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Making Sense of Recent Labor Rules for Government Contractors

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In April, federal contractors were made aware of less-than-consistent messages from the federal government about nondiscrimination programs. On one hand, President Obama declined to require federal contractors to prohibit discriminating against employees because of their sexual orientation or gender identity. Yet just two weeks later, the Equal Employment Opportunity Commission ruled that federal law prohibited gender-identity discrimination by almost all employers, including federal contractors.

These developments leave federal contractors' employees protected from gender-identity discrimination but perhaps not so from sexual-orientation discrimination. But either way, the nondiscrimination rules applicable to federal contractors and their employees have shifted, and they may well change again before November's elections. Close attention to these rules is therefore warranted over the coming months.

The Executive Order

Last month, the White House confirmed it will not issue an executive order requiring federal contractors to prohibit discrimination based on employees' sexual orientation or gender identity. In recent months, news outlets had reported that President Obama would soon sign such an order, which would have added these two prohibitions to Executive Order 11246's long-standing prohibitions against discrimination on the basis of race, religion, sex and national origin.

This reversal may seem surprising because, reportedly, a draft

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executive order had already been reviewed and approved by the U.S. Departments of Labor and Justice. (Most likely, the Department of Labor's Office of Federal Contract Compliance Programs would have enforced the nondiscrimination requirements as it does for other federal nondiscrimination programs.) And such nondiscrimination policies had become common in federal contracting, as most notably reported by an April 2012 University of California, Los Angeles study finding that 86 percent of the 50 largest federal contractors (measured by contracting dollars) already prohibited discrimination because of sexual orientation and 55 percent because of gender identity.[1]

The EEOC Decision

Later in April, the EEOC ruled that Title VII of the Civil Rights Act of 1964 protects employees from being discriminated against on the basis of their gender identity. Broadly applicable to almost all employers nationwide, including federal contractors, Title VII bars discrimination on the basis of race, color, religion, sex or national origin, or on association with individuals in those groups.[2] In last month's decision, EEOC unanimously held that gender-identity claims are cognizable as claims of discrimination "based on ... sex."[3]

The EEOC's decision applies nationwide, allowing aggrieved employees to file claims alleging that federal contractors and other employers have discriminated on the basis of gender identity. The decision also may influence the OFCCP's interpretation of E.O. 11246, the executive order that President Obama declined to expand, because the OFCCP generally[4] follows the EEOC's Title VII interpretations in deciding its own questions of contractors' compliance with applicable labor rules.

Implications

The decisions by the White House and EEOC together suggest that federal contractors cannot, under federal law, discriminate against employees on the basis of gender identity but are not contractually required to have nondiscrimination policies to that effect; contractors' discrimination on the basis of sexual orientation, in contrast, remains uncovered by Title VII and E.O. 11246.

Whether and when federal contractors will be required to have added these nondiscrimination policies remains unclear. Although the White House publicly called for prohibiting sexual-orientation and gender-identity discrimination through passage of the Employment Nondiscrimination Act, which would amend Title VII of the Civil Rights Act of 1964 to include these prohibitions, reports indicate that the bill's prospects for passage are dim.

Still, the best policy is one of robust protections against discrimination to ensure compliance with all applicable state laws and also to ensure compliance with any future changes in federal law. And to be sure, contractors can reasonably expect these labor rules will change again before November's elections.

[1] Here.

[2] 42 U.S.C. § 2000e-2.

[3] Macy v. Holder, No. 0120120821 (EEOC April 20, 2012). The EEOC supported this rationale in part with the U.S. Supreme Court's 1989 plurality decision in Price Waterhouse v. Hopkins, in which Justice William Brennan wrote that under Title VII, "a person's gender may not be considered in making decisions that affect her." 490 U.S. 228, 242 (1989). The disagreement among the plurality, concurring, and dissenting opinion was over evidentiary rules and burdens of persuasion, not over whether Title VII prohibited discrimination on the basis of gender identity.

[4] Nan D. Hunter et al., The Relationship between the EEOC's Decision that Title VII Prohibits Discrimination Based on Gender Identity and the Enforcement of Executive Order 11246, May 4, 2012, available here.