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Top 10 Things to Know About the Executive Order on Combatting Race and Sex Stereotyping

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On September 22, 2020, President Trump issued Executive Order 13950, "Combating Race and Sex Stereotyping" ("Order"). The Order sets forth the policy of the United States "not to promote race or sex stereotyping or scapegoating", and prohibits federal contractors from inculcating such views in their employees. Although the Order was met with surprise by many in the government contracting community, it has far-reaching implications for businesses that contract with the federal government. Below are the top ten takeaways from the Order for federal contractors, subcontractors and their vendors.

Question No. 1: Who Must Comply with This Order?

Answer: All Executive departments and agencies, all Uniformed Services, all federal contractors and all federal grant recipients must comply with this Order.

Question No. 2: What Constitutes Race or Sex Stereotyping? What Constitutes Race or Sex Scapegoating?

Answer: The Order defines "race or sex stereotyping" as "ascribing character traits, values, morals and ethical codes, privileges, status or beliefs to a race or sex, or to an individual because of his or her race or sex." It further defines "race or sex scapegoating" 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." The Order explains that "race or sex scapegoating" encompasses any claim that, "consciously or unconsciously, and by virtue of his or her own 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 including to oppress others."

The Order makes clear that race or sex stereotyping or scapegoating are examples of "divisive concepts." The term "divisive concepts" also includes the ideas that:

- 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.

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Question No. 3: What does the Order Require of Government Contractors?

Answer: The Order expresses the President’s belief that government contractors (as well as federal agencies and Uniformed Services) have conducted “blame-focused diversity training” for their employees that “reinforces biases and decreases opportunities for minorities.” This training espouses the divisive concepts described above, including race or sex stereotyping and scapegoating. The Order further states that such activities “promote division and inefficiency.” Accordingly, the Order prohibits federal contractors from providing such training to their employees.

Question No. 4: Does the Order Prohibit All Types of Diversity Training?

Answer: No. The Order specifies that contractors should “continue to foster environments devoid of hostility grounded in race, sex, and other federally protected characteristics,” and goes on to provide that “[t]raining employees to create an inclusive workplace is appropriate and beneficial.”

In its Frequently Asked Questions regarding the Order, which can be accessed [here](#), the Office of Federal Contract Compliance Programs (“OFCCP”) addressed the question of whether the Order prohibits all unconscious or implicit bias training. The OFCCP reiterated that it does not, explaining:

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.

Training is not prohibited if it is designed to inform workers, or foster discussion, about pre-conceptions, 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.

Question No. 5: Does the Order Require That Any Specific Language Be Included in Government Contracts?

Answer: Yes. Pursuant to the Order, contracting agencies must include the following language in all of their contracts:

“During the performance of this contract, the contractor agrees as follows:

The contractor shall not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts that (a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (e) an individual’s moral character is necessarily determined by his or her race or sex; (f) 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; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term “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, and the term “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.

Question No. 6: Must a Federal Contractor Flow-Down the Requirements of This Order to Subcontractors and/or Vendors?

Answer: Yes. A federal contractor must include the provisions of paragraphs 1 through 4 of the Order in every subcontract or purchase order that it enters so that such provisions will be binding upon each subcontractor or vendor, unless exempted by rules, regulations, or orders of the Secretary of Labor.

Question No. 7: When Does This Order Become Effective?

Answer: The Order became effective immediately when signed on September 22, 2020, but the requirements for federal contractors and subcontractors will apply to contracts entered into 60 days after the date of the Order—November 21, 2020. Even so, the OFCCP may investigate claims of sex and race stereotyping pursuant to its existing authority under Executive Order 11246, which requires contractors and subcontractors to treat employees without regard to their race or sex, among other protected bases, and requires contractors to take affirmative action to ensure that such discrimination does not occur.

Question No. 8: Has the Government Established a Method for Reporting Instances of Race and Sex Stereotyping and Scapegoating?

Answer: Yes. OFCCP has established a new hotline for any individual or group (or a third party filing a complaint on behalf of an individual or a group) to report instances of race or sex stereotyping and scapegoating. The hotline receives complaints via telephone at 202-343-2008 and via email at OFCCPComplaintHotline@dol.gov.

Question No. 9: Will the Department of Labor (“DOL”) Publish a Request for Information Regarding the Order?

Answer: Yes. Pursuant to the Order, the DOL is required to publish a Request for Information (“RFI”) no later than October 22, 2020. The RFI will seek information from federal contractors, federal subcontractors and employees of federal contractors and subcontractors regarding the training, workshops, or similar programming provided to employees. The RFI will request copies of any training, workshop or similar programming having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities.

Question No. 10: What Are the Potential Penalties for Noncompliance with This Order?

Answer: The Order provides that, when a federal contractor fails to comply with the requirements of the Order, the contractor’s contract may be “canceled, terminated, or suspended in whole or in part and the contractor declared ineligible for further government contracts in accordance with procedures authorized in Executive Order 11246,” and other sanctions may be imposed or remedies invoked.

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