

CLIENT ALERT: Executive Order Takes Aim at Diversity Training, Starting with New Restrictions on Federal Contractors

On September 22, 2020, President Trump signed an “**Executive Order on Combating Race and Sex Stereotyping**.” The Order seeks to regulate how diversity training is conducted within the federal government as well as by federal contractors and recipients of federal grants. It also seeks to lay the groundwork for its restrictions to potentially be expanded more broadly into federal guidance on hostile work environment discrimination. In particular, the Order takes aim at the inclusion of certain topics, which it defines as “divisive concepts,” in workplace training programs.

New Rules for Federal Contractors as well as their Subcontractors and Vendors

Federal contractors, as well as their subcontractors and vendors, will be directly impacted by this new Order. Most notably, federal contractors will be prohibited from providing any workplace training that teaches any of the “divisive concepts” (as defined by the Order). Federal contractors will also be required to include similar prohibitions in most of their subcontractor and vendor contracts for the purpose of binding the subcontractors and vendors to the Order and its prohibitions on training topics. In addition, federal contractors will be required to send notices about the Order to labor unions, if applicable, and to post such notices at the workplace.

These new requirements will take effect for most government contracts entered into after November 21, 2020.

Potential Future Implications for Federal Grant Recipients

The Order does not yet extend its training prohibitions to all federal grant recipients. Rather, it directs the heads of all federal executive departments and agencies to review their respective grant programs and to identify programs for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use federal funds to promote “divisive concepts” (as defined by the Order). The agencies are further required to submit a report of all such grant programs by November 21, 2020.

The Order’s Definition of “Divisive Concepts”

The Order defines “divisive concepts” to include the following concepts:

- (a) one race or sex is inherently superior to another race or sex;
- (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- (c) an individual should be discriminated against or receive adverse treatment solely or partly

because of his or her race or sex;

(d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;

(e) an individual's moral character is necessarily determined by his or her race or sex;

(f) 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;

(g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or

(h) 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 Order further provides that "divisive concepts" also include: (1) "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"; (2) "assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex"; and (3) "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."

Enforcement of the Order

The U.S. Department of Labor has been tasked with enforcing the Order and establishing a hotline for the receipt and investigation of complaints relevant to training programs that allegedly violate the Order.

If a federal contractor violates the Order, it may see the federal contract terminated or suspended, it may be barred from further business with the federal government, and it may be subject to additional sanctions by the U.S. Department of Labor.

Potential Impact on Title VII

The Order separately instructs the U.S. Attorney General to assess the extent to which teaching about "divisive concepts" (as defined in the Order) "may contribute to a hostile work environment and give rise to potential liability under Title VII of the Civil Rights Act of 1964[.]" The Order further instructs the U.S. Attorney General and the U.S. Equal Employment Opportunity Commission to issue public guidance as may be appropriate.

Next Steps for Employers

It is anticipated that the Order may be subject to several legal challenges – both with respect to its implementation and its overall legality. However, the Order is in effect until further notice and



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employers – particularly federal contractors – need to be prepared for potential compliance.

Given some of the Order's broad language, it is very possible that common elements of diversity training programs (e.g. implicit bias training) could potentially fall within the Order's prohibitions. Therefore, federal contractors, as well as their subcontractors and vendors, should review their training programs and materials to identify any portion that may be considered a "divisive concept" (as defined by the Order). They will then need to examine those issues closely to determine whether they need to be modified and/or eliminated in order to comply with the Order's restrictions.

Employers should contact their MBJ attorney with any questions they may have regarding the Order, their training programs and obligations, or any of the other issues addressed herein.

Sean P. O'Connor and Cassandra L. Santoro, attorneys with Morgan, Brown & Joy, LLP, authored this client alert. Sean and Cassandra may be reached at (617) 523-6666 or at soconnor@morganbrown.com and csantoro@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was prepared on September 29, 2020.

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