

FEDERAL CONTRACTORS: KEY POINTS IN NEW EXECUTIVE ORDER ON COMBATING RACE AND SEX STEREOTYPING

Insights
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When President Trump issued an executive order on September 22 on “Combating Race and Sex Stereotyping,” the federal contractor community was concerned about what new requirements might be added to their already full plates. Fortunately, most of the executive order addresses federal government agency requirements. However, there are two key points of which the federal contractor community must be aware:

1. New contract clause required for contracts entered into on or after November 21, 2020; and
2. Upcoming regulations regarding diversity training, workshops, or similar programs to ensure the materials do not “inculcate” in the contractor’s employees “any form of race or sex stereotyping or race or sex scapegoating.”

WHAT DO YOU NEED TO DO?

The contract clause must be added to all contracts except those few exempted, such as those with religious organizations. The four-paragraph addition to the contracts entered into on or after November 21, 2020 requires, among other things, inserting the following from Section 4 of the Executive Order:

DURING THE PERFORMANCE OF THE CONTRACT, THE CONTRACTOR AGREES AS FOLLOWS:

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THE CONTRACTOR SHALL NOT USE ANY WORKPLACE TRAINING THAT INCULCATES IN ITS EMPLOYEES ANY FORM OF RACE OR SEX STEREOTYPING OR RACE AND SEX SCAPEGOATING, INCLUDING THE CONCEPTS 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 sex or race;
- 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 others 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. to oppress another race or sex.

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.

WHAT'S NEXT?

Without regulatory guidance by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), or even an FAQ reference, it is difficult to know

whether incorporating the mandatory clause by reference to the executive order would be sufficient to satisfy the new requirements. Many other clauses, such as the Equal Opportunity Clause, may be satisfied by incorporating the legal citation reference rather than restating the clause in its entirety. Thus, without guidance at this time, you should arguably be able to satisfy the requirement by reference to Executive Order 13950, Section 4 for contracts entered into on or after November 21, 2020.

The executive order also states that the OFCCP must publish a request for information in the Federal Register within 30 days (that is, before the end of October). That request for information, addressed to federal contractors, federal subcontractors, and their employees, asks them “to provide 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.” Presumably, those materials are requested to be provided to the OFCCP for some sort of evaluation of whether the materials comply with the requirements in the executive order.

The executive order also requires the OFCCP to establish a hotline to investigate complaints that an employer’s training programs violate the requirements of this order or of Executive Order 11246, which establishes the basis for federal contractor affirmative action requirements. The agency moved quickly to establish [just such a hotline](#) yesterday.

WHAT SHOULD YOU DO?

Consequently, we caution contractors to carefully review your diversity and inclusion training materials, including those used by vendors you engage. You should also be aware that employees may record diversity and inclusion training sessions, so we recommend your trainings be carefully scripted to protect you from allegations that you are attempting to improperly “inculcate” your employees as described above.

We will continue to monitor the developments that follow this executive order and to keep you informed. Make sure you are subscribed to [Fisher Phillips’ Alert System](#) to get the most up-to-date information. If you have questions about how this development impacts your organization, please

reach out to your Fisher Phillips attorney or any member of our [Affirmative Action and Federal Contract Compliance Practice Group](#).

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.