

## Publications

### *Labor and Employment Alert: It's Final: The Department of Labor's Final Rule on LGBT Protections in Federal Contracts*

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Eighteen states and the District of Columbia currently protect lesbian, gay, bisexual and transgender employees (LGBT). In July 2014, President Obama issued Executive Order 13672, which extended this protection by prohibiting discrimination on the bases of sexual orientation and gender identity in federal contracts. According to the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which oversees affirmative action and equal employment opportunity in federal contracts, EO 13672 was the first federal action to ensure LGBT workplace equality in the private sector.

On December 3, 2014, the DOL issued its Final Rule implementing EO 13672. The DOL issued its Final Rule without the usual notice-and-comment rulemaking. The DOL explained that the dictates of EO 13672 were very clear about the steps the DOL was required to take and left no discretion regarding how to proceed. Given this, the DOL was allowed to publish a final rule without prior notice and comment. The Final Rule will go into effect in April 2015 and applies to federal contracts entered into or modified thereafter.

The Final Rule simply adds "sexual orientation" and "gender identity" to the list of protected categories (race, color, religion, sex and national origin) in EO 11246, which was issued in 1965. The Final Rule does not define "sexual orientation" or "gender identity." Consequently, in interpreting these terms, OFCCP will probably look to the definitions used by the Equal Employment Opportunity Commission in Title VII cases.

Notably, the Final Rule does not require federal contractors to solicit or collect any information about their applicants' or employees' sexual orientation or gender identity. Nor does the Final Rule require federal contractors to conduct data analysis concerning the sexual orientation or gender identity of applicants or employees. The Final Rule does not prohibit federal contractors from asking applicants and employees to voluntarily provide this information – but federal contractors should consult their Vorys lawyer before doing so as the collection of such data may create other legal issues, and may be prohibited by state or local

law. Federal contractors may not use any such information to discriminate on the basis of sexual orientation or gender identity.

Federal contractors also should contact their Vorys lawyers to ensure that their policies, contract language, job advertisements, affirmative action plans, training and other materials (such as the “EEO is the Law Poster”) are up-to-date and comply with the EO 13672.