

NWX-DOL ESA OFCCP (US)

**Moderator: Lisa Jordan
December 5, 2014
1:00 pm CT**

Coordinator: Welcome and thank you for standing by. At this time all participants will be in a listen-only mode. Today's conference is being recorded. If there are any objections you may disconnect at this time.

Now I'd like to introduce your host for today's conference Brenda Stewart.
Thank you. You may begin.

Brenda Stewart: Thank you (Dori) and welcome everyone. My name is Brenda Stewart and I will be your moderator for today's presentation.

The regulations implementing Executive Order 13672 are expected to be published in the Federal Register on Tuesday. And today during our presentation we will be providing you an overview of the new rules.

Before we start I'd like to offer a few housekeeping items. If you have questions please submit them through the WebEx chat box. And some of you have been doing that already.

You'll notice that it's located to the right of your screen. And click on the Diamond next to the word checked.

When submitting the question make sure you send it to all panelists because we do have a group of people here that will be reviewing the questions and preparing the answers for you.

We encourage you to submit your question throughout the presentation so that we will have time to get to as many as our time will allow but we won't be able to cover all of the questions but know that OFCCP will be reviewing them and considering them for future guidance and FAQs.

Now please note that on the bottom right of your screen that closed captioning is available if you click on the Media Viewer button.

Now if you're having any technical difficulties with WebEx you can still just listen to the audio portion of the Webinar. And that number is 888-606-5725 passcode 5267066.

Next slide. So now I'd like to present our presenters for today. We have Naomi Levin and Adam Pulver. Naomi is the Chief of the Branch of Regulatory Legislative and Policy Development.

She joined OFCCP in May of 2008 after more than 20 years as a senior attorney at the ELC for nine years since Levin served as a special assistant and advisor to two of the EEOC's commissioners.

Prior to her work as a special assistant Ms. Levin worked in EEOC's Office of Federal Operations and then in EEOC's Office of Legal Counsel where her accomplishments included co-authoring the commissions original ADA

regulations and conducting hundreds of ADA and Rehabilitation Act training around the country.

Ms. Levin received her law degree from the Washington College of Law at the American University and her BA in American government from Clark University. Welcome Naomi.

Adam Pulver is an attorney from the Civil Rights and Labor Management Division of the Office of the Solicitor at Labor.

Prior to joining the Department in 2014 he spent several years as a civil rights litigator representing plaintiffs in employment, housing, prisoners' rights and police misconduct cases at the ACLU of the nation's capital and Emery Celli Brinckerhoff & Abady LLP in New York, a private public interest firm.

He's also the author of several publications on LGBT, disability, and labor and employment issues. Mr. Pulver is a graduate of Tufts University and Columbia Law School.

In addition we have other people that will be in the room with us. As I mentioned before our resident experts that will be screening your questions and preparing answers for you so that we can get to as many as we can.

Now I'd like to go to the next slide and we will start with Naomi.

Naomi Levin: Thanks Brenda and hello everybody. Thank you for joining us today. On July 21, 2014 President Obama signed Executive Order 13672 amending Executive Order 11246 to specifically add sexual orientation and gender identity to the prohibitive bases of discrimination.

So in addition to race, color, religion, national origin and sex the Executive Order now explicitly prohibits discrimination on the basis of sexual orientation and gender identity.

It also requires that contractors take certain limited affirmative steps to ensure the no discrimination occurs. And we'll be talking to you about those a little later in this presentation.

Executive Order 13672 and the new final rule are in addition to the pre-existing prohibition on gender identity discrimination as a form of sex discrimination in violation of Executive Order 11246.

OFCCP addressed this prohibition in an August 19, 2014 directive on gender identity and sex discrimination. And we'll touch on how the directives and the new final rules work together as well.

As Brenda told you the final rule implementing Executive Order 13672 and revising the 11246 regulation is expected to be published in the Federal Register this coming Tuesday.

Our objective today in this Webinar is to give you a general overview and introduce you to the new regulation.

We'll highlight some general information for you, the dates you need to remember which contracts the new regulations and the changes in them apply to the general substance of what the regulatory changes are. And we'll talk a little bit about how we're going to be implementing the changes in the final rules.

Let me stress that this is only meant to be a general overview of the final rule and we know that it may not address every question that you may have.

Over the course of these next few months before the effective date we will have additional training Webinars and provide guidance in the form of additional frequently asked questions and perhaps other forms of guidance as well.

So let's begin now with key dates and the contracts affected. And let's go to the next slide.

The final rule becomes effective 120 days after it is published which will put us sometime in early April of 2015.

It applies to covered contracts covered federal contracts and to covered federal subcontracts that are entered into or modified on or after the effective date of the final rule.

So it applies to any new federal contracts, any new federal subcontracts, any modifications to existing federal contracts or federal subcontracts entered into on or after the executive date of the final rule.

And since we're talking about Executive Order 11246 as many of you joining us already know the federal contract or subcontract is a covered federal contract or subcontract if it is in excess of \$10,000.

Next slide, while the regulations implementing Executive Order 13672 only apply to contracts and contract modifications occurring on or after the rules effective date discrimination on the basis of gender identity including

transgender status is also a form of sex discrimination prohibited under the existing Executive Order 11246 regulation.

This means that such discrimination is already prohibited for all federal contractors and subcontractors currently covered by Executive Order 11246 without reference to the effective date of the new final rule.

The new final rule does not change that at all. So if you're currently a covered federal contractor and subcontractor that applies to you the gender identity discrimination already applies to you.

As we mentioned just a couple of minutes ago coverage of gender identity discrimination as a form of sex discrimination is discussed in Directive Number 2014-02 which was issued in August. You can find it fairly easily on our public Web site if you're not familiar with it and want to take a look.

In accordance with that directive complaints of discrimination on the basis of gender identity and transgender status are treated by OFCCP as complaints of sex discrimination and will be processed accordingly.

The directive if you go ahead and take a look at it you'll see that what we're doing is following EEOC's interpretation of sex discrimination under Title VII as EEOC set out in its decision in a case called Macy versus Holder.

And with that let me turn it over to Adam who will talk a little about the regulations affected by the final rule. And we'll go to the next slide.

Adam Pulver: Thank you Naomi and good afternoon everyone. Now we're going to walk through some of the specific changes made to the regulations by this rule.

The final rule is pretty straightforward. It simply amends the OFCCP 11246 regulations everywhere the entire list of protected bases where it lists race, color, religion, national origin and sex appears.

As a result of this there are several changes and most are to the part 60-1 regulations. In 60-1 in particular there are changes to the equal opportunity clause, the tagline used in job advertisements, and the notices that must be hung up and displayed for employees which you may know as the EEO is the Law poster.

In addition there's a change to a visa reporting provision found at 41 CFR 60-1.10. There are also some changes made to the regulations in parts 60-2, 60-4, and 60-50.

Over the next few slides we're going to talk to you about all these changes and provide as much information as we can to help you.

Next slide please. So as I said before the majority of the changes made by this rule are in the 41 CFR part 60-1 regulations.

First the Equal Opportunity clause or EO clause that federal agencies are required to include in covered contracts and in turn that contractors are required to include in covered subcontracts is amended to include sexual orientation and gender identity.

Contractors who enter into or modify contracts on or after the effective date of the rule will be subject to the revised EO clause and will be prohibited from discriminating on the bases of sexual orientation and gender identity. And in addition are required to take some affirmative steps to ensure equal opportunity.

Contractors subject to this new EO clause will in turn have to include the revised EO clause in all of their nonexempt subcontracts and purchase orders. They can do this by either including the full clause or incorporating it by reference.

The same changes made and section 60-4.3A which sets out the EO clause requirements for federal and federally assisted construction contractors and subcontractors.

Turning to section 60-1.482 and 1.4 B2 these are often referred to as the EEO tagline requirements. These provisions require contractors to indicate that they are an equal opportunity employer in all of their job postings and on ads.

As always these regulations allow contractors to do so in a variety of ways including simply using the phrase equal opportunity employer. But the contractor can also set out all the bases protected bases which it does not discriminate on.

If the contractor chooses to go that later route they now must add sexual orientation and gender identity to that list.

Sections 1.4 A1 and 1.4 B1 relate to the notice to employees and applicants the EEO is the Law poster that employers must conspicuously display.

The posters will be updated to include sexual orientation and gender identity. Since the revision to the VEVRAA regulations earlier this year OFCCP and the EEOC have been working together to update the poster.

Until the new poster is finalized though -- and we don't have a date yet -- contractors are permitted to continue to use the existing poster which is the one most recently updated in November 2009.

Finally there is a reporting provision that has changed. Contractors that have employees who will be working abroad have always been required to inform OFCCP and the State Department if one of their employees or prospective employees is denied a visa to enter a foreign country and the contractor thinks that that denial may be based on the employee's race, color, religion, national origin or sex.

Sexual orientation and gender identity are now added to the list of basis that trigger this requirement.

Thus if a contractor is unable to obtain a visa for an employee and believes that it is because of the employee's sexual orientation or gender identity the contractor must report it to OFCCP and the State Department.

This isn't something that we expect to see a lot of but it is a change to the regulations and we wanted to make you aware of it.

So these are the major changes to the part 60-1 regulations. And I'm now going to turn it over to Naomi who's going to tell you a lot of things that aren't changing.

Naomi Levin: Okay thanks Adam. The rule is very clear about what is not changing. The Affirmative Action Program requirements are not changing.

So the Affirmative Action Program requirements in the part 60-2 regulations are not changing. That also means that the affirmative action program

requirements the construction contractors found in part 60-4 of the regulations are not changing.

This means that the final rule does not require contractors to establish goals related to sexual orientation or gender identity.

The final rule does not require contractors to invite voluntary self-identification of sexual orientation or gender identity.

The final rule does not require contractors to engage in data collection. And lastly the final rule does not require contractors to engage in other affirmative action activities that they are now required to perform as part of their affirmative action efforts on behalf of women and minorities.

Having said all of those things that are not changing there are however a couple of provisions in the affirmative actual - action actual action regulations that are changing but none of them are provisions that require contractors to engage in affirmative action activities.

Let me explain. Sections 60-2.16 1, 6 and 60-4.3 of the regulations state that contractors cannot use their temps to meet goals for minorities or women to justify discrimination on a prohibited basis.

That is contractors may not use their efforts to meet goals to justify discrimination against someone else on the basis of race, color, religion, sex or national origin. And now under the final rule on the basis of sexual orientation or gender identity as well.

Section 60-22.35 that's .35 of the regulation addresses OFCCP's assessment of a contractor's compliance with 11246 obligations.

It states simply that a contractor's compliance with his obligation is measured by statistical data and non-statistical information to determine if a contractor treats employees and applicants without regard to any of the prohibitive factors.

That is their race, color, religion, sex or national origin. And again now under the final rule they're sexual orientation or gender identity.

Note that this provision does not require contractors to collect any data on their employee's sexual orientation or gender identity.

Like the other changes we've been discussing so far all that's new here is that we're adding sexual orientation and gender identity to the existing covered bases.

Next slide please. Similar change has also been made to the guidelines on discrimination because of religion or national origin.

That is CFR part 60-50. So section 60-50.5 currently states that contractors cannot use their attempts to comply with the religious and national origin discrimination requirements to justify discrimination on any other prohibited basis.

Once again sexual orientation and gender identity have been added to the list of prohibited bases as required by Executive Order 13672.

On the slide is the text of that revised regulation. And it says that provisions of this part are not intended and shall not be used to discriminate against any

qualified employer applicant for employment because of race, color, religion, sex, sexual orientation, gender identity or national origin.

Once again what we've done here is add sexual orientation and gender identity to the list of prohibited bases.

So now that we've discussed the changes let's talk a little bit about how this is going to work. Next slide please.

Adam Pulver: So we've covered the substance of the changes to the regulations. And so we're going to flag a few key issues that may come up in implementing the changes including the impact of the changes on the exemptions that already exist under the rules and how OFCCP is going to incorporate these changes into its compliance evaluations and complaint investigations.

Next slide please. First we're going to talk about exemptions. I want to be very clear on this that none of the exemptions currently contained in the regulations which are 41 CFR 60-1.5 have been altered in any way.

There is no change to the existing exemptions any of them. In particular one that people may be particularly interested about is the religious exemption found at 41 CFR 60-1.5(a)5.

An exemption is unchanged and states that a religious corporation, association, educational institution or society may favor employees or applicants of a particular religion but it cannot discriminate against employees or applicants on any of the other bases covered by Executive Order 11246 which now includes sexual orientation and gender identity.

In interpreting this provision OFCCP follows the precedence developed in applying the analogous exemption under Title I I'm sorry under Title VII both by EEOC and the federal courts.

Note though that this is separate and apart from the ministerial exemption which is provided by the First Amendment.

That exemption only applies to employees engaged in certain job functions and OFCCP honors that exemption.

Next slide please.

Naomi Levin: Okay. Turning now to enforcement most are to enforce Executive Order 11246 OFCCP conducts compliance evaluations of covered contractor establishments.

Contractor establishments are selected for evaluation from the Federal Contractor Scheduling System better known as FCSS using administratively neutral selection criteria.

Establishments are evaluated for compliance with all of the laws that OFCCP enforces and not simply for discrimination or nondiscrimination on a particular basis.

When conducting compliance evaluations of contractors covered by the new final rule OFCCP will be checking the equal opportunity clause in contracts, job advertisement tag lines and of course the EEO is the Law poster once the new poster becomes available.

Additionally there may be questions related to whether there have been any visa notices to OFCCP or the State Department.

However OFCCP will not be expecting contractors to have personal activity data or any analysis related to personal activity data regarding sexual orientation or gender identity.

As we noted earlier data collection requirements in the new well there is no data collection requirement in the new rule.

And the new rule does not have an invitation to self-identify requirement. So we won't be expecting contractors to have information that they might have if they were gathering that sort of information.

If during a compliance evaluation we do determine that there is potential discrimination based on sexual orientation or gender identity including any possible harassment on either of those bases then we'll investigate that potential discrimination following Title VII principles to - as applicable and appropriate for us to do that.

Next slide please. While compliance evaluations are generally the primary way that we enforce Executive Order 11246 that is not the only way.

OFCCP also accepts complaints of discrimination. And OFCCP will accept complaints of employment discrimination based on sexual orientation and gender identity.

Employees and applicants for employment with covered federal contractors may file complaints of discrimination on the basis of sexual orientation and gender identity with OFCCP.

OFCCP is going to keep and investigate both individual and group complaints that allege discrimination on these bases.

Since OFCCP's newly revised complaint form doesn't specifically reference gender identity or gender or sexual orientation if someone wishes to file a complaint on either of those bases they should check the box next to sex/gender and provide additional information for us in the description section that is found on the second page of the complaint form.

Now some people may very well go ahead and check the box that says Other and then fill in the description where we ask you to tell us what the alleged discrimination is.

And so be aware that we really rely not only on the box checked but on what's in the description box when we determine the basis of a complaint.

And that's always been our practice. And that's what we we'll be continuing to do to ascertain what the basis is of a complaint and that we have jurisdiction over it.

Whether OFCCP can accept a complaint that's based on sexual orientation discrimination is going to depend on whether the date of the alleged discrimination and the date of the employer's most recent contract or contract modification are on or after the effective date of the final rule.

Please remember however that although the new rule won't be applied until the rules effective date we may accept and investigate gender identity complaints as sex discrimination complaints right now so today, yesterday we can accept those complaints.

And we can do that even if the contractor isn't yet subject to Executive Order 13672 in accordance with the directive we discussed earlier the - directive 2014-02.

And again when we investigate those complaints we'll be looking to Title VII principles to the extent they're applicable to the cases in front of us.

Additional information about filing complaints with us is found on our Web site. We're aware that there may be additional questions regarding coverage related to OFCCP's complaint process.

As we indicated earlier over the next 120 days or so once the rule between when the rule is published and when it's effective we'll be adding additional guidance on our procedures and processes through frequently asked questions, training sessions and possibly other kinds of guidance as are appropriate for us to do.

Next slide please.

Brenda Stewart: Okay. Before we take questions please remember that today's presentation is just the first introductory overview and we will be providing more in-depth training at a later date.

As a result we're not going to take - be able to take all of your questions today. We do have several that came in through the chat box and we will be using our subject matter experts Bev Dankowitz, Margaret Kraak, Adam and Naomi to provide you answers but if you have questions on an implementation of this final rule then we ask that you contact our national office.

On our Web site you'll also find many things that many - a lot of the material we have FAQs as well as a link to the directive. So now I'll start the questions that have come in and have our experts provide answers.

First there's a question about the information collection document on the table at the Federal Register and what is it?

Adam Pulver: So some of you may have seen online that the Federal Register today put what they call on the table or for public inspection an information collection request document related to this rule.

The term information collection request may scare people but that does not mean that there's any new information collection requirements.

All that is, is for compliance with the Paperwork Reduction Act we're required to post that and publish that in the Federal Register.

In substance if you want to see what that's talking about now we just direct you to the Paperwork Reduction Act section of the preamble of the rule itself but there is nothing other than the changes that we've already covered in this presentation today in that document.

Brenda Stewart: Thanks Adam. Next question is will all employers be required to post the updated poster or only federal contractors?

Naomi Levin: It - the poster requirement is not a new requirement. So whoever is now if you're required now to post the EEO law the EEO is the Law poster then you'd be required to post the updated poster. If you're not required to post the poster then you're not required to post the poster.

Brenda Stewart: And to piggyback on that question federal contractor does that mean construction contracts procured through a state agency with federal dollars or just contractors who have contracts with federal agencies directly?

Naomi Levin: Federally existed construction contractors are covered. So this includes you if you're a federally assisted construction contract.

The Executive Order 11246 applies to those federally assisted construction contractors as does the amendment in Executive Order 13672.

Brenda Stewart: Okay. What about federal grants or recipients of government funds, are they considered government contracts?

Naomi Levin: Well federal grantees are not federal contractors. So if all you have is a federal grant you're not a federal contractor.

The one caveat I would add is that we look at what the actual relationship with the government is rather than what it may be colloquially referred to.

So we have people calling things grants that are contracts and calling things contracts that are grants but grantees are not federal contractors.

Brenda Stewart: Thank you.

Naomi Levin: And let me just say if you're a contractor you're basically doing business with the federal government.

You're providing a service. You're buying a service. You're selling the government something, or buying the government something or performing a

service for the government in exchange for funds. So that's the kind of relationship that's going to be a contractual relationship.

Brenda Stewart: Okay. Next question asks about the - whether they need to update the actual language in their contract templates?

Adam Pulver: Yes the answer to that question. The new EO clause which is in the regulations has - will on or after the effective date if you are a federal contractor who has entered into a modified or new contract on or after the effective date then from then on your subcontracts will also have to incorporate that and your purchase orders. So basically anything that had that old EEO clause now is going to have to have the new EEO clause.

Naomi Levin: And this is probably a good time for me to add if you go to our Web page www.dll.gov/ofccp you will be able to easily find we have a landing page set up for Executive Order 13672.

On there you can see the text of the rule as well as some frequently asked questions that already answer some of the very, very basic question some of the things we've been talking about today.

So you may want to take a look at those questions there. There's some good basic information already there for you.

Brenda Stewart: Thanks Naomi. Now we have a question about the taglines and job postings. Is it acceptable to use a general EEO clause instead of including all of the protected categories?

Naomi Levin: Yes. In the taglines the regulations permit you to say equal opportunity employer. You have the choice of doing that or listing basis.

So if you already just simply say equal opportunity employer that meets your obligation under Executive Order 11246 and that will continue to satisfy your obligation under this new final rule as well.

If however you're a contractor who instead lists bases on which you provide equal employment opportunities then you have to include the new bases of sexual orientation and gender identity to your tagline.

Brenda Stewart: Okay Naomi. And this is a question that I've seen quite a few people submit through the chat box about the new regulations and whether they're required to survey employees and applicants?

Adam Pulver: No. There is no requirement to survey, to ask, to inquire nothing of the sort. There is no obligation whatsoever to ask, infer, guess any collection of data document, invite anything no.

Brenda Stewart: I think that is a strong answer.

Naomi Levin: Oh thank you.

Naomi Levin: But if they do they...

Adam Pulver: Right. But if you do you cannot use that information to discriminate against your - the employee or a potential employee.

And also there's one thing you should note is that we do not prohibit that but you should be aware that some state and local laws may prohibit the collection of that information. And you'll have to consult with your state on that.

Brenda Stewart: Okay. The effective date of the new regs, is it December 9?

Naomi Levin: No. No we're expecting publication on December 9 which is Tuesday in the Federal Register. The effective date will be 120 days after that that date. That exact date will appear in the Federal Register.

I'm reluctant to guess. Experience tells me I always count differently than the Federal Register which is why that will bring us to early April.

But the exact date will appear in the Federal Register. And then on our Web site as soon as we have that exact information.

Brenda Stewart: Okay. Looking at this new Executive Order how will it impact the EEOC?

Naomi Levin: It does not impact EEOC.

Brenda Stewart: Well today we collect data and gender for EEOC and so is OFCCP saying not to ask for gender data?

Naomi Levin: No. We're not saying that at all. Gender data is different than gender identity data. Gender identity is something that yes you do collect you have affirmative action obligations related to affirmative action for women. So you do collect that data.

What we're saying is you do not have new data collection obligations as a result of the final rule implementing Executive Order 13672. So you do not need to collect additional data regarding gender identity or sexual orientation.

Brenda Stewart: Okay. Now I'd like to introduce our Director Pat Shiu has joined us. And she'd like to say a few words.

Patricia Shiu: Welcome everybody or I guess we're coming to the close so it would be good by everybody but I'm really happy that you were all able to join us.

We here at OFCCP and the Department of Labor and our colleagues the Solicitor Office are very excited about this new rule and are going to work hard to implement it and work hard to implement it with you to make sure that you understand exactly what's going to be required of you. And also importantly what's not required of you in this rule.

So as always we are here to respond to your questions and to think through any thorny issues that you may have.

And we really appreciate everybody taking the time to be here with us on a Friday afternoon with very little notice. So thank you.

Brenda Stewart: Thank you Director Shiu.

Adam Pulver: Just one thing I want to add on that, that reminds me of is some of you may see that we have another one of these planned next week on Tuesday.

Substantively that's going to be the exact same presentation. So we appreciate you taking the time. If you want to hear our voices again you're welcome to but you don't need to come and hear us again on Tuesday.

Naomi Levin: Unless you're dying to.

Brenda Stewart: Unless you're dying to. And you'll see that posted on our Web site we will also advertise more Webinars coming up that will address Executive Order 13672.

But if you have questions you need to submit that weren't covered today don't forget that you can contact us at the national office.

And on the slide you see where there is a helpdesk phone number as well as an email inquiry link that you can go to individually submit your questions.

Please understand though while we were not able to answer all questions and certainly not questions that were very detailed you may still submit your questions and we'll do a case by case analysis of the specific factual scenarios and provide some answers best as we can at this time.

I think that is a wrap up. We want to thank everyone for joining us today, Director Shiu, Bev Dankowitz, Margaret Kraak, our presenters, Lisa Jordan co-producer and thank you all of you for contacting us and joining us today. Please stay on the lookout for new information on our Web site. Have a great day.

Coordinator: Thank you for joining today's conference. That does conclude the call at this time. All participants may disconnect.

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