SQUIRE PATTON BOGGS

Federal Contractors: President Trump Issues Executive Order on Combating Race and Sex Stereotyping That Targets Reverse Discrimination

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Overview of the Executive Order and Implications for Federal Government Contractors

On September 22, 2020, President Trump issued Executive Order 13950, Combating Race and Sex Stereotyping (the EO). The Executive Office of the President published it in the *Federal Register* on September 28, 2020.

According to the EO, "it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes." The EO addresses federal government contractors, the United States Uniformed Services and federal grant programs. Concerning federal government contractors, the EO applies to all government contracts, except for contracts exempted by section 204 of Executive Order 11246 of September 24, 1965, Equal Employment Opportunity. The EO also includes a section discussing federal grant programs and directing agencies to identify grant programs where recipients could be required to provide certain training certifications. Such a list is to be provided to the Director of the Office of Management and Budget within 60 days of the date of the EO.

The EO is effective immediately, except for the requirements of Section 4 – Requirements for Government Contractors – which are effective November 21, 2020. Federal agencies must include certain contractual provisions outlined in the EO in all government contracts entered after November 21, 2020. Specifically, those provisions mandate that contractors "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," and according to the EO, this includes:

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

Failure to comply with the requirements of the EO may result in the contract being canceled, terminated, or suspended in whole or in part. Further, the contractor may be declared ineligible for future government contracts. It is important to note that any exclusion is not an automatic or one-sided process. The government is required to follow an administrative process before a contractor is excluded from future government procurements. Further, the contractor has the opportunity to participate in the process before the government makes a final decision.

The EO also directs the Department of Labor, through the Office of Federal Contract Compliance Programs (OFCCP), to establish a hotline and investigate complaints received that a contractor's training program violates this EO or Executive Order 11246. It is important to note that the OFCCP recently announced that the hotline is established and already open to receive complaints via phone or email. It further provides that within 30 days, OFCCP will publish a request for information in the Federal Register seeking information from contractors, subcontractors and employees regarding training, workshops or similar programming provided to employees. According to the EO, this should include "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."

On September 28, 2020, the Office of Management and Budget issued a memorandum titled "Ending Employee Training that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for All." The memorandum provides EO-related guidance to federal agencies.

Practical Steps for Government Contractors

The current language of the EO leaves open many questions for government contractors trying to determine how to comply with these new training requirements. Until further regulatory guidance is provided, or unless the EO is revoked or invalidated, government contractors should take the following steps to ensure that they are prepared to meet the requirements of the EO.

1. Government contractors should gather all of their training materials on diversity, subconscious bias or similar trainings, to understand what language is used and what topics are included in these trainings, as well as to be able to provide such information if they receive a request for information from OFCCP. This review should include all third-party and vendor training materials leveraged by contractors, including any online training modules.
2. Government contractors should identify which training materials could be deemed to be "divisive concepts" as described in the EO (i.e. "[C]onsciously 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").
3. Government contractors should be prepared to remove such training materials that could be deemed to be in violation of the EO.
4. And, finally, in an abundance of caution, government contractors may also want to have their training materials reviewed by counsel to discuss what changes, if any, should be implemented prior to the November 21, 2020 deadline.

Employment Law Implications

The EO's guidelines radically deviate from most employers' current diversity and inclusion trainings and initiatives, and likely state legislation mandating or promoting certain training for workers, particularly of late.

First, if this EO stands, then a significant portion of subconscious bias and diversity trainings are at risk. Pursuant to Section 4 of the EO, employers who are government contractors may not provide any workplace training that "inculcates in its employees any form of race or sex stereotyping or any form of 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."

Government contractors are also required to send a notice of their obligations under the EO to their labor unions, and to post copies of the notice in "conspicuous places" available to both employees and applicants. Further, as discussed above, contractors are required to include the provisions of paragraphs (1) through (4) of Section 4 of the EO in all subcontracts and purchase orders, to ensure that these obligations are also binding on their vendors and subcontractors. Thus, the EO will significantly impact government contractors' working relations with their employees, and even with their subcontractors and suppliers.

Importantly, all employers should be aware of the provision of the EO (Section 8) concerning Title VII, specifically instructing the Attorney General to "continue to assess the extent to which workplace training that teaches the divisive concepts set forth in section 2(a) of this order may contribute to a hostile work environment and give rise to potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq." The effects of this provision may result in employers experiencing an uptick in reverse discrimination cases.

Potential Future Litigation Arising From the EO

Given its focus on the content of government contractor's workplace training programs, the EO raises serious First Amendment questions that will likely lead to litigation. Under the "unconstitutional conditions" doctrine, the government cannot deny a benefit to a private citizen "on a basis that infringes his constitutionally protected freedom of speech" – even if the party has no "entitlement" to the benefit itself. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). In *Umbehr*, the Supreme Court extended this protection to government contractors. *Id.* at 684–85. By requiring government contractors to refrain from providing workplace training programs that cover specific "concepts" (e.g., that "members of one race or sex cannot and should not attempt to treat others without respect to race or sex"), EO 13950 plainly reaches protected speech. Indeed, the EO leaves no doubt that its very purpose is to restrict certain speech and belief: "Federal contractors will not be permitted to inculcate such views in their employees." Companies subject to EO 13950's requirements may, therefore, argue that the EO unconstitutionally conditions government contract work on a contractor's agreement to cease and refrain from engaging in constitutionally protected speech.

The lack of specificity in the EO's requirements may also raise "void for vagueness" concerns. Under the "void for vagueness" doctrine, a government edict must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). When an order "is capable of reaching expression sheltered by the First Amendment, the doctrine demands a great degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). A person of ordinary intelligence may very well struggle to discern the scope of several of EO 13950's requirements – e.g., the nebulous bounds of "divisive concepts" or the requirement that a training program should not make any individual "feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex." This lack of specificity threatens to chill protected speech, as companies are forced to decide whether to forego diversity and inclusion training or risk transgressing EO 13950's unclear boundaries.

Sit Tight

Notwithstanding the EO's intent, in its current form, to abolish trainings for critical race theory, diversity, subconscious bias and cultural sensitivity for many employers, employers reasonably may wish to sit tight for now as events unfold. Notably, the requirements of Section 4 apply to contracts signed on or after November 21, 2020. As the November 3 Presidential election looms close, we may see a shift in the requirements (or even the existence) of the EO itself based on the election results.

Contacts

Karen Harbaugh
Partner, Washington DC
T +1 202 457 6485
E karen.harbaugh@squirepb.com

Benjamin Wood
Partner, Washington DC
T +1 202 457 6685
E benjamin.wood@squirepb.com

Katharine Liao
Partner, New York
T +1 212 872 9804
E katharine.liao@squirepb.com

Scott Coyle
Senior Attorney, Cincinnati
T +1 513 361 1257
E scott.coyle@squirepb.com

Lauren Herz
Associate, New York
T +1 212 872 9820
E lauren.herz@squirepb.com

Danielle Mehta
Associate, Washington DC
T +1 202 457 6328
E danielle.mehta@squirepb.com

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squirepattonboggs.com

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