



Executive Order Protects Federal Contractor LGBT Workers

Insights

7.22.14

Yesterday President Obama issued an Executive Order extending antidiscrimination protection on the basis of sexual orientation and gender identity, as well as including these categories in affirmative action requirements. Regarding the federal contractor obligations, the Secretary of Labor will prepare regulations within 90 days, which will apply to contracts entered into on or after the effective date of the rules. Federal contractors or subcontractors holding contracts of \$10,000 or more are subject to this Executive Order, a lower threshold than the \$50,000 contract requirement for full affirmative action obligations. The additional antidiscrimination requirements are effective immediately for federal employees.

The Basis For The President's Action

This Executive Order follows the recent controversy associated with the Employment Non-Discrimination Act (ENDA), which, until recently, had been strongly supported by the LGBT community (lesbian, gay, bisexual, transgender). But following the recent U.S. Supreme Court decision in *Burwell v. Hobby Lobby*, the LGBT community withdrew its support of ENDA. The changed position was based on a concern that the religious exemption existing in the ENDA bill would be extended similarly to the religious exemption carved out by *Hobby Lobby*.

Although the Senate had passed ENDA previously, the House has failed to act. In light of ENDA's stalled status, a few weeks ago President Obama promised this new Executive Order so that the federal-contractor community, over which he exercises greater control, would provide protection for the LGBT community in workplace equality.

Significantly, the Executive Order does not address any religious exemption. However, existing affirmative action requirements do not apply to government contractors or subcontractors that are religious organizations, at least with respect to employment of individuals to perform work connected with carrying out of the activities of the organization. Previously, religiously affiliated contractors were permitted to favor individuals of a particular religion when making employment decisions. Thus, a contractor subject to this religious exemption could "discriminate" on the basis of hiring individuals of a particular religion to perform work associated with the organization's activities. Because the issue is not addressed in the current Executive Order, such institutions may not discriminate against hiring an individual based on his or her sexual orientation or gender identity.

As noted in the White House Fact Sheet accompanying the Executive Order, many federal contractors already have LGBT workplace-equality policies in place. The press release notes that 86% of the largest 50 federal contractors (representing nearly half of all federal contracting dollars) prohibit sexual-orientation discrimination and 61% already prohibit discrimination based on gender identity. “In addition, the five top federal contractors, which received nearly a quarter of all federal contracting dollars, already bar discrimination based on both sexual orientation and gender identity.” Thus, the President’s Executive Order, when implemented in the regulations, will have no practical effect on the policies of these federal contractors that already have LGBT Workplace Equality policies in place.

A related press release notes that, while workplace inequality still impacts millions of LGBT workers, 90% of transgender employees say they have experienced harassment, mistreatment, or discrimination on the job. The press release also notes that “according to surveys and studies,” more than 40% of the gay, lesbian, bisexual population have experienced some form of employment discrimination based on their sexual orientation.

The Impact

Currently 18 states and the District of Columbia, as well as over 200 cities and counties, prohibit employment discrimination on the basis of sexual orientation or gender identity. Federal contractors operating in those locations are already accustomed to complying with the requirement to not discriminate in employment decisions on the basis of sexual orientation or gender identity. This, of course, is in addition to the other protected class categories identified in Title VII and enumerated in the Executive Order: race, color, religion, sex, or national origin.

Federal contractors continue to be required to go beyond the nondiscrimination commitment required by Title VII of the Civil Rights Act of 1964. Instead, they must take affirmative action to ensure that applicants are employed and treated fairly during their employment without regard to these categories.

The U.S. Labor Department’s Office of Federal Contract Compliance Programs (OFCCP) has the authority to investigate complaints arising out of the categories that the affirmative-action laws protect. Although traditionally we have seen the Equal Employment Opportunity Commission as the enforcement agency of sex-related complaints, in light of yesterday’s Executive Order, we may anticipate that the OFCCP, the enforcement agency for affirmative-action requirements, may see an increase in individual complaints, in addition to its more often seen audit functions.

Once the regulations have been issued, we anticipate that the affirmative-action programs required by federal contractors and subcontractors may also be modified to incorporate these new categories.

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