

# New executive order and accompanying OFCCP FAQs demands federal contractors and grantees scrutinize all diversity workforce training

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On September 22, 2020, President Trump issued an Executive Order on Combating Race and Sex Stereotyping.

The Order is directed squarely at federal contractors and subcontractors and states that its purpose is to “promote economy and efficiency in Federal contracting, ... unity in the Federal workforce, and ... combat[] offensive and anti-American race and sex stereotyping and scapegoating.”

The Order is effective immediately but is applicable to contracts issued after November 22, 2020 (60 days after the order).

The Order seeks to prohibit policies or training that “perpetuate[] racial stereotypes and division and [which] use subtle coercive pressure to ensure conformity of viewpoint,” citing examples of new workforce training implemented at federal entities (Argonne National Laboratories, Sandia National Laboratories, and the Smithsonian Institution).

The Order is premised on the belief that diversity policies and training that indicate the United States is structurally racist and assign “fault, blame, or bias” to members of a race or sex because of their race or sex serve to “reinforce biases and decrease[] opportunities for minorities.”

Moreover, the Order extends beyond the federal supply chain to federal grants, mandating that all agencies identify within 60 days those grants that should be conditioned on a certification that a grantee will not employ workplace training and policies that promote race and sex stereotyping and scapegoating.

The Order builds on Executive Order 11246, directed to federal contractors and subcontractors, first promulgated by President Johnson a year after the passage of the Civil Rights Act of 1964 and subsequently amended, to (1) prohibit discrimination in employment based on race, color, religion, sex, national origin, sexual orientation and gender identity (the latter two were added by President Obama in Executive Order 13672 and kept in place by the Trump administration); and (2) require affirmative action (and in the case of contractors with over 50 employees and a contract of at least \$50,000, require written affirmative action plans) to ensure that in both hiring and during the course of their employment, prospective and existing employees are treated

without regard to race, color, religion, sex, national origin, sexual orientation and gender identity.

Federal contractors should be well familiar with these obligations as they are present in every contract over \$10,000 and are embodied primarily in FAR 52.222-26 (“Equal Opportunity”) — which directs the application of Department of Labor regulations to contractors, including 41 C.F.R. Part 60-1 (requiring annual compliance reports via Form EEO-1) and Part 60-2 (requiring affirmative action programs) — and FAR 52.222-25 (“Affirmative Action Compliance”).

The Order does not change any of these requirements, acknowledging the long-standing commitment by the government to prohibit contractors from engaging in race and sex discrimination and to require contractors to “take affirmative action that such discrimination does not occur.”

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Rather, the Order states that “race or sex stereotyping or scapegoating” is contrary to these requirements.

The Order requires all federal contracts issued after November 22, 2020, to include the following provision:

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.

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Contractors subject to this clause must (1) post copies of a notice establishing this commitment in conspicuous places available to employees and applicants for employment, and (2) advise its labor unions of such policies.

Moreover, potential penalties for noncompliance include default termination, suspension, debarment, and the panoply of penalties and remedies available to the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP").

Finally, the Order directs contractors to flow down the clause in their subcontracts and purchase orders so that these directives will be binding on each subcontractor and vendor.

In addition to highlighting the always-present risk of an OFCCP audit, the Order requires the OFCCP to establish a hotline for employees (and any third parties) to report violations of the Order — now in the form of a directed email on the OFCCP website<sup>2</sup> — and requires the OFCCP to

investigate all complaints and take appropriate enforcement actions.

Moreover, the OFCCP is instructed to require, by means of a request published in the Federal Register no later than October 22, 2020, all federal contractors, subcontractors, and employees of such contractors to supply information regarding 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 October 7, 2020, OFCCP published its first guidelines on the Order in the form of nine questions and answers (Guidelines<sup>3</sup>). The Guidelines do little to expand or explain the requirements of the Order or to address how contracting officers will incorporate the Order's requirements in new contracts (or incorporate modifications or newly issued task orders in existing indefinite delivery, indefinite quantity contracts) or whether the inclusion of the new requirements will depend on the promulgation of a contract clause under the direction of the Federal Acquisition Regulatory Council and/or the Department of Labor. The Guidelines do identify a separate telephonic hotline for raising violations of the Order, now included on the OFCCP website,<sup>4</sup> and provide that complaints will be investigated following OFCCP's standard complaint procedures, which require the completion of a prescribed complaint form.<sup>5</sup> In addition, the Guidelines provide that the Department of Labor is on track to release by October 22, 2020, the Request for Information mandated by the Order, seeking information from federal contractors, subcontractors, and their employees regarding training, workshops, or similar programming that may be in violation of the Order and of Executive Order 11246.

As we enter election season, it is uncertain how long this Order will survive and the extent to which it will be enforced.

Regardless, the Order demands that immediate — and considered — action be taken by federal contractors, federal grantees, and their respective supply chains.

This is especially true in light of recent and well-publicized changes to workforce diversity training programs announced by many companies in the federal supply chain.

A failure to closely scrutinize workforce training programs or the abandonment of such programs in fear of a possible violation may well lead to a plethora of complaints by employees alleging a violation of the Order or a violation of the affirmative action obligations embodied in Executive Order 11246 and its progeny.

This rock-and-a-hard-place situation contractors find themselves in could lead to a variety of complaints, an unwelcome investigation by the OFCCP, and possible contract termination and/or other adverse penalties.

(Editor's note: This article has been updated to reflect a recent update to OFCCP's guidelines.)

## Notes

- <sup>1</sup> <https://bit.ly/30A8vb0>
- <sup>2</sup> <https://bit.ly/2Swh2aN>
- <sup>3</sup> <https://bit.ly/33TXpQn>
- <sup>4</sup> <https://bit.ly/2SSrtWo>
- <sup>5</sup> <https://bit.ly/3jXv0hT>

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