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**MEMORANDUM**

DATE: October 12, 2020

TO: Education Attorneys

FROM: Dave Stoler, Sr. Assistant Attorney General  
Education Division Chief

Aileen Miller, Sr. Counsel  
Olympia Section Chief

Justin Kjolseth, Assistant Attorney General

SUBJECT: **Initial Guidance Concerning Executive Order on Combating Race and Sex Stereotyping (EO 13590, issued on September 22, 2020)**

**1. What does this Executive Order prohibit?**

“Divisive Concepts”

**2. What is a Divisive Concept?**

- (1) One race or sex is inherently superior to another race or sex;
- (2) The United States is fundamentally racist or sexist; *\*(not included in list of prohibited concepts in the grant and contract sections);*
- (3) An individual, by virtue of their 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 their 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 their race or sex;

# ATTORNEY GENERAL OF WASHINGTON

October 12, 2020

Page 2

- (7) An individual, by virtue of their 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 their race or sex; or
- (9) Meritocracy or traits, such as a strong work ethic, are racist or sexist, or were created by a particular race to oppress another. The term “divisive concepts” also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating (defined below).
  - 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 their 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.

### **3. What does the Executive Order apply to right now?**

The Order is effective immediately. But, unless the Institute of Higher Education (IHE) is providing training directly to federal agencies, there does not appear to be any immediate actions an IHE must take, or any rules or regulations that the IHE is immediately in violation of. That said, see the caution under the OFCCP Hotline discussion below.

## **I. FEDERAL CONTRACTS**

### **4. What are the requirements for government contractors?**

After November 22, 2020, all new contracts entered into with the federal government, and probably also contract renewals, will contain language barring the use of “Divisive Concepts” in all workplace training. The prohibitions will extend to all federal subcontracts and require any IHE with a federal contract to provide notice to all bargaining units advising of the employer’s commitments under the Order. Despite the anticipated new language for federal contracts, there is still risk for IHEs who are federal contractors to wait until their contracts are renewed or amended to begin complying with the Order. This is because federal agencies could broadly interpret the compliance language of current contracts as a basis for enforcement of the Order. Given the anticipated request for information discussed below, IHEs can mitigate risk by starting to develop a record of compliance in the short term.

## ATTORNEY GENERAL OF WASHINGTON

October 12, 2020

Page 3

### **5. Will IHEs have to detail and report all of their current workforce trainings to the federal government?**

Those that are federal contractors will be subject to a request for information regarding training, workshops, or “similar programming” provided to its employees. The recent OFCCP FAQ says that the Department of Labor is currently drafting the Request for Information to meet the October 22, 2020, deadline. “The Request for Information will seek information from federal contractors, federal subcontractors, and employees of federal contractors and subcontractors regarding their training, workshops, or similar programming provided to employees that may be in violation of Executive Orders 11246 or 13950.”

### **6. What is the significance of the Department of Labor Office of Federal Contract Compliance Programs (OFCCP) launching its Hotline?**

While, technically, IHEs do not need to comply with the workplace training requirements until the new contract clauses are in effect, the press release announcing the opening of the Hotline said it could be used immediately to enforce a preexisting nondiscrimination EO 11246. That Order dates back to 1965 and is a general prohibition on discrimination by government contractors signed by President Johnson in the wake of the Civil Rights Act. It essentially ensures that Title VII discrimination protections are extended to employees of government contractors. This caution was reiterated in a recent OFCCP-released FAQ.

## **II. FEDERAL GRANT PROGRAMS**

### **7. When will the Order apply to federal grants?**

Unknown. By November 20, 2020, all federal agency heads must identify grant programs for which the agency may require the recipient, as a condition of the grant, to certify that it will not use federal funds to promote the “Divisive Concepts.” This will entail some review of the programs and their statutory authority. Agency directors must submit a report to the Office of Management and Budget (OMB) listing all grant programs so identified. It is unclear what OMB will do with that list of grants, but we can assume that at some point such conditions will be made a part of the identified grants and it is possible that they will be considered applicable to existing grants based on the wording of the existing nondiscrimination clauses.

### **8. Can the OMB apply the new requirements to existing grants, or only new ones?**

Unknown. According to a September 28, 2020 Memo from OMB, some process needs to take place before the prohibitions make their way into federal grants:

For those programs so identified, Federal awarding agencies must update their guidance, practices, and procedures to ensure that future notice of funding

## ATTORNEY GENERAL OF WASHINGTON

October 12, 2020

Page 4

opportunities and the terms and conditions of Federal awards restrict the use of Federal funds, including funds to meet cost share requirements, from being used to promote the divisive concepts set forth in the E.O. (including by conducting research premised upon these concepts), to the extent consistent with the statute(s) governing the grant program and all other applicable law.

Notwithstanding the above, there is standard language in all grants to the effect that all relevant laws will apply, as well as generalized requirements to abide by all nondiscrimination laws. Thus, there is some risk that federal agencies could attempt to enforce the new prohibitions based on current relevant nondiscrimination law.

### **9. Will the grant conditions also target workplace training? What exactly does it mean to “use federal funds to promote” something?**

The language in the Order simply provides that the recipient will not use federal grant funds to promote the Divisive Concepts. “Promotion” in this context is ambiguous. It is probably a good risk management idea to assume that certain federal agencies will take a broad interpretation. So, the scope of impermissible training activities is potentially much broader than workplace training. Therefore, such trainings should not be supported by federal funds.

## **III. MISCELLANEOUS**

### **10. What will an IHE need to do to comply with the contract or grant conditions?**

Basically, an IHE will have to avoid using “Divisive Concepts” in workplace training and cannot expend federal funds to promote the “Divisive Concepts.”

- **Grants**
  - Once affected grants are identified, review the list to ascertain the extent to which the IHE is a recipient of any affected grants. The Order requires that the list must be submitted by federal agency heads to OMB by November 21, 2020. It is unknown when the grantees will have access to the list or how they will be notified if they are the recipient of the grant.
  - Ensure that no Federal funds are used to promote “Divisive Concepts.” This can be satisfied, at least in part, by using clear accounting that delineates which funds are used for programming on sex and race discrimination.
  - Review any programming supported by Federal funds to ensure that the training does not promote “Divisive Concepts.” Search terms identified in the OMB September 28, 2020 Memo can be used as a starting point for this

October 12, 2020

Page 5

review: “‘critical race theory,’ ‘white privilege,’ ‘intersectionality,’ ‘systemic racism,’ ‘positionality,’ ‘racial humility,’ and ‘unconscious bias.’” If these terms appear in the programming, review to ensure that they are presented in a manner that does not apply to individuals based on sex or race. This will require fact specific analysis but it may be possible to present these concepts in a manner that does not violate the prohibitions in the Order.

- Document your review and efforts to comply.
- **Contracts/subcontracts**
  - After November 21, 2020, expect that contract provisions contained in the Order will be included in all Federal contracts and subcontracts.
  - During the term of such contracts, the IHE will be prohibited from using “workplace trainings” that include “Divisive Concepts.”
  - Review “workplace trainings” to ensure that they do not include “Divisive Concepts,” “race or sex stereotyping or any form of race or sex scapegoating.” As noted above, the search terms identified in the OMB September 28, 2020 Memo can be used as a starting point for the review. For example, presenting examples of sexual harassment by male, female, and nonbinary individuals and refraining from linking one gender identity to the role of complainant or respondent would safeguard against allegations that the training included sex stereotyping.
  - If you are a contractor or subcontractor, send a notice to your unions informing them of the Order’s prohibitions obligations and post in conspicuous places in the workplace. Document your review and efforts to comply.

**11. Does this mean that workplace trainings and federally funded programming cannot include the concepts identified as search terms in the OMB September 28, 2020 Memo?**

Not necessarily. While the OMB memo identifies search terms that may help to identify “Divisive Concepts” in training and programming, the memo recognizes that is a starting point for the review of DEI trainings. The “Divisive Concepts” identified in the Order are vague and contain built-in assumptions about the concepts being presented in DEI training; many of which are erroneous, and others that can be addressed through careful review and crafting of the trainings.

ATTORNEY GENERAL OF WASHINGTON

October 12, 2020

Page 6

As noted in the recent OFCCP-released FAQ:

Unconscious or implicit bias training is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously.

Training is not prohibited if it is designed to inform workers, or foster discussion, about preconceptions, 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.

This FAQ provides insight into how the Order might be enforced and reveals that concepts that may be taught in DEI training can still be taught and still fall within the scope of the order. For example, based on the language of the FAQ, teaching that all individuals are the product of society and their experiences, which results in each individual carrying their own unconscious or implicit biases, is not prohibited. Grounding that same training in the various tools designed to increase *individual* awareness of their own biases so that the IHE can promote a more inclusive workplace and campus, would safeguard against the argument that the training ascribes traits based on race or sex stereotyping. In other words, training that focuses on the concept of unconscious/implicit bias and the removal of barriers to creating a more inclusive workplace without using broad statements or assumptions about how individuals may be biased inherently based on their race or gender is, arguably, not prohibited.

On the other hand, while concepts such as privilege could also be included in DEI trainings in a manner similar to that described above, use of the terms “white privilege” or “male privilege” are likely prohibited. It may be that even these concepts could be presented carefully in a broader discussion of privilege, but it would likely expose the IHE to significant risk of being found in violation of the Order, than the approach outlined for unconscious bias.

Notably, while the Order prohibits Federal agencies and the military from teaching that “the United States is fundamentally racist or sexist,” that prohibition is not included in the grant and contract provisions. As such, there appears to be an ability to argue that concepts such as systemic racism can be included in IHE workplace trainings. It is also worth noting that anti-racism, “the policy or practice of opposing racism and promoting racial tolerance,” would not fall within the scope of the prohibited concepts; particularly if the focus is creating a more inclusive workplace and campus and eliminating barriers based on race or sex based stereotypes.

The approach taken by each IHE will depend on the IHE’s risk tolerance. Given the likelihood that future DEI training will result in complaints about non-compliance, it is advisable to consult with your assigned AAG in order to evaluate the risks associated with upcoming DEI training, and help to shore up the arguments in support of the training.

October 12, 2020

Page 7

**12. How does the Executive Order affect Title VII?**

Currently, it does not, but we may see guidance in the future. The Order directs the U.S. Attorney General to assess the extent to which workplace training that teaches the “Divisive Concepts” outlined in the Order may contribute to a hostile work environment and give rise to potential liability under Title VII. That would be a significant development and could mean that those contractors that are delivering implicit bias training are at risk of violating Title VII, depending on how the concepts are presented.

**13. Does the Executive Order apply to classroom teaching?**

Probably not. One of the general provisions states that nothing in the Order shall be construed to prohibit discussion of the “Divisive Concepts,” as part of a “larger course of academic instruction,” in an objective manner and without endorsement. Arguably, this means a class devoted solely to DEI instruction would not be exempted and, therefore, should not be supported by federal grant funds.

**14. Will it make a difference if DEI training is voluntary versus mandatory?**

This is unclear. For federal contractors, any employer-provided training, whether mandatory or discretionary, may be in play. The OFCCP FAQ provides the following: “The Request for Information will seek information from federal contractors, federal subcontractors, and employees of federal contractors and subcontractors regarding their **training, workshops, or similar programming provided to employees** that may be in violation of Executive Orders 11246 or 13950.” (Emphasis added.)

**15. What is the likely sanction for non-compliance?**

For violation of prohibitions in federal contracts, the new contract clauses will carry a clause that provides that the contract may be canceled, terminated, or suspended and that the contractor may be debarred from participating in future federal contracts. In addition, other unspecified sanctions may be imposed and remedies identified by the Secretary of Labor. The following appears in the recently issued FAQ from OFCCP:

Complaints received under the authority of Executive Order 11246 will be investigated immediately, following the agency’s standard procedures. Once Executive Order 13950 becomes effective in federal contracts, OFCCP will begin enforcing it. Contractors found in violation may have their contracts canceled, terminated, or suspended in whole or in part. The contractor may also be declared ineligible for further Government contracts in accordance with the procedures authorized in Executive Order 11246.

ATTORNEY GENERAL OF WASHINGTON

October 12, 2020

Page 8

For violation of grant conditions, all the usual remedies for violation of federal grants may apply, including loss of federal funds. Depending on where the U.S. Attorney General takes the direction to review Title VII, it is also possible that Department of Justice enforcement of civil rights statutes or prior civil rights executive orders could ensue.