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Will Religiously Based Federal Contractors Challenge OFCCP's New LGBT Regulations?

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As 2014 headed toward close, the Office of Federal Contract Compliance Programs ("OFCCP") gave the federal contractor community, already [presented with five Executive Orders in 2014](#), one last compliance gift. On December 9, 2014, without notice or an opportunity for public comment, OFCCP issued its final rule ("Rule") implementing Executive Order ("EO") 13672. President Obama signed EO 13672 on July 14, 2014, extending protections against workplace discrimination to members of the lesbian, gay, bisexual, and transgender ("LGBT") community by amending Executive Order 11246 to add sexual orientation and gender identity as protected characteristics. It also requires contractor employers to take affirmative action to ensure that applicants and employees are treated without regard to their sexual orientation or gender identity during their employment. The Executive Order was effective immediately. The Rule is effective April 8, 2015, and applies to all new or modified federal contracts and subcontracts after that date.

The issuance of EO 13672 and the requirements of its implementing Rule highlight OFCCP's intention to focus on LGBT protections and might be seen as steps to squarely tee up the issue of enforcement of LGBT protections in the post-*Hobby Lobby* era. First, and seemingly to leave no doubt of its intention, OFCCP had also issued Directive 2014-02 in August 2014, with its stated purpose, "[t]o clarify that existing agency guidance on discrimination

on the basis of sex under Executive Order 11246, as amended, includes discrimination on the bases of gender identity and transgender status." The directive explicitly piggybacked off of the EEOC's 2012 decision in [Macy v. Holder](#), where the EEOC concluded that gender identity and transgender status did not need to be specifically addressed in Title VII in order to be protected bases of discrimination, as they are simply part of the protected category of "sex" under Title VII. Anticipating the question of why EO 13672 was then necessary if already protected under Title VII, OFCCP offered a questionable explanation that the directive "does not address gender identity as a stand-alone protected category, which (along with sexual orientation) is the subject of Executive Order 13672."

Second, as written, the Rule is relatively straightforward. It amends EO 11246's implementing regulations by replacing the phrase "sex or national origin" with the phrase "sex, sexual orientation, gender identity, or national origin" wherever the former appears in the regulations. The Rule also places the following obligations on employers:

1. Ensure that applicants and employees are not discriminated against based on their sexual orientation or gender identity.
2. Update existing affirmative action plans and all equal opportunity, harassment, and nondiscrimination policies to reflect the additional protected categories.
3. Make available to applicants and employees a revised version of the "EEO is the Law" poster that includes a notice regarding the protections for LGBT workers.
4. Include "sexual orientation" and "gender identity" as protected traits in the equal opportunity job solicitation taglines. (OFCCP suggested in the Rule preamble that "equal opportunity employer" may be sufficient to cover all protected categories of EO 11246.)
5. Incorporate the new categories into new or modified subcontracts and purchase orders.
6. Report to OFCCP and the Department of State any suspicion that it cannot obtain a visa for an employee, from another country with which it does business, due to the employee's sexual orientation.
7. Ensure that facilities (e.g., restrooms, locker rooms, and dressing areas) provided for employees are not segregated on the basis of sexual orientation and gender identity.

The Rule does not burden contractor employers with the same data collection and analysis obligations that are required with respect to females and minorities and does not require contractor employers to set placement goals on the bases of sexual orientation or gender identity, nor does it require them to collect or analyze any data with respect to the sexual orientation or gender identity of their applicants or employees. Contractor employers are also not required

to, or prohibited from, soliciting applicants or employees to self-identify regarding their sexual orientation or gender identity.

Finally, it is notable that EO 13672 and its implementing Rule were issued despite the growing number of states (currently 20 states plus the District of Columbia) that have implemented protections against sexual orientation and/or gender identity discrimination. And further, that they are set within the larger context of the legalization of same sex marriage by, as of this article, 37 states, as well as the US Supreme Court's consideration of the status of same sex marriage this year. Thus, the issue brought to focus by these OFCCP actions and the Executive Order may be more pointed than an identification of sexual orientation and gender identity as protected traits and may go towards whether a religious contractor employer may base employment decisions on the LGBT status of an applicant or employee.

EO 13672 contains no exemption for religiously affiliated federal contractors. Section 204(c) of EO 11246, which allows a religious corporation, association, educational institution or society, to base employment decisions on the religious membership of a particular individual (rather than on the beliefs of the organization), was specifically *not* amended by EO 13672. Possibly by design, this may result in a test of the reach of the Supreme Court's 2014 decision in [*Burwell v. Hobby Lobby Stores, Inc.*](#), which, broadly speaking, allowed a closely-held, for-profit corporation to be exempt from the Affordable Care Act's birth control mandate based upon its owners' religious objection because it found that there was a less restrictive means of furthering the law's interest.

A similar legal challenge may play out in the arena of employee benefits governed by EO 13672. OFCCP enforcement of the new Rule's nondiscrimination prohibitions would bring within OFCCP's purview the provision of benefits to an employee's same sex spouse. Title VII and Supreme Court precedent require employers to make available the same benefits for spouses regardless of the gender of the employee. Closely-held contractor employers who oppose same sex marriage as a violation of religious belief may object to this requirement's enforcement as a burden on their religious beliefs, similar to the arguments made by Hobby Lobby. While the *Hobby Lobby* majority attempted to dismiss the idea that its decision might allow an employer to "cloak as religious practice" prohibited acts, such as racial discrimination in hiring, the reach of the *Hobby Lobby* decision is far from settled, and the next batch of cases may seek to extend that decision to regulations requiring equal benefits based upon sexual orientation or gender identity.

And, lest employers think that the OFCCP was done, just today it announced that on January 30, 2015, it will publish a Notice of Proposed Rulemaking to update contractors' obligations to not

discriminate on the basis of sex under EO 11246 to "reflect present-day workplace realities and align OFCCP's rules with current law under Title VII." The new rules will touch on "compensation discrimination, sexual harassment, failure to provide workplace accommodations for pregnancy, and gender identity and family caregiver discrimination, among other topics." The regulatory landscape for federal contractors saw many changes in 2014, and it seems 2015 is shaping up to be no different.

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