LEGAL TOPICS RELATED TO RECENT DIVERSITY INITIATIVES

The recent focus on social justice, coupled with the #MeToo movement created several years ago, has pushed companies to make bold efforts related to diversity and inclusion. Those efforts have taken many forms as companies seek creative ways to ensure more inclusive workplaces. In addition, groups of employees have placed gender and racial equity—backed up by hard commitments—at the top of their agendas. However, responding to those efforts creates risks for companies, ranging from reverse discrimination claims to government efforts targeted at restricting diversity initiatives.

I. Goal-Setting Legal Guardrails for Companies

Many companies have turned to hard commitments to drive their diversity and inclusion efforts. However, those commitments come with risks if they do not take into account the complex tests related to the legal landscape and balance the interests of the entire workforce. Recent actions by the government questioning these commitments have raised the stakes, and companies must strike a balance when thinking about how far they can go to set and meet their commitments. Below, we identify the types of commitments made by companies across several industries, summarize the legal landscape and describe how employers can reduce the legal risks associated with these efforts.

A. Diversity Goals by Various Employers

Many employers have set a variety of goals related to increasing diversity, equity and inclusion within their workforce. Companies have promised to

- Fill a minimum of 30% of all new positions—internal and external—with Black and Latino talent (adidas)
- Strive for a 30% increase in the number of people of color in leadership positions over the next five years (Facebook)
- Take companies public only if they have at least one diverse board member, with a focus on women in 2020, and at least two diverse board members by 2021 (Goldman Sachs)
- Aim for 40% of individuals in vice president roles to be women (Goldman Sachs)
- Double the number of Black and African American people managers, senior individual contributors, and senior leaders in the United States by 2025 (Microsoft)
- Use progress toward a diversity matrix in evaluating executive bonuses (Starbucks)
- Not hire for a position unless an underrepresented group is interviewed (VMWare)[1]

[1] Heather Barbour Wyatt, 25+ Examples of Awesome Diversity Goals, Ongig (July 8, 2020), https://blog.ongig.com/diversity-and-inclusion/diversity-goals/.

B. Legal Landscape Regarding Diversity Efforts

The legal landscape regarding goal setting has evolved from the U.S. Supreme Court cases striking down strict set-aside programs to looking closely at efforts to create and implement affirmative action plans.

1. Illegality of Quotas and Hard Set-Asides

Title VII of the Civil Rights Act of 1964 makes clear that the prohibition on discrimination should not result in employers setting quotas. The law provides:

> **Preferential treatment not to be granted on account of existing number or percentage imbalance.** Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

See 42 U.S.C. § 2000e-2(j).

In two landmark cases, the Supreme Court considered programs that required governmental entities to set aside a specific percentage of contracts for minority- and women-owned businesses. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989), the Supreme Court considered Richmond, Virginia's Minority Business Utilization Plan, which required contractors who were awarded public construction contracts to subcontract at least 30% of the total dollar amount of the contract to minority business enterprises. The Court analyzed the program under the equal protection provisions of the Fourteenth Amendment. The Court applied a strict scrutiny test as the programs took into account racial and ethnic classifications as bases for decision-making. Finding that the plan did not meet the high burden, the Court struck down Richmond's plan. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), the Court returned to the issue of minority set-aside programs and considered a U.S. Department of Transportation affirmative action program that awarded financial bonuses to prime contractors if minority subcontractors were employed. Finding that the program failed to meet equal protection standards under the Fifth and Fourteenth Amendments, the Court rejected the government's efforts. Both cases solidified the standard applied by courts when evaluating whether actions result in unlawful quotas. Under the strict scrutiny test, quotas or race-based affirmative action programs can be justified only if they satisfy a "compelling state interest" and are "narrowly tailored" to further that interest.

2. Non-Quota Goal Setting

The Supreme Court has approved of goal setting through voluntary affirmative action plans and found them to be consistent with Title VII. In *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979), the Court stated that "Title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans [which, first, have] purposes … [that] mirror those of the statute [and second], does not unnecessarily trammel the interests of the [nonminority] employees." The affirmative action plans that have met with the Supreme Court's approval under Title VII had objectives, as well as benchmarks, which served to evaluate progress, guide the employment decisions at issue, and assure the grant of only those minority preferences necessary to further the plans' purpose. *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 621-22 (1987). Those plans consider underrepresentation in job classifications, set objectives for additional employment actions to address the underrepresentation, and allow for measuring improvements toward goals. *Id*.

The Court, in *Weber*, explained that the first prong analyzes whether the goal of the plan seeks to remedy "segregation" and "under-representation of minorities that discrimination has caused." *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1556 (3d Cir. 1996). In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court made clear that affirmative action must be supported by "a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." *Id*. at 277. Subsequent decisions have interpreted the Supreme Court's language to mean that the plan must remedy a "manifest imbalance" in the workplace or respond to a finding that past discrimination affected a particular job category. *See Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 496 (3d Cir. 1999). In *Schurr*, the Third Circuit considered a statewide New Jersey plan that set percentage goals for employment of minorities and required casinos to develop affirmative action plans to meet the specific industrywide goals. The plans did not require operators to meet any hard targets but rather required that they engage in and document their good-faith efforts to achieve the goals. The Third Circuit struck down the state program on the grounds that the legislature's generalized statement that Atlantic City had a large minority population and that job creation would benefit "all segments of the population" failed to establish a manifest imbalance. *Id*. at 498. Similarly, a failure to determine whether Blacks were underrepresented in a school district or a particular high school does not establish the requisite level of manifest imbalance. *Taxman*, 91 F.3d at 1550.

Trammel the interests of nonminority parties. The second prong of the *Weber* test evaluates whether the plan or the actions taken in furtherance of the plan do not "unnecessarily trammel on non-minority" parties. In *Weber*, the Court determined that the plan did not require firing employees and, therefore, did not violate this second prong. However, making a layoff decision aimed at ensuring the employment of a school district's only Black administrator was "outright racial balancing" in violation of *Weber*'s second prong. *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 440 (10th Cir. 1990). Setting recruitment goals that operate as neither a quota nor a hiring preference does not trammel the interests of minority or nonminority applicants. *United States v. City of New York*, 308 F.R.D. 53, 66 (E.D.N.Y. 2015).[2]

[2] The second prong of *Weber* surfaces where employers conduct pay equity audits and attempt to remedy underpaid workers. In *Rudebusch v. Hughes*, 313 F.3d 506 (9th Cir. 2002), the university performed a pay equity audit and determined that the women at the university were underpaid. Male professors brought a claim against the university alleging that the women-only pay adjustment violated the equal protection clauses of the Fifth and Fourteenth

Remedial efforts in light of *Ricci v. DeStefano*. The Supreme Court's decision in *Ricci v. DeStefano*, 557 U.S. 557 (2009), addressed remedial efforts to remedy discrimination outside of the context of specific affirmative action plans and reflects the risks associated with "reverse" discrimination claims. In *Ricci*, the City of New Haven, Connecticut, determined that its test for firefighter positions had a disparate impact favoring white men. On that basis, New Haven decided to discontinue the test's use. Evaluating New Haven's actions, the Court determined that its remedial attempts to avoid bias were appropriate only if supported by a strong basis in fact that using the test results would result in an impermissible disparate impact.

Ricci's effect on remedial affirmative action plans remains unclear. In *Shea v. Kerry*, 796 F.3d 42 (D.C. Cir. 2015), the D.C. Circuit determined that *Ricci* did not change that analysis set forth in *Johnson* and *Weber*. *Id.* at 54. As such, the court upheld a State Department affirmative action program that provided a special path for minorities seeking direct placement as outside hires into entry-level Foreign Service positions. As the department provided significant evidence regarding the lack of diversity in its entry-level positions and the program provided for nonminorities to enter into the same positions, the program fell within the confines of the law.

C. Goal-Setting Guardrails for Employers

Many employers are looking for ways to make meaningful and measurable commitments toward diversity and inclusion. However, setting goals raises several risks for companies. Indeed, the Department of Labor recently questioned Microsoft and Wells Fargo regarding their publicly stated goals, resulting in a strong public response from Microsoft in which the company stood behind the elements of its initiative.[3]

While many employers will not seek to institute formal affirmative action plans akin to those noted above, prudence dictates having this legal framework in mind when pursuing efforts to diversify workplaces.

Analyze your workplace to dig deep on where you stand. Goals and targets should be grounded in measurable and accurate data. Employers choosing to set goals should ensure that their efforts are based on an examination of their current workforce. This examination can take many forms. Current information, such as reporting on the EEO-1 form filed with the Equal Employment Opportunity Commission, provides a window into the representation numbers in a workforce. The EEO-1 form includes workforce demographic data broken up into ten job categories.[4] However, the EEO-1 form provides limited utility because the job categories are fairly broad and include employees with a wide range of skills, duties and responsibilities. Also, the EEO-1 form merely provides a snapshot based on a moment in time during the employer's yearly reporting cycle. It does not provide insight into movement among various job categories that may help employers evaluate hiring, promotion, retention or other trends. Also, the EEO-1 form does

Amendments. The Ninth Circuit determined that the decision to adjust pay for women failed the legal tests and remanded the matter to determine the appropriate non-gender-based adjustments.

[3] Dev Stahlkopf, Responding to the OFCCP on our June diversity commitments, Microsoft (Oct. 6, 2020), https://blogs.microsoft.com/on-the-issues/2020/10/06/ofccp-diversity-employment-laws/.

[4] Indeed, many employers post their current EEO-1 forms on their websites as part of their diversity and inclusion efforts.

not capture demographics that employers may want to evaluate such as age, disability or sexual orientation.

The federal contractor approach results in a more nuanced analysis of the workforce. *See* 41 C.F.R. § 60-2.15. This approach creates affirmative action groupings of employees as a means to look more closely at narrower bands of individuals with similar tasks, duties and responsibilities. Some employers create groupings using job titles, while others roll up job titles into larger groups for analyses. Once appropriate groups are formed, calculating the demographic makeup of the current workforce can be straightforward. However, data issues related to employee self-identification often complicate this step. At that point, census data or applicant flow data can be used to determine utilization of various demographic categories as compared against incumbents. Where underutilization exists, employers can create internal goals and make efforts to address those goals through good-faith efforts. For many employers, these steps provide a starting point to grasp where they stand and where they need to dig deep with additional efforts.[5]

Prudently set goals and avoid quota risks. Within the current legal framework, setting broad goals with little to no basis raises significant legal and reputation issues, which is why analysis of the workforce is crucial. Broad representation goals that bear no relation to the specific workplace or company face claims that efforts to meet those goals do not bear a relationship to a specific or ongoing imbalance. As such, they may run afoul of legal guardrails. Even goals based on industry participation numbers raise the risk of failing to reflect historical discrimination. As such, employers should refrain from setting goals or targets on a whim.

Employers should also think deeply about the types of goals they set and how they would address any claims that the goals are quotas. Goals that focus squarely on increasing the applicant or feeder pools for positions present low risks. These goals emphasize the *efforts* to ensure that diverse candidates are considered where they may have not been aware of opportunities. Similarly, figures that track current overall representation in hires or promotions are low risk. Notably, goals that focus on supplier or contractor diversity typically do not trigger employment law considerations. Forward-looking strategies that commit to numerical goals or targets present greater risks, as they could signal to decisionmakers that gender or race are allowable factors for hiring decisions. Nonetheless, goals that focus on increasing the percentage of hires or numbers that represent broad goals of participation in segments of the workforce (such as leadership or executive ranks) tend to be more defensible than targets that specify actual numbers in a specific role. The latter may begin to look like quotas. Tying performance ratings or salary increases to meeting diversity goals results in greater legal exposure. Such benefits should be reviewed closely

[5] Notably, the Office of Federal Contract Compliance Program's ("OFCCP's") own goal-setting efforts reflect the complexity associated with measuring affirmative action in numeric terms. In 2013, the agency finalized its rulemaking, setting forth a 7% nationwide utilization goal for federal contractors' employment of qualified individuals with disabilities. Contractors who did not meet the goals were required to engage in good-faith efforts to determine where employment barriers may exist. The rule, though, made clear that "setting an inflexible quota of disabled individuals hired is not permitted." Notwithstanding the prohibition on quotas, OFCCP had to defend allegations that the rule violated the Administrative Procedures Act because the goal was arbitrary and capricious. *Associated Builders & Contractors v. Shiu*, 30 F. Supp. 3d 25, 44 (D.D.C. 2014). Responding to the allegations, the agency explained that it had considered data from the American Community Survey reflecting that 5.7% of the civilian labor force had a disability and also considered data to account for underreporting by individuals with a disability in the general workforce. *Id.* at 44-45. Finding that the calculation was a reasonable exercise of agency discretion, the District Court upheld the 7% goal.

by counsel because they could motivate decisionmakers to use protected characteristics as levers in employment decisions.

Communicate goals clearly. Legal risks are mitigated where employers provide detailed and clear training to managers about their diversity efforts. Employers should make clear that goals and targets are not quotas and that all hiring decisions should focus on the best qualified candidates. Decisionmakers should also be cautioned that diversity cannot be a deciding factor in employment actions. Rather, efforts to target diverse candidates or other ways to increase the pool of diverse candidates should be employed to meet goals.

II. Board Diversity Goals

Outside of the employment context, efforts have been taken to institute hard quotas at the state level. For example, on August 30, 2018, the California State Senate approved a bill (SB 826) to require corporations with shares listed on "a major United States stock exchange" and incorporated or headquartered (as disclosed on the corporation's annual report on Form 10-K) in California to include a certain number of female directors on the board, with the number determined by board size. The bill requires that by the end of

- 2019, such companies have a minimum of one female director on the board.
- 2021, such companies have a minimum number of:
  - Two female directors if the corporation has five directors; and
  - Three female directors if the corporation has six or more directors.

Failure to comply with this mandate results in civil penalties ranging from $100,000 to $300,000. The bill also requires the California secretary of state to publish various reports on its website documenting, among other things, the number of corporations in compliance with these provisions. The bill also authorizes the secretary of state to impose fines for violations.

On September 30, 2018, California Governor Jerry Brown signed the bill into law, and lawsuits challenging the bill promptly followed. In *Robin Crest, et al. v. Alex Padilla*, a conservative foundation named Judicial Watch, Inc. sued in Los Angeles County Superior Court on behalf of three California taxpayers, seeking (a) to declare illegal any expenditure of taxpayer funds and taxpayer-financed resources to enforce Senate Bill 826 because the statute violates federal and state equal protection provisions, and (b) to enjoin the secretary of state (Mr. Padilla) from making such expenditures. This case is still pending trial.[6] A second lawsuit challenging the statute, *Meland v. Padilla*, filed in federal district court, was recently dismissed but has been appealed to the Ninth Circuit Court of Appeals.[7] Plaintiff was a shareholder of a publicly held corporation incorporated in Delaware but domiciled in California. Like the plaintiffs in *Robin Crest*, he argued that Senate Bill 826 contained a sex-based classification that "harms shareholder voting rights and violates the Fourteenth Amendment." *Id.* at *1. The court found, however, that

[6] Cal. Super. Ct. Case No. 19STCV27561.
[7] No. 2:19-cv-02288-JAM-AC, 2020 WL 1911545 (E.D. Cal. Apr. 20, 2020).

the plaintiff did not have standing to sue, based both upon the constitutional requirements of Article III of the U.S. Constitution and upon nonconstitutional prudential considerations. *Id.* at *4.

III. Government Efforts to Push Back on Diversity Initiatives

The Trump administration has targeted several diversity initiatives. As previously noted, the Department of Labor—specifically, the Office of Federal Contract Compliance Programs ("OFCCP")—sent letters of inquiry to Wells Fargo and Microsoft seeking information about their diversity targets. While no further public action has occurred, these efforts sent a chill among other contractors who are considering taking efforts. The most obvious attempt to target diversity efforts has been the recent Executive Order 13950 (EO 13950) issued on September 22, 2020.[8] While the administration has been sued in federal district court over EO 13950 and a Biden administration will likely pull it back, it remains in effect as of the time of this paper.

A. Requirements of EO 13950

EO 13950 requires federal contracting agencies to include in federal contracts a clause forbidding workplace training geared toward anti-racism and related concepts. Under the clause, trainings that cover divisive concepts, including race or sex stereotyping and race or sex scapegoating, are prohibited.

Those concepts are defined below:

> (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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> (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.

[8] Exec. Order No. 13950, 85 FR 60683, 2020 WL 5718050 (Sept. 22, 2020).

> (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.

Id.

While the definitions above relate to the "divisive concepts" of race or sex stereotyping and race or sex scapegoating, a question exists regarding whether trainings that question the notion of color-blindness are included in the prohibition. It does not appear that color-blindness is covered under the definition. However, the preamble of EO 13950 twice references color-blind concepts. Specifically, the preamble appears to criticize a training that "instructed small group leaders to encourage employees to avoid 'narratives' that Americans should 'be more color-blind.'" A second training that included statements like "color blindness" and the "meritocracy" as "actions of bias" is also cited.

Notwithstanding the above, OFCCP sought to clarify which types of trainings comply with EO 13950 in a set of Frequently Asked Questions (FAQs) issued on October 7, 2020.[9] The FAQs failed to shed significant light on the scope of the EO. However, one helpful takeaway is that the FAQs interpreted EO 13950 as not covering implicit bias and unconscious bias trainings. According to the agency, "[t]raining 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." (emphasis added). However, OFCCP's director, Craig Leen, recently stated that trainings that convey issues related to "white privilege" or "white fragility" would fall within the EO's coverage and are prohibited.

On October 22, 2020, OFCCP issued a request for information (RFI) related to the EO.[10] Contractors need not submit any data in response to the RFI. However, notwithstanding the RFI's voluntary nature, it seeks to encourage contractor representatives to submit data on their own to confirm their compliance. If the contractor officially submits the data voluntarily and accepts compliance assistance from OFCCP, OFCCP states that it will "not take enforcement action" against the contractor. However, if OFCCP obtains the training from another source (a lower-level employee or third party) and the contractor does not come into compliance, OFCCP "may take enforcement action" against the contractor.

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[9] Frequently Asked Questions, Executive Order 13950 - Combating Race and Sex Stereotyping, OFCCP https://www.dol.gov/agencies/ofccp/faqs/executive-order-13950 (last visited Nov. 16, 2020).

[10] 85 FR 67375 (Oct. 22, 2020), also available at: Federal Register, Request for Information; Race and Sex Stereotyping and Scapegoating, A Notice by the Federal Contract Compliance Programs Office (Oct. 22, 2020) https://www.federalregister.gov/documents/2020/10/22/2020-23339/request-for-information-race-and-sex-stereotyping-and-scapegoating.

EO 13950 and the overall administration efforts in this regard have raised the ire of federal contractors as well as progressive groups.[11] This has spurred litigation, including a complaint filed by the Urban League against the Department of Labor on October 29, 2020.[12] The complaint alleges broad claims that the government's moves violate the equal protection clauses of the Fifth and Fourteenth Amendments.

The administration has also signaled that it will bring claims not only under EO 13950 but also pursuant to "existing" discrimination and harassment laws. As we read the statements regarding enforcement under Title VII, OFCCP could determine that an anti-racism or implicit bias training made white participants uncomfortable and therefore resulted in a form of harassment of white participants. Further, if a contractor mandated that an employee attend a covered training and took an adverse action against an employee, a novel reverse-discrimination claim is possible. Should such a claim occur, it is conceivable that OFCCP could bring a claim, prevail at an administrative hearing, and seek cancellation, termination or debarment from federal contracting in a subsequent hearing process. However, this ultimate sanction is very rare.

B. Legal Considerations Related to EO 13950

EO 13950 presents several legal and compliance challenges. Chief among the concerns is the vague and ambiguous language setting forth the notion of divisive concepts. Subsequent statements and guidance have indicated that implicit bias training may continue but training that focuses on white privilege is prohibited. This guidance, however, does not present any bright lines, and contractors would be on a tightrope to determine how to comply. Moreover, while the contract clause applies to trainings, the preamble of EO 13950 seems to address broader concerns about general statements in the workplace. Overall, it is unclear how broadly the terms of EO 13950 will be interpreted.

Further, the effective date of EO 13950 is somewhat puzzling. On its face, the federal contractor obligations take effect for all contracts finalized after November 22, 2020. However, on September 29, 2020, OFCCP issued a press release indicating that **current** training could violate **current** antidiscrimination law[13] and echoed this position in its subsequently released FAQs. Nonetheless, the agency has opened its complaint line and is accepting complaints under the EO.

Another central question is whether noncompliance with EO 13950 puts a contractor's federal contracts at risk. Unlike past Executive Orders related to OFCCP's obligations, EO 13950 does not technically amend Executive Order 11246, which is essentially OFCCP's authorizing statute. As such, EO 13950 does not appear to confer authority for OFCCP to (1) enforce the provisions under its regular enforcement scheme nor (2) recommend suspension or debarment of federal contractors.

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[11] *See* Jena McGregor & Eli Rosenberg, Trump's crackdown on training about white privilege draws broad opposition, The Washington Post (Oct. 29, 2020) https://www.washingtonpost.com/business/2020/10/29/trump-diversity-training-labor-department/.

[12] *Nat'l Urban League, et al. v. Donald J. Trump, et al.*, Case No. 1:20-cv-03121-APM (D.D.C. Oct. 29, 2020). *See also*, LDF, NAACP Legal Defense Fund, National Urban League, National Fair Housing Alliance File Suit Against Trump Administration; African American Policy Form Launches #TruthBeTold Campaign (Oct. 29, 2020) https://www.naacpldf.org/wp-content/uploads/EO-Complaint__Press-Release-10.29.20-FINAL.pdf.

[13] U.S. Dep't of Labor News Release 20-1859-NAT (Sept. 28, 2020) https://www.dol.gov/newsroom/releases/ofccp/ofccp20200928-0.

Turning to the complaint process, complaints typically move slowly through the agency and can languish for months before any movement occurs. Further, unlike EEOC charges, employees do not have a private right of action to bring OFCCP-related claims. However, we caution that OFCCP may seek to make an example of contractors who are subject to complaints. Further, we note that OFCCP has, on occasion, opened full-blown compliance reviews after complaints have been filed. While this step is rare, these reviews are resource intensive.

OFCCP has not addressed how EO 13950 would affect diversity trainings that are required by various states. California, for example, requires employers to provide employees with information about generic sexual harassment centered on legal protections, the internal complaint process and potential remedies for violations. Cal. Gov't Code § 12950(b). Comparing the scope of EO 13950 to the scope of the trainings required under various state laws, including California, it appears that standard discrimination and harassment trainings may continue. The reach of EO 13950 appears narrower and targets specific anti-racism and other training in the concepts mentioned above. A risk exists, however, that generic trainings may bleed into covered trainings if, for example, participants bring up anti-bias or racism concepts. This could trigger violations of EO 13950 as currently written.

C. Recommended Actions in Response to EO 13950

The incoming Biden administration will likely roll back EO 13950. However, federal contractors should consider the following steps in the interim.

1. Have counsel review diversity trainings to ensure that they fall outside of the coverage of EO 13950 and *existing* OFCCP laws and regulations. Generic trainings may proceed, but care should be taken to ensure that those trainings do not stray into the currently prohibited areas.

2. Alert appropriate federal contracting personnel that contracting officers may seek to insert the clause into contracts. However, contracting personnel should not agree to the clause without approval from counsel.

3. Take a wait-and-see approach regarding the validity of EO 13950 and the federal contractor provisions. As we note, EO 13950 has significant legal weaknesses and is already the subject of litigation, and a Biden administration will likely withdraw the order altogether.

4. Have counsel review agreements with third-party trainers to evaluate risks if aggrieved employees submit restricted or copyrighted trainings to the government in response to EO 13950

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