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Executive Order Requires Federal Contractors to End Implicit Bias Training or Face Sanctions

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On September 22, 2020, President Trump signed Executive Order 13950 on Combating Race and Sex Stereotyping. The new EO's provisions will apply to *all federal contractors and subcontractors*, as well as to federal agencies, the U.S. uniformed services, and certain federal grant recipients, effective immediately.

The EO's stated goal is to "combat offensive and anti-American race and sex stereotyping and scapegoating," and its stated "purpose" is to prohibit "workplace diversity trainings" that, for example, critique narratives of "color-blindness." The EO includes some key definitions for understanding its intent. First, the EO defines "divisive" to include concepts such as that an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; that 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; that any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or that meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race – just to name a few.

The EO defines the term "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," as well as "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." To be clear, the EO explicitly criticizes workplace training materials that ask "non-minority males ... to 'acknowledge' their 'privilege'" which would include training such as implicit bias training.

Practical Implications for Federal Contractors

Although all other sections of the EO took immediate effect, the EO specifies that it applies specifically to federal contractors who enter contracts 60 days after the date of the EO – November 21, 2020. This means that federal contractors are not prohibited from proceeding with any workplace diversity trainings scheduled to occur **prior to November 21, 2020**. Contractors also will not be subject to the EO after that date until the contractor enters into a **new federal contract or subcontract** — or, depending on the provisions of any implementing regulations, perhaps a modification of an existing federal contract or subcontract. However, once we reach November 21, 2020, the EO requires agencies, for contracts awarded on or after that date, to include a clause that prohibits a contractor from providing workplace training that "inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating."

Additionally, federal contractors will be required to flow down the text of certain paragraphs in the EO in subcontracts, provide notice of these requirements to their labor unions, and display such notice in conspicuous places available to applicants and employees. If a contractor fails to comply with the EO, contractors will risk contract cancellation, termination, or suspension and may be debarred from entering further government contracts. The EO states that it does not prevent "contractors from promoting racial, cultural, or ethnic diversity or inclusiveness, provided such efforts are consistent" with the law.

Enforcement by the Department of Labor

On September 28, the Office of Federal Contract Compliance Programs (OFCCP), a division of the DOL, issued a [press release](#) announcing the immediate enforcement of the EO. The press release can be found on OFCCP and outlines information about a newly established [Complaint Hotline](#) and email address to receive complaints about federal contractors that may be violating the EO. The OFCCP explains the basis for the immediate enforcement by noting that training programs currently used may also "violate a contractor's obligations under the existing Executive Order 11246, which prohibits discrimination based on race, color, religion, sex, sexual orientation, gender identity, national origin, and for inquiring about, discussing, or disclosing your compensation or the compensation of others."

If you have any questions, please contact [Jennifer Curry](#) or any member of Baker Donelson's [Labor & Employment Team](#).