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What Contractors Need to Know about E.O. 13950, Combating Race and Sex Stereotyping

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On September 22, 2020, President Trump signed Executive Order 13950, Combating Race and Sex Stereotyping (the “Order”). The Order states its purpose is “to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating.”

Summary of the Order

The Order generally prohibits federal contractors and subcontractors from using any “workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating.”

The Order defines the term “race or sex scapegoating” 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. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of an individual's 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.

In addition, the Order defines the term “divisive concepts” to mean concepts that:

1. One race or sex is inherently superior to another race or sex;
2. The United States is fundamentally racist or sexist;
3. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
4. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
5. Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
6. An individual's moral character is necessarily determined by his or her race or sex;
7. 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;
8. Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or

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

OFCCP Frequently Asked Questions

Federal contractors subject to the Order may be left wondering whether their current anti-harassment, nondiscrimination, and diversity and inclusion trainings violate the Order.

On Wednesday, October 7, 2020, the Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") issued guidance in the form of Frequently Asked Questions ("FAQs") to address certain aspects of the Order. Specifically, the FAQs clarified that unconscious or implicit bias training is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously.

On the other hand, training is not prohibited if it is designed to inform workers, or foster discussion, about preconceptions, opinions, or stereotypes that people—regardless of their race or sex—may have regarding people who are different, which could influence a worker's conduct or speech and be perceived by others as offensive.

Any individual or group alleging an unlawful training program may file a complaint with OFCCP hotline. Complaints will be investigated in accordance with OFCCP's standard procedures. Contractors found to be in violation may have their contracts canceled, terminated, or suspended in whole or in part. The contractor may also be declared ineligible for future Government contracts.

Finally, the FAQs confirmed that the Order became effective upon execution on September 22, 2020, but the specific requirements applicable to federal contractors and subcontractors will apply only to contracts entered into on or after November 21, 2020.

OFCCP Request for Information

On October 22, 2020, OFCCP issued a Request for Information ("RFI"), as required by Section 4(c) of the Order. The RFI invited federal contractors to submit information or materials concerning workplace trainings that promote, or could reasonably be interpreted to promote, race or sex stereotyping or scapegoating.

The RFI encourages contractors and subcontractors who may be questioning whether their workplace training programs comply with the Order to voluntarily submit information or materials to OFCCP on or before December 1, 2020. The RFI states that OFCCP will not take enforcement actions against contractors and subcontractors for potential non-compliance with the Order. We recommend, however, that contractors and subcontractors consult with legal counsel prior to making a submission to OFCCP in response to the RFI.

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