

COURT OVERTURNS PRESIDENT TRUMP'S BAN ON FEDERAL CONTRACTOR DIVERSITY TRAINING

Insights
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A federal judge just issued a preliminary injunction to stop government enforcement of a controversial presidential executive order that severely curtailed the ability of federal contractors to offer diversity training on subjects such as systemic racism and unconscious bias. The December 22 ruling does not impact all provisions of E.O. 13950, just the specific portions in Sections 4 and 5 that created new requirements for federal contractors (new contract clause provisions and trainings) and federal grants (grant program certification regarding use of funds). The ruling frees federal contractors to once again offer typical workplace training sessions without fear of government reprisal for the time being, and given that the days of the Trump administration are quickly waning, it appears that employers will be free to provide such training for the foreseeable future.

Government Ban On Employee Training Causes Confusion And Concern

Back in September, the federal contractor and federal grantee community was surprised by [E.O. 13950](#), which, among other things, prohibited contractors from using any workplace training that ["inculcates in its employees any form of race or sex stereotyping or race and sex scapegoating."](#) The general topics prohibited by the executive order appeared to undercut some of the foundational concepts addressed in current diversity, equity, and inclusion trainings, including a probable ban on training employees on systemic racism, unconscious bias, and other

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topics deemed “anti-American” by the current administration.

As a result, many contractors and grantees were hesitant to continue their diversity training initiatives, concerned that they may inadvertently run afoul of the ambiguous new law. Moreover, the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) promptly set up the required hotline for concerned persons to report violations of E.O. 13950 for OFCCP review and investigation and quickly received numerous complaints.

Of particular concern was the vagueness of the order as well as the breadth in terms of topics that could be covered. The Office of Management and Budget (OMB) issued a Memorandum for the Heads of Executive Departments and Agencies in an attempt to clear up confusion related to E.O. 13950, and the OFCCP also provided some guidance with respect to the order. Still, the additional guidance and information did not provide sufficiently specific information for contractors and grantees as to the appropriate content for their diversity training programs that would be compliant with E.O. 13950.

Court Challenge Overturns Ban – But For How Long?

Since its issuance, E.O. 13950 has faced strong opposition with federal contractor organizations, diversity organizations, and civil rights groups calling on President-elect Biden to rescind E.O. 13950 once he takes office. In the meantime, however, at least two lawsuits sought to halt the implementation of the executive order. In *Santa Cruz Lesbian & Gay Community Center et al. v. Trump et al.*, a number of non-profit community organizations and consultants serving the LGBT community and people living with HIV challenged the training ban.

The plaintiffs provide advocacy and training to healthcare providers, local government agencies, local business, and their own employees about systemic bias, racism, anti-LGBT bias, white privilege, implicit bias, and intersectionality. They contended that this training is fundamental to their mission of breaking down barriers often experienced by underserved communities receiving health care. They said that E.O. 13950 required them to censor or stop their trainings or face losing their federal funding — which they contend violates the Free Speech Clause of the First Amendment. The plaintiffs also argued that the E.O. was “so

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vague” that it did not give notice of what speech was prohibited.

U.S. District Court Judge Beth Labson Freeman of the Northern District of California issued [a 34-page ruling on December 22](#) granting preliminary approval of an injunction that blocked key portions of the executive order, coming as the first serious blow to land against Trump’s training ban. The court found that the restrictions imposed in E.O. 13950, in conjunction with the vagueness of the restrictions, had chilled the plaintiffs’ exercise of their free speech rights. The judge also concluded that a nationwide preliminary injunction was necessary to ensure that those challenging the ban would receive “complete and meaningful relief.” But the ruling is temporary in nature – the litigation will continue to determine if the ban should be permanently applied or if it should be resurrected in some form.

What Does This Ruling Mean For Federal Contractors?

For now, contractors can rest easy as they contemplate their diversity, equity, and inclusion trainings for the upcoming year, knowing that the content will not be scrutinized by the federal government under the controversial executive Order. Moreover, contractors need not comply with the contract clause requirement in Section 4 or the grantee certification in Section 5 of the executive order while this temporary ban remains in effect.

Of course, as the OFCCP has maintained since the E.O. issued, its mission to enforce Title VII-like discrimination still allows it to examine training programs and complaints by employees subject to its jurisdiction. Regardless, the lawsuits challenging E.O. 13950 and the upcoming change in administration create doubt as to the continuing effect and applicability of E.O. 13950. Notably, the plaintiffs’ lawsuit seeking to overturn the executive order on a permanent basis remains pending, and at least one other lawsuit challenging the E.O. remains pending in federal court. More critically, however, the Biden administration will take control of the federal agencies in a matter of weeks, rendering it likely that E.O. 13950 could soon be scrapped for good and never enforced.

Accordingly, federal contractors and grantees should continue to monitor developments to ensure they remain compliant with the current state of the law. We will continue to monitor the developments that follow and 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](#).

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