

One Minute Memo®



DOL Issues Final Rule on Government Contractor Sexual Orientation and Gender Identity Non-Discrimination and Affirmative Action Requirements

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On December 9, 2014, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued the *Final Rule* implementing Executive Order ("EO") 13672, which will require affirmative action and non-discrimination in employment on the basis of sexual orientation and gender identity for federal government contractors. See our [prior post](#) on EO 13672, which President Obama signed on July 21, 2014.¹ The Final Rule becomes effective on April 10, 2015, 120 days after its publication in the Federal Register today. While the Final Rule was expected to be published in the Federal Register on December 3, 2014, later that morning the OFCCP published a notice soliciting comments under the Paperwork Reduction Act ("PRA"), which requires an analysis of the administrative burdens new regulations will have on small businesses. The agency had already issued its [FAQs](#) on the effect of EO 13672 and we do not expect the substance of the Final Rule to change despite the PRA comments period.

EO 13672 amends EO 11246, first introduced by President Lyndon Johnson in 1965, to add sexual orientation and gender identity to the list of categories, specifically race, color, religion, sex and national origin that are protected from discrimination and require affirmative action. EO 13672 is the first federal action prohibiting discrimination on these grounds, given that efforts to extend workplace protections to LGBT employees through the Employment Non-Discrimination Act ("ENDA") have been mired in legislative gridlock. EO 13672 will apply to contractors or subcontractors with more than \$10,000 in federal government business and covers contracts entered into or modified on or after the effective date.

Although contractors are required to take affirmative action to prevent discrimination on the basis of sexual orientation and gender identity, the announced Final Rule clarifies that contractors will not be required to collect or analyze data regarding the sexual orientation or gender identity of applicants or employees. Likewise, there will be no affirmative action program requirements and contractors will not be required to establish goals for employing persons on the basis of sexual orientation or gender identity. Nonetheless, contractors will be required to expressly include "sexual orientation and gender identity" as protected bases in their EEO policy statement, job solicitations, and in covered subcontracts and purchase orders.

Finally, neither EO 13672 nor the announced Rule modify the limited religious exemptions found in EO 11246, which essentially allow religious organizations to hire and employ co-religionists to perform work connected with the organization's activities.

To meet their compliance obligations, federal contractors and subcontractors will be required to ensure that applicants and employees are treated without regard to their sexual orientation or gender identity in all employment decisions. In addition, contractors should begin to take the necessary steps to incorporate sexual orientation and gender identity non-discrimination language into their equal opportunity policies, job solicitations, covered subcontracts and purchase orders and update their EEO postings and notices.

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¹ As we have [previously noted](#), the OFCCP's August 19, 2014, directive "Gender Identity and Sex Discrimination," Dir. 2014-02, took the position that sex discrimination includes discrimination on the bases of gender identity and transgender status, consistent with the EEOC's decision in *Macy v. Holder*. Thus, the OFCCP's position is that *existing* government contractors are already barred from discriminating based on gender identity or transgender status due to prohibitions against discrimination based on sex in current government contracts. EO 13672 does not alter the OFCCP's Directive 2014-02.

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