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## Executive Order on Combating Race and Sex Stereotyping

On September 22, 2020, President Donald Trump issued an Executive Order on Combating Race and Sex Stereotyping. In the near term, this order requires government contractors to review their diversity, equal opportunity, and sexual harassment training.

### **New Mandatory Contracting Clause**

Of particular relevance to contractors,<sup>1</sup> the order requires the following language in every<sup>2</sup> government contract signed after November 21, 2020:

During the performance of this contract, the contractor agrees as follows:

1. The contractor shall 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; (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 term "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, and the term "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.

2. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under the Executive Order of September

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<sup>1</sup> The order also imposes similar regulations on grant recipients, which will be the topic of a separate client alert.

<sup>2</sup> The Secretary of Labor has the authority to promulgate regulations exempting certain agencies and contracts from the order's requirements.

22, 2020, entitled Combating Race and Sex Stereotyping, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

3. In the event of the contractor's noncompliance with the requirements of paragraphs (1), (2), and (4), or with any rules, regulations, or orders that may be promulgated in accordance with the Executive Order of September 22, 2020, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246, and such other sanctions may be imposed and remedies invoked as provided by any rules, regulations, or orders the Secretary of Labor has issued or adopted pursuant to Executive Order 11246, including subpart D of that order.

4. The contractor will include the provisions of paragraphs (1) through (4) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

### **What does this mean?**

The new contract language bars contractors from holding trainings that teach "any form of race or sex stereotyping or any form of race or sex scapegoating." The government considers the following ideas as race or sex stereotyping or scapegoating:

- That any character trait, value, moral or ethical code, privilege, status, or belief should be ascribed to any race or sex;
- That any race or sex is superior to any other;
- That any person's race or sex makes them inherently racist or sexist;
- That any person should be discriminated against or suffer adverse action because of their race or sex;
- That members of one race or sex should not attempt to treat members of other races or sexes without regard to their race or sex;
- That any person's race or sex determines their moral character;
- That any person bears responsibility for past acts committed by members of their race or sex;
- That any person should feel guilt or any other form of mental discomfort because of their race or sex;
- That meritocracy and hard work are racist or sexist concepts, or created to oppress others.

The new contract language also requires contractors to flow the language down to all subcontractors, and to notify all labor unions or workers' representatives of the contractor's obligations. Federal contractors will also have to post a notice in "conspicuous places available to employees and applicants for employment" of the contractor's obligations under the order.

## What should I do?

Diversity, equal opportunity, and racial and sexual harassment training has become a fixture in most corporate cultures as a prophylactic against discrimination charges. Most of the concepts the order forbids should not affect your company. For example, it is unlikely that your trainings include the concept that any race or sex is superior to another. Others, however, may prove more difficult.

For example, some trainings include discussions of race or sex-based privilege. Under this order's terms, a training that posits the existence of race or sex-based privilege would be racial or sexual stereotyping. Similarly, a training that includes examples of historical oppression of some races by others in order to contextualize present-day discrimination might run afoul of the prohibition on teaching that any person bears responsibility for past acts by members of their race or sex, or that they should feel guilt or discomfort because of their race or sex.

We suggest that you undertake a review of your company's diversity, equal opportunity, and racial and sexual harassment training materials and ensure that none of them reflect any of the topics listed in paragraph 1 of the new contract language. We are, of course, more than willing to help with that process and work with your human resources department to amend your current materials or, if needed, develop new ones.

We also suggest that you ensure that any outside vendors providing diversity, equal opportunity, and racial and sexual harassment training are aware of the order, and that when providing training to your employees they must abide by it. Again, we are happy to review your vendor agreements and suggest changes to incorporate the order's requirements.

## Penalties

This order carries significant teeth. Failure to comply with the new contract language can result in a termination for cause, cancellation of award, or suspension of the contract. It could also lead to debarment.

President Trump has directed the Office of Federal Contract Compliance Programs to set up a hotline to report violation of the executive order. OFCCP will also post a request for information by October 22, 2020, in which it will seek information from government contractors on their trainings, workshops, or similar programs dealing with diversity and inclusion.

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