

THE WHITE HOUSE
WASHINGTON

April 10, 2000

MEMORANDUM FOR BRUCE REED

FROM: ANN O'LEARY

CC: ERIC LIU
TOM FREEDMAN
HEATHER HOWARD

SUBJECT: EXECUTIVE ORDERS

This memo is intended to provide you with a list of outstanding and suggested executive orders from the children and families team. Please provide us guidance on which orders you would like to move forward, release, or, alternatively, no longer consider.

Executive Orders Already Announced by the President:

Ending Parental Discrimination in the Federal Workplace

First Announced: State of the Union in 1999

Substance: This EO would prohibit discrimination against parents in the Federal workplace, specifically with regards to hiring and promotion.

Legislative action: Senators Dodd and Kennedy introduced the "Ending Discrimination Against Parents Act of 1999" in November 1999 and the President released a statement of support at the time of introduction.

Possible rollout: This EO could be rolled-out at the White House Conference on Teenagers as part of the message that we need workplaces that support parents in their roles as parents. This EO would send a basic message that individuals should not be discriminated against based on their status and role as parents. The release of the EO would also allow us to highlight the Dodd-Kennedy bill once again.

Status of EO: Draft completed (see attached). Needs to be cleared through OMB.

Nondiscrimination in Federally Conducted Education and Training Programs

- First Announced: June 17, 1997 at a speech commemorating the 25th Anniversary of Title IX of the Education Amendments of 1972
- Substance: This EO would prohibit discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent in educational or training programs offered by the Federal government.
- Current Law: While Title IX prohibits discrimination based on sex – and Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin – in education programs that receive Federal financial assistance, these laws do not apply to comparable educational programs conducted by the Federal government.
- Possible rollout: This EO could be released with a press statement from the President or as part of a departure statement.
- Status of EO: Draft completed (see attached) and cleared through OMB.
- NOTE: The women's groups have been most vocally and actively calling for the completion of this EO given its original tie to the anniversary of Title IX.

Possible Executive Orders (Not yet signed-off on or announced):

Expand FMLA to include broader definition of families for Federal employees

- First Considered: As part of SOTU 2000 development under discussion of domestic partner benefits.
- Substance: This EO would broaden the definition of "family" for Federal employees who use FMLA. There are two options for broadening the definition: (1) use the definition created by OPM for sick leave policies, which leaves out the words "domestic partner," but provides for individual or agency discretion (2) spell out the exact "family" members included.
- Under sick leave policies, OPM has issued a proposed regulation stating that "family member" is defined as an employee's children, parents, spouse and spouse's parents, brothers and sisters and spouses thereof, and "any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

Under Congresswoman Maloney's bill, family member is expanded to include domestic partner, grandparent, parent-in-law, adult child, or sibling.

- Legislative Action: In June 1999, Maloney introduced her bill to amend FMLA in order to expand the definition of family member.
- History of Issue: During promulgation of regulations, OPM was asked to adopt a broad definition of "family" and "spouse," but declined citing Congressional intent and DOMA.
- Pros: The expansion of family member recognizes the changing nature of the American family. With a broad definition that does not only focus on the domestic partner issue, it is one that the Administration could claim credit for with grandparent groups, long-term caregivers, as well as gay rights groups.
- Cons: By highlighting this issue through EO, Congress could strike out against other OPM policies that have allowed for the broader definition of family. In addition, opening up FMLA through EO could provide Congress with an impetus to provide legislative "fixes" to other perceived FMLA problems, such as restricting the definition of "serious illness."
- Recommendation: I would recommend this EO with the OPM definition of family member which leaves out the domestic partner language, but clearly intends to signal the inclusion of domestic partners. This EO signals that the WH understands the changing nature of the family and is providing a model workplace for employees.
- Status of EO: Not yet drafted

Non-discrimination on basis of sexual orientation in Federal Contracts

- First Considered: As part of a WH working group on issues of sexual orientation and domestic partner benefits. The group includes WH Counsel (Eddie Corriea, Paul Oetken), OPL (Jullian Potter), and DPC (Mary Smith and myself).
- Substance: This EO would prohibit discrimination based on sexual orientation by any Federal contractor.
- History: In June 1941, President Roosevelt issued EO 8802 forbidding race-based discrimination by Federal contractors and shortly thereafter, he issued EO 9001 forbidding defense contractors to discriminate on the basis of race.

- Pros: This EO would signal the Administration's continuing commitment to non-discrimination based on sexual orientation. In May 1998, the President issued EO 13087 prohibiting discrimination based on sexual orientation in Federal civilian employment. In addition, non-discrimination based on sexual orientation has been part of the Administration's Hate Crimes legislation message. This EO would provide further proof that the Administration will not tolerate such discrimination.
- Cons: There is some concern among the working group that this EO could infringe about religious rights of Federal contractors.
- Recommendation: At this point, I would recommend that this EO be more thoroughly vetted through the government to determine what type of impact it would have on Federal procurement.
- Status of EO: Rough draft has been completed, but it has gone through no informal or formal clearance process (see attached).

Executive Memorandum Opening Federal Buildings and Spaces for use in Non-School Hours

- First Considered: This suggestion came up as part of our brainstorming around the White House Conference on Teenagers.
- Substance: This executive memorandum would encourage Federal agencies to invite local government-community partnerships to use available Federal space during non-school hours for after-school activities.
- History: The Clinton Administration has encouraged such partnerships between Federal agencies and local community organizations or schools. In addition, the Administration has encouraged agencies to allow Federal employees to volunteer for up to two hours during a regular workweek.
- Pros: Space issues are often a problem for community based after-school programs. This executive memorandum would allow Federal agencies to do their part in providing safe spaces for children after school.
- Cons: The use of Federal space could potentially be of high-cost to the government by keeping buildings open and needing to provide additional security. In addition, the Federal government would need to ensure that liability was assumed by the community-based organization.
- Recommendation: If this executive memorandum were of interest, it would need to be studied further to determine costs and potential difficulties in implementation.

Draft – October 15, 1999

EXECUTIVE ORDER

FURTHER AMENDMENT TO EXECUTIVE ORDER 11478, EQUAL EMPLOYMENT OPPORTUNITY IN FEDERAL GOVERNMENT

By the authority vested in me as President by the Constitution and the laws of the United States, and in order to provide for a uniform policy for the Federal Government to prohibit discrimination based on an individual's status as a parent, it is hereby ordered that Executive Order 11478, as amended, is further amended as follows:

Section 1. Amend the first sentence of section 1 by substituting "sexual orientation, or status as a parent." for "or sexual orientation."

Sec. 2. Insert the following new sections 6 and 7 after section 5:

"Sec. 6. An individual has the status of a parent, if, with regard to another individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, that individual –

(a) stands in loco parentis to such other individual; or

(b) has the status of –

(i) a biological parent;

(ii) an adoptive parent;

(iii) a foster parent

(iv) a stepparent;

(v) a custodian of a legal ward; or

(vi) a person who is actively seeking legal custody or adoption.

"Sec. 7. The Office of Personnel Management shall be responsible for developing and implementing guidance to effectuate the provisions of this order prohibiting discrimination on the basis of an individual's sexual orientation or status as a parent."

Sec. 3. Amend section 4 by substituting "and appropriate to carry out its responsibilities under this Order" for "appropriate to carry out this Order."

Sec. 4. Renumber current sections, 6, 7, and 8 as sections 8, 9, and 10, respectively.

Sec. 5. Add a section 11 to read as follows:

“Sec. 7. This Executive Order does not confer any right or benefit enforceable in law or equity against the United States or its representatives.”

WILLIAM J. CLINTON

THE WHITE HOUSE
[date]

Executive Order

NONDISCRIMINATION ON THE BASIS OF RACE, SEX, COLOR, NATIONAL ORIGIN, DISABILITY, RELIGION, AGE, SEXUAL ORIENTATION, AND STATUS AS A PARENT IN FEDERALLY CONDUCTED EDUCATION AND TRAINING PROGRAMS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 921-932 of title 20, United States Code; section 2164 of title 10, United States Code; section 2001 et seq., of title 25, United States Code; section 7301 of title 5, United States Code; and section 301 of title 3, United States Code, and to achieve equal opportunity in Federally conducted education and training programs and activities, it is hereby ordered as follows:

Section 1. Statement of policy on education programs and activities conducted by executive departments and agencies.

1 -101 . The Federal Government must hold itself to at least the same principles of nondiscrimination in educational opportunities that it applies to the education programs and activities of State and local governments, and to private institutions receiving Federal financial assistance. Existing laws and regulations prohibit certain forms of discrimination in Federally conducted education and training programs and activities -- including discrimination against people with disabilities, prohibited by the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq., as amended, employment discrimination on the basis of race, color, national origin, sex, or religion, prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-17, as amended, discrimination on the basis of race, color, national origin or religion in educational programs receiving Federal assistance, under Title VI of the Civil Rights Acts of 1964, 42 U.S.C. 2000d, and sex-based discrimination in education programs receiving Federal assistance under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. Through this Executive order, discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age,

disability, and status as a parent will be prohibited in Federally conducted education and training programs and activities.

1-102. No individual, on the basis of race, sex, color, national origin, religion, sexual orientation, age, disability, or status as a parent, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination in, a Federally conducted education or training program or activity.

Sec. 2. Definitions.

2-201. "Federally conducted education and training programs and activities" includes programs and activities conducted, operated, or undertaken by an executive department or agency.

2-202. "Education and training programs and activities" include, but are not limited to, formal schools, extracurricular activities, academic programs, occupational training, scholarships and fellowships, student internships, training for industry members, summer enrichment camps, and programs to train teachers.

2-203. The Attorney General is authorized to make a final determination as to whether a program falls within the scope of education and training programs and activities covered by this order, under subsection 2-202, or is excluded from coverage, under section 3.

2-204. "Military education or training programs" are those education and training programs conducted by the Department of Defense or, where the Coast Guard is concerned, the Department of Transportation, for the primary purpose of educating or training members of the armed forces or meeting a statutory requirement to educate or train Federal, State, or local civilian law enforcement officials pursuant to 10 U.S.C. Chapter 18.

2-205. "Armed forces" means the Armed Forces of the United States.

2-206. "Status as a parent" is defined as follows: an individual has the status of a parent, if, with regard to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, that individual has the status of :

- (a) ab a biological parent;
- (b) ab an adoptive parent;
- (c) ab a foster parent;

- (d) ab a stepparent;
- (e) ab a custodian of a legal ward;
- (f) ab a person who is actively seeking legal custody or adoption; or
- (g) ab a person who stands in loco parentis to such an individual.

Sec. 3. Exemption from coverage.

3-301. This order does not apply to members of the armed forces, military education or training programs, or authorized intelligence activities. Members of the armed forces, including students at military academies, will continue to be covered by regulations that currently bar specified forms of discrimination which are now enforced by the Department of Defense and the individual service branches. The Department of Defense shall develop procedures to protect the rights of and to provide redress to civilians not otherwise protected by existing Federal law from discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, disability, or status as a parent and who participate in military education or training programs or activities conducted by the Department of Defense.

3-302. This order does not apply to, affect, interfere with, or modify the operation of any otherwise lawful affirmative action plan or program.

3-303. An individual shall not be deemed subjected to discrimination by reason of his or her exclusion from the benefits of a program limited by Federal law, or a program established consistently with Federal law, to individuals of a particular race, sex, color, national origin, religion, sexual orientation, age, disability, or status as a parent different from his or her own.

3-304. This order does not apply to ceremonial or similar education or training programs or activities of schools conducted by the Department of Interior, Bureau of Indian Affairs, that are culturally relevant to the children represented in the school. "Culturally relevant" refers to any class, program, or activity that is fundamental to a tribe's culture, customs, traditions, heritage, or religion.

3-305. This order does not apply to (a) selections based on national origin of foreign nationals to participate in covered education or training programs, if such programs primarily concern national security or foreign policy matters; or (b) selections or other decisions regarding

participation in covered education or training programs made by entities outside the Executive Branch. It shall be the policy of the Executive Branch that education or training programs or activities shall not be available to entities that select persons for participation in violation of Federal or State law.

3-306. The prohibition on discrimination on the basis of age provided in this order does not apply to age-based admissions of participants to education or training programs, if such programs have traditionally been age-specific or must be age-limited for reasons related to health or national security.

Sec. 4. Administrative enforcement.

4-401. Any person who believes himself or herself to be aggrieved by a violation of this order or its implementing regulations, rules, policies, or guidance may, personally or through a representative, file a written complaint with the agency that such person believes is in violation of this order or its implementing regulations, rules, policies, or guidance. Pursuant to procedures established by the Attorney General, each executive department or agency shall conduct an investigation of any complaint by one of its employees alleging a violation of this Executive order.

4-402. (a) If the office within an executive department or agency that is designated to investigate complaints for violations of this order or its implementing rules, regulations, policies, or guidance concludes that an employee has not complied with this order or any of its implementing rules, regulations, policies, or guidance, such office shall complete a report and refer a copy of the report and any relevant findings or supporting evidence to an appropriate agency official. The appropriate agency official shall review such material and determine what, if any, disciplinary action is appropriate.

(b) In addition, the designated investigating office may provide appropriate agency officials with a recommendation for any corrective and/or remedial action. The appropriate officials shall consider such recommendation and implement corrective and/or remedial action by the agency, when appropriate. Nothing in this order authorizes monetary relief to the

complainant as a form of remedial or corrective action by an executive department or agency.

4-403. Any action to discipline an employee who violates this order or its implementing rules, regulations, policies, or guidance, including removal from employment, where appropriate, shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

Sec. 5. Implementation and Agency Responsibilities.

5-501. The Attorney General shall publish in the Federal Register such rules, regulations, policies, or guidance, as the Attorney General deems appropriate, to be followed by all executive departments and agencies. The Attorney General shall address:

- a. ab which programs and activities fall within the scope of education and training programs and activities covered by this order, under subsection 2-202, or excluded from coverage, under section 3 of this order;
- b. examples of discrimination conduct;
- c. applicable legal principles;
- d. enforcement procedures with respect to complaints against employees;
- e. remedies;
- f. ab requirements for agency annual and tri-annual reports as set forth in section 6 of this order; and
- g. ab such other matters as deemed appropriate.

5-502. Within 90 days of the publication of final rules, regulations, policies, or guidance by the Attorney General, each executive department and agency shall establish a procedure to receive and address complaints regarding its Federally conducted education and training programs and activities. Each executive department and agency shall take all necessary steps to effectuate any subsequent rules, regulations, policies, or guidance issued by the Attorney General within 90 days of issuance.

5-503. The head of each executive department and agency shall be responsible for ensuring compliance within this order.

5-504. Each executive department and agency shall cooperate with the Attorney General and provide such information and assistance as the Attorney General may require in the performance of the Attorney General's functions under this order.

5-505. Upon request and to the extent practicable, the Attorney General shall provide technical advice and assistance to executive departments and agencies to assist in full compliance with this order.

Sec. 6. Reporting Requirements.

6-601. Consistent with the regulations, rules, policies, or guidance issued by the Attorney General, each executive department and agency shall submit to the Attorney General a report that summarizes the number of nature of complaints filed with the agency and the disposition of such complaints. For the first three years after the date of this order, such reports shall be submitted annually within 90 days of the end of the preceding year's activities. Subsequent reports shall be submitted every three years and with 90 days of the end of each three-year period.

Sec. 7. General Provisions.

7-701. Nothing in this order shall limit the authority of the Attorney General to provide for the coordinated enforcement of nondiscrimination requirements in Federal assistance programs under Executive Order 12350.

Sec. 8. Judicial Review.

8-801. This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. This order is not intended, however, to preclude judicial review of final decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701, et seq.

THE WHITE HOUSE,

Employment Nondiscrimination in Federal Contracts

Employment non-discrimination directly promotes efficient economic performance and productivity. When Federal contractors engage in discrimination on the basis of sexual orientation, the unavoidable consequence is a serious adverse impact upon the Federal Government's economy, efficiency, and cost of operations. In order to operate as effectively as possible, the Federal Government must demand that the entities with which it has contractual relations not discriminate on the basis of sexual orientation.

The adverse effects of employment discrimination on federal procurement are demonstrated by the straightforward application of basic principles of market economics. When Federal contractors discriminate, the supply of labor is artificially reduced. Other factors being equal, this decrease in supply will cause an increase in the cost of labor. It is the policy of the Federal government to secure goods and services, to complete Federal contracts, and to see federally assisted construction contracts completed in the most economical and efficient manner possible. Therefore, it is the policy of the Executive branch not to tolerate employment discrimination by Federal contractors.

Every President since Franklin Delano Roosevelt has recognized and acted on the force of this argument. In June 1941, President Franklin Roosevelt issued Executive Order 8802 forbidding race-based discrimination by Federal contractors. Less than three weeks after entering World War II, President Roosevelt issued Executive Order 9001 forbidding defense contractors to discriminate on the basis of race. Thus, when economical and efficient procurement has been most vital to the national interest, Presidents have insisted on the non-discrimination principle as crucial to maximizing our procurement efforts.

NOW, THEREFORE, to ensure the economical and efficient administration and completion of Federal Government contracts, and by the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 486(a) and 3 U.S.C. 301, it is hereby ordered as follows:

Section 1. It is the policy of the executive branch to oppose all forms of discrimination, including discrimination on the basis of sexual orientation.

Sec. 2. It is the finding of the executive branch that discrimination on the basis of sexual orientation interferes with the economical and efficient administration and completion of Federal contracts and federally assisted construction contracts.

Sec. 3. All Federal contractors are hereby forbidden to engage in discrimination on the basis of sexual orientation.

Sec. 4. The Office of Management and Budget is directed to issue regulations to enforce this Executive Order. These regulations shall establish:

(a) procedures by which individual allegations that a Federal contractor has engaged in

discrimination on the basis of sexual orientation may be received, investigated, and resolved;

(b) protections for individuals who make an allegation under subsection (a) against retaliation by a Federal contractor;

(c) specific measures to respond to a determination that a Federal contractor has engaged in discrimination on the basis of sexual orientation. These measures should include, without limitation, termination of contract(s) for convenience, suspension, and debarment; and

(d) mechanisms to encourage equal employment opportunity practices by Federal contractors. These mechanisms may include posting of notices to employees of the equal employment opportunity policies of this Order and positive incentives to Federal contractors that foster a work environment of non-discrimination on the basis of sexual orientation.

The Director shall issue these regulations within 60 days of the effective date of this order.

Sec. 5. For the purposes of this Order, it shall be considered "discrimination on the basis of sexual orientation" for a Federal contractor, or any organizational unit thereof,

(a) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's sexual orientation;

(b) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the status of the individual as an employee because of the individual's sexual orientation; or

(c) to discriminate against any individual because of the sexual orientation of the individual in admission to, or employment in, any program established to provide apprenticeship or other training.

Sec. 6. For the purposes of this Order, "sexual orientation" means homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived.

Sec. 7. This Order does not, and the implementing regulations shall not, authorize or require:

- (a) adoption or implementation of a quota on the basis of sexual orientation;
- (b) preferential treatment for any individual on the basis of sexual orientation;
- (c) entering into an order or consent decree that includes a quota, or preferential treatment to an individual based on sexual orientation; or
- (d) collection of statistics on sexual orientation.

Sec. 8. The fact that an employment practice has a disparate impact, as that term is used in section 703(k) of the Civil Rights Act of 1964, on the basis of sexual orientation does not establish a prima facie violation of this Order, or the implementing regulations.

Sec. 9. This Order does not:

- (a) repeal or modify any Federal, State, territorial, or local law, creating a special right or preference concerning employment or an employment opportunity for a veteran;
- (b) prohibit the enforcement of rules regarding nonprivate sexual conduct, if the rules of conduct are designed for, and uniformly applied to, all individuals regardless of sexual orientation; or
- (c) require the provision of employee benefits to an individual for the benefit of the domestic partner of such individual.

Sec. 10. This Order shall not apply to a Federal contractor that is a religious organization, except that this Order shall apply to employment or an employment opportunity for an employment position of a Federal contractor that is a religious organization if the duties of the position pertain solely to activities of the organization that generate unrelated business taxable income subject to taxation under section 511(a) of the Internal Revenue Code of 1986.

Sec. 11. Nothing in this Order shall be construed to prohibit a covered entity from enforcing rules regarding nonprivate sexual conduct, if the rules of conduct are designed for, and uniformly applied to, all individuals regardless of sexual orientation.

Sec. 12. Each contracting department and agency shall cooperate with the Office of Management and Budget and provide such information and assistance as it may require in the performance of the its functions under this Order.

Sec. 13. The Director of the Office of Management and Budget may delegate any function or duty under this order to any officer in the Office of Management and Budget or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

Sec. 14. This Order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. This order is not intended, however, to preclude judicial review of final agency decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

Sec. 15. This Order shall apply only to contracts in excess of the Simplified Acquisition Threshold.

Sec. 16. This Order is effective immediately.

WILLIAM J. CLINTON