

What Does President Trump's Executive Order on Combating Race and Sex Stereotyping Mean for Government Contractors?

October 5, 2020

On September 22, 2020, President Trump signed Executive Order 13950, Combating Race and Sex Stereotyping (the “EO”), which seeks to “combat offensive and anti-American race and sex stereotyping and scapegoating,” and end so-called “divisive concepts” covered in some of these workplace trainings. The EO establishes requirements aimed at “promoting unity in the Federal workforce,” by prohibiting messages in workplace trainings that imply “an individual, by virtue of their race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously.” Discussion of the EO by both its proponents and detractors has been swift and thoughtful, particularly at a time when many American businesses have been increasing their focus on equity, diversity and inclusion and issuing public statements denouncing racism and injustice in the wake of events such as George Floyd’s death. In this context, it is critical to understand what the EO does and does not require of government contractors, and to recognize that its lasting impact and enforceability are currently uncertain, as the nation awaits the outcome of the upcoming election and expected legal challenges to the EO.

Who is Impacted?

In general, the EO covers federal contractors, federal agencies, certain federal grant recipients and the military. While certain aspects of the EO are effective immediately, its workplace training restrictions are set for inclusion in federal contracts entered into **after** November 21, 2020, for those contractors covered by Executive Order 11246 and over whom OFCCP has jurisdiction (“Government Contractors”). The

MEET THE AUTHORS



Dawn Siler-Nixon

Partner
Tampa, Florida Office
dsiler-nixon@fordharrison.com
P: 813-261-7834



Nancy Van der Veer Holt

Partner
Washington, DC Office
nholt@fordharrison.com
P: 202-719-2010



Cymoril M. White

Associate
Tampa, Florida Office
cwhite@fordharrison.com
P: 813-261-7800

training restrictions in the EO appear to apply to trainings for all employees of Government Contractors and their subcontractors, regardless of whether those employees support a federal contract.

Federal grant recipients may also be impacted by the EO if the head of the agency that issues their grant programs identifies the recipient's grant program as one for which the agency will require recipients to make certifications as a condition of receiving the grant. The certifications will involve confirming that the federal funds will not be used to promote the eight enumerated concepts involving race and sex stereotyping and scapegoating.

What Does the EO Cover?

The EO seeks to combat "division and inefficiency" in federal contracting by prohibiting contractors from providing employee training on "divisive concepts," which the EO defines as ideas such as "race or sex stereotyping" or "race or sex scapegoating."

- **Race or sex stereotyping** "means 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** "means 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."

The EO also lists the following proscribed training topics:

- 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.

These topics mirror the eight certifications that may be required of certain grant recipients under the EO.

What Are the Notice Requirements?

Covered contractors must conspicuously post a notice (to be provided by the agency contracting officer) where it will be seen by employees and applicants for employment. They must also provide this notice to

all labor unions or similar entities with which they have a collective bargaining agreement and must include specific language regarding prohibited training concepts, notice requirements, and noncompliance penalties in all subcontracts and purchase orders.

How Will the EO Be Enforced?

The Office of Federal Contract Compliance Programs (“OFCCP”) is tasked with investigating complaints and enforcing the EO. The OFCCP has already established a hotline to field whistleblower complaints alleging that a Government Contractor is utilizing prohibited training programs in violation of EO. The EO also requires the OFCCP to publish in the Federal Register, no later than October 22, 2020, a request for information from Government Contractors and subcontractors, as well as their employees. As part of this request for information, the OFCCP will seek (1) copies of any training, workshop, or similar programing having to do with diversity and inclusion, and (2) information about the duration, frequency, and cost of those activities.

What are the Potential Penalties for Noncompliance?

Government Contractors can potentially face rather steep penalties, including cancellation/termination or suspension, in whole or part, of their federal contracts, debarment and/or monetary sanctions.

The Attorney General will also assess the extent to which workplace training that teaches the “divisive concepts” outlined in the EO may contribute to a hostile work environment under Title VII. The Attorney General and the EEOC may issue future guidance “to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII.”

What Does This Mean For Covered Contractors?

Government Contractors—many of which have recently invested in equity, diversity and inclusion initiatives—may understandably be unsure about how to proceed in light of the EO. The EO applies specifically to “training,” and not policies or other documents that employers may publish as part of their equity, diversity and inclusion efforts. If the EO is fully implemented, its terms could trigger significant modifications to current equity, diversity and inclusion trainings, including how and whether concepts such as unconscious bias, privilege, sexual harassment, and meritocracy are addressed. Yet, the EO does not appear to prohibit training or dialogues involving cultural competence, generational diversity, microaggressions, communications across differences, mindfulness and trainings unrelated to race or gender, to name a few.

The future of the EO is currently uncertain, given the upcoming presidential election and rumblings from many organizations regarding legal challenges. If a new administration takes over in January 2021, the EO most likely will be rescinded, even if implemented briefly in the interim. Likewise, if President Trump is re-elected, legal challenges potentially lodged on various grounds, including policy concerns (failure to follow rulemaking procedures, obtain agency or congressional input or to be supported by data) and the First Amendment, may also impact enforceability of the EO.

Employers that anticipate entering into new covered federal contracts and Government Contractors that will be renewing federal contracts after November 21, 2020, may want to proactively evaluate their equity, diversity and inclusion training programs and determine whether any changes may be appropriate

to avoid penalties under the EO. However, many Government Contractors will likely want to wait on further regulatory and legal developments before undertaking any major programming adjustments.

FordHarrison's Diversity Practice Group will continue to monitor developments in this area and will report them here - <https://www.fordharrison.com/DiversityInclusion>. If you have any questions regarding this Alert, please contact the authors Dawn Siler-Nixon, Diversity & Inclusion partner in our Tampa office at dsiler-nixon@fordharrison.com, Nancy Van der Veer Holt, partner in our D.C. office at nholt@fordharrison.com, or Cymoril M. White, associate in our Tampa Area office at cwhite@fordharrison.com. Of course, you can also contact the FordHarrison attorney with whom you usually work.

Please see our dedicated [Coronavirus Taskforce](#), [Coronavirus – CARES Act](#), and [Coronavirus - Return to Work](#) pages for the latest FH Legal Alerts and webinars on COVID-19, the new American workplace, workplace-related provisions of the CARES Act, as well as links to governmental and industry-specific resources for employers to obtain additional information and guidance. For more information or to be connected with a Coronavirus Taskforce or CARES Act attorney, please contact clientservice@fordharrison.com.