NACUBO Town Hall:

The President’s Executive Order on Combating Race and Sex Stereotyping

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Agenda

➔ Introductory Remarks
➔ Background
➔ The Executive Order: Coverage, Scope, and Impact
  ➔ Definitions
  ➔ Covered Entities
  ➔ Exceptions and Distinctions
  ➔ Impact
➔ Questions & Answers
Executive Order on Combating Race and Sex Stereotyping

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating, it is hereby ordered as follows:
Chris Wallace: (32:21)
This month, your administration directed federal agencies to end racial sensitivity training that addresses white privilege or critical race theory. Why did you decide to do that, to end racial sensitivity training? And do you believe that there is systemic racism in this country, sir?

President Donald J. Trump: (32:42)
I ended it because it’s racist. I ended it because a lot of people were complaining that they were asked to do things that were absolutely insane. That it a radical revolution that taking place in our military, in our schools, all over the place. And you know it, and so does everybody else. And he would know it- [crosstalk 00:33:02]

Chris Wallace: (33:02)
What is radical about racial sensitivity training?

President Donald J. Trump: (33:05)
If you were a certain person, you had no status in life. It was sort of a reversal. And if you look at the people, we were paying people hundreds of thousands of dollars to teach very bad ideas and frankly, very sick ideas. And really, they were teaching people to hate our country. And I’m not going to do that. I’m not going to allow that to happen. We have to go back to the core values of this country. They were teaching people that our country is a horrible place. It’s a racist place. And they were teaching people to hate our country. And I’m not going to allow that to happen.
Executive Orders are not law, but…

• President can set terms on items like federal contracts, and agency policies.
• Executive Orders are enforceable with the stroke of a pen, but can be ended with the stroke of a pen.

• Effective Date:
  • (in general) effective immediately, but…
  • Section 4 (contract language, hotline, and RFI for examples) effective after 60 days
Executive Orders are not law, but…

• President can set terms on items like federal contracts, and agency policies.
• Executive Orders are enforceable with the stroke of a pen, but can be ended with the stroke of a pen.

• OMB Memo followed the Executive Order
• OFCCP Q & A followed as well
• OFCCP Hotline active and RFI issued

Executive Orders are not law, but…

• Justifications (four anecdotal reports of trainings)

• “Today, however, many people are pushing 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 as human beings and Americans.”

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• “But 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. Research also suggests that blame-focused diversity training reinforces biases and decreases opportunities for minorities.”
A Few Points

• Inclusivity OK (as is the prohibition on federal contractors actively discriminating)

“Executive departments and agencies (agencies), our Uniformed Services, Federal contractors, and Federal grant recipients should, of course, continue 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.”
Barred trainings make use of:

1. “Divisive concepts”
2. “Race or sex stereotyping”
3. “Race or sex scapegoating”
Barred trainings make use of:

(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.
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Barred trainings make use of:

(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.

(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.
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OMB Memo Search Terms

OMB Memo encourages agencies to search “financial data and procurements” for:

- critical race theory
- white privilege
- intersectionality
- systemic racism
- positionality
- racial humility
- unconscious bias
Who Is Covered?

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

- Federal Agencies
  - May hire your institution’s departments, faculty, or staff; could result in debarment or other penalties
- Armed Services (including ROTC)
  - May hire your institution’s departments, faculty, or staff; could result in debarment or other penalties
  - We may host ROTC sites
- Federal contractors and their sub-contractors
- Federal grantees
Impact

- Federal Agencies
- Armed Services (including ROTC)

- Federal contractors and their sub-contractors
  - Incorporate language into future federal contracts; must be decanted into sub-contracts and purchase orders; ensure contractors are not using such training for their employees.

- Federal grantees
  - Incorporate language into future grants; ensure we are not using federal funds for such training.
Impact on SUNY

- Federal contractors and their sub-contractors
  - Incorporate language into future federal contracts; must be decanted into sub-contracts and purchase orders; ensure we are not using such training for contractor employees.

- Federal grantees
  - Incorporate language into future grants; ensure we are not using federal funds for such training.

- Per OMB Memo, Agencies will look at current contracts and may cancel for “convenience” where trainings include such concepts. May declare expenditures unallowed.
Academic Issues

• Minor academic carveout:
  • “[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.”

• OMB Memo states that agencies must look at all grants (not just training grants), restricting federal funds “from being used to promote the divisive concepts set forth in the E.O. (including by conducting research premised on these concepts)”
“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) (emphasis added).
First Amendment

- Teaching
- Research
- Consistency with other federal Executive Orders
Next Steps

- Government moving quickly, but…
- There are other laws that the Government can try to use
- Comes within timeframe of other actions (e.g. Princeton OCR)

- Executive Order, OMB Memo, and OFCCP Q&A are published
- RFI pre-print published yesterday in Federal Register

- What is the actual exposure on your campus?
  - Self-audit
  - Remember the contract/grant distinction

- November 3, 2020

- Will there be legal action taken?
- Will your institution issue a statement?
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