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OFCCP Releases Guidance on Executive Order Limiting Contractors' Anti-Discrimination Trainings

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Quick Hit:

The U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") has issued guidance on President Trump's September 22, 2020 "Executive Order on Combatting Race and Sex Stereotyping" (the "Order") which restricts the concepts which contractors may include in anti-discrimination and diversity trainings provided to their employees. Though much of the publication summarizes key provisions of the Order, two key components provide important guidance: (1) although the Order's prohibitions will only apply directly to contractors with contracts executed after November 21, 2020, OFCCP warns including the prohibited concepts in trainings may also violate the non-discrimination obligations found in Executive Order 11246 which apply to all federal contractors; and (2) OFCCP does *not* view the Order as barring *all* forms of unconscious bias or implicit bias trainings.

Key Takeaways:

Whether or not federal contractors are parties to contracts entered into after November 21, 2020, all contractors need to be aware of the restrictions contained in the Order, particularly given the hotline OFCCP established last week to receive complaints about trainings that violate the Order. Contractors should also review the Order carefully to understand its precise parameters as they assess whether to enter into new contracts with the federal government. Contractors may determine that they can continue their existing training programs and comply with the letter of the Order. For example, as OFCCP has recognized, contractors can continue to provide their unconscious bias and similar trainings, provided they do not teach that a particular race or sex is "inherently racist, sexist, or oppressive."

Contractors should also be aware that the Order, and OFCCP's actions in response to it, reflect a growing focus on race discrimination of any kind, as opposed to only discrimination against traditionally disadvantaged groups. Contractors must be aware that some efforts at increasing diversity and inclusion can be viewed as discrimination against white employees and that while OFCCP may not have been as focused on such issues in the past it clearly is now. Indeed, recent press reports indicate OFCCP has initiated investigations of government contractors in response to their announced efforts to increase minority representation in their employee ranks.

More Detail:

As we previously reported, the Order, among other things, requires new federal government contracts to include a clause prohibiting federal contractors from including certain concepts in diversity and awareness trainings – including certain concepts that may appear in unconscious bias and societal privilege trainings.

OFCCP's recent publication provides further guidance on how the Order will work in practice. First, OFCCP notes that contractors who implement training programs that include race or sex stereotyping or scapegoating may not only be violating the Order, but also could violate Executive Order 11246 which prohibits discrimination "against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin." The recent guidance indicates that trainings related to race or sex stereotyping may not "ensure . . . that employees are treated, during employment, without regard to race [or sex]," even though these sorts of trainings are often designed to accomplish exactly that. As such, contractors who do not enter into new contracts with the Order's prohibitions may still find themselves subject to OFCCP investigation if they offer trainings that violate the Order's restrictions.

Second, the guidance notes that although many types of unconscious bias trainings are prohibited (including training based on the notion that individuals, by virtue of their protected characteristics are "racist, sexist, oppressive, or biased, whether consciously or unconsciously"), the training is permitted "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." This matches the text of the Order which bars implicit bias training that teaches that members of a certain race or sex are "inherently" racist, sexist or oppressive.

As always, we will continue to advise our readers of further developments related to the Order.

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