

OFCCP Issues Final Rule Barring Contractor Discrimination Based on Sexual Orientation or Gender Identity

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Yesterday, the Department of Labor (DOL) Office of Federal Contract Compliance Programs (OFCCP) published a final rule implementing Executive Order (EO) 13672, which prohibits federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity. *See* 79 Fed. Reg. 72985 (Dec. 9, 2014). EO 13672 had added these obligations via amendments to EO 11246, which has long prohibited federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, or national origin. *See* 79 Fed. Reg. 42971 (July 23, 2014). EO 13672 directed OFCCP to make the same changes to its regulations implementing EO 11246. OFCCP did so through its final rule, modifying 41 C.F.R. parts 60-1, 60-2, 60-4, and 60-50 to add sexual orientation and gender identity to the bases protected from discrimination by contractors and subcontractors.

To comply, contractors (and subcontractors) should expand and revise their existing non-discrimination policies, procedures, and training. These updates should reflect that, most notably, contractors must not discriminate based on sexual orientation and gender identity, and must update the equal-opportunity language that they use in contracts, job listings, and workplace notices accordingly. Further, contractors may not segregate facilities or deny employment based on sexual orientation or gender identity—even if the work is to be performed in countries that refuse entry of persons on those grounds. Contractors should also be aware that they may be subject to OFCCP compliance audits regarding these obligations. Finally, contractors should note that OFCCP's final rule does not require them

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to set placement goals based on sexual orientation or gender identity or to collect hiring data, as contractors currently must for some protected bases.

The final rule becomes effective April 8, 2015, and applies to contractors who hold contracts entered into or modified on or after that date. OFCCP advised that it published this final rule under the Administrative Procedure Act's "good cause" exception to notice-and-comment rulemaking because the final rule merely restates changes in enabling authority (EO 11246) and affords OFCCP no discretion as to whether or how to amend its regulations.

J. Ryan Frazee, a Wiley Rein LLP law clerk, contributed to the drafting of this alert.