



Executive Order on Combatting Race and Sex Stereotyping

On September 22, 2020, President Trump issued an Executive Order (EO) intended “to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating.” Broadly speaking, it prohibits training on specific types of information and concepts typically found in diversity and equity training. It applies to federal agencies, federal contractors and recipients of federal grants. This Order will apply to the District because it is a federal contractor. It will also apply to the District because it accepts grants from federal agencies; funding from those grants can’t be used for the prohibited training. Finally, the Order notes that employees may bring a claim under Title VII, alleging that the prohibiting training creates a “hostile work environment” under Title VII. The same claim can likely be made under Title VI.

Most of the Order’s provisions are not effective until November 21, 2020, so there should be no rush to immediately modify, cancel, or rewrite training programs. Some additional guidance must be released before the full scope of the impact of the EO can be determined. Further, depending on the outcome of the presidential election, this EO may be rescinded.

The Office of the General Counsel has examined the impact of this Order on our colleges and District Office and will be providing written guidance on the EO shortly. This phone call is to provide some broad guidance on the EO and answer some questions as to its applicability of the EO and its immediate impacts.

Leslie Cooper, General Counsel for the Maricopa County Community College District, has the responsibility of interpreting how the EO affects the District and how/when modifications will be made to existing trainings, how District and college grants are affected by this EO, and how the District will respond to any EO-related complaints made to the OFCCP. If you have specific questions, please feel free to contact her at Leslie.Cooper@domail.maricopa.edu.

College/District Contracts

James Curtin, Sr. Associate General Counsel is the Business Services (contracts grants) attorney in the Office of General Counsel. If you have specific questions about this EO, the contracts process, or CLM, please feel free to contact him at James.Curtin@domail.maricopa.edu.

While the Title IV direct loan programs may not confer “federal contractor” status (see discussion of Federal Student Aid below), there are other contracts and arrangements with other agencies that could qualify the District and the colleges as federal contractors, and thus make us subject to the EO’s requirements and restrictions. A review of our contracts in our CLM system show that the district and several colleges do have financial arrangements with, e.g. the Department of Defense and the Veterans’ Administration, and that these would render the district a “federal contractor. The district had also previously made this determination with respect to applicability of certain EEOC regulations and requirements. While there is likely to be more guidance and regulations forthcoming on the “federal contractor” question for the purposes of the EO, we can expect that it will be similar to the regulations relating to federal contractor requirements in other contexts like the EEOC.

The EO states that it is applicable only to contracts entered into after November 21, 2020. In addition, section 4 of the EO requires federal agencies to include specific language referencing the EO and its restrictions in every Government contract. Going forward, we will be reviewing all federal government agency contracts with this language in our Contracts Lifecycle Management system. This will allow the District and the colleges to flag and monitor these agreements to insure compliance.

Employee Trainings

David Bowman, Sr. Associate General Counsel is the employment/HR attorney in the Office of General Counsel. David was unable to participate in this call, but has provided the following information relative to the EO. If you have specific questions, please feel free to contact him at David.Bowman@domail.maricopa.edu.

It is not necessary to stop Diversity, Equity and Engagement training and work.

As described below, there are many approaches to DEI training that are not affected by this Order. The Office of General Counsel is available to collaboratively review training and answer questions to help ensure compliance with this Order.

Must the colleges and District stop all diversity and equity training for employees?

No. Diversity and equity training for employees can continue. There is no need to stop or delay this training.

Do the District or colleges have to change their diversity and inclusion training now?

No. The Office of General Counsel will work with Human Resources and the Office of Diversity Equity and Inclusion to identify any diversity and equity training that may require further review. The OGC does not anticipate that significant changes to existing training will be necessary.

What topics can college and District diversity and inclusion training for employees include?

1. Cultivating self-awareness through self-reflection
2. Providing examples of inclusive workplace behaviors and conduct
3. Discussing micro-aggressions, micro-insults, and micro-invalidations by focusing on observed behaviors and how they may make other persons feel
4. Recruiting, hiring, and retaining employees to achieve diverse workforces
5. Discussing equity and inclusion by focusing on positive steps
6. Creating safe spaces for employees of varied backgrounds to share concerns
7. Educating employees on how they can ally with coworkers of varied cultures and backgrounds
8. Teaching employees how to communicate with each other in culturally appropriate and respectful ways
9. Equipping leaders with tools on how to be inclusive leaders of diverse teams.

What are the most likely training topics that may need adjustment if the Order becomes effective?

The Order prohibits training on a number of “divisive concepts.” Most of the “divisive concepts” are not currently included in any diversity and inclusion training offered in the District. In David’s view, the most likely portions of training that *may* require adjustment are those that--

1. ascribe character traits, beliefs, or privileges to a race or sex (stereotyping);
2. assign fault, blame, or bias to a race or sex because of their race or sex (scapegoating);
3. claim an individual should not attempt to be “color-blind” or “sex-blind” in their treatment of others.

Curriculum and Pedagogy

Melissa Flores, Sr. Associate General Counsel is the student/academic affairs and regulatory compliance attorney in the Office of General Counsel. If you have specific questions, please feel free to contact her at Melissa.Flores@domail.maricopa.edu.

The Executive Order **should not impact curriculum and pedagogy** and the development thereof. In the order there is language that specifically states that “[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.”

The order does specify that the teaching of the divisive concepts (as outlined in the order) must be taught objectively and without endorsement. So, it will be important to see how the terms “objective” and “without endorsement” are interpreted for purposes of this Order. As of now, there has been no additional clarity provided by either the Office of Federal Contract Compliance Programs (OFCCP), the Department of Education, or the White House.

While college employees do not typically enjoy the academic freedom conferred upon faculty, employees who are involved in developing pedagogical strategies, curriculum development, or developing courses for programs of study do share in the carved out exclusion in the EO for courses of academic instruction.

Federal Student Aid

A May 23, 2019 [opinion letter](#) from the OFCCP spoke specifically to the question of whether post-secondary higher education institutions that act as a conduit for Pell Grants makes them covered federal contractors for the purposes of Executive Order 11246, as amended, ("E.O. 11246"), Section 503 of the Rehabilitation Act of 1973, as amended, ("Section 503"), 29 U.S.C. § 793, and/or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, ("VEVRAA"), 38 U.S.C. § 4212.

In response, the OFCCP stated that regulations define a government contract as "any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services." See 41 C.F.R. §§ 60-1.3; 60-300.2; 60-741.2. The term has generally not been extended to arrangements in which the primary purpose is extending help or support by conferring grants or other benefits under Federal assistance programs. So, the OFCCP said the Pell program does not make colleges and universities federal contractors or the management of the federal monies federal contracts. By extension, it is likely Title IV direct loan programs (where there is a signed PPA) would also not constitute a federal contract and in administering the Title IV program, the college or university would not, on that basis alone, be considered a federal contractor.

QUESTIONS

This question is around the timing of when the EO takes effect. I thought I heard you say on the call that grants can continue to expend funds on these DEI topics until we are notified otherwise by the funding agency on or after 11/22/20. But Section 9 of the EO says that it takes effect immediately except for Section 4 for contractors. Could you clarify which we should go with?

- **Answer:** Under Section 5, agencies must determine which grant programs will be subject to this Order, and thus which grants will include provisions that prohibit grant funding from being used for training on the prohibited concepts. This requirement—that they begin this work of identifying such programs—is effective now. They must carry out this work by Nov. 21st. Once they identify the programs subject to this Order, they will include those provisions in grants, and if the District is the recipient of such a grant, it will not be able to use funds from the grant for such purposes. Grant funding that we presently receive is not subject to these requirements.

Would you define "blame" as synonymous with "responsibility?"

- **Answer:** The way the OGC sees the term "blame" would be to provide training information that blames white people for America's social tension and systemic

racism in industry and governance. This is not the same as discussing such things as de jure or de facto segregation and laws and policy that resulted in different treatment (and social outcomes) based on race and gender. It is permissible to address historical and factual issues as long as they are presented in a neutral way. It is also permissible to discuss ways that MCCCCD as an institution can find solutions to address educational inequities.

Is it permissible to move ahead in work that critically analyzes our institutional role in either magnifying or minimizing inequities in the administration of our education?

- **Answer:** It is permissible to move forward with work that analyzes our role in finding ways to both recognize and address inequities in the way we provide education to our student populations. For example, a DEI subcommittee that looks at institutional barriers that disproportionately affect marginalized student groups, a seminar for staff that develops a critical lens in determining how to engage in meaningful social justice work, and discussing Critical Race Theory as a theoretical framework applicable to the work you do as educators. The key takeaway is that in discussing CRT as a theoretical framework, for example, should not be done in a way that lays blame upon one race.

As for asking staff to read *White Fragility*, is this part of the preliminary or scaffolding work for the discussion listed above? If it is simply used for scaffolding and if the conversation is specific to this book being the framework for the theoretical framework and if the discussion is neutral and does not lay blame or scapegoating upon one race, I don't see a problem with the reading of this book. Of course, there should be a discussion regarding whether the reading of the book is optional.

We understand there is latitude under Academic Freedom with caution for faculty teaching these subjects in their classes. For those of us in Student Affairs preparing events, speakers and projects outside of the classroom (Examples include Native American History, Black History Month, Women's History Month), what do we need to be aware of and know as we are planning for and implementing them? Are these at risk in general or are there exercises/topics we would not be able to do/address in particular? Because these are directed at students and not employees, does this EO even affect this programming?

- **Answer:** There will need to be more release of information regarding how deep the EO will go to affect the employee training and the risks in engaging speakers and partnerships with our student groups. At the present time, our advice is to communicate with the OGC to determine if there are concerns with current programs/training. We will release guidance as it becomes available.