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## BLOGS

Diversity & Inclusion

# Is Your Diversity & Inclusion Training Program in Peril?

Many employers have implemented Diversity & Inclusion (D&I) programs over the last few years, often including training on topics such as implicit or unconscious bias. For some employers, those efforts may now be in peril. On September 22, 2020, the White House issued Executive Order 13950 entitled On Combating Race and Sex Stereotyping (EO 13950 or order). The orders stated purpose is to combat offensive and anti-American race and sex stereotyping and scapegoating. Private employers are not covered by EO 13950, but federal contractors and subcontractors (and recipients of federal grant monies) are prohibited from promoting divisiveness by using any workplace training that inculcates in its employees any form of race or sex stereotyping or [ ] scapegoating. According to the order, the following specific concepts are considered divisive and are therefore prohibited in workplace trainings:

- 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 individuals 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; or
- meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

Race or sex scapegoating is defined by EO 13950 to include any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others. The language of the order is quite broad and it is plausible that aspects of some D&I trainings could be interpreted to violate the order.

Presumably in an effort to clarify questions surrounding EO 13950, on October 7, 2020, the Department of Labors Office of Federal Contractor Compliance Programs (OFCCP) issued a series of Frequently Asked Questions (FAQs). Although

many aspects of EO 13950 remain unclear, FAQ No. 6 states that the order prohibits unconscious or implicit bias training only 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. FAQ No. 6 goes on to state that training is not prohibited if it is designed to inform workers, or foster discussion, about pre-conceptions, opinions, or stereotypes that people regardless of their race or sex may have regarding people who are different, which could influence a worker's conduct or speech and be perceived by others as offensive.

The FAQs also make clear that workers and others may file complaints about alleged unlawful training programs through a new OFCCP hotline for reporting race/sex stereotyping and scapegoating. And OFCCP has stated in its FAQs that the agency may investigate complaints immediately, and will fully enforce the order once its restrictions are included in contracts (or contract amendments) which will be no sooner than November 21, 2020, i.e., 60 days after the order was entered. Contractors found in violation may have their contracts canceled, terminated or suspended in whole or in part. Contractors also may be barred from future contracts.

Interestingly, EO 13950 commanded the OFCCP to prepare and publish within 30 days of the order a Request for Information (RFI) noted in EO 13950, which is supposed to seek information from federal contractors/subcontractors regarding training or workshops having to do with diversity and inclusion as well as information about the duration, frequency and expense of such activities. The OFCCP's FAQs suggest the agency is on track to meet its October 22, 2020 RFI publication deadline.

If your business is a federal contractor or subcontractor (or recipient of federal grant monies) that provides D&I training to the workforce, you should carefully review applicable training content to safeguard against pitfalls created by EO 13950. Even if you use a vendor for such training, it is advisable to preview and approve training materials in advance. Many business leaders believe D&I training is fundamentally important (perhaps now more than ever, with the national reckoning our society is experiencing around race relations), and are rightfully concerned that EO 13950 derails their plans to continue facilitating important conversations around D&I issues in the workplace. While the order and FAQ fail to provide sufficient clarity to put contractors' minds at ease in terms of what specific training is ok/not okay, we are not sounding the alarm just yet. Bottom line: there is no need to throw away your training materials or plans for future training (at least not yet). Standard non-discrimination and anti-harassment trainings are likely permissible under the order. For any trainings that touch on issues of unconscious or implicit bias, theories of systemic or structural racism, or similar concepts, however, proceed with caution. You should make sure that they do so in a way that complies with the order. Material around these topics should be presented in an even-handed, non-discriminatory manner.

Finally, stay tuned because there may be legal challenges around whether EO 13950 can be included in federal contracts prior to the satisfaction of several statutory requirements that could take time for the government to accomplish, and, more than 150 businesses, industry groups and nonprofits have sent letters to the White House expressing concern about the order and requesting the President withdraw it.