THE
NATIONAL LAW REVIEW

DOL Releases Regulations Extending Protections to Lesbian, Gay, Bisexual, and Transgender Employees, Applicants

Monday, December 15, 2014

Final regulations implementing the July 21, 2014, Presidential Executive Order prohibiting federal contractors and subcontractors from discriminating against lesbian, gay, bisexual, and transgender (LGBT) employees and applicants were published in the Federal Register ("the Rule" or regulations).

The Rule will become effective April 9, 2015, 120 days after its publication, and will apply to federal contracts entered into or modified on or after this date.

Calling Executive Order 13672 the first federal action ensuring workplace equality for LGBT employees in the private sector, the U.S. Department of Labor released the highly anticipated regulations in a controversial fashion by omitting an opportunity for public comment.

jackson lewis.

Article By Michelle E. Phillips
Eric J. FelsbergJackson Lewis P.C.
Workplace Resource Center Update

Civil Rights
Labor & Employment
All Federal

Similar to other, recently revised regulations, including the updated Vietnam Era Veteran's Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act regulations, the new mandates will be enforced by the DOL's Office of Federal Contract Compliance Programs ("OFCCP"), the agency charged with monitoring employer compliance with the federal affirmative action regulations.

Coverage

The Rule prohibits covered employers from discriminating on the bases of sexual orientation and gender identity and requires that they take affirmative action to ensure that applicants are employed, and employees are treated, without regard to their sexual orientation or gender identity. The regulations modify Executive Order 11246 (which generally provide for affirmative action on the bases of race and sex) by substituting the phrase "sex, sexual orientation, gender identity, or national origin" for "sex or national origin" wherever the latter phrase appears in the regulations implementing Executive Order 11246.

Despite early speculation that the Rule could include the same data collection and analysis obligations that are required with respect to females and minorities, the Rule does not require federal contractors and subcontractors to set placement goals on the bases of sexual orientation or gender identity, nor does it require them to collect or analyze any data with respect to the sexual orientation or gender identity of their applicants or employees. The Rule also does not require or prohibit solicitation of information from applicants or employees regarding their sexual orientation or gender identity.

There is a growing trend among employers to collect information about LGBT status as part of diversity and inclusion initiatives. Jackson Lewis attorneys met with OFCCP leadership to request clarification that if an employer chose to collect this type of information, the information would not be subject to disclosure during a compliance review or complaint investigation. OFCCP appeared receptive to this feedback and committed to take it under advisement.

Given the open question about whether this information will be requested during a compliance review, employers should weigh the risks of collecting this data when not otherwise required to by law.

Practical Considerations

In order to comply with the requirements of the Rule, covered employers should:

1. incorporate the new language into the equal opportunity clauses used for all new and modified subcontracts and purchase orders,
2. revise, as necessary, the equal opportunity language used in job solicitations and posting notices,
3. update their affirmative action plans and policies to include all prohibited bases of discrimination, and
4. modify their equal opportunity training programs.

Additionally, employers may consider posting advertisements or listings in "LGBT friendly" publications or job postings sites and working with national and local LGBT business organizations, such as the National Gay and Lesbian Chamber of Commerce, the LGBT Bar Association and similar business trade and job fair organizations, to attract and retain LGBT applicants and employees

Challenges on the Horizon?

The Rule was promulgated without notice or an opportunity for public comment and OFCCP could face challenges to it. In fact, in a letter to the Director of OFCCP, the House of Representatives' Committee on Education and the Workforce has requested that the OFCCP withdraw the final regulation and that the public be afforded at least 60 days to comment on the proposed regulations. The Committee stated that such a period would give the public an opportunity to alert the OFCCP to problems that may arise in implementing the Executive Order.

While it is unusual for OFCCP to issue a Rule without a notice-and-comment period, here, OFCCP relied on the "good cause exemption," which allows it to forego the notice-and-comment period where it is "impracticable, unnecessary, or contrary to the public interest." OFCCP has stated the notice-and-comment period was unnecessary in connection with the finalization of these rules because the regulatory changes merely restate the changes set forth in the Executive Order. OFCCP most recently relied on this exemption in 2002, when President George W. Bush amended Executive Order 11246 to add an exemption for certain religiously affiliated federal contractors and subcontractors to favor individuals of a particular religion.

Additionally, OFCCP could face substantive legal challenges because, despite efforts from religious groups and their advocates, the Rule does not include an exemption based on the religious beliefs of an organization. The Rule simply leaves in place the existing religious exemption, permitting religiously affiliated employers to favor individuals of a particular religion. Given the U.S. Supreme Court's decision in Burwell v. Hobby Lobby Stores, Inc., 2014 U.S. LEXIS 4505 (2014), creating a religious exemption from the Affordable Care Act based on the religious beliefs of closely held for-profit corporations, the regulations may be challenged on the basis that they burden the exercise of religion.