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ALERT

DOL Releases "FAQs" on Executive Order 13950 regarding Contractor Diversity and Inclusion Training and Signals Potential Immediate Enforcement

October 9, 2020

WHAT: On October 7, 2020, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) released guidance in the form of frequently asked questions (FAQs) regarding the September 22 Executive Order (EO) 13950, Combating Race and Sex Stereotyping, that addresses contractor workplace diversity and inclusion training, among other things, and that we addressed in a prior alert. Most prominent, although the FAQs recognize that the EO applies only to contracts entered into 60 days after the EO's issuance, OFCCP states that it may investigate claims of sex and race stereotyping now "pursuant to its existing authority under Executive Order 11246," Equal Employment Opportunity, which prohibits employment discrimination.

Further, OFCCP has already set up the reporting hotline anticipated by the EO and is allowing individuals or groups, including "third parties," to submit complaints. The FAQs also attempt to address whether unconscious or implicit bias training is prohibited, but leaves the issue open for subjective interpretation.

WHEN: Apparently now. Despite the EO's stating that it would apply to contracts entered into 60 days after its issuance, OFCCP asserts that it may investigate complaints starting now.

WHAT DOES IT MEAN FOR INDUSTRY: Regardless of the effective date for contractors of EO 13950, contractors should be reviewing their diversity and inclusion training now to determine if it conflicts

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with the EO as supplemented by the FAQs.

READ MORE: Beyond signaling that OFCCP may begin immediate enforcement and has set up a hotline and reporting website, the FAQs address the type of training that is prohibited. Largely, the FAQs quote the EO's examples of prohibited race or sex stereotyping in workforce training, without further elaboration or examples. The FAQs do attempt to address whether training that addresses on unconscious or implicit bias is prohibited. Many workplaces have adopted training about unconscious or implicit biases at all levels of the workforce, both to improve employee interactions and to actively promote diversity and inclusion. The FAQs state this type of training is not prohibited by the EO, but only "if it is designed to inform workers, or foster discussion, of pre-conceptions, opinions or stereotypes that people – regardless of their race or sex – may have regarding people who are different" and could be perceived by others as offensive. On the other hand, according to the FAQs, 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."

As discussed above, OFCCP has created a new hotline for reporting alleged violations of the EO, and this hotline will receive complaints from both those who may directly impacted as well as third parties. Any complaint received from the hotline will be investigated according to the OFCCP's regular complaint procedures pursuant to EO 11246. The FAQs state that once EO 13950 starts applying to federal contracts, OFCCP will also enforce it pursuant to the EO's mandate.