

## Executive Order on Combating Race and Sex Stereotyping Frequently Asked Questions

### Q. What Is The Executive Order?

A. On September 22, 2020, President Donald J. Trump issued an Executive Order banning federal contractors from conducting training “based on race and sex stereotyping,” as well as training that “portrays certain races as oppressors.” The EO targets “divisive ideologies,” and explains that it became necessary “to combat a radical ideology that has infiltrated diversity training throughout American institutions.” Additionally, the EO requires that agencies review their grant programs and orders the agencies to identify programs that would require a recipient to certify that they would not use Federal funds to promote concepts of “divisive ideologies”.

### Q. What Types of Programs Would the EO Ban?

A. The EO bans federal grants to programs unless such programs certify that they will not promote “divisive concepts.” The EO will also ban training by qualifying federal contractors on the same “divisive concepts”. The EO defines divisive concepts to include any notions that promote that:

- (1) one race or sex is inherently superior to another race or sex;
- (2) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive,
- (3) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- (4) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- (5) an individual’s moral character is necessarily determined by his or her race or sex;
- (6) 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;
- (7) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
- (8) 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 “divisive concepts” also includes any other form of race or sex “stereotyping” or any other form of race or sex “scapegoating.”

### Q. Does The EO Ban All D&I Training?

A. No. We suspect most of your D&I training will be unaffected by the EO. The White House Fact Sheet

accompanying the EO notes that diversity training is permitted where “no one feels marginalized because of his or her race or sex.” While that admittedly is an impossibly vague and unhelpful standard, the Executive Order itself makes clear it does not

“prevent agencies, the United States Uniformed Services, or contractors from promoting racial, cultural, or ethnic diversity or inclusiveness, provided such efforts are consistent with the requirements of this order.”

The EO also makes clear that “[n]othing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts [identified in the EO] in an objective manner and without endorsement.”

## Q. Our nonprofit aims to address the implicit and unconscious biases all people have. Will this be impacted by the Executive Order?

A. Of all the programs likely to be impacted by the Executive Order, implicit/unconscious bias is at the top of the list. Indeed, the term “unconscious bias” is on the list of OMB’s dirty words, i.e., words that “may help to identify the type of training and/or programs prohibited by the E.O.”

According to DOL, unconscious or implicit bias training is banned if it suggests that people may be unconsciously biased by virtue of their race or sex. As that pretty much describes what most/all implicit bias training is about, it’s not easy to visualize what compliant implicit bias training would look like.

Here is the actual language from the DOL memorandum:

“Unconscious or implicit bias training is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously. Training is not prohibited 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.”

Walking the line between training that is “designed to inform” and training that implies that an individual may be unconsciously biased will be no easy task.

This background notwithstanding, there does seem to be some room to maneuver so long as one maneuvers carefully. One approach is to discuss implicit bias as something that impacts every human being, regardless of race, as opposed to a given race, sex, or ethnicity. That would not run afoul of the rule as written, although it still could put up a red flag.

## Q. Does The EO Apply To Me? Who Does It Cover? Are There Any Exceptions?

A. The Executive Order likely does apply to you. The Executive Order applies to Federal Contractors as defined below as well as Federal Grant Programs as identified by the various agencies.

As it pertains to Federal Contractors, the EO states that all contracts are covered except those “exempted in a manner provided by” Section 204 of the Equal Employment Opportunity Executive Order. (E.O. 11246, Sept. 24, 1965) DOL has not released guidance on the exemptions applicable here, but under its Section 204 authority, DOL has exempted the following classes of contracts (among others) are from the Equal Employment Opportunity requirements:

1. Transactions of \$10,000 or less;

2. Contracts for work outside the United States (and performed by employees not recruited in the United States);
3. Contracts with State or local governments; or
4. Contractors who are religious entities.

Remember, though, if this clause makes its way into even one of your Federal awards and/or contracts, it applies organization-wide.

## Q. When Does The EO Go Into Effect, And How Will It Find Its Way to My Nonprofit?

A. Most of the Executive Order is effective immediately. For example, DOL's complaint hotline is up and running, and as of October 7, DOL already has received and started investigating complaints against unnamed federal contractors.

However, as it pertains to Federal Grant programs, the EO requires that within 60 days (i.e. November 21, 2020), the heads of agencies report to the OMB a list of grant programs that would be in violation of the EO and/or that will be required to certify that they will not promote the "divisive ideologies".

Finally, keep in mind, to the extent your nonprofit is considered a "government contractor" under the EO, the DOL OFCCP maintains the right to conduct investigations into pre-November 21 activities pursuant to its existing investigative authority under EO 11246.

## Q. How Will The Government Audit/Investigate Compliance?

A. With respect to the training aspect of the EO, the Department of Labor, Office of Federal Contract Compliance Programs, has set-up a hotline (both phone and e-mail address) to receive complaints alleging violations of the Executive Order. Upon receipt of a Complaint, the OFCCP immediately will investigate the allegations in accordance with its "standard procedures." However, unlike other audits performed by the OFCCP, an investigation for violations of this Executive Order likely will be fairly swift as it will be heavily focused on documents reflecting training given and/or available to employees. Additionally, it will not be as data driven as other OFCCP audits; instead, it will be subjectively focused on how the complainant feels and/or how others felt when receiving the training.

DOL's enforcement here likely will align with the Agency's broader efforts to scrutinize companies' heightened focus on diversity and inclusion programs. Just recently, we have observed the DOL undertake investigations into two large companies whose diversity programs seek to promote and/or hire various minority groups.

## Q. What Steps Can I Take Right Now To Mitigate Risk?

A. Everyone is struggling as to what they should do in response to the Executive Order, if anything. Obviously, companies are in a tough spot here. The EO flies in the face of the demands of employees, customers, and other stakeholders that we all take meaningful action to right unfairness and injustice. In this complicated context, here is a list of potential steps (in no particular order) a prime contractor or subcontract might take to mitigate risk.

- Develop a plan to review current training to identify potentially violative components.
- Evaluate the language used to describe your programs. Here again are the terms the DOL claims will "help to identify the type of training prohibited by the E.O.": "critical race theory," "white privilege," "intersectionality," "systemic racism," "positionality," "racial

humility,” and “unconscious bias.” While these terms are not banned, they clearly will signal a potential non-compliance to an agency reviewer.

- Review current training and related communications to identify “red flag” words, and consider replacing those words with equally impactful, non-red-flag words. For example, consider focusing on fairness, equity, and inclusion for all rather than focusing on a specific group.
- Review your hotline and hotline communications to incorporate language that encourages potentially aggrieved employees to notify the Company in the first instance rather than going straight to the Government. Just remember, do not suggest in any way that they do not have the right to go to the Government directly.
- Ensure required posters are hung appropriately.
- Ensure unions are notified appropriately.
- Craft flow-down language for subcontractors and vendors.
- Craft a flow-down representation for vendors delivering diversity/inclusion training through which those vendors can represent their training meets the requirement of the Executive Order.
- Evaluate ongoing programs to provide opportunities to under-represented classes of employees.
- Evaluate implicit/unconscious bias training to ensure it focuses on the inherent biases of all people as opposed to people of a certain race, gender, or ethnicity.