

ALERT

White House Declines to Issue Executive Order Requiring Federal Contractors to Bar Discrimination Based on Sexual Orientation and Gender Identity

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On Thursday, April 12, the White House confirmed it will not issue an executive order requiring federal contractors to prohibit discrimination based on employees' sexual orientation or gender identity. In recent months, news outlets had reported that President Obama would soon sign such an order. But late last week, the Obama administration revealed that no such executive order would be forthcoming and that the President would instead seek passage of legislation prohibiting discrimination based on sexual orientation and gender identity throughout the private sector.

This reversal may seem surprising because, reportedly, a draft executive order had already been reviewed and approved by the Departments of Labor and Justice. (Most likely, the Department of Labor's Office of Federal Contract Compliance Programs would have enforced the non-discrimination requirements as it does for other federal non-discrimination programs.) And such non-discrimination policies were already becoming common in federal contracting, as most notably revealed by an October 2011 study which found that many of the largest federal contractors (measured by contracting dollars) already prohibited discrimination based on sexual orientation or gender identity.

This reversal is not comparable, however, as it might first appear, to another recent about-face by the Obama administration. In February, the U.S. Department of Agriculture (USDA) withdrew a proposed rule that would have required contractors to certify compliance "with all

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applicable labor laws." In that instance, the USDA rule was publicly proposed (through streamlined procedures designed to accelerate implementation) and then formally withdrawn, whereas here the non-discrimination executive order was never signed or otherwise made publicly available.

Also, as Wiley Rein reported, the contracting community publicly criticized the proposed USDA rule as ambiguous (especially as to what constituted an applicable labor law), unduly burdensome on both contractors and contracting officers, and not really needed in the first place. But here, no such public criticism from the contracting community appears to have factored into the Obama administration's decision not to issue the non-discrimination executive order.

Whether and when federal contractors will be required to have added these non-discrimination policies remains unclear. Although the White House publicly called for prohibiting discrimination based on sexual orientation and gender identity through passage of the Employment Non-Discrimination Act, reports indicate that the bill's prospects for passage are dim.