



PRACTICAL TIPS FOR AVOIDING OR REDUCING THE RISKS OF THE TRAINING EXECUTIVE ORDER (EO 13950)

On September 22, 2020, President Trump issued [Executive Order 13950](#) on Combating Race and Sex Stereotyping ("EO 13950"). EO 13950 purports to combat the perpetuation of racial or sex stereotyping in the workplace by prohibiting federal contractors from providing workplace training that inculcates in its employees what the administration deems as "divisive concepts." The Law Center believes that this action is unconstitutional, and legal challenges are already underway. In the meantime, we offer these practical tips for housing and homelessness prevention organizations who receive federal funding and may be affected by the order. Please note that these tips are not intended to be legal advice, nor should they be construed as opinions on the legality of any specific practices or prohibitions, but rather general points to consider as you conduct business in light of the order.

For additional information, the U.S. Department of Labor has published a [FAQ page](#) providing additional guidance. The Office of Management and Budget has also issued a memorandum for the heads of executive departments and agencies found [here](#). The Office of Federal Contract Compliance Programs (OFCCP) has issued a [Request for Information](#) seeking comments, information, and materials from the public relating to workplace trainings that involve race or sex stereotyping or scapegoating. Finally, the OFCCP has launched a hotline "to combat race and sex stereotyping by federal contractors." Find information on the hotline and OFCCP Director Craig Leen's corresponding comments [here](#).

1. *Tips for Avoiding the EO Altogether*

- a. **Contracts and Subcontracts.** The EO is not immediately applicable to federal contracts and subcontracts. Instead, Section 4 of the EO contains a clause that must be inserted in all federal contracts and subcontracts (except those exempted in the manner provided by section 204 of EO 11246) that are entered into on or after November 21, 2020. Therefore, any existing contractor or subcontractor can avoid the requirements of EO 13950 by not entering into a contract with a federal government agency or a subcontract with a federal government prime contractor on or after that date. This will give the contractor/subcontractor, or would-be contractor/subcontractor, the opportunity to see if the election on Nov. 3 is likely to alter the government's inclination to proceed with implementing EO 13950.
- b. **Grants and Sub-Grants.** EO 13950 does not include a clause for grants and sub-grants as it does for contracts and subcontracts. Instead, Section 5 of the EO requires the heads of all federal agencies to review their respective grant programs and identify those 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 certain enumerated "concepts." The

EO gives the federal agencies until November 21, 2020 to submit a report to the Director of OMB that lists all grant programs so identified. Grantees and sub-grantees should resist any attempt by any agency to impose the certification requirement or any other EO 13950 requirement on them on the grounds that the EO does not provide for the imposition of such requirements on grants or sub-grants without further action by the OMB Director following his receipt of the agency lists on Nov. 21.

- c. Cooperative Agreements. EO 13950 does not refer to cooperative agreements. However, such agreements were treated in the same manner as grants under EO 11246, and a Sept. 28, 2020 OMB memorandum regarding EO13950 lumps cooperative agreements in with grants.

2. *Tips for Living With the EO (If You Have To)*

- a. Structure your diversity and inclusion training/ communications to employees as forums for discussion rather than “inculcations.” The EO expressly states that it does not prevent contractors “from promoting racial, cultural, or ethnic diversity or inclusiveness, provided such efforts are consistent with the requirements of this order”, and that “nothing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts [identified in the EO] in an objective manner and without endorsement.” Review your organization’s training materials (and revise them if necessary) to ensure that such materials cannot reasonably be characterized as promoting or inculcating race or sex stereotyping or scapegoating (as defined in the EO and the DOL FAQs).
- b. Discuss concepts of unconscious bias or systemic racism as tools for understanding and promoting diversity, non-discrimination, and inclusion. Do not attribute unconscious bias, racism, or sexism to all white people or to all men (or to all people of any color or gender, for that matter), or state that individuals are unconsciously biased because they are white (or black) or because they are men (or women). It will be difficult for the government to characterize characteristics attributed to some but not all individuals of a certain race or gender as race or sex stereotyping or scapegoating.
- c. Avoid terms such as “critical race theory,” “white guilt,” “white fragility”, and other terms specifically referred to as “prohibited” by the order.

Consider seeking a “safe harbor” determination from the DOL Office of Federal Contractor Compliance Programs (OFCCP) that it will not enforce the EO against you by submitting your organization’s training program for OFCCP review pursuant to the RFI issued by the DOL Office of Federal Contract Compliance on Oct. 22.. (Warning— OFCCP may recommend changes to a particular organization’s program that must be implemented by the organization if it is to secure the safe harbor.)