wiley

ALERT

The Latest on Executive Order 13950's Impact on Diversity Training

October 23, 2020

Originally published on October 23, 2020, this article was last updated on October 27, 2020.

On September 22, 2020, President Trump issued Executive Order 13950, "Combating Race and Sex Stereotyping," to bar certain topics from diversity and inclusion training provided by federal contractors and grantees. The EO prohibits many federal contractors from holding "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 "race or sex stereotyping" and "race or sex scapegoating" broadly, along with providing an illustrative list of topics.

The EO directs "all government contracting agencies" to insert a clause prohibiting such training in all prime contracts except those exempt from EO 11246, Equal Employment Opportunity. This requirement applies to contracts entered into 60 days after the EO's date, which is (Saturday) November 21. Other provisions in the EO were to take effect immediately.

An unusually fast-paced flurry of activity has followed:

- The Office of Federal Contract Compliance Programs released guidance in the form of FAQs. Most prominent, although the EO requires including a clause only in contracts entered into 60 days after the EO's issuance, the FAQs state that OFCCP may investigate "claims of sex and race stereotyping" under EO 11246 effective immediately.
- OFCCP launched a landing page for the EO, which includes email and phone hotlines for reporting training purportedly

Authors

Eric W. Leonard
Partner
202.719.7185
eleonard@wiley.law

Craig Smith
Partner
202.719.7297
csmith@wiley.law

Practice Areas

Employment & Labor

Employment and Labor Standards Issues in Government Contracting

Government Contracts

inculcating the prohibited topics.

- OFCCP issued a Request for Information (RFI) seeking examples of training purportedly inculcating the prohibited topics, along with related information. The OFCCP Director held a "stakeholder" call timed to coincide with the RFI's release. The Director emphasized that submissions are voluntary. The Director also stated that OFCCP expects individual employees will submit training examples on their own.
- Numerous industry and business organizations have signed letters urging withdrawal of or otherwise expressing concern about the EO.
- On a call with industry, the Office of Federal Procurement Policy reportedly stated that class deviations would be issued in time to start incorporating the EO's prohibitions into contracts on November 21.
- Twenty-four representatives signed on to cosponsor what is likely a symbolic U.S. House bill to "nullify the effect" of the EO.

All that in just a month.

What does all this mean for federal contractors? The government is rolling out these requirements with atypical speed. Indeed, OFCCP's guidance shows the government's position that the training restrictions apply now under EO 11246. And no matter the election results, OFCCP appears likely to enforce the requirements at least through January. So contractors should be familiar with the EO's prohibitions and potential impacts on training. Read on for more analysis to inform your review and assessment of training.

Putting the EO in Context

Stepping back, the EO does not instruct contractors to cease providing diversity, inclusion, and anti-discrimination training. Such training remains important for, among other reasons, compliance with equal employment opportunity requirements. Many training efforts may have contents unaffected by the EO. But contractors should bear in mind the general trend has been toward addressing anti-bias/anti-racism principles, critical race theory, and associated topics in diversity and inclusion training.

Contractors should thus review existing and planned training materials, along with other measures, to encourage diversity and prevent workplace discrimination. Also contractors should recognize the uncertainty, which might not be resolved soon, in the EO's broad definitions, subjective standards, and undefined reach into contractor organizations.

The EO's Contractual Prohibitions

Unlike many executive orders affecting contractors, the EO does not call for a Federal Acquisition Regulations (FAR) Council rulemaking to implement the clause or to receive public input on the definitions, scope, or enforcement. Instead, the EO specifies the required clause to be included in the vast majority of federal contracts.

The clause applies these prohibitions to the "contractor." There are no limitations such as excluding commercial-item contractors, imposing minimum-dollar thresholds, or applying the prohibitions only to employees who work on government contracts. On the latter point, neither the clause nor the EO in general defines "contractor," leaving room for varying positions by enforcement personnel of how far into the contractor organization the clause's prohibition reaches.

The clause prohibits:

- Training that "inculcates" in the contractor's employees "any form of race or sex stereotyping," which is defined 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
- Training that "inculcates" in the contractor's employees "any form of race or sex scapegoating," which is defined 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 clause's "scapegoating" definition omits, for reasons not stated, additional definition from elsewhere in the EO that "scapegoating" also "encompasses any claim that, consciously or unconsciously, and by virtue of his or her 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 inclined to oppress others."

The clause lists illustrative examples of "concepts" (labeled "divisive concepts" elsewhere in the EO) encompassed by these two prohibitions:

- 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; and
- 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 be sure, the EO states that it "does not prevent . . . contractors from promoting racial, cultural, or ethnic diversity or inclusiveness." Yet these definitions and examples may make it difficult to present training compliant with both the EO and with federal, state, and local non-discrimination or affirmative-action obligations.

OFCCP's FAQs add little substance. Most of the document consists of quotes from the EO itself. The FAQs do attempt to address whether training that addresses unconscious or implicit bias is prohibited. Many workplaces have adopted training about unconscious or implicit biases at all levels of the workforce, both to improve employee interactions and to actively promote diversity and inclusion.

The FAQs state unconscious/implicit bias training is not prohibited by the EO, but only "if it is designed to inform workers, or foster discussion, of pre-conceptions, opinions or stereotypes that people – regardless of their race or sex – may have regarding people who are different" and could be perceived by others as offensive. On the other hand, per the FAQs, 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." OFCCP has provided no further guidance on how this type of training can stay within the EO's bounds.

Related guidance from the Office of Management and Budget (OMB) identifies keywords that contractors might consider using to identify training materials for review: "critical race theory," "white privilege," "intersectionality," "systemic racism," "positionality," "racial humility," and "unconscious bias." The appearance of these terms would not on its own make training impermissible under the EO, but the terms do provide a useful way to identify an initial set of training for closer review.

Extra Focus for Training Contractors

Contractors should take special note if they provide diversity and inclusion training to the government. The EO directs agencies to incorporate a contract clause requiring compliance with the EO's restrictions on "promot [ing] divisive concepts" in all agency contracts for diversity training. This provision is among those taking effect immediately, so training contractors should monitor contracts and solicitations for these types of terms – particularly because the EO requires agencies to consider debarring contractors that provide training in conflict with the EO's prohibitions.

Contract Clause Remedies

The EO and specified implementing clause provide that a contracting officer can cancel, terminate, or suspend a contract, in whole or in part, if a contractor violates the clause.

Further, "the contractor may be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order 11246 . . . ." In other words, noncompliance with the clause is now a cause for potential debarment across the entire government.

Lastly, the clause allows further penalties and actions against the contractor in accordance with the U.S. Department of Labor (DOL) regulations adopted pursuant to subpart D of Executive Order 11246. These include referring the contractor to the EEOC or U.S. Department of Justice (DOJ) for proceedings under Title VII of the Civil Rights Act of 1964 and recommending that the DOJ seek an injunction against a prohibited practice.

Contract Clause Application to Subcontracts and Beyond

Contractors, however defined, must flow down the EO's obligations in all subcontracts and purchase orders, regardless of subcontract type or value, unless DOL issues rules or orders that exempt them. Reinforcing this breadth, the clause is to be binding on both "subcontractors" and "vendors."

Further, DOL is to "direct" how the provision is to be enforced by prime contractors. Though EO 11246 implementation has a similar regulatory provision, any "direction" might instead be provided by the class deviations foreshadowed by OFPP. But that remains to be seen. For now, contractors should plan to insert the EO's obligations into every subcontract and potentially other agreements providing direct support for the covered prime contract.

Under an uncommon provision, if a prime contractor is sued by a subcontractor for enforcing the clause, the contractor can request that the United States intervene in that litigation "to protect the interests of the United States." Though this language is also drawn from EO 11246 enforcement, it is not clear to what extent such requests are granted in practice, if the requests will be granted going forward, or how the prime contractor's costs of such litigation or any judgment would be treated.

Additional Enforcement Mechanisms

OFCCP has established a hotline as the EO required. Per OFCCP's announcements, the hotline will receive complaints from those who say they were directly affected by training and from third parties. Any complaint received from the hotline will be investigated according to the OFCCP's regular complaint procedures pursuant to EO 11246. The FAQs state that once the EO starts applying to federal contracts, OFCCP will also enforce it pursuant to the EO's mandate.

For contractors and other employers alike, the EO also directed the Attorney General to continue assessing whether training on so-called "divisive concepts" contributes to hostile workplaces and may give rise to liability under Title VII of the Civil Rights Act of 1964. The EO contemplates guidance from the DOJ and Equal Employment Opportunity Commission (EEOC) on this topic. Any future guidance, however, presumably would not form the basis for enforcement action on its own – DOJ takes the position that agency guidance documents cannot form the basis for criminal or civil enforcement actions.

Request for Information

OFCCP has requested information on trainings that "promote, or could be reasonably interpreted to promote, race or sex stereotyping" and "race or sex scapegoating." The RFI also seeks information on such trainings' duration, frequency, and cost. Reaching further into contractor operations, the RFI also requests information on companies' diversity training in general and any complaints about training.

OFCCP requests the information from contractors, employees, and any other member of the public. Submissions can include materials of any format, such as PowerPoint presentations, photographs, videos, handwritten notes, or printed handouts.

Submissions should not include materials subject to copyright or a confidentiality agreement, however. That restriction would seem to bar submitting materials from many training sessions (as copyrighted material, at a minimum). It remains to be seen how closely this direction is followed by submitters.

OFCCP is encouraging contractors to submit materials by offering a purported safe harbor. OFCCP asserts that it will not take enforcement action against contractors that voluntarily submit information OFCCP finds to be noncompliant – if the contractor corrects the purported noncompliance.

But such a submission must be by "executives, owners, or legal representatives with actual authority to legally bind the contractor or subcontractor in agreements with the United States government." It's unclear why OFCCP insists on such high-level submissions, other than giving itself room to initiate enforcement based on materials submitted by other employees or through other channels.

Keep in mind, too, that submissions could well become public. The RFI states that OFCCP will protect materials from disclosure under the Freedom of Information Act to the extent possible, but that is no guarantee. Indeed, as of October 27, at least one submission posted to regulations.gov included detailed training materials from what appears to be an individual employee's submission.

Grant Recipients

Beyond federal contracts, the EO requires agency heads to review their 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 "concepts" similar to those in the clause that is to be included in federal contracts. The order requires agency heads to submit a list of all such grant programs to the OMB within 60 days.

Holders of cooperative agreements should take note of these requirements as well. In a September 28 memorandum, the Office of Management and Budget directed that agencies should identify both grants *and* cooperative agreements for these certification requirements. The memo also stated that costs of training on the divisive concepts are not allowable under the OMB Supercircular unless otherwise permitted by law—a position not articulated in the EO.

Many grantees, such as colleges and universities, also hold government contracts or subcontracts and therefore should pay close attention to the timing and scope of the EO's requirements. The certifications could begin being used by some agencies very soon and other agencies months into the future. The contract restrictions begin taking effect in 60 days but will apply across the "contractor," which could mean an entire university, for example. Heeding these nuances could help many grantee-contractors with assessing and implementing compliance plans.

Conclusion

The upcoming election's results may affect the longevity of this EO, of course. But even with a change in administration, the two months between Election Day and Inauguration Day may see efforts at implementation and enforcement. At the same time, litigants might seek to have the EO enjoined on statutory or constitutional grounds. Wiley attorneys have experience with new rules and regulations whose implementation appear to potentially hinge on an upcoming election or lawsuit, such as the Fair Pay and Safe Workplaces rulemaking finalized (and enjoined) around the 2016 elections, and helping contractors develop compliance strategies that consider the range of potential outcomes.