

Implicit Bias Discrimination Trainings in the Face of EO 13950 Restriction

By Andrew Lieb

On September 22, 2020, the anti-discrimination training world was brought to a standstill when Donald Trump issued Executive Order (EO) 13950, Combating Race and Sex Stereotyping. The EO prohibited the United States Uniformed Services, federal agencies, and federal contractors from including “divisive concepts” in their workplace DEI trainings. These “divisive concepts” were set forth in a list of eight concepts that were prohibited in trainings, including that “an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.” Of all the eight concepts listed, this sentence was viewed by many in the DEI industry as catastrophic because it could, theoretically, result in lost government contracts for any contractor that trained its workers on implicit bias. Because of this possibility, government contractors immediately cancelled their trainings on the issuance of the EO.

This did not last long, however. Subsequently, the Northern District of California issued a preliminary injunction of the EO in the case of Santa Cruz Lesbian and Gay Community Center v. Trump, No. 5:20-cv-07741-BLF (N.D. Cal. Dec. 22, 2020). In granting a preliminary injunction, the Court agreed that the EO likely violated the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. As to the First Amendment, the Court found that “the Government’s interest is outweighed by the effect of the impermissible reach of the Executive Order on Plaintiffs’ freedom to deliver the diversity training and advocacy that they deem necessary to train their own employees and the service providers in the communities in which they work, using funds unrelated to the federal contract.” Further, the Court found that the “Government cannot condition grant funding on a speech restriction that is outside the confines of the grant program... and “[i]here can be little question that vocational training is speech protected by the First Amendment.”

In addition, the Court held that the EO is likely “so vague that it is impossible for Plaintiffs to determine what conduct is prohibited.” Specifically, the EO vaguely addresses all trainings “on ‘critical race theory,’ ‘white privilege,’ or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil.” Plus, “the Government’s own interpretation of the reach of the Executive Order provides even more uncertainty about the scope of prohibited conduct.”

With respect to the Government’s interpretation of the EO, the Office of Management and Budget issued a memorandum detailing a procedure to identify prohibited trainings wherein it suggested keyword searches for terms such as “unconscious bias.” Moreover, the Office of Federal Contract Compliance Program’s frequently asked questions on the EO, includes the following question and answer about implicit bias being included in training curriculum:

Q - “Does Executive Order 13950 prohibit unconscious bias or implicit bias training?”

A - “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.” The response goes on to state that, “Training is not prohibited if it is designed to inform workers, or foster discussion, about pre-conceptions, opinions, or stereotypes that people – regardless of their race or sex – may have regarding people who are different, which could influence a worker’s conduct or speech and be perceived by others as offensive.”

Unconscious and implicit bias trainings represent a hallmark topic for many anti-discrimination / DEI trainings. As explained by the Plaintiff’s declarations in support of their motion, “[i]mplicit or unconscious biases are embedded stereotypes about groups of people that are automatic, unintentionally deeply engrained, universal, and able to influence behavior.”



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