

Office of Federal Contract Compliance Programs

Directive (DIR) 2015-01



U.S. DEPARTMENT OF LABOR Office of Federal Contract Compliance Programs

Directives (DIRs) provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.

Effective Date: April 16, 2015

1. **SUBJECT:** Handling individual and systemic sexual orientation and gender identity discrimination complaints.
2. **PURPOSE:** To establish OFCCP's policy on accepting and investigating individual and systemic complaints based on gender identity or sexual orientation.
3. **REFERENCES:**
 - A. Executive Order 11246 of September 24, 1965, Equal Employment Opportunity, as amended, at <https://www.dol.gov/agencies/ofccp/executive-order-11246> (last checked April 3, 2015).
 - B. Executive Order 13672 of July 21, 2014, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 FR 42971 (July 23, 2014).
 - C. Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 FR 72985 (Dec. 9, 2014).
 - D. Processing of Matters, 41 CFR 60-1.24(a).
 - E. Gender Identity and Sex Discrimination, DIR. 2014-02 (August 19, 2014), available at <https://www.dol.gov/agencies/ofccp/directives/2014-02> (last checked April 3, 2015).
 - F. Federal Contract Compliance Manual (FCCM) § 6B, Bases of Complaint Allegations, (October 2014).
4. **AFFECTED POLICY:** This directive takes effect on April 16, 2015, and will remain in effect until rescinded by the Director of OFCCP. This supersedes Federal Contract Compliance Manual (FCCM) § 6B (October 2014) and other guidance to the extent that they may be inconsistent with this directive.
5. **BACKGROUND:** OFCCP enforces Executive Order (EO) 11246, as amended, which prohibits federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. OFCCP applies Title VII principles and applicable case law when investigating potential violations of EO 11246. Sexual orientation and gender identity were expressly added to the categories protected from discrimination under EO 11246 on July 21, 2014, with the signing of EO 13672.¹ The Final Rule implementing EO 13672 became effective on April 8, 2015.²

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (Title VII), does not expressly cover sexual orientation and

gender identity. While violations of EO 11246 may be discovered during compliance evaluations, discrimination based on sexual orientation and gender identity may most often be found through the investigation of discrimination complaints. Therefore, this guidance is issued to clarify that OFCCP will accept and investigate individual and systemic complaints of discrimination based on sexual orientation and gender identity under Executive Order 11246, as amended, applying Title VII principles and case law, as appropriate. A determination about the handling of a complaint, once accepted, is made on a case-by-case basis. These complaints may also contain a Title VII allegation of discrimination based on sex.³ However, not all courts have conclusively established that sex discrimination is equivalent to discrimination based on sexual orientation or gender identity.⁴

Compliance officers or others responsible for complaint processing usually make referrals of individual complaints to EEOC pursuant to OFCCP's regulation at 41 CFR 60-1.24(a). This provision permits, but does not require, OFCCP to make referrals to EEOC for processing under Title VII. Yet, with the signing of EO 13672, the President gave OFCCP explicit executive authority to ensure that federal contractors and subcontractors treat applicants and employees without regard to their sexual orientation or gender identity.

Considering both the express protections conferred by EO 13672, the authority provided by OFCCP's existing provisions to retain or refer individual complaints, and the protections developed in case law under Title VII sex discrimination theory, OFCCP will continue to coordinate and share information with EEOC to the maximum extent possible to remedy complaints based on sexual orientation and gender identity. Such coordination will be fact-driven and occur on a case-by-case basis. OFCCP will continue to transfer or jointly investigate complaints when OFCCP lacks jurisdiction and in other cases when discrimination is more completely remedied by joint investigation or by EEOC alone.

6. **ROLES AND RESPONSIBILITIES:**

A. **Regional and Field Managers:** It is the responsibility of the appropriate regional and/or field manager(s) to ensure that regional and field staff make decisions about individual complaints and complaint investigations involving allegations of sexual orientation or gender identity discrimination in accordance with the policy stated in this directive.

B. **Compliance Officers and Others:** It is the responsibility of OFCCP's compliance officers, and employees responsible for complaint processing, to handle individual complaints and complaint investigations involving allegations of sexual orientation and gender identity discrimination in accordance with the policy stated in this directive.

7. **POLICY:** Because of the express prohibitions in EO 11246, as amended by EO 13672, OFCCP will accept and investigate individual and systemic complaints that allege discrimination on the basis of sexual orientation and gender identity against a federal contractor or subcontractor.² OFCCP will analyze each complaint to determine whether the alleged discrimination occurred on the basis of sexual orientation or gender identity, as well as on the basis of sex, and will coordinate with, and refer complaints to, EEOC on a case-by-case basis.

8. **ATTACHMENTS:** None.

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¹ Executive Order 13672 of July 21, 2014, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 FR 42971 (July 23, 2014).

² On December 9, 2014, OFCCP published the Final Rule in the Federal Register revising the regulations to implement EO 13672. See, Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 FR 72985 (Dec. 9, 2014).

³ See, Gender Identity and Sex Discrimination, DIR. 2014-02 (August 19, 2014). DIR. 2014-02 clarifies OFCCP's policy that discrimination on the basis of sex includes discrimination on the bases of gender identity or transgender status.

⁴ Though sexual orientation and gender identity are not explicitly protected by Title VII, EEOC and private litigants continue to develop sex discrimination theory. *Macy v. Holder*, EEOC Appeal No. 0120120821 (April 20, 2012). In *Macy*, the EEOC ruled that discrimination on the basis of gender identity is considered sex discrimination, citing, inter alia, *Glenn v. Brumby*, 663 F.3d 1312

(11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); and, Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2005). EEOC has also found that federal sector claims by lesbian, gay, and bisexual individuals alleging sex-stereotyping state a sex discrimination claim under Title VII. Veretto v. U.S. Postal Service, EEOC Appeal No. 0120110873 (July 1, 2011); Castello v. U.S. Postal Service, EEOC Request No. 0520110649 (Dec. 20, 2011). But see Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007) (gender identity discrimination not protected by Title VII); Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 260 (3d Cir. 2001) (sexual orientation discrimination not protected by Title VII).

⁵ Under EO 11246, OFCCP has jurisdiction to investigate federal contractors or subcontractors with a contract of \$10,000 or greater. For sexual orientation complaints, the contract or subcontract must be entered into or modified on or after April 8, 2015. For gender identity complaints, OFCCP has jurisdiction to accept and investigate complaints even if qualifying new or modified contracts pre-date April 8, 2015, pursuant to DIR. 2014-02.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

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