title VII of the Civil Rights Act of 1964. The EO contemplates guidance from the DOJ and EEOC on this topic. Any future guidance, however, should not form the basis for enforcement action on its own because the DOJ takes the position that agency guidance documents cannot form the basis for criminal or civil enforcement actions.

Information Gathering

Within 30 days of the order, the Director of OFCCP is directed to publish in the Federal Register a request for information seeking information from contractors, subcontractors, and employees of contractors and subcontractors regarding the training, workshops, or similar programming provided to employees. OFCCP is broadly instructed to request copies of any training, workshop, or programing "having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities." Thus, to the extent contractors, subcontractors, or employees of either comply and provide materials in response, OFCCP will presumably be reviewing those materials to determine whether they violate the order.

Grant Recipients

The EO requires agency heads to review their 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 similar to those in the clause that is to be included in federal contracts. The order requires agency heads to submit a list of all such grant programs to the Office of Management and Budget

(OMB) within 60 days.

Many grantees, such as colleges and universities, also hold government contracts or subcontracts and therefore should pay close attention to the timing and scope of the EO's requirements. The certifications could begin being used by some agencies very soon and other agencies months into the future. The contract restrictions begin taking effect in 60 days but will apply across the "contractor," which could mean an entire university, for example. Heeding these nuances could help many grantee-contractors with assessing and implementing compliance plans.

Conclusion

The upcoming election's results may affect the longevity of this EO, of course. But even with a change in administration, the two months between Election Day and Inauguration Day may see efforts at implementation and enforcement. At the same time, litigants might seek to have the EO enjoined on statutory or constitutional grounds. Wiley attorneys have experience with new rules and regulations whose implementation appear to potentially hinge on an upcoming election or lawsuit, such as the Fair Pay and Safe Workplaces rulemaking finalized (and enjoined) around the 2016 elections, and helping contractors develop compliance strategies that consider the range of potential outcomes.