



An Executive Order to Prevent Discrimination Against LGBT Workers

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Under federal law it is entirely legal to fire someone based on his or her sexual orientation or gender identity.¹ At the same time, lesbian, gay, bisexual, and transgender—or LGBT—Americans report widespread discrimination in the workplace, which forces many of them into the ranks of the unemployed and leaves them without an income to pay the mortgage, buy groceries, and otherwise make ends meet. Workplace discrimination is not only a problem for workers—it also presents problems for businesses by introducing inefficiencies and costs that cut into profits and undermine businesses' bottom lines.

While many states, municipalities, and corporations have instituted policies that shield LGBT workers from workplace bias, LGBT individuals currently lack adequate legal protections from employment discrimination. In fact, a majority of workers currently live in states that have not passed laws giving LGBT workers legal protections from workplace discrimination.

The Employment Non-Discrimination Act would bring uniform protections to all workers. If passed, the law would require that all Americans be judged in the workplace based on their skills, qualifications, and the quality of their work—not on job-irrelevant characteristics such as their sexual orientation or gender identity.²

Short of a federal law, however, President Barack Obama can take a significant step toward combating discrimination against our nation's LGBT workers. The president can issue an executive order that prohibits federal contractors from discriminating at all levels of employment based on sexual orientation and gender identity. Research indicates that the executive order would have a positive impact on workers, businesses, and the federal government.

LGBT Americans experience high rates of discrimination and harassment in the workplace

LGBT employees continue to face widespread discrimination and harassment in the workplace. Studies show that anywhere from 15 percent to 43 percent of gay, lesbian, and bisexual people have experienced some form of discrimination and harassment in the workplace.³ Specifically, 8 percent to 17 percent of LGB workers report being passed over for a job or fired because of their sexual orientation or gender identity; 10 percent to 28 percent received a negative performance evaluation or were passed over for a promotion because they were LGB; and 7 percent to 41 percent of LGB workers encountered harassment, abuse, or antigay vandalism on the job.

Transgender workers in particular experience high rates of employment discrimination. An astonishing 90 percent of transgender people report some form of harassment or mistreatment on the job or report having taken some action such as hiding who they are to avoid it.⁴ Nearly half of transgender people surveyed also reported experiencing an adverse job outcome because of their gender identity. This includes being passed over for a job (44 percent), fired (26 percent), and denied a promotion (23 percent). As with LGB employees, rates of employment discrimination are especially pronounced among transgender people of color.⁵

Anecdotal evidence also reveals that LGBT people encounter pervasive discrimination and harassment on the job. Vandy Beth Glenn of Atlanta, Georgia, lost her job with the Georgia General Assembly after her boss fired her for being transgender.⁶ Brook Waits of Dallas, Texas, was immediately let go after her manager saw a picture on Waits's cell phone of she and her girlfriend kissing on New Year's Eve.⁷ Officer Michael Carney was denied reinstatement as a police officer in Springfield, Massachusetts, because he told his supervisors that he was gay.⁸

Discrimination has a negative impact on both LGBT employees and their employers

Widespread discrimination against LGBT workers imposes financial hardships on LGBT Americans and their families and can negatively affect workers' physical and mental health.

In terms of economic security, discrimination contributes to job instability, employee turnover, and unemployment, leaving LGBT people without a steady income to support themselves and their families. Losing a job may also mean losing access to employer-sponsored health insurance. Without affordable coverage, many LGBT workers must purchase costly plans in the private-insurance market or otherwise forgo coverage, which puts these workers and their families at substantial financial risk should someone fall seriously ill.

Research confirms that families headed by same-sex couples suffer from significant economic insecurities that are likely to be related to employment discrimination. Contrary to commonly held stereotypes, families headed by same-sex couples make on average \$15,500 less per year than families headed by opposite-sex couples, according to Census data.⁹ Similarly, children being raised by same-sex parents are twice as likely to live in poverty as children being raised by married opposite-sex parents.¹⁰ After a lifetime of discrimination, older lesbian adults experience higher poverty rates than their heterosexual counterparts, as do African American same-sex couples.¹¹

Transgender individuals face especially harsh employment and economic insecurities due to high levels of workplace discrimination.¹² Compared to the general population, transgender individuals are twice as likely to be unemployed and four times as likely to have very low incomes; nearly 20 percent have been or are currently homeless. Approximately 6 in 10 transgender people report annual incomes below \$25,000.¹³

Discrimination can also negatively affect workers' mental and physical health. High levels of discrimination among LGBT people have been linked to poor health outcomes, including higher rates of having a psychiatric disorder, poorer mental health, current psychological distress, depression, loneliness, and low self-esteem.¹⁴ These health disparities are likely to be related to lower levels of health insurance coverage and minority stress and stigma, both of which can result from workplace discrimination.

In addition to having a negative impact on LGBT individuals and their families, discriminatory practices can also harm businesses that allow discrimination to go unchecked. Employment discrimination based on sexual orientation and gender identity inhibit an employer's ability to recruit qualified employees. Similarly, employment discrimination needlessly forces qualified employees out of jobs, which consequently introduces a host of costly turnover-related expenses. Hostile work environments may depress workforce productivity and job performance, close businesses off to attractive consumers and cost-efficient suppliers in the marketplace, and expose companies to potentially costly litigation.¹⁵

A majority of LGBT Americans lack legal protections against employment discrimination

Currently, a patchwork of state and local laws and regulations offer some legal protections to LGBT workers.¹⁶ Twenty-one states and the District of Columbia prohibit employment discrimination on the basis of sexual orientation, and 16 of those states and the District of Columbia also prohibit discrimination on the basis of gender identity. At least 175 municipalities have enacted local ordinances prohibiting discrimination among public and private employers on the basis of sexual orientation, with at least 135 of these municipalities including gender identity as a protected characteristic.¹⁷

In addition to nondiscrimination prohibitions, some state and local governments have implemented requirements for government contractors to comply with sexual-orientation and gender-identity nondiscrimination ordinances. More than 60 municipalities have ordinances that specifically prohibit local government contractors from discriminating on the basis of sexual orientation, and approximately 40 municipalities also prohibit local contractors from discriminating on the basis of gender identity.¹⁸

While these policies offer significant protections to many workers, a majority of LGBT workers lack any legal protection from employment discrimination under state law. Only 45 percent of American workers live in a jurisdiction where they are covered by a nondiscrimination policy based on sexual orientation.¹⁹ Only 34 percent of workers live in a jurisdiction where they are covered by a nondiscrimination policy based on gender identity.²⁰

President Obama can issue an executive order prohibiting discrimination by federal contractors

The Employment Non-Discrimination Act would bring uniform protections to all American workers under federal law. Short of such a law, however, President Obama has the authority to extend significant protections to the LGBT workforce. Specifically, the president can either amend a current executive order or issue a separate executive order to prohibit federal contractors from discriminating in employment on the basis of sexual orientation and gender identity.

Dating back to World War II, presidents from both political parties have used their power as the chief executive to prohibit companies doing business with the federal government from discriminating against employees based on certain nonwork-related characteristics.²¹ In its current form, Executive Order 11246 prohibits federal contractors from discriminating on the basis of race, color, religion, sex, or national origin.²² Existing policy does not, however, explicitly prohibit these businesses from discriminating against employees based on their sexual orientation or gender identity.

Extending Executive Order 11246 to include nondiscrimination policies based on sexual orientation and gender identity would give substantive workplace protections to a significant number of LGBT Americans. Currently, federal contractors legally bound to comply with Executive Order 11246 employ 28 million individuals—or approximately 22 percent of all U.S. civilian workers.²³

President Obama has the authority to issue such an executive order even though the Employment Non-Discrimination Act has not yet been passed by Congress. Historically, Executive Order 11246 is part of a series of executive orders in which past presidents made workplace nondiscrimination compliance a condition of federal contracts before Congress ended up passing federal statutes applying similar requirements

more generally. The Civil Rights Act of 1964, for example, which legally prohibited nearly all employers from discriminating against employees on the basis of race, was built upon executive orders signed by Presidents Franklin D. Roosevelt and Dwight D. Eisenhower that prohibited contractors from discriminating on the basis of race.²⁴ An executive order for LGBT workers could be similarly issued before congressional passage of the Employment Non-Discrimination Act.

An executive order would give significant protections to LGBT workers

Including sexual orientation and gender identity in Executive Order 11246's existing nondiscrimination requirements would give the government significant enforcement powers to combat discrimination against LGBT workers. Currently, the Department of Labor's Office of Federal Contract Compliance Programs is charged with ensuring that contractors comply with nondiscrimination requirements, among other responsibilities. It generally investigates complaints of discrimination that are filed against federal contractors by a group of employees. The office can then reach a settlement with employers who are found in violation of Executive Order 11246, or it can pursue enforcement action before an administrative law judge or in federal court.²⁵

Through its enforcement efforts, the office has been successful in securing back pay, salary, and benefits for employees who have been discriminated against by their federal-contractor employers. In 2009 22,000 employees filed discrimination complaints with the Office of Federal Contract Compliance Programs, which conducted 4,160 compliance evaluations and obtained 94 settlements totaling more than \$9 million.²⁶ In 2008 the office secured more than \$67.5 million in back pay, salary, and benefits for 24,508 employees who had been subject to unlawful employment discrimination under the categories currently included in Executive Order 11246.²⁷

The vast majority of contractors are complying with Executive Order 11246. In fiscal year 2010—the year for which the most recent data is available—the Office of Federal Contract Compliance Programs conducted compliance evaluations on 4,960 contractors based on potential evidence of discrimination. Of those contractors, it found only 1,071 contractors in violation of Executive Order 11246. Out of approximately 175,000 total federal contractors in 2010, it found only 0.61 percent to be in violation of Executive Order 11246.²⁸

Even with these substantial workplace protections, an executive order for federal contractors would still be needed if Congress were to pass the Employment Non-Discrimination Act today. The law as currently written would only apply to employers with 15 or more employees. Executive Order 11246, however, applies to businesses of any size that receive a government contract in excess of \$10,000. A federal-contractor executive order that includes sexual orientation and gender identity would therefore extend workplace protec-

tions for LGBT workers in smaller companies doing business with the federal government—workers who would otherwise not be covered under the law.

Many contractors have already adopted nondiscrimination policies

The Williams Institute recently analyzed the companies with nondiscrimination policies that include sexual orientation and gender identity. That analysis demonstrates that more federal contractors than noncontractors already have employment protections for LGBT workers, so an executive order would not drastically affect many of the companies that already do business with the federal government. The high-level findings from this analysis include:

- Among federal contractors, at least 61 percent of their employees are already covered by laws or private policies protecting against sexual-orientation discrimination.²⁹
- Among federal contractors, at least 41 percent of their employees are already covered by laws or private policies protecting against gender-identity discrimination.³⁰
- Requiring federal contractors to have policies protecting against sexual-orientation discrimination would provide protections to an additional 11 million U.S. workers; 16.5 million more would be protected from gender-identity discrimination.³¹

Furthermore, the largest federal contractors—on which most federal contracting dollars are spent—are even more likely to already prohibit discrimination on the basis of sexual orientation and gender identity.

- The top five federal contractors are all defense contractors—Lockheed Martin, Boeing, Raytheon, General Dynamics, and United Technologies. Together, they receive about a quarter of all federal contracting dollars.³² All five have nondiscrimination policies that include sexual orientation and gender identity.³³
- Nearly all of the top 50 federal contractors (90 percent) already include sexual orientation in their nondiscrimination policy. Most (67 percent) include gender identity.³⁴
- Looking at employees of federal contractors that are in the Fortune 1000, 92 percent are already protected by a companywide sexual-orientation nondiscrimination policy, and 58 percent are already protected by a gender-identity nondiscrimination policy.³⁵

The majority of companies believe that nondiscrimination policies will improve their bottom line

A Williams Institute analysis of corporate statements addressing nondiscrimination policies indicates that companies often adopt these policies as a sound business decision.³⁶ Of the top 50 federal government contractors and the top 50 Fortune 500 companies, the majority specifically link policies that prohibit sexual-orientation and gender-identity discrimination to improving their bottom line. Companies most often cited the following economic benefits garnered from these policies:

- Recruiting and retaining the best talent, giving their company a competitive advantage in the marketplace
- Generating the best ideas and innovations by drawing on a workforce with a wide range of characteristics and experiences
- Increasing productivity among employees by making them feel valued and comfortable at work
- Attracting and better serving a diverse customer base through a diverse workforce
- Securing business by responding favorably to specific policy requests or requirements from clients
- Maintaining positive employee morale and relations by responding favorably to specific policy requests from employees and unions³⁷

A majority of small businesses already prohibit discrimination against LGBT employees at little to no cost to employers

In September 2011 the Center for American Progress fielded a survey of small businesses—defined as having between 3 and 100 employees—that revealed that a majority of them already prohibit discrimination on the basis of sexual orientation and gender identity. Sixty-nine percent of small businesses prohibit discrimination on the basis of sexual orientation, and 62 percent do so on the basis of gender identity.³⁸

Furthermore, a majority of those businesses report experiencing few to no costs associated with these policies. Looking at the majority of small businesses that already prohibit discrimination against gay employees, 67 percent said that there were zero costs associated with the initial inclusion of sexual orientation within their nondiscrimination policies. Of the 25 percent of companies that said there were costs associated with implementation, 65 percent said those costs represented less than 1 percent of annual

operating costs.³⁹ Even fewer of these small businesses cited costs associated with maintaining their company's sexual-orientation nondiscrimination policy in the medium and long term. Eighty percent said that there were no costs associated with maintaining their policy prohibiting discrimination against gay workers.⁴⁰

Transgender-inclusive policies are similarly inexpensive. Looking at the 62 percent of small businesses that already prohibit discrimination against transgender employees, 68 percent said there were no costs associated with the implementation of this policy. Of the minority of businesses—22 percent—that said there were costs, 76 percent said that those costs represented less than 1 percent of annual operating costs.⁴¹ Small business owners also report zero or insignificant costs associated with maintaining their policy against gender-identity discrimination. Seventy-six percent said that there were no costs associated with maintaining their policy prohibiting discrimination against transgender workers.⁴²

Of those small businesses that do not prohibit discrimination based on sexual orientation, only 2 percent said costs deterred them from offering protections to LGB employees. Only 4 percent cited costs as a deterrent to prohibiting discrimination on the basis of gender identity. Most businesses, however, said that they simply never thought to adopt these policies, or that they did not have LGBT employees currently in their workplace. Costs were not a factor.⁴³

Americans support an executive order that expands existing nondiscrimination requirements for federal contractors

Nearly three-fourths—73 percent—of voters in a poll commissioned by the Center for American Progress supported protecting LGBT people from workplace discrimination.⁴⁴ This support cuts across political party affiliation, with 81 percent of Democrats, 74 percent of Independents, and 66 percent of Republicans supporting nondiscrimination laws for LGBT people in the workplace. Looking at key demographic groups, 74 percent of Catholics and 61 percent of senior voters solidly favored employment protections for LGBT people. Even among voters who identify themselves as feeling generally unfavorable toward gay people, a full 50 percent supported workplace nondiscrimination protections for the LGBT population.

In addition to supporting the Employment Non-Discrimination Act, a significant majority of voters specifically favor extending workplace protections to LGBT workers through an executive order. Seventy-three percent of likely 2012 voters supported the idea of President Obama issuing an executive order that would require all companies doing business with the federal government to adopt policies that protect LGBT workers from discrimination. A majority of voters across party affiliations supports such an order: 86 percent of Democrats, 70 percent of Independents, and 61 percent of Republicans would favor this action. Only 9 percent of voters opposed the policy.⁴⁵

These recent polls on an executive order are consistent with decades of opinion polls related to LGBT rights. Since at least the early 1980s, a majority of Americans have supported equal rights and opportunities for LGB people in the workplace.⁴⁶ Polling questions about transgender workers have only been asked recently, but the CAP poll shows that voters support transgender protections at almost the same rate as they support gay protections. Seventy-five percent of likely voters, for example, said they favored “protecting gay and lesbian people from discrimination in employment,” while 73 percent said they favored these protections for “gay, lesbian, and transgender people.” The responses are essentially statistically identical.⁴⁷

The CAP survey also found that 9 of out 10 voters mistakenly think that a federal law is already in place to protect LGBT people from workplace discrimination. A similar number of voters also did not know whether their state had a LGBT workplace-discrimination law. These numbers show the significant disconnect between voter perceptions about workplace protections and the realities that LGBT people face on the job.⁴⁸

Small business owners also express strong support for LGBT nondiscrimination laws and policies. CAP’s poll of small business owners and leaders found that 63 percent of small businesses support the passage of the Employment Non-Discrimination Act passage. Only 15 percent of small business owners were opposed to it. CAP also asked specifically about an executive order prohibiting federal contractors from discriminating against their LGBT employees. Fifty-six percent said they would support President Obama were he to issue such an executive order.⁴⁹

LGBT nondiscrimination protections can be implemented with minimal administrative cost and burden

A number of cities have already passed into law ordinances that require contractors to adopt LGBT-inclusive nondiscrimination policies in order to be eligible for municipal contracts. A Williams Institute survey of municipal jurisdictions with these policies shows that governments can implement nondiscrimination requirements for contractors with minimal administrative cost and burden.

The vast majority of the localities surveyed reported almost uniform compliance with the contractor ordinances with little to no contractor resistance.⁵⁰ Twenty-five of the 29 localities that provided information about their nondiscrimination ordinances reported that contractors complied with the sexual orientation and gender-identity requirements without resistance. Three of the 29 localities reported minimal resistance at first; the contractors, however, agreed to comply when the requirements were explained to them.

Of all the localities that responded to the survey, only two reported individual enforcement investigations or actions for violations of these contractor requirements, and these

localities reported only one such instance each. Twenty-eight of the 29 localities reported that no complaints of sexual-orientation or gender-identity discrimination had been filed under their nondiscrimination ordinances. The remaining locality was unaware of whether any complaints had been made because discrimination complaints were handled by a state agency rather than the local agency implementing the contractor requirements. Additionally, none of these localities reported that contractors had been barred from bidding on future contracts because they at one point did not comply with these ordinances.⁵¹

This evidence suggests that such policies also imposed little to no burden on governments. The municipal contractor requirements have been adopted, implemented, and enforced with little disruption to government operations or work, administrative burden, cost, or litigation. No locality reported that any of these ordinances made it difficult to find qualified contractors to carry out government work or operations. None of the localities that added sexual orientation and gender identity to nondiscrimination ordinances reported that doing so was administratively burdensome or resulted in additional administrative or contractor costs. Local governments' experiences with implementing and enforcing these laws suggest that the federal government could carry out a similar policy at the federal level with little administrative cost or burden.⁵²

The president has the authority to issue an executive order that broadens existing nondiscrimination requirements

It is well within the president's legal authority to issue either an amended or a new executive order to require that federal contractors do not discriminate based on sexual orientation and gender identity. Furthermore, courts are generally reluctant to overturn executive orders. The Supreme Court has only ever overturned two executive orders, neither involving nondiscrimination requirements. Not only that, but lower courts have also repeatedly upheld executive orders prohibiting discrimination by federal contractors.

If a contractor were to challenge the proposed executive order, courts would most likely use two tests to determine whether the president had authority to issue it: the "economy and efficiency" test and the conflicts test. An executive order banning sexual-orientation and gender-identity discrimination by federal contractors would most likely pass both tests.

First, the Federal Property and Administrative Services Act of 1949 gives the president broad authority to prescribe policies and directives relating to the federal government's role in the acquisition of goods and services so long as there is a sufficiently close tie between the executive order and the "economy and efficiency" of the procurement process. Generally, courts leniently apply the economy and efficiency test to executive orders, giving significant deference to the president. Some courts, however, apply the test more strictly and require a direct link between the terms of an executive order and the goals of economy and efficiency in government procurement. As described earlier,

inclusive nondiscrimination and benefits policies enhance the economy and efficiency of procurement, and an executive order requiring either should withstand legal scrutiny.

Second, courts would determine whether the executive order explicitly or implicitly conflicts with any other federal laws. Currently, no federal law exists that would pose a potential conflict with a federal-contractor executive order, meaning that such an order would also pass the conflicts test.

Conclusion

Discrimination forces qualified workers out of jobs and has negative economic effects on employers. When federal contractors discriminate, these costs and inefficiencies are passed along to the federal government. The nation's workers, businesses, and taxpayers would benefit greatly from a policy that prohibits contractors from discriminating based on sexual orientation and gender identity.

The president can issue such a policy by amending Executive Order 11246 to include sexual orientation and gender identity or by issuing a separate executive order that prohibits discrimination based on these characteristics. Ultimately, Congress might pass the Employment Non-Discrimination Act, which would mean that all LGBT workers have legal recourse should they be discriminated against in any form of employment due to their sexual orientation or gender identity.

In the meantime, however, executive action from the president would give real, meaningful, and immediate legal protections to LGBT workers—protections that could mean the difference between being employed and unemployed.

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Endnotes

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