



The Nondiscrimination Protections of Millions of Workers Are Under Threat

By Frank J. Bewkes and Caitlin Rooney | September 3, 2019

On August 15, 2019, the Office of Federal Contract Compliance Programs (OFCCP) in the U.S. Department of Labor published a proposed rule that seeks to significantly expand the number of federal contractors eligible for a religious exemption, including contractors far beyond those that courts have previously ruled qualify as a “religious corporation, association, educational institution, or society.”¹ Such a change would make millions of U.S. workers vulnerable to discrimination for not sharing their employers’ religious beliefs.²

This issue brief examines how the Trump administration’s proposed rule would weaken nondiscrimination protections available under executive order (EO) 13672. The brief begins by providing background information on the EO and exploring how the proposed rule would undermine it. It then explains why any loss of non-discrimination protections disproportionately harms LGBTQ workers. Finally, the brief’s authors analyzed publicly available federal contracting data and found no evidence that EO 13672 has excluded faith-based organizations from contracting with the federal government.

How the proposed rule undermines EO 13672

Since 1965, EO 11246 has protected employees of federal contractors and subcontractors, as well as contractors who perform under federally assisted construction contracts, from discrimination on the basis of sex, race, color, religion, and national origin. In 2014, then-President Barack Obama issued EO 13672, which amended EO 11246 to include protections on the basis of sexual orientation and gender identity and remains the largest LGBTQ-inclusive expansion of workplace protections in American history.³ According to the OFCCP’s own estimate, the protections of EO 11246 cover approximately one-fifth of all U.S. civilian employees.⁴ The OFCCP is charged with enforcing these nondiscrimination protections by both proactively conducting compliance evaluations and investigating the discrimination complaints it receives.⁵

As opponents of LGBTQ equality have acknowledged, EO 13672 retains the religious exemption included in EO 11246.⁶ Like the religious exemption in Title VII of the Civil Rights Act of 1964, this exemption allows certain religious contractors and subcontractors to hire employees who identify with a particular faith tradition.⁷ EO 11246 made it explicitly clear, however, that those organizations would not be exempt from complying with other parts of the EO, namely the nondiscrimination provisions.⁸ At the time EO 13672 was announced, a diversity of faith leaders from more than 100 faith-based organizations publicly supported its extension of nondiscrimination protections to LGBTQ workers and explicitly opposed the inclusion of an additional religious exemption to the nondiscrimination protections.⁹

The overly broad definition in the Trump administration’s proposed rule covers any contractors “that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose.”¹⁰ This language allows virtually any organization wishing to engage in discriminatory behavior to claim a religious affiliation and therefore be granted an exemption. The rule even opens the door to allowing for-profit corporations to require their employees to conform to owners’ religious views—or risk termination if they do not. In short, the rule would serve a devastating blow to religious freedom in the name of protecting it. The OFCCP is attempting to shift its policy from a presumption that nondiscrimination protections must be enforced to a presumption that contractors are exempt from these protections. This alters the OFCCP’s mission from one to “protect workers, promote diversity and enforce the law” to one that protects certain employers from losing lucrative contracts if they engage in unlawful discrimination.¹¹

The proposed rule would harm countless LGBTQ workers

While the reach of the OFCCP’s proposal extends far beyond protections for LGBTQ employees of federal contractors, undermining protections based on sexual orientation and gender identity have been a clear objective among those advocating for changes to EO 11246. Weakening the protections afforded by the EO is of significant concern to LGBTQ communities, because employment discrimination remains a serious issue for that population. A 2017 nationally representative survey from the Harvard T.H. Chan School of Public Health found that 20 percent of LGBTQ adults have experienced discrimination because of their sexual orientation or gender identity when applying for jobs, while 22 percent of LGBTQ adults have experienced discrimination with respect to equal pay or promotion.¹² These rates are even higher among transgender people and LGBTQ people of color. The job instability and unemployment that such discrimination causes can have ripple effects on LGBTQ people’s health and well-being, including exacerbating the disproportionate rate of economic insecurity that LGBTQ people face and forcing LGBTQ people to either pay for expensive private health insurance plans or go uninsured.¹³

Despite the Equal Employment Opportunity Commission, as well as a growing number of federal courts, recognizing that protections against sex discrimination in Title VII protect LGBTQ workers, nearly half of the United States' LGBTQ community still lives in a state with no explicit LGBTQ employment nondiscrimination laws.¹⁴ The protections that EO 13672 provides have been particularly important for LGBTQ employees of federal contractors in these states. Any attempt to undermine these protections, such as through the inclusion of a harmful religious exemption, is likely to negatively affect a population that is already less comprehensively protected than their peers.

EO 13672 has not hindered faith-based organizations from contracting with the federal government

When EO 13672 was first issued in 2014, nearly 160 leaders of and staff affiliated with 126 unique faith-based organizations signed on to a letter expressing opposition to the EO's lack of a more expansive religious exemption and claimed that it would exclude faith-based organizations from contracting with the federal government.¹⁵ To investigate the validity of these concerns, the authors of this issue brief analyzed publicly available contract award records for a subset of these entities. The authors recognize that the entities whose leaders and/or staff signed on to this letter were not the only organizations that raised objections to the EO's expansion of protections for LGBTQ workers, but the letter received mentions in significant media outlets and provides a clear public statement and set of arguments that can be empirically tested.¹⁶

To conduct that test, the authors searched for the organizations on USAspending.gov¹⁷ and in the Federal Procurement Data System (FPDS),¹⁸ both of which provide information about federal contract awards. While the letter included the signatures of specific individuals, the authors limited their searches to whether a signatory's organization received contracts. The Methodology provides more information on how these searches were conducted and which organizations were ultimately included in the analysis.

Using these criteria, only 35 of the organizations appeared in the search results as ever having contracted with the federal government. In order to look at what effect the implementation of EO 13672 may have had on contract awards, the authors first reviewed records of entities that had received new contracts and at least one allocation under those contracts in the 12 months immediately before EO 13672 went into effect.¹⁹ This narrowed the number of organizations for analysis to 11. The authors then looked at which of these 11 organizations received new contracts and at least one allocation under those contracts in the 12 months following the EO going into effect. Ten of the 11 organizations received new contracts and at least one allocation in the 12 months after EO 13672 went into effect. Further analy-

sis of the organization that did not receive a new contract revealed that it has not received any new federal contracts since that time, even after the OFCCP released guidance in August 2018 that overstated the rights of “religion-exercising organizations and individuals.”²⁰ Because that guidance can be seen as an early indicator of the OFCCP’s willingness to interpret any religious exemptions in an overly broad manner, the remaining organization’s lack of new contracts is likely due to a reason unrelated to the EO.

Focused on a subset of organizations whose employees publicly argued in favor of a new religious exemption targeting LGBTQ workers, this analysis indicates that among those entities that were federal contractors at the time that EO 13672 went into effect, all but one continued to receive new contracts and at least one allocation under those contracts in the 12 months following the EO. While it is not possible to assess whether the lone organization that has not received a new contract has ever attempted, but failed, to obtain one, the analysis provides no evidence for the claim that EO 13672 would systematically prohibit faith-based contractors from contracting with the federal government. Instead, the analysis suggests that the federal government is able to successfully contract with faith-based organizations while protecting people from discrimination.

Conclusion

The OFCCP’s proposed regulation, as well as its August 2018 guidance, are further attempts from the Trump administration to distort the original intentions of freedom of religion in order to attack the rights of LGBTQ and other workers—and even to undermine the freedom of religion itself. This proposed rule is unnecessary and would weaken protections for the millions of federal contractors currently protected from discrimination, including countless numbers of LGBTQ workers.

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Methodology

The authors conducted searches on USAspending.gov and in the Federal Procurement Data System to determine the date of new contracts and at least one allocation made with certain faith-based organizations. To determine the organizations included in this analysis, the authors first looked at the signers of a letter submitted to President Obama on June 25, 2014, that advocated for a religious exemption to be added to EO 13672 and expressed concern that without this exemption, the EO would threaten faith-based contractors' ability to contract with the federal government. The letter was signed by leaders and staff affiliated with faith-based organizations of a diversity of faith traditions, and not all signers were signing on behalf of their affiliated organization. In total, the letter included 159 individual signatories affiliated with 126 unique organizations. The letter included a disclaimer that signatories' affiliations with universities were included for identification purposes only and that those signatories did not speak on behalf of their university. However, since this analysis was ultimately focused on whether the EO affected the federal contracting abilities of faith-based organizations, the authors looked at all the organizations, including universities, affiliated with one or more signers of the letter.

The authors conducted keyword searches for those 126 organizations on USAspending.gov and in the FPDS to determine which organizations had ever received a contract from the federal government. For signers from organizations that are structured as associations, such as the National Association of Evangelicals, the authors only explored whether the association itself was the recipient of a contract, not whether affiliates and members—which sometimes numbered in the several hundred or several thousand—were recipients.²¹ When the search returned organizations whose name clearly indicated that they were a regional, state, or local affiliate of a parent organization the authors were searching, the authors included those organizations in the analysis as part of that parent organization. Organizations whose name was different or whose affiliate connection was uncertain were not included in the analysis; occasionally, the “Top 10: Vendor Full Name” search in the FPDS would return organization names that were similar to but did not quite match the names of searched organizations. As stated above, the search yielded 35 organizations.

To test the assertion that the EO would cause the loss of federal contracting opportunities, the authors narrowed the analysis to only include organizations that received contracts 12 months before the EO went into effect, from April 7, 2014, to April 7, 2015.²² To make sure that only new contracts were being considered, the authors checked to see if an allocation under that contract in the relevant period had a modification number of zero, indicating that it was the first allocation under that contract. This process yielded a total of 11 organizations.

For those 11 organizations, the authors then conducted searches through both USAspending.gov and the FPDS to determine if they had received new contracts and at least one allocation under those contracts from April 8, 2015, to April 8, 2016—the 12 months after EO 13672 took effect. On USAspending.gov, the authors conducted an advanced search that filtered by the recipient name, or organization name, and contract type, which included contracts but excluded the other categories of federal spending via, such as for example, grants and loans. In the FPDS, the authors conducted a keyword search with the organization name and examined the results in the “Top 10: Vendor Full Name” box in order to see which results matched the organization name. Where more than one of the top 10 vendor names matched the organization that the authors were searching for, the results were aggregated. If a search returned no results, what appeared to be the core organization name used by obvious affiliates was searched as well.

Results were sorted by date, and allocations of certain contract types were counted—including those for delivery orders, purchase orders, definitive contracts, and indefinite delivery contracts but excluding grants and cooperative agreements. This process yielded 10 organizations that received new contracts and at least one allocation under those contracts in both the year before and the year after the EO went into effect. The authors searched the name of the remaining organization to assess whether it received any new contracts from April 7, 2015, to August 27, 2019. The authors identified no new contract awards.

Endnotes

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