



# New Executive Order "Combating Race and Sex Stereotyping" – what federal contractors need to know

Employment Alert

Government Contracts Alert

7 October 2020

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President Trump issued a new Executive Order on September 22, 2020, "to combat offensive and anti-American race and sex stereotyping and scapegoating" (EO). The EO prohibits federal contractors, subcontractors and certain grant recipients 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 EO defines both key terms: "race or sex stereotyping" and "race or sex scapegoating." Race and sex stereotyping is defined as "ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex." Scapegoating, on the other hand, is defined as "assigning fault, blame, or bias to a race or sex" or to any individual by virtue of his or her race or sex. Together with specific topics for workplace trainings that are now barred, the EO curtails certain curriculum for training programs as related to diversity and inclusion.

To reinforce the impact of the EO, on September 28, 2020, the Office of Management and Budget published a

memorandum (OMB memorandum) with further guidance on the EO for heads of executive departments and agencies. The articulated purpose of the OMB memorandum is to “help ensure that all Federal workers are treated with the individual respect they deserve and that the Federal government continues to foster a workplace of respect for all.”

The implications for federal contractors can be significant. Specifically, failure to comply with the EO or the OMB memorandum may result in contract cancellation, termination, suspension, sanctions, or even debarment.

## Application to federal contractors

Section 4 of the EO affects all government contracts, except those narrowly exempted under section 204 of Executive Order 11246, entered into 60 days after the date of the EO (or November 21, 2020)<sup>[1]</sup>. These impacted contracts must now include provisions prohibiting the use of any workplace training that includes “divisive 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

These obligations must be imposed similarly upon any subcontractors or suppliers. Contractors must also send a notice of the contractor’s obligations under the EO to each labor union or representative of workers, as well as post such notices in conspicuous areas for employees and potential applicants.

The EO also extends to certain federal grant recipients. Agencies must review their grant programs within 60 days to identify those which may allow the agency to require, as a condition of the grant, certification that the recipient will not promote any of the above enumerated concepts.

## Guidance for federal agencies

The OMB memorandum also provides specific guidance for heads of executive departments and agencies. It states that federal agencies should not only review their workplace trainings in the context of diversity and inclusion, but also agency financial data and procurements for the following search terms:

- critical race theory
- white privilege
- intersectionality
- systemic racism
- positionality
- racial humility
- unconscious bias

According to the OMB memorandum, these search terms may assist in identifying the types of training and materials prohibited by the EO. The OMB memorandum specifically states, however, that simply searching for the above terms is not enough to satisfy either the OMB memorandum or the EO. The OMB memorandum notes that the EO calls for additional review to determine whether training content includes forbidden “divisive concepts.”

The OMB memorandum further requires that agencies review all Federal grant and cooperative agreement programs

to determine whether grant recipients can be required to certify that they will not utilize any training programs with the divisive concepts as defined in the EO. This requirement is not limited to just those grants and cooperative agreements that are specifically “for the purposes of providing training,” thus broadening the scope of the EO’s reach.

### Implementation and enforcement

The EO provides that the Attorney General is assigned to “assess the extent to which workplace training that teaches” any of the concepts above “may contribute to a hostile work environment” under Title VII of the Civil Rights Act of 1964. If appropriate, the Attorney General and the Equal Employment Opportunity Commission are tasked with issuing guidance on “better” practices to promote diversity and inclusion in the workplace.

Importantly, the EO also calls upon the Office of Federal Contract Compliance Programs (OFCCP) to establish a hotline and investigate any complaints under the order or of claims that any prohibited training is being offered by a government contractor. The OFCCP is also required to publish a request for information in the Federal Register within 30 days of the date of the EO, seeking information regarding current training provided to contractors, subcontractors, and their related employees.

### Implications

If the EO takes effect on November 21, 2020, US government agencies and contractors, as well as subcontractors and suppliers, will be required to review and possibly modify their workplace training programs, depending on whether the content of the training includes divisive concepts identified by the EO. Therefore, affected employers are urged to review their workplace training programs, both in-house and those provided by third parties, to ensure content is compliant with the EO.

Find out more about the implications of this EO by contacting the authors or your usual DLA Piper relationship lawyer.

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[1] The language of the EO suggests that current, existing contracts will not be affected by the EO.

## AUTHORS

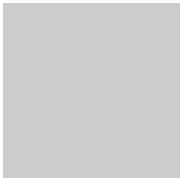


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