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New Executive Order Limits Contractors' Anti-Discrimination Trainings

Government Contractor Compliance & Regulatory Update Blog on **September 24, 2020**

Quick Hit:

On September 22, 2020, President Trump issued an "Executive Order on Combatting Race and Sex Stereotyping" (the "Order"). The Order, among other things, requires new contracts entered into with the federal government to include a clause prohibiting federal contractors from including certain concepts in diversity and awareness trainings – including certain concepts that are common in unconscious bias and societal privilege trainings. Failure to comply may result in a variety of penalties and sanctions, including debarment.

Key Takeaways:

Although many concepts the Order seeks to prohibit are not controversial (such as the teaching of racial or gender superiority), others appear aimed at some aspects of unconscious bias and societal privilege trainings that have become increasingly common in the wake of the country's renewed focus on racial justice and equality. We have already received many inquiries from government contractor clients seeking to understand the Order's prohibitions and how they impact their diversity and inclusion efforts. The Order appears to apply only to contractors who enter into new contracts with the federal government beginning in late November, but depending on how it is implemented, the Order may impact existing government contractors.

Before entering into new contracts containing the provision, contractors should be sure they understand the prohibitions to which they are agreeing and assess whether such restrictions are compatible with their diversity and inclusion training efforts and commitments.

Contractors should also monitor regulatory developments related to the Order, including a planned request for information related to their training efforts.

More Detail:

The Order's preamble notes its intent to "combat offensive and anti-American race and sex stereotyping and scapegoating," that is contrary to the "fundamental premises underpinning our Republic: that all individuals are created equal and should be allowed an equal opportunity under the law . . . ." The Order suggests that certain anti-racism efforts undermine merit systems currently in place and are, themselves, fundamentally racist.

The Order notes that contractors "should . . . continue to foster environments devoid of hostility grounded in race, sex, and other federally protected characteristics" and that "training employees to create an inclusive workplace is appropriate and beneficial." However, in fostering such environments, the Order seeks to prohibit contractors from providing certain forms of popular trainings to their employees aimed at addressing racism, sexism, and oppression.

To that end, the Order requires that, beginning 60 days after its issuance, new federal contracts include a clause prohibiting the contractor from "inculcat[ing] in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts that:

- 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 or 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 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."

Trainings that “assign[] fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex” are also prohibited. Contractors with contracts containing this new clause will have to include these requirements in their applicable subcontracts and purchase orders.

In accordance with the Order, contractors subject to the new contractual provision, will also have to send a notice to each of its labor unions advising of the contractor’s commitments pursuant to the Order and post the notice in places available both to employees and applicants.

Contractors with contracts containing the new provision face cancellation, termination, or suspension of their contracts if they fail to comply, and they risk debarment and the possibility of additional remedies and sanctions.

In addition to the above requirements, the Order directs the Office of Federal Contract Compliance Programs (“OFCCP”) to establish a hotline to receive and investigate complaints that contractors are implementing prohibited trainings, and to take “appropriate enforcement action and provide remedial relief, as appropriate.” Further, the Order requires OFCCP’s Director to publish, within 30 days of the issuance of the Order, a request for information in the Federal Register seeking information regarding contractors’ training of their employees, including “copies of any training, workshop, or similar programing having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities.” Exactly what is to be done with this information is not addressed by the Order.

We will continue to advise our readers of developments related to this Order.

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