



Government Contracts / Labor & Employment ADVISORY ■

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OFCCP Issues Final Regulations Implementing LGBT Executive Order

On December 3, 2014, the Office of Federal Contract Compliance Programs (OFCCP) announced [final regulations](#) implementing President Obama's [Executive Order 13672](#) prohibiting discrimination by federal government contractors on the basis of sexual orientation and gender identity. The regulations were published in the [Federal Register](#) on December 9, 2014. The regulations were initially going to be issued without a notice and comment period, thus bypassing the normal rulemaking process that federal agencies use when issuing new regulations. However, apparently in response to pressure from Republican lawmakers to provide a period for public notice and comment, OFCCP published a separate [notice](#) in the [Federal Register](#) on December 8, 2014, providing for a 60-day comment period under the Paperwork Reduction Act. Notwithstanding the recently announced comment period, the new regulations were published as *final* regulations on December 9, 2014, with a stated effective date of April 8, 2015. Thus, it is not clear how any public comments received during the comment period might impact the substance of the regulations.

The new regulations implement Executive Order 13672 by amending the implementing regulations under Executive Order 11246. Specifically, the new regulations replace the phrase "sex, or national origin" with the phrase "sex, sexual orientation, gender identity, or national origin" throughout 41 C.F.R. Parts 60-1, 60-2, 60-4 and 60-5, including in the Equal Opportunity Clause. As a result of these changes, contractors with contracts covered by the new regulations will be required to include the updated Equal Opportunity Clause in new or modified subcontracts and purchase orders, update the equal opportunity language used in job solicitations and post updated notices for employees and applicants.

The new regulations are most notable for what they do *not* require. Importantly, they do not change any of the written affirmative action plan requirements contained in 41 C.F.R. Part 60-2. Thus, the new regulations do not require contractors to collect, report or analyze any data regarding the sexual orientation or gender identity of applicants or employees. They also do not require contractors to set any placement goals on the basis of sexual orientation or gender identity.

The regulations do not define the terms "sexual orientation" or "gender identity." According to a [Frequently Asked Questions](#) document issued by OFCCP, this is because the implementing regulations under Executive Order 11246 do not define any of the protected classes covered by the Executive Order. Instead, OFCCP notes that it typically utilizes the same definitions used by the Equal Employment Opportunity Commission and case law developed under Title VII of the Civil Rights Act (although because Title VII does not cover sexual orientation, these sources are likely to be of very limited value in interpreting the meaning of "sexual orientation").

Assuming that OFCCP does not revise the regulations in response to any public comments, the regulations will take effect on April 8, 2015, and will only apply to contracts entered into or modified after this date. Thus, contractors should bear in mind that modifications after the effect date to, for example, extend the length of a contract or to change requirements or specifications will make the new regulations apply to the contract in question, even if it was initially entered into prior to the regulation effective date.

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