

Office of Federal Contract Compliance Programs (OFCCP)

Frequently Asked Questions

Executive Order 13672 Final Rule

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On December 3, 2014, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced a Final Rule that will prohibit federal contractors from discriminating in employment on the basis of sexual orientation or gender identity. The Final Rule implements *Executive Order (EO) 13672, (Further Amendments to EO 11478, Equal Employment Opportunity in the Federal Government and EO 11246, Equal Employment Opportunity)*, signed by President Barack Obama on July 21, 2014, which adds sexual orientation and gender identity to the prohibited bases of discrimination in EO 11246. Additional information about the new Final Rule is provided in the Frequently Asked Questions (FAQs), below.

General Information and Effective Date

1. Under the Final Rule, what changes will federal contracting agencies have to make to the Equal Opportunity Clause?

Under both the Executive Order and the Final Rule, federal contracting agencies must include gender identity and sexual orientation as prohibited bases of discrimination under the Equal Opportunity Clause.

2. When will the Final Rule take effect?

The Final Rule will be effective 120 days after its publication in the *Federal Register*, and will apply to covered contracts entered into or modified on or after that date.

3. You say the Final Rule will apply to contracts entered into or modified on or after the effective date of the Final Rule. What are some examples of modifications to existing contracts?

Contractors and contracting agencies may reach an agreement to modify an existing contract for a variety of reasons. For example, a modified contract may extend the length of an existing contract beyond the original end date. Or a modified contract may reflect revised requirements or specifications.

4. **Will the new nondiscrimination requirements be added as new terms and conditions to all existing contracts (and thus serve as modifications to those contracts)?**

No. Under the terms of *EO 13672*, the amendments apply only to contracts entered into or modified on or after the effective date of the Final Rule. Existing contracts will only be affected if contractors and contracting agencies modify those contracts on or after the effective date of the Final Rule. OFCCP is not involved in the negotiation of contracts and the Final Rule will not independently cause any existing contracts to be modified.

5. **Will this rule be effective prior to the issuance of corresponding updates to the Federal Acquisition Regulation (FAR)?**

The Final Rule will be effective 120 days after it is published in the *Federal Register*. OFCCP will work closely with its Federal partners in the timely promulgation of any corresponding regulations.

6. **How does the Final Rule relate to OFCCP's recent directive implementing the Equal Employment Opportunity Commission's (EEOC) decision in *Macy v. Holder* regarding discrimination based on gender identity or transgender status?**

OFCCP's August 19, 2014 *Directive 2014-02, "Gender Identity and Sex Discrimination,"* previously clarified that sex discrimination includes discrimination on the bases of gender identity and transgender status, consistent with the EEOC's decision in *Macy v. Holder*.

Both *EO 13672* and OFCCP's directive prohibit contractors from discriminating against applicants and employees on the basis of their gender identity. *EO 13672* prohibits discrimination on the bases of gender identity and sexual orientation as separate protected categories. The directive does not address discrimination on the basis of sexual orientation. *EO 13672* does not alter the directive or its application.

7. **Does the Final Rule require contractors to conduct any data analysis relating to compensation or other practices as they relate to sexual orientation or gender identity?**

No. The Final Rule does not require contractors to conduct any data analysis with respect to the sexual orientation or gender identity of their applicants or employees.

8. **Does the Final Rule require contractors to ask applicants and employees to voluntarily self-identify their sexual orientation or gender identity? Does the Final Rule permit contractors to invite such voluntary disclosure if they choose to do so?**

The Final Rule does not require contractors to collect any information about applicants' or employees' sexual orientation or gender identity. At the same time, the Final Rule does not prohibit contractors from asking applicants and employees to voluntarily provide this information, although doing so may

be prohibited by state or local law. Contractors may not use any information gathered to discriminate against an applicant or employee based on sexual orientation or gender identity.

9. How are “sexual orientation” and “gender identity” defined for purposes of this rule?

The regulations implementing *EO 11246*, as amended, do not define any of the protected classes of individuals and *EO 13672* does not include definitions for “sexual orientation” and “gender identity.” Accordingly, the Final Rule does not include definitions of those terms. As a general matter, OFCCP utilizes the same definitions used by the Equal Employment Opportunity Commission and developed under *Title VII* case law.

Rulemaking Process

1. Why is the Department implementing *EO 13672* with a Final Rule without prior notice and comment?

This approach is consistent with agency precedent under other Administrations including in earlier changes to these exact same regulations. For instance, OFCCP proceeded to a final rule without first giving public notice and taking comment when *EO 11246* was amended in 2002, when President Bush signed *EO 13279* to add a religious exemption to *EO 11246*.

President Obama’s Executive Order was very clear about the steps the Department of Labor was required to take, and left no discretion regarding how to proceed. In such cases, principles of administrative law allow an agency to publish final rules without prior notice and comment when the agency only makes a required change to conform a regulation to the enabling authority, and does not have any discretion in doing so.

Religious Entities

1. Does the Final Rule alter the existing religious exemption in *EO 11246* in any way?

No. *EO 13672* made no changes to the existing religious exemption, which was added to *EO 11246* by President Bush in 2002, allowing religiously affiliated contractors (religious corporations, associations, educational institutions, or societies) to favor individuals of a particular religion when making certain employment decisions. The regulation implementing that exemption is located at *41 CFR 60-1.5(1) (5)*.

That regulation states that the nondiscrimination obligations of *EO 11246* “shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or

society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order."

In addition, the Supreme Court has recognized that the First Amendment to the Constitution requires a "ministerial exception" from employment discrimination laws, which prohibits the Government from interfering with the ability of a religious organization to make employment decisions about its "ministers," a category that includes, but is not limited to, clergy.

2. How can contractors invoke the religious exemption under 41 CFR 60-1.5(a)(5)?

The EO and 41 CFR 60-1.5(a) (5) do not require contractors to obtain pre-approval from OFCCP to take advantage of the religious exemption. In the past, though, some contractors have submitted written requests for exemptions to OFCCP's Division of Program Operations, explaining why they qualify for the exemption. Contractors can also invoke the exemption in connection with an OFCCP compliance evaluation, or when they enter into a covered contract or subcontract. OFCCP carefully considers each of these requests in coordination with the Solicitor of Labor.

Implementation and Compliance Assistance

1. What steps will OFCCP take next to implement EO 13672 (e.g., workshops, webinars, and the issuance of other guidance materials)?

During the period between publication and the effective date, OFCCP will publish compliance assistance materials such as fact sheets and "Frequently Asked Questions." OFCCP will also host webinars that will describe the amended requirements, and conduct workshops and forums to listen to any questions and concerns contractors and other stakeholders may have. As with the implementation of its other rules, OFCCP is committed to engaging its stakeholders with the goals of providing access to information, identifying and addressing issues that might hinder the successful implementation of this final rule and providing compliance assistance to contractors. Contractors and other stakeholders can expect OFCCP to publish compliance assistance materials before the Final Rule takes effect.

2. How can I sign up to participate in these events and opportunities?

OFCCP will provide advance notice of these opportunities on its website, along with information as to how to participate. To view scheduled compliance assistance webinars and stakeholder events visit <http://www.dol.gov/ofccp/LGBT>. The first of these sessions will take place on Friday, December 5, 2014 at 2:00 pm EST.

3. What should I do if I have a question that is not answered by OFCCP's Final Rule or other materials?

Contractors and other stakeholders may always reach out to OFCCP's Customer Service Desk at 1-800-397-6251, or to OFCCP's public email box at OFCCP-Public@dol.gov with questions about the application of the Final Rule.