



ACC NCR Roundtable: Discussion On Executive Order 13950 – Combatting Race and Sex Stereotyping and its Impacts, Post Election

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Erin L. Felix
Shareholder
Government Contracts
efelix@polsinelli.com



Tony W. Torain, II
Shareholder
Labor & Employment
ttorain@polsinelli.com



Jack Blum
Associate
Labor & Employment
jack.blum@polsinelli.com

What Executive Order 13950 Does and Does Not Do

- EO 13950 **does not** prohibit all D&I training
 - Employers, including federal contractors and grantees, should still conduct permissible D&I training
- EO 13950 **does** prohibit trainings that include certain aspects of “critical race theory”
 - “Divisive concepts,” “race and sex stereotyping,” “race and sex scapegoating”

Key Definitions – “Divisive Concepts”

- One race or sex is inherently superior to another
- The United States is fundamentally racist or sexist
- Individuals are inherently racist or sexist because of their race or sex, whether consciously or unconsciously
- Individuals should receive adverse treatment because of their race or sex
- Members of one race or sex should not attempt to treat others without respect to race or sex
- Moral character is necessarily determined by race or sex
- Individuals are responsible for past actions committed by members of the same race or sex
- Individuals should feel guilt, anguish, or discomfort because of their race or sex
- Meritocracy or hard work ethic are racist or sexist, or were created to oppress

Key Definitions – “Race or Sex Stereotyping and Scapegoating”

- “Race or Sex Stereotyping” means ascribing character traits, virtues, moral and ethical codes, **privileges**, status or beliefs to a race or sex, or to an individual because of their 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, including claiming that members of a race or sex are inherently or unconsciously biased or oppressive.

EO 13950's Examples of Prohibited Concepts

- EO 13950 lists examples of federal trainings that are deemed problematic:
 - “Virtually all White people, regardless of how ‘woke’ they are, contribute to racism”
 - Employees should avoid “narratives” that Americans should “be more color-blind” or “let people’s skills and personalities differentiate them”
 - “Racism is interwoven into the fabric of America”
 - Employees should “acknowledge their privilege to each other”
 - Concepts like “objective, rational linear thinking” and “hard work being key to success” are “aspects and assumptions of whiteness”

Takeaways

- Many of the “divisive concepts” are academic concepts not typically found in corporate D&I trainings
- Biggest issues:
 - White privilege
 - White fragility
 - Unconscious/implicit bias
 - Color-blindness

Unconscious/Implicit Bias

- OFCCP guidance:
 - “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”
- Likely acceptable – “We all hold biases and stereotypes about others and need to be cognizant of that in our workplace interactions”
- Prohibited – “White people are unconsciously biased against minorities”

Carve-Outs from EO 13950

- EO 13950 does not prohibit contractors from “promoting racial, cultural, or ethnic diversity or inclusiveness”
- EO 13950 does not “prohibit discussing, as part of a larger course of academic instruction, the divisive concepts . . . in an objective manner and without endorsement”

Coverage of EO 13950

- Three pathways for an entity to be subject to EO 13950:
 - After November 21 – most federal contracts will have a clause incorporating EO 13950
 - After November 21 – agencies will identify grants for which federal funds may not be used in violation of the EO 13950
 - **Now** – per OFCCP, EO 13950's prohibitions overlap with the pre-existing anti-discrimination obligations in EO 11246

Pathways to Enforcement

- EO 13950 explicitly provides that it does not create any enforceable rights
 - No direct employee suits for EO 13950 violations
- OFCCP has established a complaint hotline
- Potential for OFCCP to request training materials in audits
- Copycat arguments in private discrimination litigation?
 - Issue: need adverse employment action

Potential Sanctions

- Under EO 13950, potential sanctions include:
 - Cancellation or suspension of contracts
 - Debarment from federal contracting
- In practice, OFCCP rarely pursues these drastic sanctions and focuses on remedial action and obtaining relief for affected employees

OFCCP Follow Up to EO 13950

- September 29, 2020 – OFCCP opens complaint hotline for “whistleblowers”
- October 7, 2020 – OFCCP issues FAQ guidance
- October 21, 2020 – OFCCP issues Request for Information
- October 21, 2020 – OFCCP holds stakeholder call regarding the EO
- November 2, 2020 – OFCCP/EEOC/DOJ interagency memo increases OFCCP complaint investigation authority



OFCCP Request for Information

- Contractors or others can submit training materials to OFCCP for review
- If a contractor submits materials, OFCCP will provide compliance assistance and will exercise discretion not to pursue enforcement
- Responses are entirely voluntary
- Responses are due by December 1, 2020


Best Practices to Respond to EO 13950

- Don't stop holding D&I trainings
- Review training materials to identify potential “divisive concepts,” scapegoating, or stereotyping
- Written instructions to third-party consultants regarding compliance expectations
- Emphasize the trainer's “steering” role in ensuring compliance during discussion portions
- Instruct managers who participate in sessions about EO 13950's prohibitions

Reading the Post-Election Tea Leaves

- If President Trump is re-elected:
 - Full steam ahead at OFCCP in enforcing EO 13950
 - Push for EEOC to incorporate EO 13950 into Title VII guidance?

- If Vice President Biden is elected:
 - EO 13950 likely to be rescinded
 - Biden OFCCP is unlikely to focus on D&I training in enforcing EO 11246



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