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DOL Issues Final Rule Implementing Executive Order Prohibiting LGBT Discrimination in Government Contracting

By Linda Jackson and Sherron Thomas McClain

On December 3, 2014, the Department of Labor (DOL) released its final rule implementing Executive Order (EO) 13672, "Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity." President Obama signed EO 13672 on July 21, 2014. The final rule implements EO 13672 by replacing the words "sex, or national origin" with the words "sex, sexual orientation, gender identity, or national origin" wherever they appear in the Office of Federal Contract Compliance Programs (OFCCP) regulations implementing EO 11246.¹ With the changes announced in the final rule, the DOL has codified new protections against discrimination based on sexual orientation or gender identity that will apply to federal government contractors.

Executive Order 13672

EO 13672 expanded the areas of prohibited discrimination against federal employees and contractors by amending the language that government agencies and contractors must include in covered contracts and subcontracts and requiring affirmative action to ensure applicants and employees are not discriminated against by reason of their sexual orientation or gender identity. Before President Obama issued the new EO, EO 11246 only prohibited discrimination on the basis of race, color, religion, sex, and national origin. Because of the addition to the existing forms of prohibited discrimination, the DOL touted the new EO as "the first federal action to ensure LGBT workplace equality in the private sector."²

Final Rule

The DOL's final rule implements the changes EO 13672 made to EO 11246. To satisfy their affirmative action obligations under the final rule, contractors must include an updated equal opportunity clause in new or modified subcontracts and purchase orders, ensure that applicants

¹ A total of 14 sections in 41 CFR chapter 60 are being revised by the final rule: §§ 60-1.1, 60-1.4(a)(1), 60-1.4(a)(2), 60-1.4(b)(1)(1), 60-1.4(b)(1)(2), 60-1.8, 60-1.10, 60-1.20, 60-1.41(a), 60-1.41(c), 60-1.42(a), 60-2.16(e)(2), 60-2.35, 60-4.3(a)(10), and 60-50.5. No other revisions have been made.

² Press Release, Department of Labor, Final Rule to Protect Workers From Discrimination Based on Sexual Orientation and Gender Identity Announced by US Labor Department (Dec. 3, 2014), <http://www.dol.gov/opa/media/press/ofccp/OFCCP20141942.htm> (last accessed Dec. 4, 2014).

and employees are not discriminated against by reason of their sexual orientation and gender identity, update the equal opportunity language in job solicitations, and post updated notices.

The final rule does not impose new reporting and information collection requirements upon covered entities nor does it impose additional affirmative action obligations other than those described above. The rule also does not change the written affirmative action program requirements set forth in the regulations. Furthermore, contractors are not required to set placement goals on the basis of sexual orientation or gender identity, nor does the rule require the collection or analysis of data on these bases. Employees are not required to self-identify their sexual orientation or gender identity. Finally, the final rule does not include a carve-out for religious-affiliated entities.

Next Steps

The new requirements only apply to employers that enter into a covered federal contract or subcontract on or after the effective date of the new regulations. The final rule will become effective 120 days after its publication in the Federal Register. Assuming that the new rule is published as expected in early December, the effective date will be in early April 2015.

Contractors covered by the new rule will have to ensure that agreements modified or entered into after the effective date of the final rule, as well as job solicitations and postings, contain appropriate references to the new prohibited forms of discrimination. Contractors will need to revise their EEO and affirmative action policies and statements to include sexual orientation and gender identity as protected classes. Contractors that wish to begin making these changes sooner need not wait for the effective date of the new rule to do so.

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