

Client Alert

July 22, 2014

Executive Order Extends LGBT Protections to Federal Contractor Employees

By Daniel P. Westman and Tina D. Reynolds

On Monday, July 21, 2014, President Obama amended two prior executive orders to extend employment protections to lesbian, gay and/or transgender (LGBT) workers. Executive Order 11246 was first signed by President Lyndon B. Johnson in 1965 to ban discrimination by government contractors on the basis of race and gender, and later amended to include discrimination against the elderly and disabled. President Obama's order adds gender identity and sexual orientation to the list of protected categories of employees. Executive Order 11478, which was first signed by President Richard Nixon in 1969, was amended to extend LGBT protections to employees of the federal government.

Federal contractors and subcontractors are now forbidden from discriminating in employment decisions on the basis of gender identity or sexual orientation. The President's order follows a failed effort in the House of Representatives to enact the Employment Non-Discrimination Act or ENDA, which would have banned such discrimination by all employers.

Amended Executive Order 11246 applies to companies performing government contracts or subcontracts worth in excess of \$10,000 in any year. The order directs the Department of Labor (DoL) to establish implementing regulations within 90 days. These will most likely mirror existing regulations for other forms of discrimination, which require, for example, adoption and implementation of written affirmative action policies, as well as maintenance of employment records regarding the protected classifications and submission of periodic reports to the DoL's Office of Federal Contract Compliance Programs. A company's failure to comply with these procedures could result in suspension or debarment from federal contracting. While the amendment leaves in place a religious exemption implemented in 2002 that allows certain religiously affiliated contractors to favor employees of that religion for religious roles, it does not expand religious exemptions.

Many companies have already adopted anti-discrimination policies that include some form of protection for LGBT workers. For these companies, now is the time to ensure that previously adopted policies are compliant with the new requirements. For example, while over 90 percent of Fortune 500 companies have adopted policies protecting gay and lesbian employees, few of these companies have policies that extend to transgender employees. Companies should move quickly to adopt formal policies that are fully in line with the new executive order.

While the order does not itself define the term "gender identity," the Senate version of ENDA provides some general guidance. According to that bill, "gender identity" means "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."

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While the provisions for federal employees are effective immediately, the provisions applicable to federal contractors will only be effective after formal adoption of the DoL's regulations. A period for public comment will follow the initial proposed regulations, with the final measures likely taking effect in early 2015.

The amendment to Executive Order 11246 represents a significant move by the Obama Administration. Although only government contractors and subcontractors are impacted (the order does not extend to grantees), these companies make up approximately 20% of the American workforce. For employees of these companies, federally required anti-discrimination policies will now afford protections not otherwise available under federal law and the laws of 29 of the states.

This is not the first time President Obama has used an executive order to achieve goals unrealized through the legislative process. This order falls on the heels of Executive Order 13658, which raises the minimum wage for persons working on covered federal contracts to \$10.10 per hour, effective January 1, 2015. The order, which followed the failure of Congress to pass a nationwide minimum wage bill called the Paycheck Fairness Act, was signed by President Obama on February 12, 2014. The DoL published its proposed rules thereunder on June 17, 2014, and public comments are due by July 28, 2014.

The changes created by these new executive orders, while welcomed by employees and employee advocacy groups, impose significant new obligations on government contractors. In the coming months it will be important for these companies to understand the new obligations imposed upon them and to modify their employment policies and procedures accordingly.

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