

October 2020

Dawn Siler-Nixon  
Nancy Van der Veer Holt  
Cymoril M. White

***PRESIDENT TRUMP'S EXECUTIVE ORDER ON  
COMBATING RACE AND SEX STEREOTYPING:  
WHAT DOES IT MEAN FOR GOVERNMENT CONTRACTORS?***

On September 22, 2020, President Trump signed Executive Order 13950, Combating Race and Sex Stereotyping (EO), which seeks to “combat offensive and anti-American race and sex stereotyping and scapegoating” and end so-called “divisive concepts” covered in some workplace trainings. The EO establishes requirements aimed at “promoting unity in the Federal workforce” by prohibiting messages in workplace trainings that imply “an individual, by virtue of their race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously.” The EO comes at a time when many American businesses have been increasing their focus on equity, diversity, and inclusion and issuing public statements denouncing racism and injustice in the wake of events such as George Floyd’s death. In this context, it is critical to understand what the EO does and does not require of government contractors. It is also important to recognize that the EO’s lasting impact and its enforceability are uncertain, as the nation awaits the outcome of the upcoming election and expected legal challenges to the EO.

***Who Is Impacted?***

In general, the EO covers federal contractors, federal agencies, certain federal grant recipients, and the military. While parts of the EO are effective immediately, its workplace training restrictions apply to federal contracts entered into after November 21, 2020, for those contractors (Government Contractors) covered by Executive Order 11246 and over whom the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) has jurisdiction. The training restrictions in the EO appear to apply to

trainings for all employees of Government Contractors and their subcontractors, regardless of whether those employees support a federal contract.

Federal grant recipients may also be impacted by the EO if the head of the agency that issues the grant programs identifies the recipient’s grant program as one for which the agency will require recipients to make certifications as a condition of receiving the grant. The certifications will involve confirming that the federal funds will not be used to promote eight enumerated concepts (set forth below) involving race and sex stereotyping and scapegoating.

***What Does the EO Cover?***

The EO seeks to combat “division and inefficiency” in federal contracting by prohibiting contractors from providing employee training on “divisive concepts,” which the EO defines as ideas such as “race or sex stereotyping” or “race or sex scapegoating.”

- **Race or sex stereotyping** “means 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** “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.”

The EO also lists the following proscribed training topics:

- 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 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; 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.

These topics mirror the eight certifications that may be required of certain grant recipients under the EO.

#### ***What Are the Notice Requirements?***

Covered contractors must conspicuously post a notice (to be provided by the agency's contracting officer) where it will be seen by employees and applicants for employment. Covered contractors must also provide this notice to all labor unions or similar entities with which they have a collective bargaining agreement and must include specific language regarding prohibited training concepts, notice requirements, and noncompliance penalties in all subcontracts and purchase orders.

#### ***How Will the EO Be Enforced?***

The OFCCP is tasked with investigating complaints and enforcing the EO. The OFCCP has already established a hotline to field whistleblower complaints alleging that a Government Contractor is utilizing prohibited training programs in violation of EO 13950. The EO also requires the OFCCP to publish

in the Federal Register, no later than October 22, 2020, a request for information from Government Contractors and subcontractors, as well as their employees. As part of this request for information, the OFCCP will seek (1) copies of any training, workshop, or similar programming having to do with diversity and inclusion, and (2) information about the duration, frequency, and cost of those activities.

#### ***What Are the Potential Penalties for Noncompliance?***

Government Contractors can potentially face rather steep penalties, including cancellation/termination or suspension, in whole or part, of their federal contracts, as well as debarment and/or monetary sanctions.

The Attorney General will also assess the extent to which workplace training that teaches the "divisive concepts" outlined in the EO may contribute to a hostile work environment under Title VII. The Attorney General and the EEOC may issue future guidance "to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII."

#### ***What Does This Mean for Covered Contractors?***

Government Contractors—many of whom have recently invested in equity, diversity, and inclusion initiatives—may understandably be unsure about how to proceed in light of the EO. The EO applies specifically to "training"; it does not apply to policies or other documents that employers may publish as part of their equity, diversity, and inclusion efforts. If the EO is fully implemented, its terms could trigger significant modifications to current equity, diversity, and inclusion trainings, including how and whether concepts such as unconscious bias, privilege, sexual harassment, and meritocracy are addressed. Yet, the EO does not appear to prohibit training or dialogues involving cultural competence, generational diversity, microaggressions, communications across differences, mindfulness, and trainings unrelated to race or gender, to name a few.

The future of the EO is uncertain, given the upcoming presidential election and rumblings from many organizations regarding possible legal challenges. If a new administration takes over in January 2021, the EO will likely be rescinded, even if implemented briefly in the interim. If President Trump is reelected, potential legal challenges lodged on various grounds—including policy concerns (failure to follow rulemaking procedures, to obtain agency or congressional input, or

to be supported by data) and the First Amendment—may also impact enforceability of the EO.

Employers anticipating entering into new covered federal contracts and Government Contractors planning on renewing federal contracts after November 21, 2020, may want to proactively evaluate their equity, diversity, and inclusion training programs and determine whether any changes may be appropriate to avoid penalties under the EO. However,

many Government Contractors will likely want to wait on further regulatory and legal developments before undertaking any major programming adjustments.

*Dawn Siler-Nixon is the diversity and inclusion partner at FordHarrison (Tampa), Nancy Van der Veer Holt is a partner at FordHarrison (Washington D.C.), and Cymoril M. White is an associate at FordHarrison (Tampa).*



**It's a REALITY!**

**PELRF is going all VIRTUAL this year!**

**October 22-23, 2020**

Now in its 46th year, the Public Employment Labor Relations Forum is the longest running annual seminar put on jointly by two sections of The Florida Bar. PELRF focuses on labor and employment issues affecting public employers, public employees, and the unions that represent public employees.

This year's PELRF will focus on several hot topics in public labor and employment law.

***PELRF 2020 will now be held as a virtual GoToWebinar only.***

**[Click here to register](#)**

**NOTE:** This seminar was originally scheduled as a live in-person and webcast presentation. Due to the low number of registrants, it has been changed to a virtual GoToWebinar. If you were registered for the in-person event, you will receive a refund and will need to register again for the webinar. If you were registered for the webcast, your registration has been switched to the webinar, and you will receive a refund for the difference.