



Critical Legal Updates for Federal Contractors and Subcontractors

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Executive Order Bans Federal Contractors from Providing Implicit Bias Training

In response to ongoing social justice protests and the heightened sense of awareness pertaining to matters of racial equity, many employers have taken proactive steps to address issues of race discrimination in the workplace; largely by engaging in diversity, equity, and inclusion initiatives that involve discussions about implicit bias – a framework that recognizes how psychological factors related to “sameness” and “otherness” can perpetuate racism and other forms of discrimination, such as discrimination on the basis of an individual’s race, gender, national origin, or sexual orientation.

However, employers who contract with the federal government must now rethink their approaches to workplace diversity or risk losing federal contracts and/or facing possible debarment. Following an announcement by the Trump Administration on September 22, 2020 of its “Executive Order Combatting Race and Sex Stereotyping” (Executive Order), federal contractors are now prohibited from conducting any workplace training program for or with their employees that features what the Executive Order refers to as “divisive concepts,” including a prohibition on diversity trainings that teach about implicit bias or the concept of white privilege.

The Executive Order directs federal agencies “not to promote race or sex stereotyping or scapegoating” and not to permit federal contractors or federal subcontractors to “inculcate such views in their employees.”

Effectively banning contractors from engaging in any form of training on implicit bias, the Executive Order prohibits any workplace training program that “includes the concepts” that “[a]n 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; “[or] is inherently racist, sexist, or oppressive, whether consciously or unconsciously.”

The Executive Order also prohibits topics 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.” This includes discussions about racial

prejudice and stereotyping or other theories or practices that examine racism in America's history and institutions. The Executive Order asserts that "[t]his destructive ideology is grounded in misrepresentations of our country's history and its role in the world."

The Executive Order comes approximately two weeks after the Office of Management and Budget (OMB) ordered federal agencies to redirect funding for certain diversity training programs in a memo where it classified such anti-bias education as "un-American propaganda."

Effective immediately, federal contractors are required to post a notice explaining the Executive Order's tenets in a conspicuous place and must send notices of the Executive Order to any union representatives.

Contractors also must comply with the Executive Order's mandate that specific language prohibiting such trainings is to be included in all new contracts with federal agencies and must make certain that such provisions appear in all subcontractor agreements. These specific contract terms are excerpted in an endnote below.^[i]

Penalties for non-compliance include the suspension, cancellation, or termination of the federal contract(s), debarment of the contractor and denial of eligibility for future contracts, and other sanctions to be adopted by the Secretary of Labor. These penalties must be weighed against both federal and state-level anti-discrimination laws and are likely to be challenged by employee advocates and state attorneys general in federal courts.

Regarding enforcement, the Executive Order charges the Department of Labor, through the Office of Federal Contract Compliance Programs (OFCCP), with establishing a hotline and investigating complaints of prohibited training programs. By October 22, 2020, the OFCCP is also tasked with promulgating a request for information seeking data from federal contractors and subcontractors, and from employees of federal contractors and subcontractors, regarding any trainings, workshops, or similar programming provided to employees.

The official White House page for the Executive Order may be found [here](#).

OFCCP Issues New Compliance Review Scheduling List

Each year, the OFCCP issues its Scheduling List of federal contractors and subcontractors that it intends to audit for the coming year. There are different types of audits the agency may conduct, and the audits may be largely paperwork driven, focusing mostly on the contractor's Affirmative Action Plan and related documentation of recruiting and hiring efforts, or they may involve a more in-depth review of diversity initiatives through on-site interviews with managers and employees. In these "Focused" audits, the OFCCP may target review of hiring of disabled individuals or disability accommodations, religious accommodations, promotions, or compensation, or may conduct "glass ceiling" audits for management and leadership positions. For employers, OFCCP audits can be time-consuming, very expensive, and exhaustive.

A list of companies that have been placed on the OFCCP's Scheduling List for Supply & Service or

Construction evaluations during the period from October 1, 2020 through September 31, 2021 can be found **here**. Please review the report to determine if your company is listed. If so, it is imperative that the company get prepared for the audit. The actual audit will be triggered by the OFCCP sending a Scheduling Letter, which normally gives the employer a mere 30 days to compile and produce voluminous records pertaining to recruiting, hiring, promotions, terminations, and other personnel actions, as well as production of at least the most current Affirmative Action plan and documentation of efforts to reach affirmative action goals.

OFCCP Announces Two New Types of Audits

In 2018, OFCCP issued a Focused Review Directive to introduce a comprehensive initiative aimed at examining compliance with specific portions of contractors' equal employment opportunity obligations.

For the first time in 2020, the OFCCP has rolled out two new types of compliance audits: Promotions Focused Reviews and Accommodations Focused Reviews.

a. Promotions Focused Reviews

Responding to reports and data concerning "glass ceilings" and other pay disparities that limit the upward mobility of qualified women, people of color, and differently-abled employees within organizations, the OFCCP will now be conducting Promotions Focused Reviews to analyze contractor data, policies, and other internal practices related to promotions to ensure that federal contractors are meeting their equal opportunity obligations.

OFCCP Compliance Officers (COs) will review historical trends of promotion and retention, and audits will include interviews with both employees and supervisors who have the authority to approve or deny employee advancement.

b. Accommodations Focused Reviews

Accommodations Focused Reviews are aimed at ensuring compliance with federal standards regarding issues of religious freedom and accessibility to the workplace for disabled individuals. COs will now examine contractors' policies and procedures related solely to religious and disability accommodations. Accommodation Focused Reviews will consist of interviews with supervisors and employees, as well as in-depth reviews of documentation relating to requests for accommodation, with a particular emphasis on a company's denial(s) of accommodation.

Generally, both religious and disability accommodations should be granted unless the employer can show that the accommodation would cause the organization to suffer "undue hardship" requiring a fact-specific analysis that considers the cost of the accommodation and the size of an organization and its ability to afford granting accommodation requests.

In sum, the landscape for federal contractors is changing again. Companies that do business with the federal government should carefully review the Executive Order, and they also must determine if they are listed on the OFCCP's Scheduling List for audit in this coming year and prepare accordingly.

Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

[i] Sec. 4. Requirements for Government Contractors. (a) Except in contracts exempted in the manner provided by section 204 of Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), as amended, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

?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 [sic] 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 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.?

Related People

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