

Michigan Recognizes Sexual Orientation as a Protected Class for State Contracts

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On December 27, 2018, as one of his last acts in office, term-limited Michigan governor Rick Snyder signed an [executive directive](#) which will extend sexual orientation discrimination protection to a number of private employees. The governor's executive directive, which is an order dictating how statewide executive branch departments and agencies are to act, requires all such departments and agencies to include covenants in procurement contracts prohibiting any contractor or subcontractor from discriminating against an employee or applicant for employment on the basis of sexual orientation or "gender identity or expression." Such a prohibition must also be a condition for any grant or loan involving state funds to a public or private entity. The directive became immediately effective for all contracts, grants, or loans made or modified after December 27, 2018.

The directive defines "gender identity or expression" to mean "having or being perceived as having a gender-related self-identity or expression whether or not associated with the individual's assigned sex at birth." It defines "sexual orientation" as "an individual's physical, romantic, or emotional attraction to people of the same or opposite gender." The directive also states that "[e]xamples of sexual orientations include, but are not limited to heterosexual, lesbian, gay, and bisexual."

Although this directive is just a slight extension of the recognition provided in Michigan's existing Civil Service Commission rules, it is an expansion nonetheless. The Civil Service Commission rules apply only to state departments—prohibiting them from discriminating against state employees on the basis of sexual orientation. The new directive expands coverage to private-sector employees, since the State of Michigan is one of the state's largest buyers of private-sector goods and services.

The directive is, however, far from the end of the fight for advocates seeking full legal recognition and protections for sexual orientation and gender identity. Because the directive provides only a contractual prohibition, it remains to be seen how individual employees will avail themselves of any causes of action for any legal redress against their employers—the signatories to the contracts to which the employees are not parties. This will depend, in large part, on the explicit contractual language used. Moreover, the directive will have no effect on employees who do not work for a State of Michigan contractor, or who may work for such a contractor but not on work covered by the contract (in this regard, again, the explicit contractual language will be key).

The directive does provide a blanket exemption for contracts, grants, and loans with contractors or

subcontractors that are religious organizations qualified as 501(c)(3) nonprofit organizations. The directive also does not bind Michigan's Department of State or the Department of Attorney General. These departments, however, are expressly encouraged to voluntarily comply.

Despite its limited application and exemptions, the directive is another indication that as the law continues to develop and evolve, Michigan may ultimately recognize sexual orientation and gender identity as bona fide bases of illegal discrimination. Michigan's state discrimination statute—the Elliott-Larsen Civil Rights Act—currently does not recognize either of these as legally protected characteristics. Former governor Snyder's attempts to expand the statute to do so were unsuccessful, but Governor Gretchen Whitmer has vowed to continue the effort toward expansion. If this directive is any indication, it would seem that the momentum for expansion is continuing to build. The directive may exert additional pressure on the state legislature to amend the Elliott-Larsen Civil Rights Act to expand coverage to all employees within the state, providing the same private causes of action it already does for discrimination on the longstanding protected characteristics of individual employees.

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