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## OFCCP RELEASES FINAL RULE ON LGBT NON-DISCRIMINATION

December 4, 2014

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The Office of Federal Contract Compliance Programs announced yesterday that it is issuing a **Final Rule** implementing President Obama's **Executive Order** that prohibits federal contractors from discriminating on the bases of sexual orientation and gender identity.

This Final Rule will be effective 120 days after publication in the *Federal Register* (which has not yet occurred) and will apply to federal contracts entered into or modified on or after that date.

### What does the Final Rule change?

The EO Clause has been changed to include "sexual orientation" and "gender identity." However, those contractors that incorporate the EO clause by reference will not need to physically alter their subcontracts or purchase orders.

Contractors must notify applicants and employees of their non-discrimination policy by posting the "EEO is the Law" poster. Presumably, the government will be updating this poster to include these two new categories.

Contractors are also obligated to expressly state in job advertisements that all qualified candidates will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin. The Final Rule provides that employers can satisfy this requirement by including that verbiage or simply indicating that the company is an "equal opportunity employer."

Although employees hired outside of the United States are not covered by the regulations, if a contractor is not able to obtain a visa of entry for an employee or potential employee to a country in which it is doing business, the regulations require the contractor to notify both the OFCCP and the U.S. Department of State if the contractor believes that the refusal of the visa is because of the individual's protected characteristic. This requirement now applies to sexual orientation and gender identity status.

The section of the regulations regarding Placement Goals in AAPs has also been

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updated. Contractors are prohibited from extending preferences on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin due to specific placement goals.

## **What is not affected by the Final Rule?**

The Final Rule does not change contractors' reporting and information collection requirements, so contractors are not required to survey or report on the number of LGBT applicants or employees. The required components of Affirmative Action Plans are also not affected.

## **What should contractors do to comply?**

The Final Rule simply adds sexual orientation and gender identity to the sections of the regulation where the other protected categories are listed, so the impact on federal contractors is limited. However, contractors should begin the process of determining whether and when they need to do the following:

- Update the EO Clause in subcontracts and purchase orders;
- Amend the EEO and AA policy to include sexual orientation and gender identity;
- Obtain new "EEO is the Law" posters;
- Modify their EEO tagline on job solicitations; and
- Train appropriate personnel on the new protections.

In addition, the OFCCP has issued **FAQs** regarding its interpretation of the Final Rule. These will probably be updated periodically as contractors pose questions to the OFCCP.

## **Why no *proposed* rule?**

You may be wondering whether you missed the Notice of Proposed Rulemaking on this issue. Actually, the OFCCP bypassed the notice and comment period, stating that the "Executive Order was very clear about the steps the Department of Labor was required to take, and left no discretion regarding how to proceed. In such cases, principles of administrative law allow an agency to publish final rules without prior notice and comment when the agency only makes a required change to conform a regulation to the enabling authority, and does not have any discretion in doing so." (The OFCCP must not have seen **all the questions I had** after reading the Executive Order.)

If you have any questions regarding this Final Rule, please contact a member of Constangy's **Strategic Affirmative Action Practice Group**, or the Constangy lawyer of your choice.

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