



ISSUE ANALYSIS

Obama Executive Order on “Sexual Orientation” and “Gender Identity”

Peter Sprigg and Travis Weber

What did President Obama do?

On July 21, 2014, President Obama signed an Executive Order to prohibit discrimination on the basis of “sexual orientation” and “gender identity” by federal *contractors*, and to prohibit discrimination against federal *employees* based on “gender identity” (“sexual orientation” had already been included as a protected category in federal employment by President Clinton).

The Executive Orders that were amended

President Obama’s order amended previous Executive Orders signed by President Lyndon B. Johnson and President Richard M. Nixon.

The Nixon order, Executive Order 11478, barred discrimination against *federal employees* on the basis of race, color, religion, sex, national origin, disability, and age. It was amended by President Bill Clinton (Executive Order 13087) to add “sexual orientation” to the list of protected categories. President Obama has now further amended this policy to include “gender identity” as a protected category.

The Johnson order, Executive Order 11246, prohibited federal *contractors* from discriminating on the basis of race, color, religion, sex, or national origin. President Obama added both “sexual orientation” and “gender identity” to this policy.

How does President Obama’s Executive Order relate to ENDA (the Employment Non-Discrimination Act)?

The Employment Non-Discrimination Act, known as ENDA (S. 815, H.R. 1755), is a bill proposed in Congress which has as its stated purpose “to prohibit employment discrimination on the bases of sexual orientation and gender identity” by *any* employer with over 15 employees. (ENDA passed the Senate on November 7, 2013, but the House of Representatives has not acted upon it.)

President Obama’s Executive Order applies only to *federal employees* and to “federal contractors . . . and subcontractors who do over \$10,000 in Government business in one year.”

Therefore, a private employer with over 15 employees who does not have contracts with the federal government *would* be covered by ENDA, but is *not* covered by the Executive Order.

FAMILY RESEARCH COUNCIL

801 G STREET NW, WASHINGTON, D.C. 20001
202-393-2100 • fax 202-393-2134 • (800) 225-4008 order line
www.frc.org

September 2014
Issue Analysis IS14I01

Is there a religious exemption to the Executive Order? How does it compare with ENDA?

- *Religious Exemption in Title VII, Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964 barred employment discrimination based on “race, color, religion, sex, or national origin.” There are two exemptions in Title VII that could potentially be claimed by religious organizations in certain circumstances.¹ The first exemption, contained in § 702(a), allows “a religious corporation, association, educational institution, or society” to only hire people of a particular religion to perform the work of the organization and carry on its “religious activities.” 42 U.S.C. § 2000e-1(a) (2012). This exemption applies generally to work performed for the organization.

The second exemption, contained in § 703(e)(1), allows any employer to consider religion, sex, or national origin in employment decisions, if those characteristics constitute “a bona fide occupational qualification.” 42 U.S.C. § 2000e-2(e)(1).

The exemption for “a religious corporation . . .,” etc. is based on the reasonable grounds that organizations motivated by their faith should be free to give preference in hiring to those who share that faith. In a 1987 case, a unanimous Supreme Court upheld the exemption as constitutional, declaring that it serves the “purpose of limiting governmental interference with the exercise of religion” and “of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”² The “bona fide occupational qualification” exemption is based on the idea that some specific roles require characteristics which make total application of nondiscrimination laws impractical and unworkable.

- *Religious exemption in ENDA*

ENDA would exempt any organization that qualifies for that exemption from ENDA’s provisions as well:

This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964

On its face, this means that any organization exempted from the *religious* hiring provisions of the 1964 Civil Rights Act should be exempt *altogether* from the provisions of ENDA. That is to say, religious organizations would be exempt not just with respect to hiring preferences based on religion, but completely exempt from the “sexual orientation” and “gender identity” provisions of the bill.

Family Research Council (FRC) has long been concerned that this religious exemption in ENDA is inadequate, as we have reason to believe that “a religious corporation, association, or society” would be narrowly defined, thus excluding organizations not within this definition, though they truly are exercising religion. (For example, the Supreme Court’s 2014 *Hobby Lobby* decision made clear that for-profit corporations can exercise religion, but it is unclear whether the ENDA

exemption would apply at all to for-profit corporations.) We are also concerned that the definition of “religious activities” would be construed too narrowly, forcing an employer to disregard an employee’s or applicant’s sexual practices even if those practices conflict directly with the organization’s religious teachings, unless the position specifically involves the propagation of those teachings.

- *Religious Exemption in Obama Executive Order*

However, President Obama’s Executive Order *expressly omits* even the type of religious exemption contained in the proposed ENDA (a bill which President Obama has endorsed).

Note that President Johnson’s Executive Order regarding federal contractors tracked exactly the protected categories in the 1964 Civil Rights Act (“race, color, religion, sex, or national origin”). Therefore, it made sense when—even over the objection of strict church-state separationists—President George W. Bush issued an order (Executive Order 13279) granting a religious exemption to federal contractors which also paralleled the exemption in the Civil Rights Act. The Bush Order said that the Johnson Order “shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion” President Bush added, “Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order” (that is, with the protections against discrimination based on “race, color, . . . sex, or national origin”).

President Obama has retained this, but only this, exemption. Thus, while ENDA would exempt eligible religious organizations entirely from its obligations, the Executive Order only exempts them with regard to their decisions to hire based on *religion*.

The exemption allowing religious organizations to hire co-religionists could provide some protections for the organizations in question, depending on whose definition of a co-religionist controls. Many religious organizations not only seek out adherents of their own religion to assist in carrying out their missions, but also have standards of conduct (including sexual conduct) which require employees to live their lives in a way consistent with the moral teachings of their faith. There is little question that homosexual and transgender activists see such conduct codes as a form of “discrimination,” and they want to forbid religious organizations from adopting such standards. Such government enforced conduct codes would be a shocking assault upon religious liberty.

Some religious employers may argue that a person who engages in unrepentant homosexual behavior cannot be a member of the religion, and that therefore they may exclude practicing homosexuals from working within the organization. However, much remains unsettled in this area. While the courts have generally been reluctant to adjudicate doctrinal determinations of who constitutes a “co-religionist,” in the current climate they may also be reluctant to allow such doctrinal assertions to serve as a cover for what they believe to be “discrimination.”

Furthermore, as with ENDA's religious exemption based on Title VII, the exemption for religious hiring in the Obama executive order is unlikely to extend to for-profit corporations at all.

- *Are ENDA and the Executive Order consistent with each other?*

Ironically, the portion of the Executive Order that applies to federal contractors appears to actually conflict with the text of ENDA, a piece of legislation which President Obama has endorsed. Section 6(b) of S. 815 states:

A religious employer's exemption under this section shall not result in any action by a Federal agency, or any State or local agency that receives Federal funding or financial assistance, to penalize or withhold licenses, permits, certifications, accreditation, *contracts*, grants, guarantees, tax-exempt status, or any benefits or exemptions from that employer

In other words, the bill that President Obama has endorsed would *forbid* the withholding of federal contracts from a religious employer because of their policies on sexual orientation and gender identity, but the Executive Order would *require* such contracts to be withheld. Family Research Council recommends that President Obama be asked why he has taken an action that would be forbidden by legislation which he has endorsed.

What's wrong with the Executive Order?

- *The Executive Order adds inappropriate categories of protection.*

Family Research Council believes that it is wrong in principle to include "sexual orientation" or "gender identity" as protected categories in *any* type of "non-discrimination" law or policy – federal, state, or local, public or private.

The default position in a free country and a free economy should be that individual employers are free to make their own decisions about what characteristics are or are not relevant to an employment action, without interference from others – especially the government. If employers place irrelevant considerations ahead of legitimate qualifications, they will be punished for those decisions by the market itself. For example, an employer who rejects better-qualified applicants for arbitrary and irrelevant reasons will end up with an inferior workforce that is less competent and therefore less productive and less effective in meeting the needs of their customer base – all of which will result in a decline in sales.

Exceptions to this general rule of employer discretion have primarily been made, and can only be justified, with respect to characteristics that are inborn, involuntary, immutable, innocuous, and/or in the Constitution of the United States. All of those criteria apply, for example, to the characteristic of race, so legal prohibitions on racial discrimination can be justified. None of those criteria, however, apply to the *behavioral* aspects of sexual orientation or gender identity, such as the choice to engage in homosexual sex or the choice to present one's self as the

opposite of one's biological sex. Therefore the inherent right of employers to make their own employment decisions should be preserved with respect to these issues.

- *The Executive Order does not reflect the will of the people expressed in Congress.*

In our system of government, it is Congress or the legislative branch which writes the laws. The role of the President and the executive branch is merely to carry out and enforce the laws that have been enacted by Congress and signed into law.

Where Congress has legislated to prevent employment discrimination in the marketplace (as with the Civil Rights Act of 1964), it makes sense for the President to apply those same principles to federal contractors and employees as well. However, "sexual orientation" and "gender identity" were not part of this congressional mandate. Therefore, when the President issues decrees in these areas without congressional approval, his authority to do so is on somewhat shakier ground.³

When Congress has considered proposals to expand the law and has *rejected* them, advocates of limited government and the separation of powers should be wary of actions by the executive which make new law rather than carrying out the existing law.

Family Research Council believes that President Clinton was wrong to add "sexual orientation" as a protected category under federal employment policies, and we believe that President Obama was wrong to add "gender identity" in this area, and "sexual orientation and gender identity" with regard to federal contractors.

- *The Executive Order interferes with the free market for employment among private employers.*

While there is reason for concern about the President of the United States adding non-statutory provisions to *federal* employment policies, there is even more reason for concern about his unilaterally imposing such restrictions on thousands of *private* employers through new federal contracting rules. President Obama is merely using the contracting process as a tool to impose his ideological will upon private employers, seeking to achieve with the stroke of a pen what he and his allies have been unable to achieve through the democratic process in the debate over ENDA.

- *The Executive Order is an attack upon religious liberty.*

Religious organizations often contract with the government to provide services – particularly social services that involve care for children and the poor, both at home and abroad. While government can pay for these services because the services themselves are essentially secular, religious organizations are often uniquely effective at delivering them, in part because of the deep spiritual commitment which motivates the employees of those organizations.

That is why the federal government has recognized – both in the Civil Rights Act of 1964 and in President George W. Bush's executive order regarding federal contractors – that religious

organizations have a legitimate interest in hiring people who share their faith convictions. However, for many individuals, faith groups, and religious organizations, a commitment to *living* in a way consistent with the teachings of their faith is just as important as intellectually *believing* in those teachings. That is why many religious organizations not only require employees to sign a statement of faith, but they also require them to abide by a code of conduct. Such codes of conduct may include a code of sexual conduct as well – for example, one declaring that sexual relations are only appropriate in the context of marriage between one man and one woman.

Homosexual and transgender activists, however, consider even such *conduct*-based requirements to be a form of “discrimination” fully on a par with arbitrary discrimination based on an innate characteristic such as race. Therefore, under President Obama’s Executive Order, religious organizations will be faced with an agonizing choice – compromise their faith-based principles, or forego the federal contracts which maximize their ability to minister to the needy.

This is a choice no religious organization should be forced to face. Accepting a federal contract does not constitute forfeiture of the right to freely exercise one’s religion. And the free exercise of religion means nothing if it does not include the freedom to mandate standards of conduct for employees of a religious group which are consistent with the teachings of one’s faith.

- *The Executive Order is unnecessary.*

One irony is that the White House Fact Sheet issued to justify President Obama’s Executive Order placed great emphasis on the large number (and percentage) of corporations and federal contractors that *already* prohibit “discrimination” based on “sexual orientation” and/or “gender identity,” and on a variety of studies and surveys that purportedly show the benefits of such policies for the companies and organizations that adopt them.

If those claims are true, however, they undermine any suggestion that such “discrimination” is endemic, or that federal action is required to arrest the problem. They would tend to indicate instead that social change is already eliminating any perceived invidious forms of discrimination, and that market forces themselves will punish those who place unfounded prejudice ahead of legitimate qualifications.

- *The Executive Order’s principal purpose is to punish dissent.*

In light of the last two points – the evidence that the new policy is unneeded, but that it threatens religious liberty – only one conclusion is possible: the actual purpose of laws and policies to prohibit “discrimination” based on “sexual orientation” and “gender identity” is not to insure job opportunities for homosexual, bisexual, and transgender people.

Their real purpose is to punish Americans who dissent from the politically correct ideology of the sexual revolution. It takes increasing courage to hold and express the conviction that people should abstain from engaging in sex with others of the same sex, and that people should accept their biological sex at birth as an immutable characteristic which cannot be distinguished from “gender.” These laws and policies are designed to stifle such dissent – by actively punishing it

by law where possible, and by stigmatizing it as bigotry on a par with the most virulent racism in all cases.

A much better policy would be to advance freedom—freedom of belief for all, a free debate, and freedom to determine public policy through a democratic process that respects the judgment of the people.

Peter Sprigg is a Senior Fellow for Policy Studies at the Family Research Council in Washington, D.C. Travis Weber, J.D., LL.M., is the Director of the Center for Religious Liberty at the Family Research Council in Washington, D.C.

¹ There also exists the “ministerial exemption” that is not part of the statute, but has been ruled to be required by the First Amendment. This exemption applies to an even narrower subset of employers and employees (Likely only churches or directly affiliated organizations, and only for employees of those employers who are “ministers”) than the § 702 exemption, but prohibits virtually any interference with hiring/firing decisions. That is, if someone is a “minister,” they can be fired for disability reasons even if the disability does not interfere with a religious requirement. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012).

² *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987).

³ Courts have already limited the application of President Johnson’s Executive Order 11246. See *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 171 (4th Cir. 1981) (holding Executive Order 11246 is without authority as applied to a workman's compensation insurer of Federal contractors).