

Overview of Executive Order on Combating Race and Sex Stereotyping

UAC

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The logo for New Mexico State University, featuring the letters "NM" in a large, serif font above the words "STATE UNIVERSITY" in a smaller, sans-serif font. The logo is set against a white background within a dark red square.

NM
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Executive Order

- September 22, 2020 released
- September 28, 2020 OMB updates/clarification released
- Developments of this Order must be closely monitored as more guidance from OMB, OFCCP and professional organizations are forthcoming.
- **Target:** Workforce/Employee training
- **Applies to:** federal contractors and subcontractors, federal agencies, employers receiving federal grants, Armed Services/ROTC

Executive Order Cont.

- Appears to carve out academic instruction:

“Nothing 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.”

Prohibition on Workforce Training

- Appears to target higher education, but the/one original complaint came from Sandia Laboratories.
- Prohibits training that “inculcates race or sex bias stereotyping” into the workforce.
- Prohibits training that includes the following divisive concepts identified in the EO:
 - “(1) one race or sex is inherently superior to another race or sex;

Prohibited Training cont.

- (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;

Prohibited Training cont.

- (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;

Prohibited Training cont.

- (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.**



OMB Clarification on Prohibited Training

- Federal Contracts will be searched by OMB for key words to include:
 - Critical race theory
 - White privilege
 - Intersectionality
 - Systemic racism
 - Positionality
 - Racial humility
 - Unconscious bias

“Diversity and Inclusion”

- Contractors and grant recipients have to pledge that they:
 - “shall not use any workplace training that inculcates in its employees” these divisive topics
- Diversity and inclusion training per se not prohibited, so long as these prohibited topics are avoided.

Deadlines

- Immediate – ROTC
- Immediate – hotline to OFCCP is up and running for employees to report employers.
- November 21, 2020 – Provisions for notice to federal contractors, subcontractors, unions and employees must be included in all contracts on this date and moving forward.
- OFCCP will request "diversity and inclusion" training (within 30 days of order).

Potential Exposure

- Justice Dept. review of how this training “may contribute to a hostile work environment and give rise to potential liability under Title VII.”
- Broad discretion given to feds to open investigations.
- Entities teaching, advocating or promoting concepts deemed “divisive” can have contract suspended.

Next Steps:

- Do not assume this will go away.
 - Train and educate relevant personnel about the EO.
 - Collect and review diversity and inclusion training programs – what should be changed/edited if anything?
 - How to deal with employees who are opposed to the training – allow for opt out?
 - Get a handle on research or any funding that may be implicated by the EO.