

# NEW EXECUTIVE ORDER REQUIRES ENHANCED FOCUS ON DIVERSITY AND INCLUSION TRAINING FOR FEDERAL CONTRACTORS

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## Government Contracts and Procurement Policy Alert

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On September 22, 2020, President Trump issued the Executive Order on Combating Race and Sex Stereotyping (EO), which prohibits workplace trainings that “inculcate” employees with any form of “race or sex stereotyping” or “race or sex scapegoating,” as further defined in the EO (EO Prohibition). Here are the key takeaways:

- The EO requires federal agencies to implement the EO Prohibition via a new contractual provision (Contract Provision).
- The new Contract Provision must be included in new contracts beginning 60 days after the date of the EO (November 21, 2020). The EO does not apply to contracts entered into prior to November 21, 2020, and it is not required to be included in options exercised under an existing contract.
- The new Contract Provision must be included in all contracts other than those exempt from Equal Employment Opportunity (EEO) requirements (primarily, contracts under \$10,000 and contracts for work performed overseas).
- The Contract Provision applies to both prime contractors and subcontractors: prime contractors must include the Contract Provision in all subcontracts and purchase orders other than those exempt from EEO requirements.
- The EO Prohibition does not extend to federal grants at this time, though the EO directs agencies to submit a report in 60 days identifying grant programs in which agencies may prohibit the use of federal funds to provide the prohibited trainings.

We discuss the details of the Contract Provision implementing the EO Prohibition, as well as how the EO affects grant programs, in greater detail below.

## I. IMPLICATIONS FOR FEDERAL CONTRACTORS

The EO requires agencies to include a provision in *all* contracts, except those exempted from EEO requirements,<sup>1</sup> that prohibits “any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating”. The Contract Provision defines “race or sex stereotyping” as “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 it 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 Contract

Provision lists certain concepts associated with race or sex stereotyping and race or sex scapegoating (Divisive Concepts). The Divisive Concepts, which are notions that cannot be including in trainings because they constitute “race or sex scapegoating” or “race or sex stereotyping,” are as follows:

- (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.

In addition, the Contract Provision states that contracting officers will provide contractors with a notice of the requirements under the EO. Contractors are required to provide this notice to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding. Contractors also are required to post copies of the notice in conspicuous places available to employees and applicants for employment.

The Contract Provision provides that contractors must flow down the Contract Provision, including the requirement to flow down the Contract Provision, in every subcontract and purchase order, unless they are exempt from EEO requirements. Contractors are required to take actions directed by the Labor Department when subcontractors or suppliers violate the Contract Provision.

Finally, the EO requires the Labor Department, through the Office of Federal Contract Compliance Programs, to establish a hotline and investigate complaints of trainings in violation of the EO. The consequences for noncompliance could include a contract being canceled, terminated, or suspended in whole or in part; a contractor or subcontractor being declared ineligible for future government contracts; or any other sanctions available for violations of EEO requirements as adopted by the Labor Department.

## **II. IMPLICATIONS FOR GRANT RECIPIENTS**

The EO also focuses on the use of federal grant funds. In particular, the EO requires agencies to “review their respective grant programs and identify programs for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use Federal funds to promote” the Divisive Concepts. Within 60 days of the issuance of the EO, which would be November 21, 2020, agencies are required to submit a report to the Director of the Office of Management and Budget identifying such grant programs. The EO does not place any

specific prohibitions on grant programs or the use of grant funds at this time; however, it appears possible that some prohibitions relating to grant activity may be coming.

### **III. CONCLUSION**

If you have any questions regarding this EO or its implementation requirements, please reach out to the authors of this alert.

## **FOOTNOTES**

<sup>1</sup> Per the EO, the prohibition applies to all contracts other than those “exempted in the manner provided by section 204 of Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity).” These exemptions are implemented in FAR 22.807. FAR 22.807(b) lists seven standard exemptions to EEO requirements: (1) Transactions of \$10,000 or less, (2) Work outside the United States, (3) State or local government agencies or divisions that do not participate in work under a federal contract with a state or local government, (4) Work on or near Indian reservations, (5) Facilities not connected with contracts, (6) Indefinite-quantity contracts not exceeding \$10,000 in a single year, and (7) Contracts with religious entities. FAR 22.807(b) provides additional details on these exemptions.

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