

FOCUS ON POLICY

DOL Final Rule Updates Sex Discrimination Regulations for Federal Government Contractors: "From the 'Mad Men' Era to the Modern Era"

For the first time in over 40 years, the U.S. Department of Labor (DOL) has published sex discrimination regulations that update its interpretation of Executive Order 11246.¹ Executive Order 11246 was issued by President Lyndon B. Johnson (D) in 1965 and protects workers employed by or seeking jobs with federal contractors and subcontractors from discrimination on the basis of race, color, religion, sex, or national origin. The regulations had remained largely unchanged since 1970.

On July 21, 2014, President Barack Obama (D) signed Executive Order 13672, which amends Executive Order 11246 by extending workplace protections to lesbian, gay, bisexual and transgender (LGBT) Americans in the federal contracting workforce.² President Obama's Executive Order added protections for sexual orientation and gender identity by substituting "sex, sexual orientation, gender identity, or national origin" for "sex, or national origin".³ As amended, Executive Order 11246 is intended to ensure non-discrimination in employment on the basis of sex and to take affirmative action to ensure that applicants and employees are treated without regard to their sex. The Office of Federal Contract Compliance Programs of the U.S. Department of Labor (OFCCP) was tasked with implementing the Executive Order.

Specifically, the final rule updates OFCCP's sex discrimination guidelines as applied to federal contractors. It explicitly protects workers against compensation discrimination; sexually hostile work environments; discrimination based on pregnancy, childbirth or related medical conditions; and discrimination based on unlawful sex stereotypes, gender identity and transgender status. Additionally, federal contractors must permit their employees to access sex-segregated workplace facilities consistent with their gender identity. The final rule also includes a number of recommended "best practices" for employers, including the avoidance of gender-specific job titles and the construction of single-user, gender-neutral bathrooms.

Patricia A. Shiu, Director of OFCCP, explained the rationale underlying the new regulations:

We have made progress as a country in opening career opportunities for women that were, for decades, the province of men. Yet, there is more work that lies ahead to eradicate sex discrimination. This is why

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NATIONAL EMPLOYMENT PERSPECTIVE

JUNE 17, 2016

it is important that we bring these old guidelines from the ‘Mad Men’ era to the modern era, and align them with the realities of today’s workplaces and legal landscape.

The final rule becomes effective 60 days from its June 15, 2016, publication in the *Federal Register*. It will apply to businesses with federal contracts (or subcontracts) totaling \$10,000 or more in federal government business over a 12-month period.

Federal government contractors and subcontractors should review their internal policies to ensure that they are compliant with the final rule. If their internal policies do not, for example, explicitly address transgender issues such as same-sex bathrooms, they should consider revising those policies. Moreover, businesses with federal contracts or subcontracts should ensure that their internal policies—even if facially neutral—do not have a disparate impact. Seemingly neutral policies that ultimately result in sex discrimination may trigger an OFCCP enforcement action.

According to a Fact Sheet issued by the Office of the Press Secretary for the White House, many businesses already support LGBT workplace equality, recognizing that doing so is good for business.⁴ Indeed, as of July 21, 2014, 91 percent of *Fortune* 500 companies already prohibit discrimination based on sexual orientation, while 61percent prohibit discrimination based on gender identity.

The final rule represents one of several Executive Orders signed by the Obama administration to impose additional rules and obligations on federal government contractors and subcontractors, and should serve to remind such businesses of the importance of periodically reviewing their internal policies to ensure compliance with federal laws and regulations.

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- 1 Discrimination on the Basis of Sex, 81 Fed. Reg. 39,108 (June 15, 2016) (to be codified at 41 C.F.R. pt. 60-20).
 - 2 Office of Federal Contract Compliance Programs: President Obama Signs Executive Order to Protect LGBT Workers (June 14, 2016), <https://www.dol.gov/ofccp/lgbt/lgbt.html>.
 - 3 Executive Order 13672, 79 Fed. Reg. 42,971, 42,971 (July 23, 2014).
 - 4 The White House Office of the Press Secretary, FACT SHEET: Taking Action to Support LGBT Workplace Equality is Good for Business (July 21, 2014), <https://www.whitehouse.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-o>.