

One Minute Memo®



President Obama Expands LGBT Non-Discrimination Protections with Executive Order

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Today, President Obama signed an Executive Order prohibiting discrimination by the federal government or federal contractors on the basis of sexual orientation or gender identity. Currently, only 18 states and the District of Columbia have laws explicitly protecting LGBT workers from being fired because of their sexual orientation or gender identity. No federal law prohibits discrimination on these grounds, and efforts to extend workplace protections to LGBT employees through the Employment Non-Discrimination Act ("ENDA") are mired in legislative gridlock. Consistent with recent efforts to implement the President's agenda through executive action on federal contractor minimum wage and equal pay initiatives, President Obama's Order will affect approximately 24,000 companies that employ roughly 28 million employees, roughly one-fifth of the nation's workforce.

President Obama's Order applies to contractors or subcontractors who do over \$10,000 in federal government business in one year by amending Executive Order 11246, first introduced by President Lyndon Johnson in 1965, to include sexual orientation and gender identity among race, color, religion, sex and national origin as grounds on which federal contractors may not discriminate. The Secretary of Labor has been directed to prepare implementing regulations within 90 days (or by October 19, 2014). While the Order is effective immediately, the obligations set forth in the Order will apply to contracts entered into on or after the effective date described in the regulations. Once in effect, probably in early 2015, federal contractors will be required to maintain a policy against discrimination based on sexual orientation and gender identity with respect to employees and job applicants.

Efforts by some religious leaders for President Obama to include broad religious exemptions for federal contractors were rejected. However, the Executive Order does not alter more limited religious exemptions that already exist in the regulations, which essentially allow religious organizations to hire and employ co-religionists.

President Obama's order also amends Executive Order 11478 to include gender identity among the prohibited grounds of discrimination against federal employees. First issued by President Richard Nixon in 1969 and subsequently amended by President Bill Clinton in 1998 to include sexual orientation, federal employees will now be protected against discrimination based on gender identity effective immediately. While the Obama administration has previously interpreted existing law to protect transgender federal employees, federal employees will now be formally and explicitly protected from discrimination on the basis of gender identity.

Overall, some speculated that President Obama had been waiting to sign the Order to assess the Supreme Court's recent decision in *Burwell v. Hobby Lobby*. In *Hobby Lobby*, the Supreme Court ruled that, with respect to closely-held corporations,

the government's imposition of certain provisions relating to the contraception mandate conflicted with the religious beliefs of their owners in violation of the Religious Freedom Restoration Act. Based on *Hobby Lobby*, certain religious groups have threatened to challenge the legality of President Obama's Order because it omits a broad religious exemption.

While long-promised by President Obama and demanded by LGBT organizations, the Order's impact may nonetheless be limited. All of the top five federal contractors have non-discrimination policies that include sexual orientation and gender identity. According to the Human Rights Campaign, nearly 90% of Fortune 500 companies already ban discrimination based on sexual orientation and roughly 60% of them ban discrimination based on gender identity.

Employers who do business with the federal government, or any state or municipal government inclined to follow President Obama's lead, will need to review their non-discrimination, domestic partnership, and family and medical leave policies to include protections for LGBT workers. Stay tuned for further information once the Department of Labor's proposed implementing regulations are published.

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