

The President's Executive Order on Combating Race and Sex Stereotyping: What Colleges and Universities Need to Know

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On September 22, 2020, President Trump issued an Executive Order¹ (EO) aimed at curbing the use of certain modern diversity and equity training concepts in federal agencies, the Armed Services, and federal contractors and grantees. The EO, which generally takes effect immediately,² could have a significant impact on how institutions of higher education address race and sex stereotyping at a time that campuses are participating in a national conversation around race and inequitable treatment across society. On September 28, 2020, the Office of Management and Budget issued a Memorandum (OMB Memo) that provides additional information about the EO.³ Campuses need to closely monitor developments arising from this EO, which may limit their ability to deploy some of the modern, research-informed tools used in that discussion.

I- Covered Entities

The covered entities under the EO are:

- Federal Agencies
- Armed Services (including ROTC)
- Federal contractors and their sub-contractors
- Federal grantees

Some institutions of higher education, through their faculty or staff, may offer covered training topics (or, more precisely, use covered topics within such training) to federal agencies. Many institutions of higher education are government contractors and/or receive federal grant funds from any of an alphabet soup of agencies. Except where narrowly exempted, all *future* federal contracts will include terms barring use of the covered training topics, and contractors will have to post copies of a relevant notice for employees and share that notice with collective bargaining groups. Where there are violations, contracts may be cancelled or contractors suspended or

¹ <https://www.whitehouse.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/>.

² There is a short lead-up time for sections around contracting language, development of a reporting hotline, and data gathering.

³ <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-37.pdf>.

debarred from future awards. These terms must be decanted into any sub-contracts and purchase orders, unless exempted.

The bar on federal agencies using such training (whether developed by federal employees or contractors) takes effect immediately, and the OMB Memo states strongly that “[n]oncompliance by continuing with prohibited training will result in consequences, which may include adverse action for Federal employees who violate the Order.”

Institutions that host ROTC programs “shall not teach, instruct or train any member...to believe any of the divisive concepts” and ROTC members shall not face penalties or discrimination by refusing to participate. Inasmuch as ROTC members are also students (and sometimes employees), it is unclear whether such limitation applies only to use of such topics within their ROTC training or to use in any of their education or experiences at the institution.⁴

Note that contractors have to pledge in future contracts that they “shall not use any workplace training that inculcates in its employees” the covered training topics. This does not appear to be limited to training within their contract and the plain language could be interpreted broadly to cover all of their employees (whether involved in the federal work or not). The OMB Memo lends support to this broad interpretation, stating, “Federal contractors are to be required to represent that they will not conduct such trainings *for their own employees*, with potential sanctions for noncompliance (emphasis added). The EO uses slightly different language to cover federal grants, requiring that federal agencies “review their respective grant programs and identify programs” that will require, as a condition of receipt, that the recipient “not use Federal funds to promote the” covered concepts.⁵ A plain language interpretation of that requirement would be that grantees may teach such concepts (using internal institutional or other funds), but may not use federal funds to do so. This is consistent with the OMB Memo which requires a review of grants that would “require the recipient to certify that it *will not use Federal funds* to promote the divisive concepts (emphasis added). It is unclear whether this distinction of breadth is intentional.

While the EO places requirements on future governmental contracts, the OMB Memo goes further, writing that “[e]xisting contracts should be reviewed to ensure that training is consistent with this E.O. and any work identified as inconsistent is immediately removed, if necessary and permissible through a partial termination for convenience of the government.” Future contracts must include the requirement in the contractual language.

⁴ Note also the limited academic exception described in Section II below.

⁵ The OMB Memo also declares that “although training and education for employee development may...be an allowable cost...training or education on the divisive concepts...is not an allowable cost unless otherwise provided by law.

The EO makes a passing reference to a carve out for education, stating (in full) that “[n]othing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts listed in section 2(a) of this order in an objective manner and without endorsement.” It is unclear how the EO would define its “objectivity” and “non-endorsement” requirements. The OMB Memo goes further than the EO, saying that agencies must look at *all* grants (not just training grants) and restrict the use of federal funds (including funds used to meet institutional cost share requirements) “from being used to promote the divisive concepts set forth in the E.O. (*including by conducting research premised on these concepts*)” (emphasis added). As discussed in Section III below, concerns over institutional and individual First Amendment academic freedom may arise from this requirement and the impact it may have on both teaching and research.

Institutions of higher education regularly conduct training that may be impacted by the requirements of the EO. Workplace diversity training is common and even required by law in certain states and localities. Student conduct, campus law enforcement, and Title IX investigators and adjudicators often are taught about the impact of implicit bias and how to focus solely on the facts and circumstances of a disclosure, not the identity of the complainant, respondent, or witnesses. Many institutions have programming, readings, or coursework to help understand the impact of privilege on getting to, and staying in, the educational or employment program. Institutions may wish to take a close look at the training and programming they use, especially where it may overlap with work by or with covered entities.

The EO still allows covered entities to “foster environments devoid of hostility grounded in race, sex, and other federally protected characteristics. Training employees to create an inclusive workplace is appropriate and beneficial. The Federal Government is, and must always be, committed to the fair and equal treatment of all individuals before the law.” Further, “training that will foster a workplace that is respectful of all employees” may be continued and covered entities are not prevented from “promoting racial, cultural, or ethnic diversity or inclusiveness, provided such efforts are consistent with the requirements of” the EO.⁶

II- Prohibited Training Topics (generally referred to in the EO as “divisive concepts”)

The EO lists four anecdotal examples of training offered to federal employees, and refers to them as based on “a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status

⁶ This is echoed in the OMB Memo allowing for continuation of “all training that will foster a workplace that is respectful of all employees;” just not using any of the prohibited training topics.

as human beings and Americans.” The EO makes a reference to educational institutions, arguing that “training like that discussed above perpetuates racial stereotypes and division and can use subtle coercive pressure to ensure conformity of viewpoint. Such ideas may be fashionable in the academy, but they have no place in programs and activities supported by Federal taxpayer dollars.”

The EO bars the use of three types of concepts in trainings that are given by or for covered entities: “Divisive concepts,”⁷ “Race or sex stereotyping,”⁸ and “Race or sex scapegoating.”⁹ While much of the language of these definitions, on their face, is written in a neutral manner, several aspects of the definition will run counter to approaches taken by many institutions to address historical patterns of discrimination, including the prohibition on teaching inherent, unconscious bias; training that touches on a shared responsibility for past or present inequities on the basis of race or sex; training that could lead *any* individual to even feel “discomfort” or “guilt” on account of their race or sex; or training that the modern “meritocracy” has a disparate impact *or* was created to be oppressive. Per the EO, “the term ‘divisive concepts’ also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating,” a very broad “catch all” definition that will likely be subject to interpretation.

The OMB Memo interpreting the EO goes further, and directs agencies to supplement their reviews of training curricula with a “broader keyword search of agency financial data and procurements for terms including, but not limited to: ‘critical race theory,’ ‘white privilege,’ ‘intersectionality,’ ‘systemic racism,’ ‘positionality,’ ‘racial humility,’ and ‘unconscious bias.’” Some may find this list to be very broad, and to encompass scholarly and practical concepts that are not necessarily examples of “divisive concepts” as defined in the EO. The use of several fairly broad search terms may lead to a chilling effect for researchers and trainers in these areas that goes well beyond the more narrow examples of trainings complained of in the EO.

⁷ (a) “Divisive concepts” means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual’s moral character is necessarily determined by his or her race or sex; (7) 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; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) 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.

⁸ (b) “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.

⁹ (c) “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. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

III- Overlap with Other Laws and Executive Orders

Institutions may find implementation of this EO confusing and potentially in contradiction to other EOs issued by this Administration concerning speech and inquiry. It appears that the EO will limit the speech of both private companies and public entities that work with or receive certain funds from the federal government, in a way that we have not seen before. It appears to at least partially override the traditionally recognized institutional academic freedom that institutions of higher education have to determine, among other things, “what may be taught.”¹⁰ This new EO at least appears inconsistent with the President’s recently signed Executive Orders to “prevent[] online censorship”¹¹ and “improv[e] Free Inquiry, Transparency, and Accountability at Colleges and Universities,”¹² as well as the Department of Education’s recently issued Regulations to protect free inquiry (which called on public and private colleges to “foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment to the U.S. Constitution for public institutions and compliance with stated institutional policies regarding freedom of speech, including academic freedom, for private institutions).”¹³ Institutions may be forced to censor students and staff who believe in and wish to train or conduct research on the covered topics, in spite of their academic freedoms and the plain language requirements of these other Executive Orders, or else risk a loss of federal grants or contracts (or even debarment). It is possible that future regulations or guidance may clear up some of these inconsistencies.

IV- Next Steps

Certain aspects of the EO will be subject to rulemaking. That, and agency guidance,¹⁴ may help answer some of the questions left open by the text of the EO and OMB Memo. The EO also anticipates that agencies will do some analysis of contracts and grants that are covered and how they are covered, that a hotline will be developed for employees that receive such covered training to report it to the federal government for investigation and action, and that there will be a request for information for copies of such training published in the Federal Register.¹⁵

¹⁰ “It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Sweezy v. New Hampshire*, 354 U.S. 234, 262-63 (1957) (Frankfurter, J., concurring).

¹¹ <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>.

¹² <https://www.whitehouse.gov/presidential-actions/executive-order-improving-free-inquiry-transparency-accountability-colleges-universities/>.

¹³ <https://www2.ed.gov/about/offices/list/ope/freeinquiryfinalruleunofficialversion09092020.pdf>.

¹⁴ The OMB Memo states that the Office of Personnel Management (OPM) will issue further guidance to agencies on certain aspects of the EO.

¹⁵ “Within 30 days of the date of this order, the Director of OFCCP shall publish in the Federal Register a request for information seeking information from Federal contractors, Federal subcontractors, and employees of Federal contractors and subcontractors regarding the training, workshops, or similar programming provided to employees. The request for information should request copies of any training, workshop, or similar programming having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities.”

The EO empowers agency Inspectors General to investigate covered training and take appropriate action, and the OMB Memo encourages employees to report such trainings to their Inspector General. There will also be an analysis by the Justice Department of the extent to which the training barred in the EO “may contribute to a hostile work environment and give rise to potential liability under Title VII.”

The Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) issued a non-binding FAQ on the EO.¹⁶ While the FAQ doesn’t add anything substantive beyond the other documents, it does list the contact information for the hotline and indicates that complaints will be investigated “immediately.” Noting that any individual or group may file a complaint, the FAQ adds, “Third parties may also file a complaint on behalf of an individual or a group.” This may become an area of activity for certain organizations to file complaints.

While we await clarity on these many issues, it is important to recognize that the EO expressly does not prohibit workforce training that promotes mutual respect and inclusivity. Institutions should not read this EO as a prohibition on diversity and inclusion training, but must take care in considering the design of those trainings, particularly when given in the course of administering a federal contract. While the EO generally references future contracts and grant awards, the OMB Memo does have language regarding review of current use of federal funds, which could result in programs being cancelled. Institutions should take care in reviewing both current and future contracts and grants.

This SCItations Blog Post does not constitute legal advice and no attorney/client relationship is formed. Situations and facts can vary significantly, and readers are encouraged to bring specific questions to campus or outside counsel.

¹⁶ <https://www.dol.gov/agencies/ofccp/faqs/executive-order-13950>.