

New Employment Rules for Federal Government Contractors

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President Obama recently issued two Executive Orders requiring federal government contractors to adopt practices to ensure fair treatment of certain classes of workers. The first, titled the **"Fair Pay and Safe Workplaces Executive Order," (the "FPSW Order")** makes a contractor's compliance with certain federal and state labor laws a part of the procurement process. The second - and more controversial - Executive Order **prohibits government contractors from discriminating against lesbian, gay, bisexual and transgender ("LGBT") employees in hiring decisions.**

The stated goal of the FPSW Order is to increase government contractors' understanding and compliance with both federal and state labor laws designed to promote safe, healthy, fair and effective workplaces. To that end, it requires government contractors to disclose any violations of fourteen specific federal labor laws in the preceding three years or their state-law equivalents, as part of its proposal for any contract that exceeds \$500,000. Furthermore, contracting officers must take any violations of these laws into account in determining whether the contractor is a responsible source that has a satisfactory record of integrity and business ethics. The 14 laws subject to this executive order are:

- *Fair Labor Standards Act*
- *Occupational Safety and Health Act of 1970*
- *Migrant and Seasonal Agricultural Worker Protection Act*
- *National Labor Relations Act*
- *Davis-Bacon Act*
- *The Service Contract Act*
- *Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity)*
- *Rehabilitation Act of 1973*
- *Vietnam Era Veteran's Readjustment Assistance Act of 1974*
- *Family and Medical Leave Act*
- *Title VII of the Civil Rights Act of 1964*
- *Americans with Disabilities Act of 1990*
- *Age Discrimination in Employment Act of 1967*
- *Executive Order 136558 of February 12, 2014 (Establishing a Minimum Wage for Contractors)*

The FPSW Order provides that "violations" of these laws include administrative merits determinations, arbitral awards or decisions, or civil judgments.

This disclosure requirement also extends to subcontractors whose contract exceeds \$500,000. Thus, prime contractors are now required to include in subcontracts in excess of \$500,000 a requirement that the subcontractor disclose to the prime any violations for the preceding three years. Additionally, at the time of execution of the contract, the prime contractor is required to represent to the contracting agency that it will require each subcontractor to make the same disclosures as required of the prime, and before awarding a subcontract, the contractor will consider the information submitted by the subcontractor in determining whether a subcontractor is a responsible source that has a satisfactory record of integrity and business.

During the performance of the contract, the contractor and any applicable subcontractors are required to update this information every six months. If labor law violations occur during the performance of the contract, the agency's contracting office, in consultation with the Department of Labor, can consider whether any remedial measures are required. Such measures may include decisions not to exercise an option on a contract, contract termination or referral to the agency suspension and debarment official.

As well as requiring reporting violations of labor laws to the government, the FPSW Order requires contractors to provide its employees information about hours worked, overtime hours, pay and any additions to or deductions made from an employee's respective pay. This arguably will allow workers to verify that they are being paid what is due to them under the law.

In addition to placing these reporting requirements on government contractors, the FPSW Order creates systems for more efficient monitoring and reporting of labor law violations between agencies. It mandates that government agencies coordinate with each other to ensure that labor laws are enforced consistently. This will enable government agencies to identify contractors who repeatedly and willfully violate labor laws and determine the seriousness and pervasiveness of the violations. Additionally, to aid contractors in providing information to the government, the **Government Accountability Office (GAO)** has been directed to develop a single website for contractors to meet all of their reporting requirements.

In sum, while the FPSW Order does not place any new requirements on government contractors, vis-à-vis their employees, it does increase the consequences of violating any existing labor laws. Violations of labor laws will now impact a government contractor's ability to win new work and can even lead to the termination of an existing contract.

The **LGBT Non-Discrimination Executive Order (the "LGBT Order")** modifies existing non-discrimination executive orders to add sexual orientation and gender identity to the list of protected classes - heretofore race, color, religion, sex or national origin - against whom government contractors may not discriminate in hiring decisions.

All contractors receiving more than \$10,000 in federal contracts are subject to the prohibition on LGBT discrimination. Depending on how the implementing regulations are written, the non-discrimination provision may apply beyond just contractors to any entity receiving federal money, including federal grant recipients. This is where the controversy comes in. Many religious organizations, including certain hospitals, universities and social service charities, have sincerely-held beliefs that may militate against hiring an LGBT person under certain circumstances. However, the LGBT Order does not contain any exemptions or accommodations for religious organizations. Because of this controversy, some in Congress have suggested that Congress may act to override the LGBT Order in the near future.

Others in Congress wish to extend the protections of the LGBT Order beyond government contractors, to virtually every employer in the country. The Senate passed the Employment Non-Discrimination Act of 2014, which prohibits discrimination on the basis of sexual orientation or gender identity by employers employing more than 15 employees. The bill was referred to the House, but it has yet to act on the proposed legislation and seems unlikely to do so in the near future. The Senate version of the legislation is, in some ways, less controversial than the LGBT Order because, as passed by the Senate, it includes an exemption for all private associations (defined as all 501(c) organizations), including religious organizations.

With legislative action all but frozen in the face of the impending mid-term elections, it seems improbable that any legislation either enlarging or reducing protections for LGBT workers will be enacted in the near future. But outside of the legislative arena, advancing LGBT employee rights has been identified as a top priority for the Equal Employment Opportunity Commission. Indeed, the EEOC listed coverage of lesbian, gay, bisexual and transgender individuals under Title VII as one of its top enforcement priorities in its Strategic Enforcement Plan.

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