

The Latest on EO 13950: The Fate of Workplace Diversity Training May Rest on the Election

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Amanda M. Brahm



Rae T. Vann

With the 2020 presidential election upon us, workplace EEO and diversity, equity, and inclusion (DE&I) professionals are pondering the fate—or staying power—of Executive Order 13950, “Combating Race and Sex Stereotyping.” Signed by President Donald Trump on September 22, 2020, EO 13950 prohibits federal agencies, the military, government contractors and sub-contractors, or any recipient of federal aid (including many institutions of higher education and non-profits) from conducting workplace training that contains racially “divisive” or “anti-American” concepts.

The Executive Order has been roundly criticized by workers and a number of business groups, already has been challenged in court, and is the subject of federal legislation introduced in the U.S. House of Representatives that would legislatively rescind it. Although introduction of the House bill is largely symbolic—since it has no chance of advancing this congressional term—it is widely expected that the Executive Order will be swiftly rescinded if Democratic presidential nominee Joe Biden ascends to the presidency.

Nevertheless, the U.S. Department of Labor has already established a complaint “hotline” to receive reports of training programs or content suspected of violating EO 13950 and recently published a Request for Information in the *Federal Register* seeking information from covered contractors and federal grant recipients regarding the content of existing diversity trainings. Because violations can result in significant penalties—including contract debarment or grant cancellation—every organization subject to EO 13950 needs to understand its implications for existing and planned workplace diversity and anti-bias training.

In sum, EO 13950, which goes into effect this month, has direct implications for implicit bias and other existing workplace diversity programs, and DOL has established an online complaint mechanism—through which it already has received more than 100 complaints of possible violations—and has promised to pursue enforcement where violations are found to exist.

What Does EO 13950 Require?

Executive Order 13950 is a culmination of efforts by the Trump Administration to target so-called “anti-American” ideas around the history and nature of race and sex discrimination in the United States. In September 2020, the White House Office of Management and Budget (OMB) issued Memorandum M-20-34, “Training in the Federal Government,” after it came to the “President’s attention that Executive Branch agencies have spent millions of taxpayer dollars to date ‘training’ government workers to believe divisive anti-American propaganda.” The Memorandum requires executive departments and agencies to identify all contracts or spending related to training on “critical race theory” and “white privilege,” and trainings that suggest that the United States is an inherently racist or evil country, or imply that any race or ethnicity is inherently racist or evil. According to OMB, all contracts fitting those criteria must be canceled if it is legal to do so.

Executive Order 13950 goes further, prohibiting federal agencies as well as federal government contractors and grant recipients from conducting workplace training that “inculcates” views such as “race or sex stereotyping” or “scapegoating,” as those terms are defined in the Executive Order itself. “Race or sex stereotyping” is defined in EO 13950 as “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.” “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.”

The Executive Order identifies nine sweeping training concepts as divisive and impermissible. These “divisive concepts” include teaching that:

- One race or sex is inherently superior to another race or sex;
- The United States is fundamentally racist or sexist;
- An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

- An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- An individual's moral character is necessarily determined by his or her race or sex;
- 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;
- Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; and
- Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

All federal contracts entered into after November 21, 2020, must include a clause prohibiting the use of any training “that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating” as described above. Federal contractors and subcontractors also must provide notice to labor unions, and post a notice that is visible to all employees and applicants, that details contractor obligations under the Executive Order.

What Kind of Diversity Training Content Is Permitted?

The Executive Order has left many institutions questioning what kind of diversity training is still allowed, especially in light of seemingly inconsistent statements by DOL officials charged with interpreting and enforcing the new rules. For instance, DOL's Office of Federal Contract Compliance Programs (OFCCP) Director Craig Leen said in public remarks that implicit/unconscious bias training is “perfectly fine” so long as it “teaches that everyone, based on the human condition, has unconscious biases.” At the same time, DOL Secretary Eugene Scalia expressed the view early on that teaching employees that being “color-blind and regard[ing] one another as equal is wrong and offensive” is impermissible.

Secretary Scalia has since clarified in more explicit terms what the Executive Order “does not do.” Specifically, in remarks that he made on October 12, 2020, Secretary Scalia stated that, “[i]t does not prohibit workplace training about non-discrimination and equal opportunity” and “does not prohibit trainings about pre-conceptions or biases that people may have—regardless of their race or sex—about people who are different, and which could cause slights or even discrimination that's not intended.”

EO 13950 Whistleblower Hotline Up and Running

As required by the Executive Order, on September 28, 2020, OFCCP launched an online hotline to allow employees of covered employers to report any training that includes “divisive concepts” and/or which a complainant believes violates the law. The OFCCP has published FAQs outlining the Executive Order's requirements, and made clear at that time that it would begin investigating claims immediately.

Worth noting, shortly after launching the hotline, Director Leen sent letters of inquiry to Wells Fargo and Microsoft questioning each company's recent public statements of commitment to increasing their workplace racial diversity, especially in management and leadership ranks in the next several years. According to OFCCP, more information is required from the companies to ensure they are not discriminating on the basis of race in violation of existing nondiscrimination laws.

What Companies Should Do To Avoid EO 13950 Noncompliance

Even if there's some possibility that the Executive Order may eventually be rescinded by executive or legislative action, organizations subject to its requirements *now* are wise to consider taking steps to evaluate their potential exposure and minimize risk. Among other things, organizations should:

- Review existing in-person diversity and anti-bias trainings, including resources housed in any Learning Management Systems (LMS), for language or content that may implicate the Executive Order's bar against sex or race stereotyping or “scapegoating”
- Assess whether any on-demand, third-party, off-the-shelf products being used in connection with DE&I training and initiatives include terms or language that could be considered “divisive”
- Consider reaffirming your commitment to EEO, nondiscrimination, and diversity and inclusion in employee communications or policy statements
- Consider establishing an informal, internal process or mechanism for employees to report concerns about existing training program content and designate a company point-of-contact to answer questions and receive and resolve complaints
- Ensure that managers, supervisors, learning development, and diversity and inclusion professionals are briefed on, and understand, the requirements of EO 13950.

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