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Leg[islative] Review 7/29/98 - Executive Order Prohibiting Discrimination in the Federal Civilian Workforce Based on Sexual Orientation

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Wednesday, July 29, 1998

URGENT

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below
Janet R. Forsgren
FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference
OMB CONTACT: Melinda D. Haskins
PHONE: (202)395-3923 FAX: (202)395-6148
SUBJECT: REVISED Executive Office of the President Fact Sheet on May 28th
Executive Order Prohibiting Discrimination in the Federal Civilian Workforce
Based on Sexual Orientation

DEADLINE: 5 PM Wednesday, July 29, 1998

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: This revised fact sheet is likely to be transmitted to the Congress as an attachment to the House Commerce-Justice-State Appropriations bill SAP.

THIS DEADLINE IS FIRM.

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RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melinda D. Haskins Phone: 395-3923 Fax: 395-6148
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: 7/29/98 (Date)
Todd Summers (Name)
AIDS Policy (Agency)
6-2444 (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

- [checked] Concur
[] No Objection
[] No Comment
[] See proposed edits on pages
[] Other:
[] FAX RETURN of pages, attached to this response sheet

FACT SHEET**Revised July 29, 1998****EXECUTIVE ORDER ISSUED MAY 28, 1998
PROHIBITING DISCRIMINATION IN THE FEDERAL CIVILIAN
WORKFORCE BASED ON SEXUAL ORIENTATION****Background:**

- Executive Order 13087 was issued on May 28, 1998. It amends an earlier executive order, Executive Order 11478. It restates the pre-existing policy of the Executive Branch of the Federal Government to prohibit discrimination based on sexual orientation in federal civilian employment.
- Representative Hefley of Colorado and others have indicated that they will attempt to amend an appropriations bill to prohibit the use of federal funds to implement, enforce or administer the Executive Order. The Administration opposes this effort.

What exactly does the Executive Order provide?

- The Executive Order will ensure that there is a uniform policy throughout the Federal Government's Executive Branch by adding sexual orientation to the list of categories (i.e. race, color, religion, sex, national origin, handicap, or age) for which discrimination is prohibited in hiring, firing and promotion in the civilian federal workforce, as provided for in Executive Order 11478.
- This policy is about basic fairness, not about "special rights."

Some say a recent CRS study states that the executive order mandates affirmative action and creates new enforcement rights. Is that true?

- No. Nothing in the executive order requires affirmative action, and the Administration has stated in writing conclusively that Executive Order 13087 does not authorize affirmative action, nor does it require or even permit statistical record-keeping. White House Counsel Charles F.C. Ruff, in a letter dated July 22, 1998, has clearly stated that "Executive Order 13087 does not authorize affirmative action policies, such as recruitment, reporting, or goal-setting based on sexual orientation."
- The White House, which has the authority to issue the executive order and to promulgate rules regarding the conduct of employees in the Executive Branch, has stated its unequivocal intent that the executive order does not authorize affirmative action on the basis of sexual orientation and that there

will be no reporting on that basis either. Accordingly, there is no need for the speculation about affirmative action contained in the CRS study -- the White House has clearly set forth that there will be no affirmative action on the basis of sexual orientation. With regard to all these issues, as this is the President's order, the President's intent informs the meaning of the executive order. See Sea-Land Service, Inc. v. Interstate Commerce Commission, 738 F.2d 1311, 1314 (D.C. Cir. 1984) ("The 'law' at issue in this instance is an Executive Order promulgated by the President, and it is to his intent that we must turn for guidance . . .").

- Even the CRS study concludes that "E.O. 13087 essentially makes [the prohibition against discrimination based on sexual orientation] universal in the Federal Executive Branch and with respect to civilian employees of the military departments . . . , but would not create judicial enforceable rights in the absence of congressional action."

Would the executive order require federal contractors or state and local governments to hire gays?

- This executive order applies only to employees of the Executive branch; it does not apply to federal contractors, subcontractors or grant recipients, or to State and local governments. Federal contractors are not "employees" of the Federal government.

Does this affect affirmative action policy or create special treatment for certain groups?

- No. As White House Counsel Charles F.C. Ruff has made clear in a letter dated July 22, 1998: Executive Order 13087 does not authorize affirmative action based on sexual orientation. It does not allow preferential treatment. It does not require that agencies find out which of their employees are gay, or how many gay employees they have hired. There are not quota programs in place for federal civilian hiring, and Executive Order 13087 does not create one.

Will this lead to collecting information regarding the sexual orientation of employees?

- No. Executive Order 13087 does not authorize collecting or reporting information about the sexual orientation of employees. Currently, federal agencies report information regarding the race, disability, national origin and gender of employees, but not regarding other classifications included in Executive Order 11478, such as religion. Similarly, information will not be collected or reported regarding sexual orientation.

Is this a new policy?

- No. It has always been the practice of this Administration to prohibit discrimination in employment based on sexual orientation in the civilian workforce, and most federal agencies and department have taken actions, such as the issuance of policy directives or memoranda from the agency heads, to memorialize that policy. The Executive Order states this policy uniformly and for the first time in an Executive Order of the President.
- Moreover, federal law has for a long time provided that discrimination in federal civilian employment based upon sexual orientation is a prohibited personnel practice if it is found that sexual orientation did not adversely affect the performance of the employee. [Title 5 of the U.S. Code, section 2302(b)(10) prohibits "discriminat[ion] for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others..."]
- As far back as 1980, OPM has issued its interpretation of existing federal law stating that "applicants and employees are to be protected against inquiries into, or actions based upon, non-job-related conduct, such as religious, community, or social affiliations, or sexual orientation."

If this is not a new policy, why was an Executive Order necessary?

- The Executive Order states a uniform policy throughout the Executive Branch of the Federal Government.

What impact does this have on the uniformed military service?

- None. This order does not apply to the uniformed military service.

What, if any, enforcement rights are granted?

- This Executive Order states Administration policy but does not create any new enforcement rights. Those rights would be granted by legislation passed by the Congress, such as the Employment Non-Discrimination Act, H.R. 1858, which the President supports. White House Counsel Charles F.C. Ruff has stated: "The executive order does not create any rights to file a complaint alleging discrimination on the basis of sexual orientation with a court or with the EEOC. The order leaves intact the current procedures for dealing with such complaints. An employee who believes he or she has suffered adverse action may seek redress under procedures now available

within each agency.”

What is the authority for the President to issue this executive order?

- Presidents since George Washington have directed Executive Orders to their employees in the Executive Branch. In 1966, Congress specifically reinforced the President’s Constitutional authority to “prescribe regulations for the conduct of employees in the executive branch.” 5 U.S.C. § 7301. Presidents have frequently exercised that authority over the federal workforce, issuing scores of Executive Orders. This particular Order by President Clinton amends Executive Order 11478, issued in 1969 by President Nixon, barring federal employees from discriminating based on race, color, religion, sex, national origin, handicap or age. The same authority that supported that Order supports this one. President Reagan issued Executive Order 12564, requiring a drug-free federal workplace, and Executive Order 12353, governing charitable fundraising by federal employees. President Bush issued Executive Order 12674, setting forth principles of ethical conduct for government employees. It would be contradictory to contend that the President can regulate the ethical conduct of federal employees, that he can prescribe standards for fundraising and require drug testing, but cannot instruct federal employees to refrain from discriminating on the basis of sexual orientation.

What is the meaning of the phrase “sexual orientation?”

- The President intends the term to have the common meaning stated in the Employment Non-Discrimination Act, “homosexuality, bisexuality, or heterosexuality.” With regard to all these issues, as this is the President’s order, the President’s intent informs the meaning of the executive order. See Sea-Land Service, Inc. v. Interstate Commerce Commission, 738 F.2d 1311, 1314 (D.C. Cir. 1984) (“The ‘law’ at issue in this instance is an Executive Order promulgated by the President, and it is to his intent that we must turn for guidance . . .”).

Is this an attempt to legislate by executive order?

- This executive order does not amend Title VII or Executive Order 11246 or create new rights or remedies for discrimination based on sexual orientation. It is the role of Congress, and not the Executive Branch, to amend federal statutes.
- Unlike Title VII, which applies to employers generally, including private employers, Executive Order 13087 merely sets internal employment policy for the Executive Branch.

Is there public support for the Executive Order?

- Recent national polls by Newsweek and the Associated Press indicate that between 84-85% of Americans favor equal rights for gay people in the workplace.
- The proposed federal legislation on this topic, the Employment Non-Discrimination Act, H.R. 1858 and S. 869, enjoys strong bipartisan support in the 105th Congress, with 33 Senator cosponsors and 159 House cosponsors. In addition, a majority of House Members and over two-thirds of the Senate have specifically indicated that sexual orientation was not a consideration in their own employment practices.