

Executive Order Combats Race and Sex Stereotyping

SEPTEMBER 29, 2020

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On September 22, 2020, President Trump signed a new executive order “On Combating Race and Sex Stereotyping.” The new order applies to federal contractors, federal agencies, and federal grant recipients and bans training that “inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating.” The term “race or sex stereotyping” is defined as “ascribing character traits, values, moral and ethical codes, privileges, status, or belief to a race or sex, or to an individual because of his or her race or sex.” The term “race or sex scapegoating” is defined as “assigning fault, blame, or bias to a race or sex, or to members of a race of sex because of their race or sex.”

As a practical matter, the executive order will limit the diversity and inclusion, sexual harassment, and related equal employment opportunity (“EEO”) training that has become mainstay for many employers. The executive order provides the following eight (8) examples it aims to ban from training:

- One race or sex is inherently superior to another race or sex;
- 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; or
- Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

As an anecdotal, the executive order lists the following that would fall into the scope of training:

- A Federal entity stating the racism is interwoven in every fabric of America and that statements like “color blindness” are “actions of bias”;

- A Federal entity stating that “rationality over emotionality” was a characteristic of “white male[s]”; or
- A federal museum claiming that concepts like “objective, rational linear thinking” being the “key to success” was “aspects and assumption of whiteness.”

As the executive order states: “All of this is contrary to the fundamental premises underpinning our Republic: that all individuals are created equal and should be allowed an equal opportunity under the law to pursue happiness and prosper based on individual merit.”

The executive order also requires contractors to insert a contract clause in their subcontractor and purchase order agreements prohibiting the use of any workplace training, which includes the eight bullet points above. Such provision must be included 60 days after the date of the executive order - November 21, 2020. Further, employers must send notice to their labor unions and post such notice in conspicuous places available to applicants and employees. Penalties for non-compliance include contract cancellation, suspension, or debarment, as well as investigation for Title VII violations.

In a similar vein, although not dealing with a private employer, the city of Seattle recently created a diversity training program aimed to address “[h]ow white people internalize the system of white supremacy.” Described as anti-racism rhetoric, a program like Seattle’s may actually violate Title VII of the Civil Rights Act. Such programs in the private sector would violate the new order *and* Title VII.

As the executive order does not apply to all private entities, it is still vital that each employer reevaluate its EEO policies and procedures to comply with Title VII. As in the Seattle example, singling out employees by race, for any reason, may lead to unnecessary Title VII risks and violations. As a general rule: setting up any program that categorizes some as purveyors of a hierarchical system and others as victims will open the door to legal liabilities and should be avoided by all employers.

Talking about race and sex in America is increasingly fraught these days, especially in the workplace. This order does not limit the discussion but merely provides a framework where employers treat individuals under the purview of equality of law. Employers’ obligation under federal and state law is to provide a workplace free from sex and race discrimination. Employers will want to continue to update and monitor their policies and procedures to make sure they are complying with these laws.

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