

# A Quick Take On Trump's Contractor Diversity Training Order

By **Lucas Hanback**

On Sept. 22, President Donald Trump signed an executive order "to promote economy and efficiency in federal contracting, to promote unity in the federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating." [1] The order finds that some concepts currently included in workplace diversity training are divisive. [2]



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Accordingly, the order targets for prohibition workforce training that includes the concepts that America is an irredeemably racist and sexist country, or that some people are oppressors simply on account of their race or sex. [3]

Citing several recent examples from the U.S. Department of the Treasury, the Argonne National Laboratory, the Sandia National Laboratory and the Smithsonian Institution, the order finds that these concepts are being taught in diversity trainings across the federal government and among federal government contractors.

While stating that the federal government, contractors and grant recipients should "continue to foster environments devoid of hostility grounded in race, sex and other federally protected characteristics," the order prohibits training from including certain so-called divisive concepts. [4]

## **Specific concepts are prohibited in workplace training.**

The executive order lists nine divisive concepts that may not be included in any workplace training. [5] These concepts include teaching that:

- 1) One race or sex is inherently superior to another race or sex;
- 2) An individual can be inherently racist or sexist based on their race or sex;
- 3) Moral character is determined by these components;
- 4) The U.S. is fundamentally racist or sexist;
- 5) Adverse treatment solely or partly because of race or sex is permissible for certain groups;
- 6) Certain groups should not be treated with respect;
- 7) People bear responsibility for actions committed by others in the past;
- 8) People should feel guilty about those past actions; and
- 9) Meritocracy or traits such as a hard work ethic are racist, sexist or oppressive. [6]

**Federal government contractors and grantees are covered by the order.**

The executive order requires agencies to insert a provision into every government contract requiring the contractor to agree that it will not undertake any workplace training that includes the nine divisive concepts, or encourages race or sex stereotyping or scapegoating.[9]

Contractors covered by collective bargaining agreements must also post notices regarding their commitments under the order.[10] The contract provision will be a mandatory flow down to all subcontracts unless exempted by the secretary of the U.S. Department of Labor.[11] Additionally, the order requires that contractors enforce the provisions as directed by the Labor secretary.[12]

This section appears to allow the Department of Labor to use contractors to enforce compliance, including with subcontractors, and establishes the ability of the federal government to intervene in litigation that opposes such efforts.

The order also requires federal agencies to identify grant programs for which these requirements may be included as a condition of receipt of federal grant money.[13]

### **There are stiff penalties for noncompliance.**

The order is effective for federal agencies immediately. It becomes effective for federal contractors on Nov. 21.[14] Contractors who fail to comply with the provisions of the executive order face stiff penalties including cancellation, termination or suspension of their contracts, and referral for suspension or debarment.[15]

Additionally, the executive order directs the attorney general to assess whether training targeted by the order may contribute to a hostile work environment, giving rise to potential liability under Title VII of the Civil Rights Act.[16]

This could pose another significant risk for contractors who include such concepts in their diversity training. Contractors may be subject to liability not only from the federal government, but also from employees who may be able to sue the company if such training is provided.

In particular, where the federal government finds that these contractual provisions have been violated, employees might have a very strong case that they have been subject to illegal discrimination in the workplace.

### **OFCCP will publish a request for information by Oct. 22.**

The executive order directs the Office of Federal Contract Compliance to establish a hotline for reporting violations of the order.[17] The OFCCP is also directed to seek information from federal contractors, subcontractors and their employees regarding the training, workshops or similar programming provided to employees.[18] Copies of the training will be requested.

The purpose of this request is not specified, but information collected will likely influence any follow-on guidance issued by federal agencies, and could also lead to the development of further prohibited divisive concepts. Additionally, and more troubling for contractors, the materials collected may serve to focus initial enforcement efforts on companies that have already given training that included these concepts.

As federal contractors are required to have affirmative action programs and to prohibit

discrimination,[19] virtually all of them will have training materials or policies that address workplace diversity efforts. The line between what is prohibited by the new order, and what is not, may not always be clear.

For example, a statement that the U.S. is inherently racist would likely violate the order. But would a statement acknowledging the country's long history of slavery be over the line?

The order incentivizes employees to report violations through the establishment of a hotline, and so even innocuous statements may create issues based on the varying interpretations of workers, and of federal government employees enforcing the order.

The looming election makes the long-term effects of the executive order uncertain, however, it will take effect while Trump still has several months left in office. At a minimum, contractors will need to ensure their training steers clear of these concepts for the remainder of the president's time in office. Contractors should review their training materials now to understand their potential exposure and avoid stiff and costly penalties while the order is in effect.

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[1] See Executive Order on Combating Race and Sex Stereotyping, Sept. 22, 2020, available at <https://www.whitehouse.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/>.

[2] Id.

[3] Id. at § 1.

[4] Id. at §§ 1, 2.

[5] Id. at § 2(a).

[6] Id.

[7] Id. at §§ 2(b), (c).

[8] Id.

[9] Id. at § 4(a)(1).

[10] Id. at § 4(a)(2).

[11] Id. at § 4(a)(4).

[12] Id.

[13] Id. at § 5.

[14] Id. at § 9.

[15] Id. at §§ (4)(a)(3), 7(b).

[16] Id. at § 8.

[17] Id. at § 4(b).

[18] Id. at § 4(c).

[19] See, e.g., FAR Parts 22.8, and 22.9.