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## Legal Analysis of E.O. 13087 to Prohibit Discrimination Based on Sexual Orientation in Federal Employment

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### **Abstract**

E.O. 13087, issued by President Clinton on May 28, 1998, amends a nearly 30-year executive order, E.O. 11478, to prohibit sexual orientation discrimination in most federal civilian employment along with other forms of bias covered by the earlier order.

# Legal Analysis of E.O. 13087 to Prohibit Discrimination Based on Sexual Orientation in Federal Employment

## **Summary**

E.O. 13087 amends a nearly 30 year-old executive order, E.O. 11478, to prohibit sexual orientation discrimination in most federal civilian employment along with the other forms of bias covered by the earlier order. The nondiscrimination and “affirmative program of equal employment opportunity” requirement of the executive order extends to “every aspect of personnel policy and practice in employment, development, advancement, and treatment of civilian employees of the federal government.” It applies to civilian employment by the executive branch, including the military departments, and sundry other agencies but does not cover the uniformed military. In addition, although it purports to apply to legislative and judicial branch entities “having positions in the competitive service,” relatively few such positions exist outside the executive branch, and E.O. 11478 has been judicially held not to apply to noncompetitive and excepted service personnel. This report will be updated as events warrant.

# Legal Analysis of E.O. 13087 to Prohibit Discrimination Based on Sexual Orientation in Federal Employment

On May 28, 1998, President Clinton issued an amendment to E.O. 11478 which states a basic policy of equal employment opportunity in federal executive branch departments and agencies. The original order, as earlier amended, prohibits discrimination because of “race, color, religion, sex, national origin, handicap, and age” in covered employment and requires each executive department and agency to promote equal opportunity through a “continuing affirmative program.” The scope of the equal opportunity mandate in E.O. 11478 encompasses “every aspect of personnel policy and practice in employment, development, advancement, and treatment of civilian employees of the federal government.” The Clinton order, E.O. 13087, adds “sexual orientation” after “age” as a protected category in Section 1 of the underlying document along with qualifying language, in effect, authorizing the expansion of coverage only “to the extent permitted by law.”

The nature of the nondiscrimination and other obligations imposed on federal departments and agencies by E.O. 11478 is spelled out in some greater detail in Section 2. Thus, each agency head must establish and maintain an “affirmative program of equal employment opportunity” for all civilian employees and applicants emphasizing active outreach and recruitment efforts; employee development and training designed to fully utilize and “enhance” employee skills and advancement opportunities to “their highest potential;” training for managers and supervisors to promote “understanding and implementation” of the policy; and a system for oversight and periodic evaluation of program effectiveness. Beyond these more or less inward-looking aspects of the program, federal managers are also directed to “assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability . . .” The Equal Employment Opportunity Commission has overall responsibility for implementing the executive order program through the issuance of rules and regulations which are binding on federal departments and agencies.<sup>1</sup>

When Title VII of the Civil Rights Act of 1964 was enacted, federal employees were not protected since the federal government was specifically excluded from the definition of an “employer” covered by the Act. Section 701 did, however, provide

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<sup>1</sup> Section 4 of E.O. 11478 directs the EEOC to “carry out” the order through the issuance, “after consultation with all affected departments and agencies,” of “such rules, regulations, orders, and instructions . . . as it deems necessary and appropriate” and the head of each employing agency is required by § 5 to furnish the Commission with reports and information as requested and to “comply with rules, regulations, orders, and instructions” issued by it.

that federal sector employment decisions were to be free from discrimination. The President was authorized to issue executive orders enforcing this policy. “*Provided further*, That it shall be the policy of the United States to insure equal employment opportunities for federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.”<sup>2</sup> To carry out this mandate, President Nixon issued E.O. 11478 in 1969, replacing portions of an earlier Johnson Administration directive on the subject.<sup>3</sup> Pursuant to the order, the former Civil Service Commission established comprehensive administrative procedures for the investigation and resolution of discrimination complaints by federal employees. However, the courts from an early date denied a right to judicial review of discrimination claims brought pursuant to the executive order.<sup>4</sup>

The lack of a judicial remedy for federal employees was rectified in 1972 when Congress extended Title VII coverage to the federal workplace and provided for *de novo* review in federal court of federal employee discrimination claims following completion of the administrative process. Explicit congressional ratification of the E.O. 11478, as then written, was included in § 717(c) of the 1972 amendments which authorized private civil actions for federal employees complaining of “discrimination based on race, color, religion, sex, or national origin.” In addition, the amendments state:

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.<sup>5</sup>

The Civil Service Commission's responsibility for enforcing Title VII and the Executive Order was transferred to the EEOC pursuant to Reorganization Plan No. 1 of 1978 and the Civil Service Reform Act of 1978. The EEOC carried forward the Commission's regulatory enforcement scheme, which was incorporated into the EEOC's overlapping statutory jurisdiction.

The EEOC regulations elaborate upon the responsibility of federal departments and agencies for maintaining an “affirmative program” of equal employment opportunity as required by § 717 and the Executive Order. Aside from procedures for processing complaints of discrimination, those rules focus on two major aspects of a federal employer's compliance with nondiscrimination requirements. First, they make clear that the equal opportunity mandate extends to all of a department or agency's “personnel policies, practices, and working conditions”--including job advertising, recruitment, training activities, promotion, discipline and discharge, etc. Secondly, the regulations emphasize the need for measures to inform and educate other employees, supervisors and managers in particular, concerning their role in

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<sup>2</sup> P.L. 88-352, § 701(b), 78 Stat.241, 252 (1964).

<sup>3</sup> E.O. 11246, 30 Fed. Reg. 12319 (1965).

<sup>4</sup> See e.g. *Gnotta v. United States*, 451 F.2d 1271 (8<sup>th</sup> Cir. 1969), cert. denied, 397 U.S. 934 (1970); *Brown v. G.S.A.*, 425 U.S. 820 (1976).

<sup>5</sup> 42 U.S.C. 2000e-16(e).

program implementation. Thus, the governmental employer is to “enlist th[e] cooperation” of the agency's general workforce and labor organizations and must take “appropriate disciplinary action” against discriminating employees. Similarly, managers and supervisors are to be provided “orientation, training, and advice” on the program with their participation being a factor in the evaluation of their job performance.

Both Executive Order 11478, and the EEOC regulations described above, make plain that the mandated “affirmative program of equal employment opportunity” is to encompass “every aspect of personnel policy and practice,” including “recruitment activities,” and that systems are to be established for “periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.”<sup>6</sup> The scope of this legal obligation, and specific initiatives adopted by federal agencies to implement it, have received scant judicial attention, perhaps because the order was so soon supplanted by statutory amendment to Title VII. A corollary legal requirement was incorporated into § 717 of the 1972 Title VII amendments, which requires each federal department and agency to submit for annual EEOC review “an affirmative program of equal employment opportunity” for all employees or applicants for employment.<sup>7</sup> The statute, however, has since 1978 been administered jointly with a provision of the Civil Service Reform Act, which authorized a federal “minority recruitment program” designed to eliminate “underrepresentation” of racial and ethnic minorities, and women, in specific job categories.<sup>8</sup> That program has no application to sexual orientation -- just as it does not extend to older workers and religious minorities who are also protected by E.O. 11478.

On account of this statutory history, minority and female recruiting practices of federal agencies provide no direct guidance to interpreting E.O. 11478 as most recently amended. E.O. 13087 does not explicitly mandate affirmative recruitment or other preference in federal employment based on sexual orientation. But neither does it or other legal authority preclude federal employing departments and agencies from incorporating statistically--based measures into an overall “affirmative program of equal employment opportunity.” Determination of administrative policy in this regard would appear to be within the discretion of individual departments and agencies under § 2 of E.O. 11478. In addition, under §§ 4 and 5 of E.O. 11478, as amended, EEOC would arguably have the authority, but not a legal duty, to require recordkeeping by agencies of workforce composition based on sexual orientation.<sup>9</sup>

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<sup>6</sup> 29 C.F.R. §1614.102(a)(11).

<sup>7</sup> 42 U.S.C. § 2000e-16(b)(1).

<sup>8</sup> The EEOC and Office of Personnel Management have issued rules to guide monitoring and compliance of minority recruitment programs adopted by individual federal agencies, including the requirement of “annual specific determinations of underrepresentation for each group . . . accompanied by quantifiable indices by which progress towards eliminating underrepresentation can be measured.” 5 C.F.R. § 720.205(b)(1998).

<sup>9</sup> EEOC regulations issued pursuant to E.O. 11478 and the 1972 Title VII amendments require covered departments and agencies “to collect and maintain accurate employment information on the race, national origin, sex and handicap(s) of its employees” by means of “voluntary self-identification” and to report on same to the Commission “in such form and  
(continued...)

Note, however, that neither affirmative recruitment nor data collection appear to be required by agency practice with respect other classes protected by E.O. 11478--older workers and religious minorities, for example--leaving the prospects for future agency action on sexual orientation largely conjectural.

The effect of the Clinton Administration order on federal health insurance, family leave, and other employment benefits for federal employees that include marital status distinctions would probably be marginal. Definitional aspects of family relationship, i.e. husband, wife, spouse etc., required for participation in most such programs are set by statute.<sup>10</sup> Thus, any claim of sexual orientation discrimination resulting from the denial of benefits to any person not the spouse or child of an employee--or an agency's voluntary adoption of domestic partnership policies-- would for many federal purposes be contrary to law and outside the scope of E.O. 13087. But in light of the U.S. Supreme Court ruling last term in *Oncale v. Sundowner Offshore Services Inc.*<sup>11</sup>-- finding that Title VII prohibits same-sex harassment-- the new order could require agencies to take actions to prevent and remedy harassment of employees based on their sexual orientation. Such anti-harassment policies could include agency-sponsored training programs to foster awareness and appreciation of diversity in matters of sexual orientation. Employees objecting to compulsory attendance at such programs on moral or religious grounds may enjoy uncertain constitutional protection.<sup>12</sup> However, objectors might in some circumstances find relief in the EEOC regulations which require agencies to "reasonabl[y] accommodate" the religious needs of employees when this can be done without "undue hardship" to agency business.<sup>13</sup> Nor would the amended order necessarily preclude even-handed application to all employees, regardless of sexual orientation, of agency rules governing employee conduct in relation to displays of affection or other workplace behavior that could "reasonably be expected to interfere with, or prevent, effective accomplishment by the employing agency of its duties and responsibilities."<sup>14</sup>

The executive order has its most obvious and direct implication on federal employers and for the rights of employees and applicants for employment in the Executive Branch. It would not immediately impact the employment practices of federal contractors--who are subject to nondiscrimination and affirmative action requirements on the basis of race, ethnicity, and gender imposed by E.O. 11246--or recipients of federal financial assistance governed by a host of other nondiscrimination statutes which do not include sexual orientation protections.

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<sup>9</sup>(...continued)

at such times as the Commission may require." 29 C.F.R. § 1614.602 (a),(b), and (g).

<sup>10</sup> E.g. the Federal Employee Health Benefits Plan defines "member of the family" to include the "spouse" of an employee and an "unmarried dependent child." 5 U.S.C. § 8901; "Spouse" for purposes of the Family and Medical Leave Act, 29 U.S.C. § 2611(13) means "husband or wife, as the case may be."

<sup>11</sup> 118 S.Ct 998 (1998).

<sup>12</sup> Cf. *Roberts v. United States Jaycees*, 468 U.S. 509 (1984)(rejecting First Amendment challenge to state law forcing a nominally "members-only" association to admit women to its all-male ranks).

<sup>13</sup> 29 C.F.R. § 1614.102(a)(7).

<sup>14</sup> 5 C.F.R. § 731.202(a)(2).

Nonetheless, it is possible that E.O. 11478, as amended, could have ramifications for the private sector. In addition to internal measures to avoid discrimination and affirmatively enhance employment opportunities within the agency, federal employers are directed to engage in “cooperative efforts” with employers, schools, and public or private groups “at the local level” in aid of these objectives. The authority to cooperate with local entities could conceivably provide a basis for requiring or encouraging the adoption of sexual orientation policies by such entities as a condition to federal cooperation. Some parallel may be found in federal regulations unrelated to E.O. 11478 which have either mandated nondiscrimination or required the affirmative consideration of sexual orientation as a criterion by participants in other federal programs.<sup>15</sup> It appears, therefore, that the sexual orientation amendment to the executive order program could have at least some policy implications outside the federal workplace.

The ability of federal employees or applicants to complain of and obtain administrative relief for alleged sexual orientation discrimination under the amended executive order may largely depend on future rule-making by the employing federal departments and agencies and/or the EEOC. Current procedures for enforcing equal employment opportunity with respect to other classes of employees protected by E.O. 11478 are established by EEOC regulations. Briefly, a federal employee aggrieved by discrimination must first consult with an agency EEO counselor for advice and informal resolution of the matter which, if unsuccessful, may be followed by a formal complaint with the employing agency, an investigation, and ultimately a hearing before an EEOC administrative law judge. Any final agency determination may be appealed to the EEOC and from there to the federal courts in racial, ethnic, religious, or gender discrimination cases. A right to judicial review in sexual orientation cases would not be independently available under the executive order without congressional authorization.

In addition, an argument could be made that because E.O. 13087 adds “sexual orientation” only to the statement of policy in § 1, but not the more explicit “implementation” language in § 3, the employing departments and agencies, rather than the Commission, may be primarily responsible for determining procedures for administrative enforcement. A signing statement issued by the President on May 28 possibly suggests such intent when it declares that “[t]his Executive Order [13087] does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity Commission) . . .” Clouding the issue further, however, is the fact that the Commission's current authority under § 4 of E.O.

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<sup>15</sup> E.g. 61 Fed. Reg. 40380, 40388 (8-2-96)(private participants in Groundfish Observer Program “must assign observers without regard to any preference by representatives of vessels and shoreside facilities based on observer race, gender, age, religion, or sexual orientation”); 60 Fed. Reg. 20684, 20692 (4-27-95)(applicants for Runaway and Homeless Youth Program must identify strategies “for encouraging awareness of and sensitivity to the diverse needs of runaway and homeless youth who represent particular ethnic and racial backgrounds, sexual orientations, or are street youth”); 46 Fed. Reg. 18055, 18056 (legal services programs supported by Legal Services Corporation may not discriminate on the basis of sexual orientation in delivery of legal services and “must take affirmative action to end the underutilization of certain protected groups in their workforces”); 59 Fed. Reg. 96599 (3-28-94) (Americorps technical training and assistance to state commissions or alternative entities to include “developing strategies which encourage mutual respect and cooperation among citizens of different . . . sexual orientations”).



11478 “to issue such rules, regulations, orders, and instructions, and request such information from the affected departments and agencies as it deems necessary and appropriate” remains intact. In any event, while E.O. 13087 may not create enforcement rights (and only Congress can create a judicial right of action by statute), the employing agencies and the EEOC share a residuum of rulemaking authority under E.O. 11478, which could arguably be deployed to procedurally implement the order at the administrative level.

Another enforcement avenue may exist, however. The Office of Special Counsel (OSC) was created by the Civil Service Reform Act to investigate allegations of “prohibited personnel practices” within the executive branch and, when appropriate, to seek corrective and disciplinary action through auspices of the Merit System Protection Board (MSPB).<sup>16</sup> Falling within the independent investigatory jurisdiction of the OSC is any allegation of “activities prohibited by any civil service law, rule, or regulation” and “involvement by an employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.”<sup>17</sup> Allegations of sexual orientation discrimination prohibited by E.O. 13087 may come within this definition. OSC has no independent enforcement authority, however, but where it finds “reasonable grounds,” may seek stays and corrective action from the MSPB against the employing agencies and disciplinary sanctions against alleged discriminators.

Questions have arisen as to whether any statutory basis exists for the most recent amendment to E.O. 11478 regarding sexual orientation discrimination. While Congress has authorized and approved of the executive order program as applied to racial minorities and women, both before and after its implementation, the legislative history of Title VII and the 1972 amendments provides negligible support for the post-enactment revisions effected by E.O. 13087. The President does, however, possess executive authority under the federal civil service laws to make such rules “as will best promote the efficiency of [the] service.” Thus, 5 U.S.C. § 3301 provides:

The President may---

- (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
- (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought;
- (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

In addition, while the Civil Service Reform Act of 1978 does not mention “sexual orientation,” it incorporates a job-based performance standard which has been administratively interpreted since the Carter Administration as barring disqualification of persons from the federal service based on sexual orientation alone.<sup>18</sup> By 1996, at least thirteen cabinet level agencies and 33 independent

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<sup>16</sup> 5 U.S.C. § 1212.

<sup>17</sup> Id., § 1216(a)(4),(5).

<sup>18</sup> 5 U.S.C. § 4302(b)(1)(“performance standards” to be based on “objective criteria. . . related to the job in question for each employee or position. . .”). See also “Federal (continued...)”

establishments of the U.S. Government had reportedly issued policy statements forbidding sexual orientation discrimination. These included the Departments of Justice (including the FBI), Agriculture, Transportation (including the Coast Guard), Health and Human Services, Interior, Housing and Urban Development, Labor, Energy and the General Accounting Office, General Services Administration, Internal Revenue Service, Office of Personnel Management, the White House, and the Federal Reserve System.<sup>19</sup> E.O. 13087 essentially makes such policy universal in the Federal Executive Branch and with respect to civilian employees of the military departments and sundry other governmental entities, but would not create judicially enforceable rights in the absence of congressional action.

On August 5, 1998, the House, by a vote of 176 to 252, defeated a floor amendment offered by Representative Hefley to H.R. 4276, the FY 1999 Commerce, Justice, State appropriations measure, that would have prohibited the use of appropriated funds to implement or enforce E.O. 13087.<sup>20</sup>

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<sup>18</sup>(...continued)

Employees Gain Better Protection Against Sexual Orientation Discrimination,” 24 DLR (BNA) A-9 (Feb. 7, 1994)(citing 1980 Office of Personnel Management memorandum explaining that sexual orientation discrimination is illegal.)

<sup>19</sup> See Serra, “Sexual Orientation and Michigan Law,” 76 Mich. B.J. 948, 949 (1997).

<sup>20</sup> 144 Cong. Rec. H7263 (daily ed. 8-5-98).

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