

THE NEW ERA OF EXECUTIVE ACTION

# PROHIBITING LGBT DISCRIMINATION IN FEDERAL CONTRACTS

May 5, 2015

## Background

Only nineteen states and the District of Columbia have laws explicitly protecting lesbian, gay, bisexual, or transgender (LGBT) workers from employment discrimination. Although the business community has made great strides toward eliminating LGBT discrimination—most Fortune 500 companies, many small businesses, and the top five federal contractors already prohibit discrimination based on sexual orientation and gender identity—the absence of federal level legislation leaves many millions of Americans vulnerable to discriminatory treatment by their employers.

In November 2013, the Senate passed the Employment Non-Discrimination Act (ENDA)—which would prohibit LGBT discrimination in the workplace—with bipartisan support, but the House failed to vote on the measure.

## Action

On July 21, 2014, President Barack Obama issued Executive Order 13672: Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity.

## What It Does

Executive Order 13672 prohibits federal contractors from discriminating against LGBT employees or job applicants. It also extends protections against gender identity–based discrimination to federal employees and job applicants. Although eighteen states and Washington, D.C., already prohibit discrimination against gay and transgender employees, this order was the first federal action to promote LGBT equality in the private sector. (The Employment Non-Discrimination Act (ENDA)—which would prohibit workplace discrimination on the basis of sexual orientation or gender identity—passed the Senate in November 2013, but has not yet passed the House of Representatives.)

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This brief is part of The Century Foundation initiative, The New Era of Executive Action, which is available online at <https://tcf.org/atavist.com/executive-action>.

EO 13672 applies to all federal contractors and federally assisted construction contractors and subcontractors who do at least \$10,000 in U.S. Government business in one year.

EO 13672 amended two previous executive orders. The first, EO 11246, signed by President Lyndon B. Johnson in 1965, prohibits federal contractors from discriminating against employees and job applicants based on “race, color, religion, sex, or national origin.” Obama’s order adds “sexual orientation” and “gender identity” to that list. The second, EO 11478, signed by President Richard Nixon in 1969, prohibits discrimination against federal employees and applicants based on “race, color, religion, sex, national origin, handicap, or age,” and was amended by Bill Clinton in 1998 to include “sexual orientation.” With EO 13672, Obama adds “gender identity” as a protected category under those rules.

## Status

Signed July 21, 2014, the order directed the secretary of labor to prepare regulations to implement the new protections for employees of federal contractors. On December 3, 2014, the Department of Labor announced a Final Rule changing the Office of Federal Contract Compliance Programs (OFCCP) regulations in 41 CFR Chapter 60 to prohibit discrimination based on sexual orientation or gender identity.

The Final Rule took effect April 8, 2015. After that date, federal contracting agencies were required to include gender identity and sexual orientation as prohibited bases of discrimination under the Equal Opportunity Clause in their contracts. The new regulations will not be added to pre-existing contracts, only those entered into or modified on or after April 8, 2015.

## Impact

While the order has only just recently taken effect, the intent of EO 13672 is to bring federal employment and contracting in line with the leading edge of the business community in eliminating workplace LGBT discrimination.

The Williams Institute at UCLA Law School projects that the president’s order will ultimately protect 11 million more American workers from sexual orientation-based discrimination and up to 14 million additional workers based on gender identity.

## Response

In anticipation of the executive order, faith groups lobbied the president to exempt groups with religious objections to homosexuality from abiding by the new anti-discrimination rules. EO 13672 includes no such exemptions. However, religious groups receiving federal funds will still be permitted to take into account an employee’s religious beliefs—as established by President George W. Bush’s Executive Order 13279 in 2002—when making employment decisions. And religious organizations still have the right—as affirmed by the Supreme Court—to ignore discrimination laws in making employment decisions about their “ministers,” which includes but is not limited to clergy.

The action received support from a variety of sources:

- Human Rights Campaign (HRC) president Chad Griffen said President Obama’s action “cemented his legacy as a transformative leader” on LGBT rights.
- The Congressional LGBT Equality Caucus praised the order, saying its implementation moves the country “closer to ensuring that employees are judged by the quality of their work, not who they are or who they love.”
- ACLU executive director Anthony Romero called it “one of the most important actions ever taken by a president to eradicate LGBT discrimination from America’s workplaces.”
- National Center for Transgender Equality executive director Mara Keisling hailed the action as “one step forward in the ongoing fight to end anti-transgender bias and prejudice in the workplace.”
- See [here](#) for more positive reactions.

The action also received some criticism, mostly over its purported violation of religious liberty:

- Family Research Council senior fellow Peter Sprigg said that President Obama’s action orders employers to “put aside their principles and practices in the name of political correctness.” He added, “This level of coercion is nothing less than viewpoint blackmail that bullies into silence every contractor and subcontractor who has moral objections to homosexual behavior. This order gives activists a license to challenge their employers and, expose those employers to threats of costly legal proceedings and the potential of jeopardizing future contracts.”
- Ryan T. Anderson, a senior research fellow at the Heritage Foundation, said the order “undermines our nation’s commitment to pluralism and religious liberty.”