



OFFICE OF THE ATTORNEY GENERAL
CONNECTICUT

WILLIAM TONG
ATTORNEY GENERAL

October 30, 2020

Via First Class and Electronic Mail

President Donald J. Trump
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Re: Executive Order 13950 *Combating Race and Sex Stereotyping*

Dear Mr. President:

We, the undersigned Attorneys General of Connecticut, California, Colorado, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Wisconsin and the District of Columbia, write to express serious concerns with your *Executive Order on Combating Race and Sex Stereotyping*, issued on September 22, 2020 (the "Order"). Promoting diversity, equity and inclusion is a top priority in state government and for businesses, nonprofit organizations, and academic institutions across our states. As the preamble to your Executive Order acknowledges, the fair and equal treatment of individuals, without regard to race, ethnicity or sex, is a fundamental principle of American law. As chief legal officers in our respective jurisdictions, we regard the elimination of racial and sex discrimination and other forms of discrimination as an official imperative.

As Attorneys General committed to eradicating racism and other forms of discrimination in our society, we strongly urge that the Order be withdrawn. Among other concerns, we firmly oppose language in this Order that could be construed to prohibit implicit bias trainings for federal contractors and federal grantees. Implicit bias trainings are a vital component of advancing the goals of diversity, equity and inclusion. Any attempt to deny that all of us have unconscious biases is contrary to science and common sense. Your invocation of the American Civil Rights Movement as the basis for banning or curtailing this critical and impactful work is beyond confounding.

A primary goal of diversity training in the workplace is to raise awareness of the value of collaborating with people of different cultures, races, genders, ethnicities, ages, beliefs, experiences and ideas. The American economy has greatly benefited from diversity and inclusion training as a more informed and diverse workforce has increased ingenuity and creativity, produced dramatic increases in productivity and profits, expanded markets and attracted diverse talent to American firms.

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Science has demonstrated that all people possess implicit biases, a tendency to process information based on unconscious associations and feelings. Our brains are wired to make generalizations and associations and take cognitive shortcuts. In this sense, implicit bias is not always harmful. These cognitive shortcuts help us to process the world and all the data we gather in various social settings. However, implicit biases are fueled by stereotypes and can cause judgments which result in disparate outcomes based on race, ethnicity, gender, sexual orientation, religion, age or social-economic status. These biases have been embedded in our unconscious through years of exposure to harmful cultural stereotypes and narratives. In certain settings, like the workplace, implicit biases may impede collaboration and affect understanding, judgments, actions and decisions on an unconscious level in a way that is harmful to members of certain groups. In turn, they can perpetuate and justify racist and sexist policies, practices and behaviors. This is true even where individuals and organizations profess egalitarian intentions to treat others fairly. To eliminate harmful bias, research suggests that conscious awareness of one's own implicit biases is critical.

Implicit bias training—helping individuals understand unconscious or subtle associations and how to identify them in oneself—is therefore vital in mitigating such biases and their negative implications. Ending this training would have damaging consequences for our nation. We will continue to conduct this important training and education on racism, sexism and implicit bias in the workplace, and we encourage other federal contractors and grantees in our jurisdictions to do the same.

Accordingly, we urge you to reconsider and withdraw this ill-advised Executive Order. All constituents, wherever they may be employed, deserve access to a workplace free of unlawful bias and discrimination. Whether it is intended to ban implicit bias or unconscious bias trainings or merely has the tragic and foreseeable consequence of reducing this important work, we firmly oppose the Order's application in our states.

Should you decline to withdraw the Order, we request that you provide written clarification of your specific intentions. Our request is advanced on behalf of federal contractors, grantees and all residents of our jurisdictions who may be impacted by your policies. If and to the extent that this Order is intended to bind state officials or agencies, we further request that clarification.

A. Implicit Bias and Unconscious Bias Trainings

Rather than support its nominal goal of preventing “race or sex stereotyping” in federal contracts and grants, the Order has the opposite effect. To begin with, given the extensive body of law which prohibits discrimination on the basis of race or sex, including provisions in the U.S. Constitution itself, in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and in Executive Order 11246 of 1965, as amended, it is not entirely clear what this Order is intended to change or add to the current legal landscape. To the extent the Order seeks to change the status quo, it does so in problematic ways. For example, the Order defines “race or sex scapegoating” as:

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.

E.O., Sec. 2(c). After the issuance of the Order, the Office of Management and Budget (OMB) issued a memorandum directing agencies to use search terms such as “critical race theory,” “intersectionality,” “systemic racism” and “unconscious bias” to identify trainings that may be prohibited by the Order.¹ Then, the United States Department of Labor issued guidance, that raises even more confusion, as it states that implicit bias training might not be prohibited by the Order, but could be “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.”²

This seeming attempt to categorize implicit bias training within the definition of “race or sex scapegoating” is troublesome in that it gravely mischaracterizes the typical manner in which diversity trainings involving unconscious bias or implicit bias have been presented in a variety of workplaces for many years, including those for the federal workforce.³ Implicit bias and unconscious bias trainings are beneficial to all participants regardless of race, sex or other personal characteristics, as an invaluable tool for advancing diversity, equity and inclusion. To the extent that the Order is intended to ban discussion and self-examination of an individual’s implicit and unconscious bias, we vigorously object.

We reject the notion that diversity, equity and inclusion trainings must stop if they ask participants to consider their own implicit biases and the historical and continued role of racism and sexism in our society and workplaces. This prohibition would be wrongheaded. Moreover, the subsequent guidance issued by OMB and the Department of Labor only furthers the ambiguity in the Order with its broad, sweeping language, including a prohibition against “implicit bias training [which] 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.” (Emphasis added.) Inclusion of the word “implies” only worsens the confusion about which trainings are intended to be banned. The language is so broad and subjective that it gives no notice of what is actually permissible, potentially allowing federal funds to be withheld or penalties to be enforced based on subjective and arbitrary judgments. This uncertainty also has a profound chilling effect on important trainings that improve diversity, equity, inclusion and opportunity in workplaces across our jurisdictions.

Unless the Order and subsequent guidance are modified to clearly and unequivocally permit the continued use of implicit bias and unconscious bias trainings, the Order should be withdrawn.

Application to the States

Additionally, the Order prohibits all federal contractors from using workplace trainings that “inculcate [] in [their] employees” the concept that “an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously.” E.O., Sec. 4. Further, the Order authorizes federal officials to require certain grant recipients to certify that they “will not use Federal funds to promote the concepts that . . . an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously.” E.O., Sec. 5. Again, it is unclear what this Order is intended to change or add to the extensive body of existing Constitutional and statutory law which has long outlawed

¹ See <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-37.pdf>.

² See <https://www.dol.gov/agencies/ofccp/faqs/executive-order-13950>.

³ See <https://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel>; <https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/presidential-memorandum-promoting-diversity-and-inclusion-our-national>.

discrimination based on race or sex. For the reasons discussed above, we are very concerned that these statements appear to be intended to ban implicit bias and unconscious bias trainings by federal contractors and grantees, including state agencies. The uncertain breadth of the Order and the lack of clarity in the applicable procedures and standards compel us, again, to urge you to rescind the Order.

State agencies and officials are frequently recipients of federal contracts and grants. Many state agencies have long been engaged in implicit bias and unconscious bias trainings as integral and beneficial components of their diversity, equity and inclusion programs. The Order could arguably be construed to apply to any federal contracts entered into by states moving forward, and it does not state whether Section 5 is intended to apply to federal grants to states. Rather, in Section 5 of the Order, you require that within 60 days of the Order (or by November 23, 2020), agency heads report to the Director of the Office of Management and Budget (OMB) to which grant programs the requirements of the Order may be applied.

We are deeply concerned about the potential (intended or unintended) to direct or coerce the substance of our diversity training programs, including without limitation implicit bias and unconscious bias trainings authorized by state agency recipients of federal contracts and grants for their employees and contractors. To the extent that you refuse to rescind the Order in its entirety, we ask that you provide us with copies of all agency reports submitted to OMB pursuant to Section 5 of the Order and a list of all federal grants that will include a funding condition prohibiting the trainings to be covered by the Order. Clarification as to how public access to the reports will be provided and the date when those reports will be publicly available is needed. Additionally, the Order is unclear and vague about the guidelines or methods that will be used to identify which grants are selected for submission to OMB pursuant to Section 5 of the Order. We request a clear explanation of why any such grants were selected to include this new funding condition, and the statutory authority purportedly supporting the imposition of the new funding condition for each grant.

B. Advancing Racial Justice

Furthermore, the potential chilling effect of this Order on our country's ongoing racial justice work is profound, particularly now. Equal justice under law will not be achieved until we acknowledge and reckon with the racial inequities that persist in our society. The nationwide movement for racial justice has heightened awareness of not only how we treat each other as individuals, but also the role systems play in affording, or restraining, the advancement of particular groups. Our workplaces, public, private and non-profit, are grappling with how to become more inclusive and equitable. To that end, government should expand and increase its commitment to trainings centered on understanding and combating racial injustice. Now is the time for greater communication and support for diversity, equity and inclusion, not less.

We therefore urge you to withdraw the Order.

Sincerely,



WILLIAM TONG



Xavier Becerra
California Attorney General



Maura Healey
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Phil Weiser
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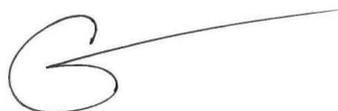
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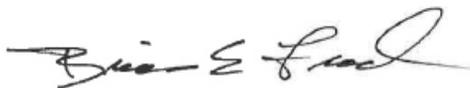
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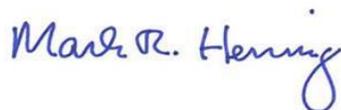
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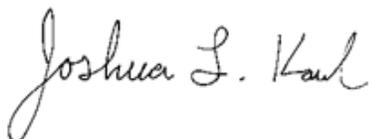
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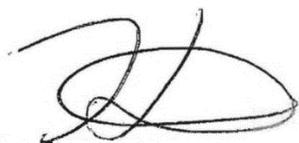
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cc: Russell Vought, Director of the Office of Management and Budget