



Prohibit Discrimination by Federal Contractors

Issue

Discrimination on the basis of sexual orientation and gender identity by federal contractors in their employment practices denies employment opportunities to gay, lesbian, bisexual, and transgender (“GLBT”) persons.

Short Answer

The President should issue an Executive Order (“EO”) that would prohibit discrimination on the basis of sexual orientation or gender identity by federal contractors.

Background

Drafted by President Johnson in 1965, Executive Order 11,246, as amended,¹ prohibits federal contractors from discriminating on the basis of race, color, religion, sex, or national origin in their employment practices. The executive order was drafted to enhance equal employment opportunity by ensuring that the Federal government has recourse to act when an employer contracting or subcontracting for the federal government is found to be discriminating on one of these bases. EO 11,246 provides for sanctions against employers by making the non-discrimination measure a term of the contract.

The current federal executive order allows employers to engage in discriminatory practices while continuing to receive federal funds and contracts. When the government is acting on behalf of its citizens in contracting for goods and services, the government becomes a de facto discriminator in employment when it fails to provide adequate protections to the GLBT employees of federal contractors and subcontractors. This results in the denial of employment opportunities to the GLBT community—an effect that is amplified for those GLBT employees who live in states or localities that lack protections against employment discrimination.

EO 11,246 must be amended in order to ensure the government’s mission and duty to provide for fair and equal employment opportunity to all Americans. Although the federal government cannot prohibit wholly private employers who are not federal contractors from discriminating on the basis of sexual orientation or gender identity without action by Congress, it can and should prohibit private employers who willingly agree to perform contracts for the Federal government.

Recommendation

The President should issue an executive order that would amend Executive Order 11,246 to prohibit discrimination on the basis of sexual orientation and gender identity by federal contractors. The President should further instruct the Secretary of Labor to direct the Deputy Assistant Secretary for the Employment Standards Administration and the Director of the Office of Federal Contract

¹ EO 11,375 amended the EO 11,246 to also prohibit discrimination by contractors on the basis of sex.



Compliance Programs to revise the implementing regulations for EO 11,246,² the Federal Contract Compliance Manual, and any other guidance for federal contractors to reflect this amendment.

Authority

In addition to the general grant of authority to the President as Chief Executive under Article II, § 1 of the Constitution, presidential authority to issue Executive Order 11,246 is based in the Federal Property and Administrative Services Act of 1949 (“FPASA”), otherwise known as the Procurement Act. 40 U.S.C. § 121(a) authorizes the President to “prescribe policies and directives that the President considers necessary to carry out this subtitle,” as long as the policies are consistent with the subtitle, which is designed to provide for an “economical” and “efficient” system for procurement.³ For further discussion on the President’s authority to implement the executive order, please refer to the extended memorandum in the Appendix.

The Secretary of Labor is authorized under Section 201 of EO 11,246 to administer and enforce the Order and to “adopt such rules and regulations and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of Parts II and III of this Order.”

² 41 CFR Chapter 60.

³ 40 U.S.C. § 101.