

# The Final Rule on LGBT Equality in Federal Contracts is Here

## Labor & Employment Law Update

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Back in July, we told you that President Obama signed Executive Order 13672, which directed the Department of Labor to expand the Equal Employment Opportunity requirements for certain federal contracts so as to prohibit discrimination by contractors based on sexual orientation or gender identity.

Taking the cue from that Executive Order, on December 3, 2014, the Department of Labor issued its Final Rule implementing the Executive Order. The Final Rule will take effect on April 8, 2015.

A central component of the Final Rule is its directive that covered contracts and subcontracts, as well as policy, notice, and affirmative action plan documents, must be re-drafted so that where those documents formerly stated “sex, or national origin,” they must now state, “sex, sexual orientation, gender identity, or national origin.” Notably, the Final Rule does not define sexual orientation or gender identity, which means the definitions of those terms will likely be taken from judicial decisions and agency guidance—much of which has developed under various states’ laws.

Federal contractors should recognize that the Final Rule does not require contractors to collect information about applicants’ or employees’ sexual orientations or gender identities. In that same vein, the new Final Rule does not require employers to undertake any data analysis based on applicants’ or employees’ sexual orientations or gender identities. However, nothing in the Final Rule, itself, prohibits asking applicants or employees to identify their sexual orientation or gender identity. That said, state and local laws may prevent such questioning, and we generally advise against asking employees and especially applicants to identify their membership in protected classes as doing so may make discrimination claims more difficult to defend.

The requirements of the Final Rule will apply only to contracts that are entered into or modified after the effective date of the Final Rule. Contracts entered into prior to April 8, 2015, and which are not modified after that date, are not required to include the sexual orientation and gender identity language.

But this is more than just a paper change. To the extent federal contractors had not already done so, they must now train their managers to recognize and properly address potential instances or complaints of sexual orientation or gender identity-based discrimination. Additionally, all employees of covered federal contractors and applicable subcontractors must be clearly advised that discrimination and harassment based on sexual orientation or gender identity is prohibited, and that there are complaint mechanisms in place in the event discrimination or harassment occurs.

The federal government has made a clear commitment to LGBT equality in employment under federal contracts, so federal contractors and subcontractors would do well to make efforts to transition seamlessly to compliance with the Final Rule's sexual orientation and gender identity EEO requirements.

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