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President forbids contractors from training on “divisive” concepts regarding race, sex

By Cara Crotty
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President Trump signed an **Executive Order** on September 22, titled “**Combating Race and Sex Stereotyping.**” The Order focuses on prohibiting the federal government, the U.S. military, *and federal contractors* from promoting race or sex stereotyping or scapegoating through workforce training.

The Executive Order creates a new contract clause to be inserted in all government contracts and subcontracts to which Executive Order 11246 applies. (EO 11246 prohibits federal contractors from discriminating against employees or applicants on the basis of race, color, religion, sex, sexual orientation, gender identity, and national origin, and requires contractors to take affirmative action to employ females and minorities.)

Under yesterday’s Executive Order, organizations entering into federal contracts or subcontracts must agree that they will 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 the concepts that

- (a) one race or sex is inherently superior to another race or sex;
- (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- (e) an individual’s moral character is necessarily determined by his or her race or sex;
- (f) 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;



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(g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or

(h) 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 Executive Order labels these topics as “divisive concepts.”

In addition, the Executive Order defines “race or sex stereotyping” 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.” “Race or sex scapegoating” 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. 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.”

The Executive Order specifically provides, however, that it does not prevent contractors “from promoting racial, cultural, or ethnic diversity or inclusiveness, provided such efforts are” not inconsistent with its mandates.

The Executive Order includes a notice and posting obligation for contractors. The federal contracting officer will provide contractors a notice regarding the requirements of the Executive Order, and contractors will be required to post this notice “in conspicuous places available to employees and applicants” as well as provide it to any union with which they have a collective bargaining agreement.

The Office of Federal Contract Compliance Programs must develop a “hotline” to receive and investigate complaints that a contractor is providing training in violation of the Executive Order. The OFCCP is also directed to publish a notice in the *Federal Register* “seeking information from Federal contractors, Federal subcontractors, and employees of Federal contractors and subcontractors regarding the training, workshops, or similar programming provided to employees. The request for information should request copies of any training, workshop, or similar programming having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities.”

These new requirements apply to new contracts with the government and covered subcontracts that are entered into on or after November 21, 2020. (Contractors that have difficulty identifying when the organization enters into new or amended federal contracts should consider ensuring compliance on this effective date.)

The Executive Order states that its purpose is to promote economy and efficiency in federal contracting, as well as “to combat offensive and anti-American race and sex stereotyping and scapegoating.” To support this premise, the President’s Order explains,

many people are pushing a . . . vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.

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Unfortunately, this malign ideology is now migrating from the fringes of American society and threatens to infect core institutions of our country. Instructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country, even in components of the Federal Government and among Federal contractors. For example, the Department of the Treasury recently held a seminar that promoted arguments that “virtually all White people, regardless of how ‘woke’ they are, contribute to racism,” and that instructed small group leaders to encourage employees to avoid “narratives” that Americans should “be more color-blind” or “let people’s skills and personalities be what differentiates them.”

In addition to the requirements noted above for federal contractors, the Executive Order

- Prohibits the U.S. military from instructing service members to believe any divisive concepts.
- Mandates that federal agencies identify programs for which the agency may condition receipt of grant funds on certification that federal funds are not used to promote divisive concepts.
- Requires federal agencies to ensure that training provided to federal employees does “not teach, advocate, act upon, or promote in any training to agency employees any of the divisive concepts.”
- Directs the Attorney General to determine whether “workplace training that teaches the divisive concepts . . . contributes to a hostile work environment in violation of Title VII of the Civil Rights Act of 1964.”
- Suggests that the Attorney General and the Equal Employment Opportunity Commission “issue guidance to assist employers in promoting diversity and inclusive workplaces without violating Title VII.”

This Executive Order will undoubtedly be viewed as political in nature and will most certainly be rescinded if Vice President Joe Biden is elected in November. Meanwhile, however, federal contractors should review all training materials to ensure that any component that could fall within the purview of “divisive concepts” is eliminated.

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