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DOL Prohibits Federal Contractors from Gender Identity and Sexual Orientation Discrimination

The U.S. Department of Labor (DOL) has issued a final rule that prohibits federal contractors and subcontractors from discriminating against workers based on sexual orientation or gender identity. This rule implements Executive Order 13672, signed by President Obama July 21, 2014. The final rule, which is available here is effective 120 days after publication in the Federal Register and will apply to federal contracts entered into or modified on or after that date.

The rule prohibits discrimination against job applicants and employees based on sexual orientation or gender identity in addition to other protected characteristics. After the effective date contractors must now include gender identity and sexual orientation as prohibited bases of discrimination under their Equal Opportunity Clause. In addition, sexual orientation and gender identity language must be used in job solicitations and in new or modified subcontracts or purchase orders. Notably, this rule does not require contractors to ask for self-identification by applicants or employees, to set goals or to conduct any data analysis regarding compensation or other personnel practices as they relate to sexual orientation or gender identity.

Though the rule has not yet gone into effect, federal contractors and all other private employers should be aware that the EEOC already considers discrimination based on gender identity or discrimination based on transgender status as a form of sex discrimination under Title VII. (*Macy v. Dep't of Justice*). In *Macy* the EEOC found sex discrimination under Title VII had occurred against employees because they were transgender, because of their gender identity, and/or because they had transitioned. On September 24, 2014, the EEOC filed its first lawsuits challenging transgender discrimination under the Civil Rights Act. Moreover, as noted in its Strategic Enforcement Plan, the EEOC also considers discrimination based on sexual orientation as sex discrimination. OFCCP agrees that discrimination based on gender identity or

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transgender status is a form of sex discrimination already encompassed within the scope of Executive Order 11246. OFCCP along with the EEOC will now accept and investigate complaints based on gender identity and/or sexual orientation.

Ultimately, though there is no comprehensive federal law explicitly protecting gay or transgender employees from discrimination; employers should be aware that the EEOC—the agency responsible for enforcing federal anti-discrimination laws—already considers discrimination based on being gay or transgendered as sex discrimination. Moreover, according to the DOL, 18 states (including Wisconsin) and the District of Columbia already have laws protecting individuals from discrimination based on gender identity or sexual orientation. Thus, employers, and not only those doing business with the federal government (contractors and subcontractors), may be prudent to take a fresh look at their anti-discrimination policies and practices

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