

Executive Order Warns Government Contractors About Race or Sex Stereotyping

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A recent executive order from President Donald Trump could cause some changes in federal workplace training programs - including federal contractors and subcontractors - to combat race or sex stereotyping.

Trump's [September order](#) aims to combat "race or sex stereotyping or scapegoating in the Federal workforce in the Uniformed Services, and not to allow grant funds to be used for these purposes."

The order became effective immediately when signed on September 22 and is targeted at workplace training programs used by the military, federal contractors, federal grant recipients and federal agencies.

General Provisions of the Order

The order prohibits employers covered under the order from using "divisive concepts" in workplace training material. "Divisive concepts" is defined as concepts that:

- One race or sex is inherently superior to another race or sex.
- The United States is fundamentally racist or sexist.
- 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.
- Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "divisive concepts" also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

The order further prohibits "race or sex stereotyping" and "race or sex scapegoating" which, according to the order, 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."

Additionally, "Race or sex scapegoating" means assigning fault, blame or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly 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, according to the order.

Special Considerations for Contractors

There are also special considerations that federal government contractors must take into account. While the order generally became effective immediately when it was signed, the order specifically provided that it does not become effective until November 21, 2020, for federal contractors and subcontractors.

Additionally, the order mandates that federal agencies include certain contractual provisions in all government contracts. Those provisions mandate that a contractor "not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating," including training material that presents the "divisive concepts." A contractor must also send to each labor union or representative of workers with which it has a collective bargaining agreement a notice advising the representative of the contractor's commitments under the order. The contractor must post copies of the notice in noticeable places available to employees and applicants for employment. Under the order, a contractor is also required to include this information in every subcontract or purchase order (unless exempt by the U.S. Secretary of Labor) so that these provisions will be binding on each subcontractor or vendor.

Penalties for violating the order could be stiff, particularly for contractors. Complaints received will be investigated immediately, and once the order becomes effective for federal contracts, the Office of Federal Contract Compliance Programs will begin enforcement measures. Contractors found in violation may have their contracts canceled, terminated or suspended. An offending contractor may also be declared ineligible for further government contracts or be subject to sanctions.

Department of Labor Guidance

The U.S. Department of Labor recently [issued guidance on the order](#). The DOL opined 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" The DOL further opined that the order does not prohibit unconscious or implicit bias training to the extent that such training does not teach or imply 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."

Notably, as it relates to contractors, the DOL's guidance does not define the term "contractor." As a result, it is entirely possible that federal agencies could take the position that obligations under the order apply to an entire organization, not just the division of an organization that contracts with the federal government. Likewise, the DOL's guidance provides no opinion on whether current contracts with the federal government should be modified to include the new provisions.

Where Do We Go From Here?

The DOL is currently drafting a Request for Information, which will seek information from federal contractors, federal subcontractors, and employees of federal contractors and subcontractors regarding their training,

workshops, or similar programming provided to employees that may be in violation of the Order. Further details on that Request for Information are expected by its October 22 deadline.

In the meantime, the order's impact on an employer's training programs will depend upon the specific content presented. Much of what is prohibited by the order is already covered under existing law.

Even so, until further regulatory guidance is provided, or unless the order is revoked or invalidated (we may see the Order rescinded based on the upcoming presidential election results), employers covered under the order may want to:

- Review their training programs for compliance.
- Maintain records of any training provided to ensure that the employer can provide information about the scope and content of its workforce training if it is later subject to an audit or investigation.

If you have any questions regarding the Order and how it may apply to your organization and training materials, please contact any member of and the [Barley Snyder Employment Practice Group](#).

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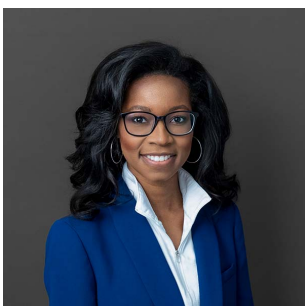


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