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AFFIRMATIVE ACTION FOR LGBT APPLICANTS & EMPLOYEES: A PROPOSED REGULATORY SCHEME

*Ryan H. Nelson**

I. INTRODUCTION

On March 6, 1961, President John F. Kennedy signed into law Executive Order 10,925, requiring certain government contractors¹ to take “*affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”² This was the genesis of affirmative action in the United States.³

President Kennedy’s executive order was the first in a series of watershed civil rights laws aimed at promoting affirmative action in the workplace.⁴ Today, Executive Order 11,246 requires contractors to take affirmative action to recruit and employ minorities and females,⁵ section 503 of the Rehabilitation Act of 1973 (“section 503”) requires the same

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1. For the sake of brevity, the terms “contractor,” “federal contractor,” or “government contractor” as used in this article refer to both prime contractors and subcontractors as those terms are used in 41 C.F.R. § 60-1.3 (2009).

2. Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963), *superseded by* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted as amended in* 42 U.S.C. § 2000e (2006) (emphasis added).

3. See James E. Jones Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 906-07 (1984).

4. See generally *id.* (discussing the evolution from President Kennedy’s Executive Order to the 1964 Civil Rights Act to Executive Order 11,246).

5. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted as amended in* 42 U.S.C. § 2000e (2006) [hereinafter Executive Order 11,246]; see also Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970) (adding “sex” to the list of classifications initially protected by Executive Order No. 11,246).

with respect to “qualified individuals with disabilities,”⁶ and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“VEVRAA”) requires the same with respect to certain veterans.⁷ Together, Executive Order 11,246, section 503, and VEVRAA are known as the Affirmative Action in Employment Laws.⁸

For decades, contractors have been required to take affirmative action to recruit and employ only these classes of individuals.⁹ However, the United States has seen increasing support for extending civil rights like these to LGBT¹⁰ individuals.¹¹ Consequently, LGBT rights activists have begun to rally behind a proposed law that is the subject of this article. They are urging President Barack Obama to sign an executive order that would require federal contractors to take affirmative action to recruit and employ LGBT individuals.¹² Because of the proposed order’s similarities to the oft-proposed Employment Non-Discrimination Act (“ENDA”), it has been referred to as the “ENDA Executive Order.”¹³

6. Rehabilitation Act of 1973 § 503, 29 U.S.C. § 793 (2006) [hereinafter section 503].

7. Vietnam Era Veterans’ Readjustment Assistance Act of 1974, 38 U.S.C. § 4212 (2006) [hereinafter VEVRAA].

8. See, e.g., *Employment Discrimination and Harassment*, U.S. Small Bus. Admin., <http://www2.ntis.gov/content/employment-discrimination-and-harassment> (last visited Dec. 7, 2012). These Affirmative Action Laws solely concern affirmative action in employment. They should not be confused with laws relating to affirmative action in education. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 334-35 (2003). Nor should they be confused with affirmative action in government set-aside programs. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 259 (1995).

9. See Chris Geidner, *EEOC Decision in Trans Woman’s Case “Will Almost Certainly Impact” Federal Contractor Rules*, *Scholars Say*, METRO WEEKLY (May 4, 2012, 1:25 AM), <http://www.metroweekly.com/poliglot/2012/05/eec-decision-in-trans-womans.html>.

10. Finding an umbrella term to encompass the LGBT community is challenging. Terms currently in use range from referring to all LGBT individuals as “queer” to elaborating upon the LGBT acronym *ad infinitum* (i.e., LGBTQQIAAH stands for lesbian, gay, bisexual, transgender, queer, questioning, intersex, asexual, ally, and HIV positive). In an attempt at brevity, I refer to all individuals falling under this all-inclusive acronym as “LGBT individuals.”

11. See Tico Almeida, *We Can’t Wait: How Obama Can Stop Discrimination Now*, THE HUFFINGTON POST (Feb. 19, 2012, 12:29 PM), http://www.huffingtonpost.com/tico-almeida/enda-executive-order_b_1285927.html; Dr. Jillian T. Weiss, *President Obama: Sign The ENDA Executive Order*, THE BILERICO PROJECT (Mar. 7, 2012, 9:30 AM), http://www.bilerico.com/2012/03/president_obama_sign_the_employment_non-discrimina.php.

12. See Weiss, *supra* note 11; Geidner, *supra* note 9; Chris Geidner, *News Analysis: Four Reasons Why Enacting LGBT Workplace Protections Is Different Than Ending DADT*, METRO WEEKLY (Apr. 17, 2012, 4:15 PM), <http://www.metroweekly.com/poliglot/2012/04/news-analysis-why-enacting-lgbt-workplace-protecti.html>; Chris Johnson, *The Next Champion of LGBT Workplace Rights?*, THE WASHINGTON BLADE (Feb. 15, 2012), <http://www.washingtonblade.com/2012/02/15/the-next-champion-of-lgbt-workplace-rights/> [hereinafter Washington Blade Article].

13. Chris Johnson, *ENDA Exec Order Waiting at the White House: Sources*, THE WASHINGTON BLADE (Feb. 1, 2012), <http://www.washingtonblade.com/2012/02/01/enda-exec->

To date, the President has not signed the ENDA Executive Order and instead, has chosen to focus his efforts on lobbying Congress to pass ENDA.¹⁴ However, as many commentators have noted, it is unclear how long the President will hold out with the Republican-controlled House of Representatives refusing to consider or support ENDA.¹⁵ This article reserves comment on the normative questions arising out of the President's consideration (chief among them, whether contractors should be required to take affirmative action to recruit and employ LGBT individuals). Instead, this article assumes the President will sign the ENDA Executive Order and that the Order will require contractors to take affirmative action to recruit and employ LGBT individuals. Proceeding under those assumptions, this article outlines the regulations the Office of Federal Contract Compliance Programs ("OFCCP") should adopt to best effectuate the purpose of the ENDA Executive Order (e.g., equal employment opportunity for LGBT applicants and employees) without overburdening contractors in the process.

Part II summarizes the history of LGBT protections in employment law with a special emphasis on the Affirmative Action in Employment Laws. Part III proposes regulations implementing the ENDA Executive Order. Finally, Part VI summarizes the essential concerns inherent in proposing any regulations implementing Affirmative Action in Employment Laws.

II. A BRIEF HISTORY OF LGBT PROTECTIONS IN EMPLOYMENT LAW

Many states and municipalities have statutes that prohibit private employers from discriminating against applicants and employees on the basis of sexual orientation, gender identity/expression, or both.¹⁶ In

order-waiting-at-the-white-house-sources/; see also Weiss, *supra* note 11.

14. Seth Borden, *White House Will Not Ban Employment Discrimination by Federal Contractors on Basis of Sexual Orientation or Gender Identity by Executive Order "At This Time,"* GOV'T CONTRACTS ADVISOR (Apr. 19, 2012), <http://www.governmentcontractsadvisor.com/2012/04/19/white-house-will-not-ban-employment-discrimination-by-federal-contractors-on-basis-of-sexual-orientation-or-gender-identity-by-executive-order-at-this-time/>; *President Obama Refuses to Issue Ban on Gay Discrimination*, AULABORLAWFORUM (April 16, 2012), <http://aulaborlawforum.org/2012/04/16/president-obama-refuses-to-issue-ban-on-gay-discrimination/>.

15. See Joe Davidson, *Why Did Obama Refuse Executive Order?*, THE WASH. POST (Apr. 12, 2012), http://www.washingtonpost.com/politics/why-did-obama-refuse-executive-order/2012/04/12/gIQAHSWfDT_story.html; Laura Meckler, *Obama Won't Issue Ban on Gay Discrimination*, THE WALL ST. J. (Apr. 11, 2012), <http://online.wsj.com/article/SB100014240527023044446045773383749279166.html>.

16. See, e.g., IOWA CODE § 216.6A (2009); GAINESVILLE, FLA., CODE OF ORDINANCES § 8-

states with no such statutory prohibitions, some courts have interpreted existing laws (*e.g.*, laws prohibiting employment discrimination on the basis of sex) as encompassing discrimination on the basis of gender identity/expression.¹⁷ Moreover, many states that provide no protection to LGBT employees in the private sector do provide at least some protection to public employees.¹⁸ Even if a state does not afford protection against employment discrimination to LGBT employees, in most cases, some cities, counties, or municipalities within that state do.¹⁹

At the federal level, however, employment nondiscrimination laws protecting LGBT individuals are sparse. President Bill Clinton's Executive Order 13,087 prohibits discrimination based on sexual orientation in the competitive service of the federal, civilian workforce.²⁰ All federal employees are protected by the Due Process Clause of the Fifth Amendment, which incorporates the substance of the Equal Protection Clause of the Fourteenth Amendment.²¹ In addition, some courts interpreting Title VII of the Civil Rights Act of 1964 ("Title VII")²² have found that employees discriminated against on the basis of their sexual orientation or gender identity/expression were discriminated against "because of sex," and, accordingly, have viable causes of action on a variety of theories.²³

Yet no federal law protects all LGBT employees from employment discrimination. Many advocates of LGBT rights are familiar with ENDA, which has been introduced to no avail in nearly every Congress since the early 1990s.²⁴ Yet many advocates forget that the fight for

48(a)(1) (2012); *see also Statewide Employment Laws & Policies*, HUMAN RIGHTS CAMPAIGN, available at http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf (last updated June 12, 2012).

17. *See Statewide Employment Laws & Policies*, *supra* note 16.

18. *Id.* Additionally, some state constitutions have been interpreted to protect state and local employees from employment discrimination on the basis of sexual orientation or gender identity. *See, e.g., Miguel v. Guess*, 51 P.3d 89, 97 (Wash. Ct. App. 2002).

19. *See, e.g., Thomas E. Chapman, Constructing the Moral Landscape Through Antidiscrimination Law: Discourse, Debate, and Dialogue of Sexual Citizenship in Three Florida Communities*, at 3, Fig. 1.2 (2007) (Ph.D. dissertation submission, The Florida State University College of Social Sciences), available at http://etd.lib.fsu.edu/theses/available/etd-08242007-210618/unrestricted/tec_dissertation.pdf.

20. Exec. Order No. 13,087, 3 C.F.R. § 191 (1998), *reprinted as amended* in 42 U.S.C. § 2000e (2006).

21. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

22. 42 U.S.C. § 2000e [hereinafter Title VII].

23. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 73, 82 (1998) (holding same-sex discrimination claims are actionable under Title VII); *Kelly v. City of Oakland*, 198 F.3d 779, 783-85 (9th Cir. 1999).

24. *See History of Nondiscrimination Bills in Congress*, NATIONAL GAY AND LESBIAN TASK

equality in employment for LGBT individuals began not long after the bedrock of employment discrimination legislation – the Civil Rights Act of 1964 – took effect.²⁵ Just ten years later, a Congresswoman, in collaboration with the National Gay Task Force, introduced the Equality Act of 1974 in the U.S. House of Representatives; the Act would have banned discrimination against, *inter alia*, gays and lesbians in employment, housing, and public accommodations on a national level.²⁶ So, in some sense, the recent surge of support for federal laws barring employment discrimination on the basis of sexual orientation and gender identity/expression is not a novelty borne of the zeitgeist of the late 2000s and early 2010s, but rather the culmination of decades of effort.

With this background in mind, it is surprising that there has been practically no discussion of LGBT inclusion in the Affirmative Action in Employment Laws until recently. The Affirmative Action in Employment Laws are limited in that they apply only to certain financial institutions and to private employers that have: i) at least a certain number of employees, and ii) a federal contract worth at least a certain dollar amount.²⁷ Nevertheless, the *limited* reach of Affirmative Action in Employment Laws encompasses nearly thirty million Americans and thousands upon thousands of employers.²⁸

LGBT advocates finally caught the scent of this low-hanging fruit in 2012 when the first rumors of LGBT inclusion in the Affirmative Action in Employment Laws began to percolate throughout the affirmative action community.²⁹ In an article in *The Washington Blade*, Tico Almeida, President of Freedom to Work, noted that he and other advocates have been pushing OFCCP Director Patricia Shiu to press President Obama to sign the ENDA Executive Order.³⁰ The U.S.

FORCE, <http://www.thetaskforce.org/issues/nondiscrimination/timeline> (last visited Dec. 7, 2012).

25. *See id.*

26. *Id.*

27. *See* 41 C.F.R. §§ 60-2.1(b)(1), 60-250.40(a), 60-300.40(a), 60-741.40(a) (2009).

28. M.V. Lee Badgett, *The Impact of Extending Sexual Orientation and Gender Identity/Expression Non-Discrimination Requirements to Federal Contractors*, The Williams Inst., 12, tbl.3 (Feb. 2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-EOImpact-Feb-20121.pdf> (Feb. 2012).

29. For example, in February 2012, the Williams Institute published the first large-scale study analyzing the impact of expanding Affirmative Action in Employment Laws to include protection on the bases of “sexual orientation” and “gender identity/expression.” *See id.*

30. *See* Washington Blade Article, *supra* note 12; accord Dave Boyer, *Gay Couple to Pitch Obama at Easter Egg Roll*, THE WASH. TIMES (Apr. 6, 2012), available at <http://www.washingtontimes.com/blog/inside-politics/2012/apr/6/gay-couple-pitch-obama-easter-egg-roll/>; see Jeff Krehely & Crosby Burns, *A One-Two Punch for Worker Protection: Both Federal Law and Executive Order Are Necessary*, Ctr. for American Progress (Apr. 4, 2012), http://www.americanprogress.org/issues/2012/04/krehely_enda_worker_protection.html.

Departments of Labor and Justice have cleared such an order for the final step – the President’s signature.³¹ However, the President, thus far, has declined to sign the order.³²

It remains to be seen whether the Affirmative Action in Employment Laws will ever require contractors to take affirmative action to recruit and employ LGBT individuals and, if so, when such a change would occur. However, what we do know is that there will be scant advance warning. Executive orders become law with the flick of a pen. If and when such an executive order is signed, the responsibility to draft the regulations implementing that order immediately will fall to the U.S. Secretary of Labor, and, by extension, OFCCP.³³ One drawback to this process is that implementing the ENDA Executive Order regulations would be done without the benefit of public debate and input.

Moreover, the Administrative Procedure Act requires only that agencies like OFCCP publish proposed regulations once a draft is ready.³⁴ That is, by the time OFCCP opens the forum for public comments, a draft proposal is already underway. Often, the mandated public comment period becomes little more than a paperwork exercise where OFCCP defends regulations it has spent months drafting, making few (if any) substantive alterations in response to comments. The purpose of this article is to mitigate such imperfect rulemaking by spurring advance discussion on a regulatory scheme for implementing the ENDA Executive Order.

III. PROPOSED REGULATIONS

Any regulatory scheme implementing Affirmative Action in Employment Laws will have certain components. For example, the regulations implementing the ENDA Executive Order likely will require contractors to adopt an equal employment opportunity clause that prohibits discrimination against applicants and employees on the basis of sexual orientation and gender identity/expression.³⁵ However, there are

31. Johnson, *supra* note 13.

32. Borden, *supra* note 14.

33. See, e.g., Exec. Order No. 11,246, 3 C.F.R. 339 § 201 (1964-1965), *reprinted as amended in* 42 U.S.C. § 2000e (2006) (assigning responsibility to the Secretary of Labor to “adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of [the relevant parts] of [Executive Order 11,246]”).

34. See 5 U.S.C. § 553(b) (2006).

35. Cf., 41 C.F.R. §60-1.4 (2009) (equal opportunity clause on the basis of race, color, religion, sex, and national origin); 41 C.F.R. §§ 60-250.5, 300.5 (equal opportunity clause for special disabled veterans, veterans of the Vietnam era, recently separated veterans, and other

some standard components in Affirmative Action in Employment Laws concerning race and sex that, if included in regulations implementing the ENDA Executive Order, could damage the LGBT community. What follows is a discussion of the potential components of such regulations and a normative analysis of which of those components should be adopted.

A. Definitions

The following subsection addresses the most basic of issues: which individuals are covered by the ENDA Executive Order. The definitions suggested herein are highly technical, and rightfully so. A core mission of OFCCP, and the federal government as a whole, is to ensure equal treatment of minorities, no matter how small their voices may be.³⁶ Many of those associating themselves with the LGBT community are just that – minorities. They find it difficult to define themselves and often struggle to find any laws that are crafted carefully enough to include them.³⁷ To that end, OFCCP should endeavor to define precisely inexplicit terms like “sexual orientation,” “gender identity,” “gender expression,” and “sex” so as to ensure full inclusion of all those individuals who define themselves as LGBT.

1. Sexual Orientation

The only definition of “sexual orientation” in the United States Code is in the federal hate crimes reporting statute, which defines “sexual orientation” as “consensual homosexuality or heterosexuality.”³⁸ This definition is far from ideal and should not be used in any regulations implementing the Affirmative Action in Employment Laws. The phrase “consensual homosexuality or heterosexuality” is baffling.

protected veterans); 41 C.F.R. § 60-741.5 (equal opportunity clause for workers with disabilities).

36. See generally, e.g., U.S. CONST. amend. XIV, § 1 (requiring states to provide equal protection to all persons); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000a-1 (2006) (prohibiting employment discrimination on the basis of certain protected classifications).

37. See generally, e.g., *Non-Discrimination Laws; State by State Information Map*, AMERICAN CIVIL LIBERTIES UNION (Sep. 21, 2011), <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (indicating that some States have laws prohibiting employment discrimination based on sexual orientation generally, but do not explicitly state whether transsexuals would be included under that protection).

38. *Section by Section Analysis of the Military Readiness Enhancement Act (HR 1283)*, SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/pages/1283-analysis> (last visited Dec. 10, 2012) (citing 28 U.S.C. § 534).

Foremost, it is unclear whether the adjective “consensual” modifies the nouns “homosexuality” and “heterosexuality,” or only the noun “homosexuality.” Moreover, while consensual homosexual or heterosexual *activity* may not be difficult to understand, comprehending the meaning of “consensual homosexuality” or “consensual heterosexuality” is as impossible as comprehending the meaning of “consensual whiteness” or “consensual maleness.” The modifier “consensual” is an anachronistic understanding of sexuality that suggests individuals have a sexual orientation only when engaging in sexual activity. Therefore, “consensual” should be dropped as a modifier from any definition of “sexual orientation.”

More appropriate is the definition used in the Military Readiness Enhancement Act of 2009³⁹ (the “MREA”). Had it become law, the MREA would have imposed an anti-discrimination mandate on the U.S. military, protecting individuals from discrimination on the basis of “sexual orientation.”⁴⁰ There, “sexual orientation” is defined as “heterosexuality, bisexuality, or homosexuality, whether the orientation is real or perceived, and includes statements and consensual sexual conduct manifesting heterosexuality, homosexuality, or bisexuality.”⁴¹ This comes close to an appropriate definition in two regards.

First, it recognizes a wider variety of orientations – heterosexuality, homosexuality, and bisexuality. This list, however, is missing *asexuality*. The inclusion of asexuality recognizes that some individuals are not attracted to anyone, and that they should not be discriminated against for their lack of sexual attraction. Moreover, protecting asexuality and all sorts of sexuality alike would comport with those cases that have found atheism just as protected as all brands of theism under Title VII.⁴²

Second, the MREA’s definition recognizes that discrimination occurs not only when an individual *identifies* as a given sexual orientation, but also when that individual is *perceived* as such. It is paramount that the definitions of “sexual orientation,” “gender identity,” “gender expression,” and “sex” include language clarifying that discrimination based on *perceived* sexual orientation or *perceived* gender identity/expression is just as unlawful as discrimination based on actual

39. Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (2009).

40. *Id.* at § 2.

41. *Id.* at § 4(f).

42. See, e.g., *EEOC v. Townley Eng’g & Mfg.*, 859 F.2d 610, 620-21 (9th Cir. 1988); *Young v. Sw. Sav. & Loan Ass’n*, 509 F.2d 140, 141 (5th Cir. 1975).

sexual orientation or actual gender identity/expression.⁴³ In the Americans with Disabilities Act (“ADA”), for example, “disability” means, *inter alia*, and with respect to an individual, “*being regarded as having*” a physical or mental impairment that substantially limits one or more major life activities of the individual.⁴⁴ In contrast, Title VII contains no such language. The result has been a fractured judiciary. Some courts agree with the position of the U.S. Equal Employment Opportunity Commission (“EEOC”) that discrimination on the basis of perceived race, national origin, religion, or sex is unlawful,⁴⁵ while others take the opposite approach.⁴⁶ A clearer rule would have avoided such problems.

Confusingly, the MREA then notes that “*statements and consensual sexual conduct* manifesting heterosexuality, homosexuality, or bisexuality” are included within the definition of “sexual orientation.”⁴⁷ The only way an employer can draw the inference that an employee has a certain sexual orientation is if the employer *perceives* something, which *could* include statements or consensual sexual conduct, but also could include consensual, non-sexual conduct such as speech or mannerisms. Because statements and consensual sexual conduct are already subsumed within the phrase, “whether the orientation is real or

43. In fact, OFCCP would do well to clarify this in the Equal Opportunity Clause concerning race, color, religion, sex, and national origin, which at present does not specify whether an employer would breach its federal contract by discriminating against an applicant based on a perceived classification. See 41 C.F.R. § 60-1.4 (2009).

44. 42 U.S.C. § 12102(2) (2006) (emphasis added).

45. See *Estate of Amos v. City of Page*, 257 F.3d 1086, 1093 (9th Cir. 2001); *Eriksen v. Allied Waste Sys., Inc.*, No. 06-13549, 2007 U.S. Dist. LEXIS 23909, at *9-10, *19 (E.D. Mich. Apr. 2, 2007); *Greene v. Swain Cnty. P’ship for Health*, 342 F. Supp. 2d 442, 446-47, 451 (W.D.N.C. 2004); *Perkins v. Lake Cnty. Dept. of Utils.*, 860 F. Supp. 1262, 1277-78 (N.D. Ohio 1994); EEOC COMPLIANCE MANUAL at § 15-II (2012), available at <http://www.eeoc.gov/policy/docs/race-color.html> (“Title VII’s prohibition of race discrimination generally encompasses . . . [e]mployment discrimination against an individual based on a belief that the individual is a member of a particular racial group Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.”); *id.* § 13-II.B, available at <http://www.eeoc.gov/policy/docs/national-origin.html> (stating that “[e]mployment discrimination against a national origin group includes discrimination based on . . . the employer’s belief that [an individual] is a member of a particular national origin group.”).

46. See *Lewis v. N. Gen. Hosp.*, 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007); *Leonard v. Katsinas*, No. 05-1069, 2007 WL 1106136, at *13 (C.D. Ill. Apr. 11, 2007); *Berrios v. Hampton Bays Union Free Sch. Dist.*, No. CV 02-3124, 2007 WL 778165, at *1 (E.D.N.Y. Mar. 12, 2007) (recognizing that a perceived discrimination charge is cognizable under Title VII, but acknowledging that some courts do not recognize such a charge); *Uddin v. Universal Avionics Sys. Corp.*, No. 1:05-CV-1115-TWT, 2006 WL 1835291, at *6 (N.D. Ga. June 30, 2006); *Butler v. Potter*, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004).

47. See Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. § 4(a)(1)(f) (2009).

perceived,” the final clause in the MREA is merely duplicative and confusing.

Hence, the definition of “sexual orientation” in the ENDA Executive Order regulations should read: sexual orientation means heterosexuality, homosexuality, bisexuality, or asexuality, whether the orientation is actual or perceived.

2. Gender Identity/Expression

The only section of the United States Code to define “gender identity” does so poorly. In defining acts that constitute hate crimes, the Code defines “gender identity” as “actual or perceived gender-related characteristics.”⁴⁸ This definition more accurately describes gender *expression* – that is, how one expresses one’s sex through characteristics such as clothing, affect, and speech.⁴⁹ The Code fails to account for individuals who identify and express themselves in conformity with their biological sex, yet “believe[] that [they are] – or ought to be – of the opposite sex.”⁵⁰ Slightly better is the Encyclopedia Britannica definition, which states that gender identity includes “an individual’s self-conception as being male or female.”⁵¹ Yet even this definition is too narrow as it does not take into account the possibility an individual might consider himself or herself an intersex individual.

Therefore, the regulations should define “gender expression” as actual or perceived gender-related characteristics and “gender identity” as an individual’s self-conception as being male, female, or intersex, whether the conception is actual or perceived.

3. Sex

The regulations implementing Executive Order 11,246 do not define “sex.”⁵² This is problematic for many reasons. First, a court may deny protection to an intersex individual, or an individual perceived to be intersex, on the ground that “sex,” as used in the regulations, could be understood as applying only to the traditional, binary genders – male and

48. 18 U.S.C. § 249(c)(4) (West Supp. 2012).

49. *Gender Expression*, GILL FOUNDATION, <http://gillfoundation.org/grants/within-colorado/gender-expression-toolkit/gender-expression/> (last visited Nov. 6, 2012).

50. *Gender Identity*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/228219/gender-identity> (last visited Dec. 10, 2012).

51. *Id.*

52. See 41 C.F.R. § 60-1.3 (2009).

female. To fully ensure protection of all LGBT individuals, OFCCP should define “sex” to include intersex individuals.

Second, neither “sexual orientation” nor “gender identity/expression” contemplates an individual who transitions sexes (e.g., transsexual individuals). Often, transsexual individuals accompany their transition with characteristics conforming to their new gender⁵³ (e.g., a male-to-female individual may begin wearing makeup and dresses). In these cases, employers may potentially discriminate against the individual on the basis of: i) her having transitioned sexes, ii) her gender characteristics, iii) her conception of herself as female, or iv) her perceived sexual orientation. While the latter three bases would be unlawful discrimination under the ENDA Executive Order’s prohibition of discrimination on the bases of “gender expression,” “gender identity,” and “sexual orientation,” respectively, the individual has no recourse for the employer’s discrimination based on her having transitioned sexes.

It is not difficult to imagine an individual who transitions from male to female, but is not yet comfortable wearing dresses or referring to herself as a woman, and who may not be perceived as having a particular sexual orientation. For such an individual, the only remedial recourse would be Executive Order 11,246’s prohibition on sex discrimination. Yet the circuit courts are split on the issue of whether transsexual individuals are protected by a law that prohibits “sex” discrimination.⁵⁴

To ensure that transsexual individuals are protected from discrimination on the basis of having transitioned sexes, the ENDA Executive Order regulations should define sex as follows: sex means male, female, or intersex; discrimination against an individual because of that individual’s transition between sexes constitutes sex discrimination.

53. Esra Acikalin Hudson & Laura Todd Johnson, Univ. of Ariz., OFFICE OF GEN. COUNSEL, *Gender Identity Issues: Transgender, Transsexual, and Transitioning Employees* 4 (2006).

54. Compare *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (reasoning that the term “sex” as used in Title VII does not encompass discrimination on the basis of transitioning sexes), and *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982), and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977), with *Schwenk v. Hartford*, 204 F.3d 1187, 1200, 1202 (9th Cir. 2000) (reasoning that the term “sex” as used in Title VII *does* encompass discrimination on the basis of transitioning sexes), and *Rentos v. OCE-Office Sys., No. 95 CIV. 7908 LAP*, 1996 WL 737215, at *1 (S.D.N.Y. Dec. 24, 1996) (denying motion to dismiss of transsexual woman’s claim that she had been discriminated against on the basis of sex in violation of state and local employment discrimination laws), and *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001), and *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995). See also State of Conn. Comm’n on Human Rights and Opportunities, *Declaratory Ruling on Behalf of John/Jane Doe* (2000) (state statute prohibiting, and discrimination on the basis of sex encompasses discrimination against transgender individuals).

B. Statistical Analyses

The Affirmative Action in Employment Laws require contractors to create and maintain an affirmative action plan (“AAP”) to effectively recruit and employ minorities, females, qualified individuals with disabilities, and veterans.⁵⁵ By far the most burdensome components of the AAP are the statistical analyses required by Executive Order 11,246: the Utilization Analysis⁵⁶ and the Adverse Impact Analysis.⁵⁷ Because these analyses are born out of Executive Order 11,246, contractors are required to perform them only with respect to their workers’ race, sex, color, national origin, and religion.⁵⁸ This begs the question: should contractors be required to perform either of these analyses with respect to sexual orientation, gender identity/expression, or both?⁵⁹

The regulations implementing the ENDA Executive Order should not require contractors to perform statistical analyses with respect to

55. 41 C.F.R. §§ 60-2.1(b), 60-250.40(b), 60-300.40(b), 60-741.40(b) (2009).

56. *See id.* §§ 60-2.12 to 60-2.16.

57. *See id.* § 60-2.17(b)(2).

58. *Id.* § 60-1.1.

59. Both analyses require a comparison between two classifications. Defining those classifications can be easy (i.e., males versus females). However, defining those classifications can also be difficult; with respect to race, OFCCP compares minorities to non-minorities, and also compares seven classifications against each other: Hispanic or Latino, White, Black or African American, Native Hawaiian or Other Pacific Islander, Asian, American Indian or Alaska Native, and Two or More Races. Agency Information Collection Activities: Notice of Submission for OMB Review; Final Comment Request, 70 Fed. Reg. 71294, 71302 (Nov. 28, 2005); *see also EEO-1 Data File Specifications*, U.S. Equal Emp’t Opportunity Comm’n (July 2010), <http://www.eeoc.gov/employers/eo1survey/datafile.cfm>. If the ENDA Executive Order were to require such analytics, the OFCCP could compare LGBT individuals (e.g., individuals who are homosexual, bisexual, asexual, or intersex; individuals conceiving of themselves as being of a different sex; individuals with gender-related characteristics not corresponding to their sex; and individuals who have transitioned sexes) to non-LGBT individuals. Alternatively, OFCCP could compare: i) LGBT individuals to non-LGBT individuals, and ii) individuals with differing sexual orientations, gender identities, and gender expressions to each other (e.g., a “sub-LGBT” analysis). If the ENDA Executive Order requires any form of analytics, OFCCP should choose the latter of these options so as to root out discrimination against one group that may be masked by the absence of discrimination against another group. For example, if all LGBT applicants are grouped together for purposes of conducting an adverse impact analysis, a discriminatory failure to hire transsexuals may be undetectable if the employer is hiring homosexual applicants at an equivalent or greater rate as it is hiring heterosexual applicants. Therefore, OFCCP should conduct “sub-LGBT” analyses in the same way it conducts “sub-minority” analyses. *See, e.g., News Release: Shipping Giant FedEx to Pay \$3 Million to Settle Charges of Hiring Discrimination Brought by U.S. Department of Labor*, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS (Mar. 22, 2012), *available at* <http://www.dol.gov/opa/media/press/ofccp/OFCCP20120507.htm#UIq2a7R19LQ>; *see also Roy Maurer, OFCCP to Increase Scrutiny on Pay Practices, ‘Sub-Minorities,’* SOC’Y FOR HUM. RESOURCE MGMT. (Mar. 15, 2012), <http://www.shrm.org/LegalIssues/FederalResources/Pages/OFCCPtoIncreaseScrutiny.aspx>.

sexual orientation or gender identity/expression for three reasons. Foremost, both a Utilization Analysis and an Adverse Impact Analysis would require contractors to know the LGBT demographics of their workforces. Yet, inviting applicants to self-identify as LGBT could be devastating in a world where nationwide protection against employment discrimination on the bases of sexual orientation and gender identity/expression does not exist. Moreover, even if OFCCP could ensure protection to those applicants who chose to self-identify as LGBT, one-time invitations to self-identify are insufficient because LGBT status can change. Finally, a Utilization Analysis also would require accurate external demographics concerning LGBT individuals, the likes of which does not yet exist on a national scale.

1. Overview of the Utilization Analysis and the Adverse Impact Analysis

Before examining the effects of requiring contractors to perform statistical analyses with respect to sexual orientation and gender identity/expression for applicants and employees, it is helpful to understand the demands of each analysis.

A Utilization Analysis begins with the principle that each job group within a contractor's workforce should approximate the relevant demographics from which the contractor recruits. Thus, any Utilization Analysis begins by performing an Availability Analysis. Assume that in Contractor, Inc., job group⁶⁰ 201 is comprised entirely of software engineers, 20% of whom were female. Contractor, Inc. recruits 60% of these engineers externally from the San Francisco primary metropolitan statistical area, while 40% are promoted internally from job group 202. Finally, 75% of employees in job group 202 are male and 25% are female. To determine whether Contractor, Inc. is appropriately utilizing females, the first step is determining the hypothetical availability of females for job group 201. According to the 2000 Census,⁶¹ 21.8% of software engineers in the San Francisco primary metropolitan statistical area were female in 2000.⁶² Thus, the availability of females for job

60. A job group is a grouping of employees in jobs "with similar content, wage rates, and opportunities." 41 C.F.R. § 60-2.12(b).

61. It should be noted that OFCCP still uses 2000 census data as opposed to 2010 census data. *Equal Employment Opportunity (EEO) Tabulation*, U.S. CENSUS BUREAU, <http://www.census.gov/people/eeotabulation> (last visited Dec. 16, 2012).

62. *Census 2000 EEO Data Tool*, U.S. CENSUS BUREAU, <http://www.census.gov/eo2000/> (select "Employment by Census Occupation Code," "San Francisco Metropolitan Area," and

group 201 was 23.08%.⁶³ According to OFCCP's 80% rule,⁶⁴ the actual makeup of job group 201 (e.g., 20%) is within 80% of the hypothetical availability (e.g., 23.08%).⁶⁵ Therefore, this job group is compliant because it approximates the relevant demographics and Contractor, Inc. need not establish a goal.⁶⁶

In contrast, an Adverse Impact Analysis begins with a hypothesis (also known as the "null hypothesis"): the personnel decisions (e.g., hires, promotions, and terminations) made in each job group within a contractor's workforce were made on a race- and sex-neutral basis.⁶⁷ Like any hypothesis, this null hypothesis could never conclusively be proven true. Instead, two statistical tests – the 80% Rule or a Z-Test – are applied to determine whether the null hypothesis must be rejected and, if so, with what degree of certainty. For example, to test our null hypothesis with respect to hiring decisions in job group 301 based on race, the first question is whether the rate at which minorities were hired is within 80% of the rate at which non-minorities were hired. If so, the null hypothesis cannot be rejected. Nonetheless, even if the data fails the 80% Rule, a traditional Z-Test must be applied. If the resulting Z-Score is below 1.96, the null hypothesis cannot be rejected. Alternatively, if the Z-Score exceeds 1.96, then the null hypothesis can be rejected, leading to the conclusion that the personnel decisions are not occurring as randomly as would be expected were the decision-making race- or sex-neutral. OFCCP views any Z-Score in excess of 1.96 as presumptive evidence of discrimination.

It is clear, therefore, that performing both the Utilization and Adverse Impact Analyses requires marshaling and refining considerable amounts of workforce and personnel data. It should be no surprise that mandating performance of these analyses imposes a significant burden on contractors. In light of such burdens, and especially in the wake of an

"Computer Software Engineer (102) SOC 15-1030") (last visited Dec. 16, 2012).

63. $(60\% * 21.8\%) + (40\% * 25\%) = 23.08\%$.

64. U.S. DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, FEDERAL CONTRACT COMPLIANCE MANUAL § 7E06 (2012) [hereinafter FCCM], available at <http://www.dol.gov/ofccp/regs/compliance/fccm/ofcpcch7.htm>.

65. $20\% > 23.08\% * 80\% = 18.464\%$. In contrast, if the actual makeup of females in job group 201 was 18%, and therefore not within 80% of the hypothetical availability, Contractor, Inc. would need to establish a goal for recruiting females into job group 201. See 41 C.F.R. § 60-2.15 (2009).

66. See 41 C.F.R. § 60-2.15(b) (contractors must establish a goal when "the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group").

67. See generally FCCM, *supra* note 64, at § 7E (indicating that Adverse Impact Analyses are based upon facially neutral criteria putting the burden of proof on the adversely affected party).

economic recession, it is only where such analyses are particularly helpful and narrowly tailored (to borrow a term of art from our affirmative-action-in-education friends) should they be forced upon contractors. However, requiring contractors to perform either analysis with respect to sexual orientation or gender identity/expression would be imprudent.

2. Inviting LGBT Applicants to Self-Identify Without Adequate Protection

The first prerequisite of both a Utilization Analysis and an Adverse Impact Analysis is access to accurate internal availability data. Traditionally, contractors ascertain internal availability demographics with respect to race and sex by inviting new employees to self-identify as one of several races and as either male or female.⁶⁸ Also, regardless of the fact that neither statistical analysis is performed with respect to protected veteran status, contractors must invite all applicants to self-identify as an individual with a disability and as a protected veteran to comply with the regulations implementing section 503 and VEVRAA, respectively.⁶⁹ Therefore, were the regulations implementing the ENDA Executive Order to mandate performance of either statistical analysis, contractors would be forced to invite applicants to self-identify as LGBT in order to accurately determine LGBT demographics within their applicant pools and workforce.

However, invitations to self-identify do not exist in a vacuum. The repercussions of inviting applicants to self-identify are substantial. Employment discrimination on the basis of race, sex, disability status, and protected veteran status is prohibited across the United States by Title VII, the ADA, and the Uniformed Services Employment and

68. Inviting all new employees to self-identify on the bases of race and gender serves the dual purpose of satisfying the regulations implementing Executive Order 11,246 as well as 42 U.S.C. § 2000e-8(c) (2006), which mandates all federal contractors and certain employers submit EEO-1 reports.

69. 41 C.F.R. §§ 60-250.42, 60-741.42 (protected veterans and individuals with disabilities, respectively). Inviting new employees to self-identify as protected veterans serves the dual purpose of satisfying VETS-100 and VETS-100A reporting requirements. See 38 U.S.C. § 4212(d) (2006). For purposes of this article, it is immaterial that, generally, contractors may only invite applicants to self-identify as an individual with a disability or as a protected veteran *post-offer*, whereas contractors must invite applicants to self-identify on the basis of race and sex *pre-offer* so as to perform an Adverse Impact Analysis with respect to hiring decisions.

Reemployment Rights Act ("USERRA"),⁷⁰ respectively. In contrast, a limited number of states and municipalities prohibit employers from discriminating against applicants on the basis of sexual orientation or gender identity/expression.⁷¹

In those parts of the country where employment discrimination laws do not protect applicants from discrimination on the basis of sexual orientation or gender identity/expression, LGBT applicants would be faced with a Catch-22. By not self-identifying as LGBT, applicants would be unable to avail themselves of the perks of their potential employer's AAP. On the other hand, if they *do* choose to identify as LGBT, applicants risk having no legal recourse should their potential employer discriminate against them on the basis of their sexual orientation or gender identity/expression.⁷² Therefore, the regulations implementing the ENDA Executive Order should not require contractors to invite applicants to self-identify as LGBT.

a. Why Anonymity Matters to LGBT Applicants

Why is anonymity so important to LGBT applicants? The answer is best framed in contrast to other protected classifications. The specter of losing anonymity is of little concern for applicants self-identifying their race because race is often apparent. Furthermore, even where an employer was unaware of an applicant's race prior to receipt of the

70. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (2006); Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 (2006).

71. See, e.g., IOWA CODE § 216.6A (2009). In these states and municipalities, the aggrieved party has no legal remedy short of creatively pleading that they were discriminated against because of sex stereotyping. See, e.g., *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (recognizing harassment based upon sex stereotyping is harassment "because of sex," in violation of Title VII); see also *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263-64 (3d Cir. 2001) (there are three ways in which a plaintiff may allege same-sex sexual harassment, one of which is sex stereotyping); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (relief may be available for individuals discriminated against based on their sexual orientation under a theory of sexual stereotyping); *Spearmen v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000) (sex stereotyping may constitute evidence of sexual harassment); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-252 (1989)); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999) (noting that sexual orientation discrimination must be based on sex to be an actionable claim under Title VII); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997). It should be noted that these aggrieved employees are foreclosed from alleging disability discrimination. 41 C.F.R. § 741.3(e)(1) (2009) (excluding transvestism, transsexualism, and gender identity disorders not resulting from physical impairments from the scope of the term "disability").

72. See *infra* note 84 and accompanying text.

invitation to self-identify, Title VII protects all applicants from discrimination on the basis of their now-disclosed race.⁷³

Retaining anonymity is somewhat of a concern for applicants identifying their sex, disability status, and veteran status as these traits are not always apparent and applicants may prefer that these characteristics remain private. Nonetheless, such applicants are protected by Title VII, the ADA, and USERRA, respectively, which afford them at least some protection should a prospective employer discover their once-hidden characteristic and discriminate against them on that basis.

In contrast, an applicant's sexual orientation or gender expression/identity may be less apparent. Many individuals may wish to keep their sexual orientation or gender expression/identity private for personal reasons. Moreover, should these characteristics be revealed, LGBT applicants in many states and municipalities would risk having no legal recourse against employment discrimination on the basis of their LGBT status.⁷⁴ Hence, it is possible that the regulations implementing the ENDA Executive Order – the very purpose of which is to help LGBT applicants and employees – could unintentionally harm those same individuals unless appropriate precautions are taken.

b. The Impossibility of Anonymity in Self-Identifications

The first precaution is a regulatory mandate that invitations to self-identify as LGBT be anonymous. However, guaranteed anonymity in self-identifications is a fiction. Both of the statistical analyses mentioned earlier use job groups as their units of analysis.⁷⁵ Invitations to self-identify as LGBT would be worthless unless they required those responding to identify their job group or provide some other information about their job group (e.g., job title, level of compensation). In companies with large workforces comprised of large job groups, this concern may be negligible as employees self-identifying as LGBT could get lost in the crowd, retaining their anonymity. But in smaller workforces, job groups may be made up of no more than a handful of employees. Anonymity fades when a job group that has been 100% non-LGBT for years suddenly accounts for a single employee

73. See 42 U.S.C. § 2000e (2006).

74. See *infra* note 84 and accompanying text.

75. Cf. 41 C.F.R. § 60-2.14(b) (2012) (noting that, as a prerequisite to completing a Utilization Analysis and an Adverse Impact Analysis, contractors must separately determine the availability of minorities and woman in each job group).

“anonymously” self-identifying as LGBT as soon as the “new guy” joins the team.

Similarly, LGBT applicants would fear discrimination should they decline to respond to the invitation to self-identify. LGBT applicants who fear adverse employment action should they “come out” would either lie (*e.g.*, identify as non-LGBT) or decline the invitation to self-identify entirely. While LGBT applicants willing to identify as non-LGBT would be in the clear, those who opt not to respond may face discrimination. In smaller job groups, a missing invitation to self-identify could say just as much as an invitation affirmatively self-identifying as LGBT. Simply by choosing not to respond, an LGBT applicant may be effectively outed and discriminated against.

Ironically, this pitfall could have repercussions for *non*-LGBT employees. Should a non-LGBT employee decline to respond to the invitation to self-identify, he or she could be erroneously perceived as LGBT. Absent laws barring employment discrimination based on perceived sexual orientation or gender identity/expression, such a non-LGBT employee could be lawfully discriminated against on the basis of wrongly perceived LGBT status.

c. Solutions that Account for the Impossibility of LGBT Anonymity

This quandary can be solved in a number of ways. First, the regulations implementing the ENDA Executive Order could refrain from requiring contractors to invite applicants to self-identify entirely. The downside of this, of course, is that contractors would have no way of knowing which employees to seek out for an action-oriented program (*i.e.*, requiring supervisors to submit a written justification for their decision when apparently qualified LGBT employees are terminated, demoted, or passed over for advancement, transfer, or training). The upsides, however, are that LGBT applicants would not be outed or subjected to potential discrimination and that contractors would not be saddled with the significant burden of preparing statistical analyses.

Alternatively, the regulations could mandate that the invitations to self-identify as LGBT include a clause prohibiting discrimination on the basis of sexual orientation or gender identity/expression against anyone self-identifying as LGBT in exchange for the applicant voluntarily submitting the self-identification form. As neat as this solution sounds, it may have its own pitfall. It is unclear whether the employee’s submission of a self-identification form would qualify as valuable consideration, the absence of which would prevent the formation of an

enforceable contract.⁷⁶

At minimum, the OFCCP should not use the perks of an AAP to entice applicants to self-identify as LGBT without warning them of the potential risks in doing so.

The OFCCP should not mandate that employers invite applicants to self-identify as LGBT unless the regulations also require the invitation to clearly and unambiguously state that, unless the state or municipality in which the contractor is located affords them protection, applicants are not guaranteed protection against adverse employment actions as a result of self-identifying should they chose to self-identify as LGBT.

d. The Threat of Debarment

Contractors do have *some* incentive not to discriminate against applicants on the basis of sexual orientation or gender identity/expression beyond the specter of employee litigation, personal convictions, and the fear of business declining from potential negative publicity. Discrimination on the basis of sexual orientation or gender identity/expression likely would run afoul of any equal opportunity clause that will likely be required in federal contracts by virtue of the regulations implementing the ENDA Executive Order.⁷⁷ However, the remedy for such a contract breach is either termination of the contract,⁷⁸ debarment from participation in future federal contracts,⁷⁹ or a conciliation agreement between the contractor and OFCCP whereby, in exchange for continuation of its contract, the contractor agrees, *inter alia*, to make whole those applicants who were discriminated against.⁸⁰

Where a contract is terminated because of discrimination on the basis of race, color, national origin, religion, sex, disability status, or protected veteran status, the aggrieved applicants may not be made whole via a conciliation agreement, but they can invoke the private rights of action afforded them by federal employment discrimination

76. See generally RESTATEMENT (SECOND) OF CONTRACTS § 71(3)(a) (1981). On the one hand, the employee had no legal obligation to voluntarily self-identify, which suggests that the employee is undertaking "an act other than a promise" in exchange for the employer's forbearance of its right to discriminate against the employee on the basis of sexual orientation or gender identity/expression. On the other hand, the contractor may be unilaterally promising not to discriminate, which precludes formation of a contract, and leaves LGBT applicants just as vulnerable as they would have been without such a clause.

77. See *supra* note 35 and accompanying text.

78. 41 C.F.R. § 60-1.4(a)(6).

79. *Id.* § 60-1.27(b).

80. *Id.* § 60-1.26(a)(2).

laws.⁸¹ This is not always true in cases of LGBT discrimination because no federal private right of action exists for employment discrimination on the basis of sexual orientation or gender identity/expression.⁸² Consequently, aggrieved applicants would only see relief if OFCCP were able to secure make-whole relief on their behalf.⁸³ However, it is unclear whether OFCCP has the right to seek such relief *after* the contractor has opted for termination of their contract.⁸⁴ Without a law like ENDA, if a contractor discriminates against an applicant on the basis of sexual orientation or gender identity/expression, there is simply no guarantee that the aggrieved applicant would be made whole.

3. Burdens Associated with Multiple Invitations to Self-Identify

Assuming *arguendo* that LGBT applicants attain sufficient protection to self-identify as LGBT, what remains unclear is how frequently contractors must invite their workforce to self-identify. Race is essentially static; there is no need to resurvey employees concerning their race because employees' race will not change. Similarly, there is rarely a need to resurvey employees concerning their veteran status because it too is largely static.⁸⁵

In contrast, sex, disability status, sexual orientation, and gender identity/expression are dynamic classifications. Employees may

81. See 42 U.S.C. §§ 1981(a)(1), 2000e *et seq.* (2006).

82. See *Employment Non-Discrimination Act*, Human Rights Campaign, <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act> (last visited Nov. 7, 2012).

83. See 41 C.F.R. § 60-1.26(a)(2) (2009).

84. On the one hand, the regulations implementing Executive Order 11,246 grant OFCCP the right to seek make-whole relief "for victims of discrimination identified during a compliant investigation or compliance evaluation." *Id.* Because victims of LGBT discrimination would have been identified during a compliant investigation or compliance evaluation, the plain meaning of this regulation appears to confer on OFCCP the right to seek make whole relief on their behalf even after termination of the contract. On the other hand, such an interpretation would run contrary to basic tenants of contract law. Although the victims of LGBT discrimination are the intended beneficiaries of the federal contract, see RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b) (1981), their rights under the contract are discharged by the contractor's nonperformance. *Id.* § 309(2) ("If a contract ceases to be binding in whole or in part because of . . . present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified."). This suggests that OFCCP would *not* have the right to seek make-whole relief on their behalf after the termination of the contract.

85. Only in those situations where a non-veteran employee joins the armed forces, takes a leave of absence from civil employment, and returns upon discharge would the employee's veteran status change. See, e.g., 41 C.F.R. 60.250.2(n)-(r) (2012). Moreover, in these situations, the contractor is sure to know that the employee's veteran status has changed, thereby avoiding the need to resurvey the contractor's entire workforce.

transition sexes, become disabled, or “come out of the closet” during their tenure with an employer. Thus, a one-time invitation to self-identify as male, female, or intersex, as an individual with a disability, or as LGBT would inadequately represent the fluid nature of those characteristics. However, as of early 2010, OFCCP had not explicitly required contractors to annually resurvey their workforces to ascertain sex⁸⁶ and disability statuses.⁸⁷

It appears OFCCP had again overlooked the fluid nature of disability status when it published an advanced notice of proposed rulemaking (“ANPRM”) on July 23, 2010, which sought to revamp the regulations implementing section 503.⁸⁸ The ANPRM asked for public comment on, *inter alia*, whether contractors should be required to ask job applicants “to voluntarily and confidentially self-identify if they have a disability prior to an offer of employment.”⁸⁹ However, there was no proposal for an annual resurveying. Then, after reviewing public comments on this and other issues, OFCCP proposed an entirely novel rule in its December 9, 2011, notice of proposed rulemaking (“NPRM”) before seeking public comment on the same.⁹⁰ The NPRM stated that

86. Federal law does not define the terms “sex,” “male,” or “female” in any of the Affirmative Action in Employment Laws or the laws requiring compliance with EEO-1 reporting. This omission leaves two possibilities regarding interpretation of federal law, both of which have been adopted by various courts interpreting state law. First, a male-to-female transsexual employee could be regarded as male, suggesting that federal law regards sex at birth to be dispositive. *See, e.g., Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re Marriage of Simmons*, 825 N.E.2d 303, 310-12 (Ill. App. Ct. 2005); *In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999). Alternatively, a male-to-female transsexual employee could be regarded as female, suggesting that federal law may weigh any number of factors to determine a person’s sex. *See, e.g., Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 272 (N.Y. Sup. Ct. 1977). In the former instance, annual invitations to self-identify on the basis of sex would be unnecessary because sex is regarded as static. In the latter instance, annual invitations to self-identify on the basis of sex would be necessary because sex is regarded as fluid. Therefore, it is an open question whether contractors should be annually inviting all employees to self-identify on the basis of sex so as to comply with EEO-1 reporting requirements in good faith.

87. *See OFCCP Proposed Section 503 Regulations Webinar*, U.S. DEP’T OF LABOR, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAM, 8 (Dec. 20, 2011), *available at* http://www.dol.gov/ofccp/Presentation/Proposed_%20Sec503_Revisions_Webinar.pdf.

88. *See Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Evaluation of Affirmative Action Provisions Under Section 503 of the Rehabilitation Act, as Amended*, 75 Fed. Reg. 43,116, 43,117 (proposed July 23, 2010) (codified at 41 C.F.R. pt. 60-741).

89. *Id.* at 43,118.

90. *See Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities*, 76 Fed. Reg. 77,056 (proposed Dec. 9, 2011) (to be codified at C.F.R. pt. 60-741), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-12-09/pdf/2011-31371.pdf> [hereinafter NPRM].

contractors would be required to

annually survey their employees, providing an opportunity for each employee who is, or subsequently becomes, an individual with a disability to voluntarily self-identify as such in an anonymous manner, thereby allowing those who have subsequently become disabled or who did not wish to self-identify during the hiring process to be counted.⁹¹

The OFCCP found that many contractors do not disagree with the purpose behind annual resurveying since it helps ensure that contractors collect accurate information with respect to their employees' current disability status so as to ensure that their AAPs remain effective if and when employees' disability status changes.⁹² However, much of the criticism from the contractor community has focused on the *unnecessary* burdens associated with achieving this commendable purpose.⁹³

Under the proposed regulation, contractors must use language mandated by OFCCP in their annual invitations to self-identify.⁹⁴ The NPRM, however, gave no support for the proposition that the OFCCP's language would be more effective than language contractors would have used instead. Moreover, OFCCP's proposed language is lengthy and confusing.⁹⁵ This leads to two problems. First, some employees would not bother to read the form at all; they may decline to complete it, or simply self-identify based on an educated guess. Second, those employees who do read the form will have significant difficulty understanding whether they have a disability. Both problems would result in underreporting of individuals with disabilities, which could cause contractors to set goals where – in reality – none is called for.

91. *Id.* at 77,062 (emphasis added).

92. *See id.* at 77,057, 77,062.

93. *See id.* at 77,057.

94. *Id.* at 77,063.

95. OFCCP's proposed language includes the following definition:

A person has a disability as defined in section 503 if that person either: (1) Has a physical or mental impairment which substantially limits one or more of that person's major life activities; or (2) has a history or record of such an impairment. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Major life activities also include major bodily functions such as functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions. *Id.*

The same problems could recur should the regulations implementing the ENDA Executive Order require contractors to annually invite employees to self-identify as LGBT. OFCCP should take two approaches to avoid encountering the problems it did with disability status. If, at the time of proposing the regulations implementing the ENDA Executive Order, any regulation requiring annual resurveying (à la the NPRM), OFCCP should permit contractors to use a single form to accomplish all resurveying. In addition, regardless of whether any annual resurveying is required, OFCCP should allow contractors to use their own language to invite their employees to self-identify as LGBT.⁹⁶ These approaches would reduce the burden on contractors and result in more accurate workforce demographics.

4. Absence of External Availability Data

As noted above, a Utilization Analysis cannot be performed without accurate external availability data.⁹⁷ To perform a Utilization Analysis for LGBT individuals in a workforce, data showing the percentage of LGBT individuals comprising a particular job group from a specific recruitment area must exist. The regulations implementing Executive Order 11,246 offer examples of such data as “census data, data from local job service offices, and data from colleges or other training institutions.”⁹⁸ Practically, only census data provides consistent, current, and reliable demographic data specific enough to approximate the availability of different occupations across the country. The U.S. Census Bureau, however, has never asked respondents to identify their sexual orientation or gender identity/expression in any census.⁹⁹

Scholars have purported to estimate the population of homosexual or bisexual individuals in the United States using the decennial census or the American Community Survey (“ACS”), a more-detailed U.S. Census

96. Cf. 41 C.F.R. §§ 60-250 App. B, 60-300 App. B (2012) (OFCCP does not mandate the language that must be used in the invitations to self-identify as a protected veteran, but rather provides sample invitations for contractors’ benefit).

97. See *supra* Part III.B.1.

98. 41 C.F.R. § 60-2.14(d) (2012).

99. Both the 2000 and 2010 censuses asked questions that allowed same-sex partnerships to be counted while not specifically asking individuals to identify as LGBT. See *Gay and Lesbian Demographics*, URBAN INST., <http://www.urban.org/toolkit/issues/gayresearchfocus.cfm> (last visited Dec. 16, 2012); Lisa Leff, *2010 Census Will Count Same-Sex Couples In Reversal Of Bush Policy*, THE HUFFINGTON POST (June 20, 2009, 12:03 AM), http://www.huffingtonpost.com/2009/06/20/210-census-will-count-sam_n_218489.html. This demographic data would be irrelevant to determining accurate LGBT demographics.

Bureau survey sent to approximately 1.4 million addresses each year.¹⁰⁰ By far the most cited estimates of homosexual and bisexual demographics based on U.S. Census Bureau data come from a research paper published by the Williams Institute entitled, *Same-Sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey* (the “Williams Institute Paper”).¹⁰¹ While the Williams Institute Paper remains a groundbreaking study and the best estimate of homosexual and bisexual population in the United States, for the following reasons, even its estimates should not be used in a Utilization Analysis.

a. U.S. Census Bureau Data Is Too Imprecise to Approximate the Percent of LGB Individuals Comprising Each Type of Job

The first problem with approximating the LGBT population using the U.S. Census Bureau’s data is that it provides zero insight into the transgender population. While some census questions arguably can approximate the homosexual or bisexual (i.e., LGB) population, approximating the LGBT population is impossible without data to approximate the percentage of individuals identifying as transgender.

Furthermore, the most accurate LGB demographic data would not only approximate the LGB population for a given area (which the Williams Institute Paper attempts to do), but would also approximate the LGB population for the area broken down by job types.¹⁰² As of yet, precise data like this has not been released by the U.S. Census Bureau.¹⁰³ Without public access to such data, it is impossible for OFCCP to mandate a Utilization Analysis like those required pursuant to the regulations implementing Executive Order 11,246.

However, OFCCP has a history of trying to find a way around such difficulties. One striking component of the proposed regulations

100. Gary J. Gates, *Same-Sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey*, THE WILLIAMS INST., 1-2, 4 (October 2006), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Same-Sex-Couples-GLB-Pop-ACS-Oct-2006.pdf> [hereinafter Williams Institute Paper] (“Census and ACS are the only sources of data available that count the number of same-sex couples at state and local levels.”).

101. See *id.*

102. For example, it is possible that the percent of the population self-identifying as LGB differs between Mechanical Engineers (census code 146) and Human Resources Managers (census code 13).

103. Such data likely exists because the U.S. Census Bureau asks for job title, which can be used to determine type of job, sex, and relationship status (the latter two of which, when combined, could estimate the percentage of the population self-identifying as LGB). See *infra* Part II.B.4.b (discussing why such an estimate would be flawed).

implementing section 503 was OFCCP's decision to "establish a single, national utilization goal for individuals with disabilities."¹⁰⁴ All contractors would be required to set a 7% utilization goal for individual with disabilities, regardless of the contractor's recruiting area and of the demographics of individuals with disabilities in a particular type of job.¹⁰⁵

Therefore, *if* OFCCP could be assured that the LGB population of each type of job could be accurately extrapolated from U.S. Census data, OFCCP could take the same route and establish a national utilization goal for individuals self-identifying as LGB. However, such a decision would be ill-formed. It is essential that OFCCP does *not* implement a national utilization goal for LGB individuals because an accurate extrapolation of the LGB population from U.S. Census data is impossible.

b. An Accurate Extrapolation of the LGB Population from U.S. Census Bureau Data is Impossible

The presuppositions underlying estimates of the LGB population are faulty. The Williams Institute Paper estimates the LGB population by assuming that "the proportion of all same-sex couples who live in a given state or locality is the same as the proportion of all [homosexual or bisexual] individuals living in that area."¹⁰⁶ This assumption is unsupported and, for the following reasons, likely untrue. First, homophobia is still a very real concern for LGB Americans.¹⁰⁷ Many LGB individuals may not cohabit with their partner for fear of the threat of violence. Similarly, LGB individuals may fear retaliation from their government if they identify as LGB and therefore, may decline to identify as cohabiting with a same-sex partner on the census form. Accordingly, the census data would be under-representative of the true population of LGB individuals.

Furthermore, the census data counts only those same-sex couples who cohabitate.¹⁰⁸ This makes it difficult to approximate the percent of the population that actually self-identify as LGB because most

104. NPRM, *supra* note 90, at 77,068.

105. *See id.* at 77,070.

106. Williams Institute Paper, *supra* note 100, at 4.

107. *See generally* Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-affected Communities In the United States in 2011, THE NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, <http://towleroad.typepad.com/files/ncavphvreport2011.pdf> (last visited Dec. 16, 2012).

108. *See* Williams Institute Paper, *supra* note 100, at 4.

unmarried couples who live together are twenty-five to thirty-four,¹⁰⁹ yet the percent of individuals self-identifying as LGB is steadily increasing in populations under age twenty-five across the nation.¹¹⁰ Data counting only LGB individuals who cohabitates ignores the reality that there is a substantial and growing percentage of individuals who self-identify as LGB in populations below the average age of cohabitation.¹¹¹

Finally, estimating the percent of the population that identifies as LGB (“X”) from cohabitation data presumes that LGB couples cohabitates as often as heterosexual couples. This is untrue.¹¹² The LGB population (“P₁”) can be derived from the percent of homosexual/bisexual couples that *cohabitates* (“C₁”) and the percent of all cohabitating couples that *identify* as homosexual or bisexual (“I₁”).¹¹³ Similarly, the heterosexual population (e.g., total population – P₁) (“P₂”) can be derived from the percent of heterosexual couples that cohabitates (“C₂”) and the percent of all cohabitating couples that identify as heterosexual (e.g., 100% – I₁).¹¹⁴ Thus, X equals P₁ divided by (P₁ + P₂).

One could not calculate X without knowing I₁, C₁, and C₂. The ACS data, however, provides only I₁.¹¹⁵ The Williams Institute Paper incorrectly assumes that C₁ = C₂,¹¹⁶ which allows C₁ and C₂ to cancel out in the final calculation of X. However, if the proclivities of LGB and heterosexual couples to cohabitates were different, C₁ would not equal C₂, and the Williams Institute Paper’s estimates would be flawed.

One study (the “California Cohabitation Study”) found that approximately “37%–46% of gay men and 51%–62% of lesbians aged 18–59 [in California] are in cohabiting partnerships (compared with 62% of heterosexual individuals in coresidential unions at comparable ages).”¹¹⁷ According to this study, the percent of LGB couples cohabitating is different from the percent of heterosexual couples

109. Sharon Jayson, *Cohabitation Is Replacing Dating*, USA TODAY (July 17, 2005, 8:48 PM), http://www.usatoday.com/life/lifestyle/2005-07-17-cohabitation_x.htm.

110. See Katy Reckdahl, *Gay People Are Coming Out Younger*, THE TIMES-PICAYUNE (Oct. 9, 2011, 8:00 AM), http://www.nola.com/education/index.ssf/2011/10/gay_people_are_coming_out_young.html.

111. See *id.*

112. See Christopher Carpenter & Gary J. Gates, *Gay and Lesbian Partnership: Evidence from California*, 45 DEMOGRAPHY 573 (2008), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Carpenter-GL-Partnership-Evidence-CA-Aug-2008.pdf> [hereinafter California Cohabitation Study].

113. $P_1 = [(total\ number\ of\ cohabitating\ couples) * (I_1)] / C_1$.

114. $P_2 = [(total\ number\ of\ cohabitating\ couples) * (100\% - I_1)] / C_2$.

115. See *Gay and Lesbian Demographics.*, *supra* note 99.

116. See *supra* text accompanying note 106.

117. California Cohabitation Study, *supra* note 112, at 573.

cohabitating.¹¹⁸ Because the Williams Institute Paper does not account for such differences, the LGB demographic estimates derived in it are inaccurate.

To resolve this, LGB population estimates would need to take into account the differences between proclivities of LGB and heterosexual couples to cohabit. Unfortunately, such data is not widely available. Other than the California Cohabitation Study, no data exists that details such information on any scale, whether local, state, or national. Furthermore, given that the LGB population estimates in California differ by nearly 25% once the proclivity of LGB and heterosexual couples to cohabit is taken into account,¹¹⁹ public access to such proclivity data is a must. Without it, the Utilization Analysis would be wrought with inaccurate data, thereby reducing the analysis to little more than a paperwork exercise.

Moreover, the percent of gay men cohabitating in the California Cohabitation Study differs from the percent of lesbians cohabitating.¹²⁰ Further, there is no data on the proclivity of bisexuals or intersex individuals to cohabit. Hence, a truly accurate estimate of the LGB population would require knowledge of the relative cohabitation proclivities of gay men, lesbians, bisexuals, intersex individuals, and non-LGB couples.

For the foregoing reasons, it is clear that extrapolating LGBT demographics from the U.S. Census Bureau data is, at present, near impossible. Without more-detailed information, attempting to set a national utilization standard would be useless as that standard is sure to significantly differ from the actual availability of LGBT individuals. Thus, the regulations implementing the ENDA Executive Order should not require contractors to perform a Utilization Analysis on the basis of their workforce's sexual orientation or gender identity/expression.

118. See *id.* at 587.

119. The Williams Institute Paper estimates the LGB population of California to be 5.2% and the heterosexual population of California to be 94.8%. Williams Institute Paper, *supra* note 100, at tbl.2. These figures were derived from the 2005 ACS Survey, which determined only the percentage of couples that were same-sex (e.g., I₁). *Id.* at 1. Hence, I₁ = 5.2%. Moreover, the proclivity of LGB individuals to cohabit is roughly 49%, whereas the proclivity of heterosexual couples to cohabit is 62%. See California Cohabitation Study, *supra* note 112, at 573. Thus, P₁ = [(total population of California) * (5.2%)] / (49%), P₂ = [(total population of California) * (94.8%)] / 62%, and X = P₁ / (P₁ + P₂) ≈ 6.9%. 6.9% / 5.2% ≈ 6.5%. 6.5% / 5.2% ≈ 25%.

120. California Cohabitation Study, *supra* note 112, at 573.

C. Non-Statistical Components of an AAP

AAPs exist, in part, to remedy systemic discrimination.¹²¹ Like the groups already protected by the Affirmative Action in Employment Laws, LGBT individuals face widespread, systemic discrimination.¹²² Thus, the regulations implementing the ENDA Executive Order should require AAPs for LGBT individuals (“LGBT AAPs”).

In addition to requiring that Executive Order 11,246 AAPs include the statistical analyses discussed above,¹²³ the regulations mandate that such AAPs contain four components.¹²⁴ Two – *Designation of Responsibility* and *Periodic Internal Audits* – should undoubtedly be included in the regulations implementing the ENDA Executive Order because contractors must designate which managers/supervisors are responsible for the AAP and must evaluate the effectiveness of that plan. However, the analyses required under the *Identification of Problem Areas* component (e.g., the Workforce Analysis, Job Group Analysis, Adverse Impact Analysis, and Compensation Analysis)¹²⁵ should not be mandated as part of an LGBT AAP because they require accurate, internal LGBT demographics. Yet, for the reasons discussed above, to require contractors to collect such data would be imprudent.¹²⁶ The final component – *Action-Oriented Programs* – would be the most burdensome component of an LGBT AAP; for that reason, it is discussed in detail below.

Additionally, the regulations implementing Executive Order 11,246 require AAPs to include specific sections devoted to sex discrimination¹²⁷ and religious and national origin discrimination.¹²⁸

121. *Frequently Asked Questions for the Employer*, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAM, U.S. DEP'T OF LABOR, <http://www.dol.gov/ofccp/regs/compliance/faqs/emprfaqs.htm> (last visited Nov. 7, 2012) (“OFCCP is focusing its enforcement activities on finding and resolving what might be called ‘systemic’ discrimination.”).

122. U.S. Congresswoman Judy Chu, *Lesbian, Gay, Bisexual and Transgender (LGBT) Issues*, <http://chu.house.gov/issue/lgbt> (last visited Dec. 16, 2012); see also M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination* (June 2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf>.

123. See *supra* Part III.B.

124. 41 C.F.R. § 60-2.10(b)(2) (2012) (requiring the four components listed at 41 C.F.R. § 60-2.17 in each Executive Order 11,246 AAP). Although there are additional components cataloged under the regulations implementing section 503 and VEVRAA, those components are largely duplicative of the components in the regulations implementing section 503 and VEVRAA. See *id.* §§ 60-250.44, 60-300.44, 60-741.44.

125. *Id.* § 60-2.17(b).

126. See *supra* Part II.B.2-3.

127. 41 C.F.R. § 60-20.1.

Each section addresses issues unique to a protected classification. For example, the sex discrimination section must include a policy on maternity leave that does not penalize women because they require time off on account of childrearing.¹²⁹ Because LGBT individuals have similar unique characteristics, one section of each LGBT AAP should be devoted to issues unique to the LGBT community.

1. Action-Oriented Programs

Action-oriented programs ensure that an equal employment opportunity (“EEO”) policy is more than a few sentences hidden in the fine print of an employee handbook. These programs seek to disseminate the EEO policy; actively recruit and hire LGBT employees; advance them in employment; and ensure that, if an openly LGBT employee is terminated, such termination was not the result of discrimination.¹³⁰ Much like the regulations implementing Executive Order 11,246, OFCCP should require action-oriented programs in LGBT AAPs while allowing contractors flexibility to adopt programs that would best serve the contractor’s business. What follows are examples of action-oriented programs that would especially benefit the LGBT community.¹³¹

a. Dissemination of the EEO Policy

Internal dissemination of the EEO policy is paramount, especially in the form of supervisory and employee trainings. In contrast to trainings on sexual harassment (which most employees likely have seen during their career), equal employment for LGBT individuals is a wholly new concept for many businesses.¹³² Additionally, contractors should be required to post the EEO policy on bulletin boards.

With regard to external dissemination, all purchase orders, leases,

128. *Id.* § 60-50.

129. *Id.* § 60-20.3(g).

130. *See infra* Parts III.C.1.a-c.

131. As noted above, LGBT individuals should recognize that availing themselves of these action-orientated programs will reveal their LGBT status and potentially subject them to discrimination for which there is no remedy at law. *See supra* Part III.B.2.

132. Of Fortune 500 companies, 52% provide training that includes topics on sexual orientation and 42% provide training that includes topics on gender identity/expression. *Diversity Training on Sexual Orientation and Gender Identity Issues*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/diversity-training-on-sexual-orientation-and-gender-identity-issues> (last visited Dec. 16, 2012).

contracts, and employment applications should include the EEO policy. Similarly, contractors should send the EEO policy to all subcontractors, vendors, and suppliers. Employment advertisements should state that the contractor does not discriminate on the bases of sexual orientation or gender identity/expression, and contractors should direct all advertising media not to place help-wanted advertisements in columns that discriminate against LGBT individuals.

b. Recruitment, Hiring, and Advancement in Employment

The best way to increase the number of LGBT applicants is to target the LGBT community. Contractors should reach out to the growing number of LGBT-focused career fairs,¹³³ job banks,¹³⁴ and professional and student organizations.¹³⁵ Moreover, they should place a reasonable proportion of their advertising in media directed at LGBT individuals. Finally, contractors should train human resources personnel to avoid interviewing or recruiting techniques that may not be reasonably related to job performance and unintentionally cause an adverse impact against LGBT applicants.¹³⁶

In addition to augmenting the number of LGBT applicants, contractors should endeavor to retain and promote applicants who become employees. To that end, they should adopt policies that promote LGBT individuals in the workplace, without causing a disadvantage to any non-LGBT employee. Many contractors already have adopted policies that achieve this goal pursuant to AAPs required by state or local laws.¹³⁷ For example, contractors should post jobs internally; implement formal employee evaluation programs; and require managers to submit written justifications for their decision when apparently qualified, openly

133. See, e.g., *LGBT Professional Recruitment Events*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/lgbt-professional-recruitment-events> (last visited Dec. 12, 2012).

134. See, e.g., LGBT CAREER LINK, <http://lgbtcareerlink.com> (last visited Dec. 12, 2012); THE TRANSGENDER JOB BANK, <http://www.tjobbank.com> (last visited Dec. 12, 2012).

135. See, e.g., *About NGLCC*, NAT'L GAY & LESBIAN CHAMBER OF COMMERCE, <http://www.nglcc.org/about/overview> (last visited Dec. 12, 2012); *LGBT Professional and Student Associations*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/lgbt-professional-and-student-associations> (last visited Dec. 12, 2012).

136. For example, an employer's preference for married applicants based on a belief that marriage is a sign of stability and dedication may have an adverse impact against homosexual applicants who may be unable to marry in the employer's state.

137. See Christy Mallory & Brad Sears, *An Evaluation of Local Laws Requiring Government Contractors to Adopt LGBT-Related Workplace Policies*, 5 ALB. GOV'T L. REV. 478, 481 n.10, 494-98 (2012).

LGBT employees are passed over for advancement, favorable transfer, or training.

c. Separation from Employment

When an openly LGBT employee is terminated, contractors should take steps to root out the cause of the termination to ensure that LGBT discrimination was not the cause. To accomplish this, contractors should conduct exit interviews and attempt to determine the reasons for the termination. Moreover, they should counsel openly LGBT employees about unsatisfactory job performance prior to termination and provide an opportunity for the employee to correct his or her performance.

This program kills two birds with one stone. On the one hand, it takes steps to further the goals of the EEO policy. On the other hand, it shields the contractor from potential liability in states and municipalities that afford employees private rights of action in cases of adverse employment decisions (i.e., terminations) based on sexual orientation or gender identity/expression. Where a contractor documents why an employee was lawfully terminated, that contractor increases its chances of successfully fending off a lawsuit or charge from a state or city agency that enforces employment discrimination laws.

2. LGBT Discrimination

LGBT employees face a myriad of workplace issues that are foreign to non-LGBT employees. Many employers, however, retain traditional workplace policies that impact LGBT employees in a discriminatory manner. To decrease the incidence of such LGBT discrimination, LGBT AAPs should require contractors to adopt the following policies.

a. Domestic Partnership Benefits

The sentiment animating a model policy providing employees with domestic partnership benefits is simple: all benefits available to married spouses and their children should be available to domestic partners and their children. However, putting this into practice is a challenge. This article offers a roadmap for contractors to offer domestic partner benefits with minimal effort and cost.

Contractors are free to define “domestic partner” as they see fit, so long as that definition does not exclude any employee on the basis of his

or her sexual orientation or gender identity/expression.¹³⁸ The Human Rights Campaign highlights a model domestic partnership benefits definition that excludes couples that, *inter alia*, are not financially interdependent, are legally married, have a blood relationship that would bar marriage, or are in a relationship solely to obtain benefits.¹³⁹ Similarly, the policy can define which “children” are covered, so long as the policy is not discriminatory against LGBT couples.¹⁴⁰ Moreover, domestic partnerships should enjoy the same level of benefits as married couples.

However, domestic partner benefits are taxed, whereas health benefits for federally recognized spouses are not.¹⁴¹ Section 106 of the Internal Revenue Code states that gross income of an employee does not include employer-provided coverage under insurance, including coverage for a spouse or other dependents.¹⁴² Because of section 3 of the Defense of Marriage Act (“DOMA”), homosexual domestic partners are not “spouses” under federal law.¹⁴³ As such, the only way domestic partner benefits are non-taxable would be if the domestic partner qualifies as a “dependent” under the IRS’ definition.¹⁴⁴

138. This article supports equal access to domestic partnership benefits for same-sex and opposite-sex couples alike. Under current federal law, however, it is lawful for an employer to limit domestic partnership benefits to same-sex couples. *Cleaves v. City of Chicago*, 68 F. Supp. 2d 963, 966-67 (N.D. Ill. 1999); *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 330 (S.D.N.Y. 1999). Yet, such a limitation would likely run afoul of an LGBT AAP’s EEO clause prohibiting sexual orientation discrimination. See *Ayyoub v. City of Oakland*, No. 99-02937 (Cal. State Labor Comm’r Oct. 27, 1997) (employer’s limitation of domestic partnership benefits to same-sex couples was unlawful sexual orientation discrimination). Moreover, such a prohibition likely would constitute unlawful marital status discrimination in jurisdictions where such discrimination is prohibited. See, e.g., *Cleaves*, 68 F. Supp. 2d at 967 (holding, in *dicta*, that such a limitation would be marital status discrimination).

139. 2001 *Domestic Partner Information*, IMATION, 2, available at <http://www.hrc.org/files/assets/resources/Sample-Policies-Imation.pdf> (last visited Dec. 12, 2012).

140. For example, a domestic partnership policy that covers biological children of both spouses, but does not cover biological children of one spouse or adopted children, would preclude coverage of homosexual domestic partners’ children while covering heterosexual married couples’ and heterosexual domestic partners’ children. This sort of coverage would be inappropriate because it adversely affects LGBT couples on the basis of their inability to conceive children, thereby singling them out on the basis of their sexual orientation.

141. See e.g., Erik Carter, *In a Nontraditional Relationship? Beware These 7 Financial Pitfalls*, FORBES (May 30, 2012, 9:53 AM), <http://www.forbes.com/sites/financialfinesse/2012/05/30/in-a-nontraditional-relationship-beware-these-7-financial-pitfalls/>.

142. I.R.C. § 106(a) (2012); 26 U.S.C. § 106(a) (2006).

143. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006)).

144. See I.R.C. §§ 152(a), (d) (defining a “dependent” as either a qualifying child or a qualifying relative, while requiring a qualifying relative to be either: (A) a child or a descendant of a

Pursuant to section 152 of the Internal Revenue Code, the term “dependent” includes a “qualifying relative.”¹⁴⁵ An LGBT domestic partner is a qualifying relative only if four criteria are met.¹⁴⁶ In contrast, spouses need not meet these four criteria.¹⁴⁷ Under DOMA, this inequality in taxation is unavoidable. As the Center for American Progress and the Williams Institute aptly put it, employees in same-sex domestic partnerships faced with the decision of whether to enroll in a domestic partner benefits program are “[t]axed if you do, uninsured if you don’t.”¹⁴⁸ Therefore, employers should offer domestic partner benefits programs, but notify employees that the IRS – and many states – will tax these benefits as income earned.

Moreover, because the IRS views such healthcare insurance benefits as imputed income, they increase the employee’s total taxable income.¹⁴⁹ This increases the employer’s federal Social Security (“FICA”) and unemployment insurance (“FUTA”) taxes.¹⁵⁰ Therefore, not only would contractors face increasing costs borne of covering premiums under a domestic partnership benefits policy, but FICA and FUTA costs also would increase. At first blush, this may appear to dramatically increase the total cost employers can anticipate bearing upon adopting a domestic partner benefits policy. In reality, however, the total financial impact on the majority of employers is less than 1% of total benefits cost.¹⁵¹ Moreover, there is no evidence that domestic

child; (B) a brother, sister, stepbrother, or stepsister; (C) the father or mother, or an ancestor of either; (D) a stepfather or stepmother; (E) A son or daughter of a brother or sister of the taxpayer; (F) A brother or sister of the father or mother of the taxpayer; or, (G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law).

145. *Id.* § 152(a)(2).

146. *See id.* § 152(d)(1). First, he or she must have the same principal place of abode as the taxpayer and is a member of the taxpayer’s household for the taxable year of the taxpayer. *Id.* § 152(d)(1)(A) (requiring all qualifying relatives to meet at least one of the criteria in subsection (d)(2)); *id.* § 152(d)(2)(H). Second, his or her gross income for the calendar year in which such taxable year begins must be less than the exemption amount under I.R.C. section 151(d). *Id.* § 152(d)(1)(B). Third, the taxpayer must provide over one-half of his or her support for the calendar year in which such taxable year begins. *Id.* § 152(d)(1)(C). Fourth, he or she must not be a qualifying child of such taxpayer or of any other taxpayer for any taxable year beginning in the calendar year in which such taxable year begins. *Id.* § 152(d)(1)(D).

147. *See supra* text accompanying notes 142-43.

148. M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits*, CTR. FOR AMERICAN PROGRESS & THE WILLIAMS INST., 8 (Dec. 2007), available at http://www.americanprogress.org/issues/2007/12/pdf/domestic_partners.pdf.

149. *Id.* at 4.

150. *See* Taxation of Domestic Partner Benefits, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/taxation-of-domestic-partner-benefits> (last visited Nov. 6, 2012).

151. *Domestic Partner Benefits: Cost and Utilization*, HUMAN RIGHTS CAMPAIGN,

partnership benefits are more costly than spousal benefits.¹⁵²

Finally, contractors must be required to keep confidential all information concerning which employees have enrolled in their domestic partner benefits policy. Without a national nondiscrimination law like ENDA, LGBT employees may decline to enroll in a domestic partner benefits program if they could face lawful discrimination on account of doing so.

b. Family and Medical Leave Time

Under the Family and Medical Leave Act ("FMLA"), private employers with at least fifty employees must give eligible employees up to twelve weeks of unpaid leave time, inter alia, because of the birth or adoption of a child in order to care for that child¹⁵³ and to care for a spouse.¹⁵⁴ Recently, the U.S. Department of Labor clarified that all employees – LGBT and non-LGBT – are legally entitled to take FMLA leave time to care for a child for whom the employee is serving as parent, even if there is no legal or biological relationship to the child.¹⁵⁵ Thus, LGBT employees have equal rights vis-à-vis leave time with respect to caring for children.

However, the FMLA is less generous to same-sex partners. Because section 3 of DOMA precludes federal recognition of same-sex partners as "spouses,"¹⁵⁶ employers covered by the FMLA are required to grant employees time off to care for sick opposite-sex partners, but *not* for sick same-sex partners.¹⁵⁷ The regulations implementing the ENDA Executive Order should fill this gap. Contractors should define "spouses" for purposes of their policies on leave time to include same-

<http://www.hrc.org/resources/entry/domestic-partner-benefits-cost-and-utilization> (last visited Dec. 12, 2012).

152. Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1082 (1990).

153. 29 U.S.C. §§ 2612(a)(1)(A), (B) (2006).

154. *Id.* § 2612(a)(1)(C).

155. *Administrator's Interpretation No. 2010-3*, U.S. DEP'T OF LABOR, WAGE & HOUR DIV. (June 22, 2010), available at http://www.dol.gov/whd/opinion/admin/Intprtn/FMLA/2010/FMLAAI2010_3.pdf; see also *Family and Medical Leave Act: FMLA-Equivalent Benefit for LGBT Workers*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/family-and-medical-leave-act-fmla-equivalent-benefit-for-lgbt-workers> (last visited Dec. 12, 2012).

156. See *supra* note 143.

157. Alana M. Bell & Tamar Miller, *When Harry Met Larry and Larry Got Sick: Why Same-Sex Families Should Be Entitled to Benefits under the Family and Medical Leave Act*, 22 HOFSTRA LAB. & EMP. L.J. 276, 281 (2004).

sex domestic partners. LGBT couples in a domestic partnership would have the same right to take leave time to care for their partner as heterosexual couples in a marriage or domestic partnership. The additional cost to contractors would be minimal.¹⁵⁸

An additional problem presents itself in the form of medical leave for individuals with Gender Identity Disorder (“GID”) who undergo sex transitions. The FMLA also permits an employee to take leave time “[b]ecause of a *serious health condition* that makes the employee unable to perform the functions of the position of such employee.”¹⁵⁹ A “serious health condition” is defined as an “illness . . . , impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider.”¹⁶⁰ Under these definitions, a contractor could conceivably deny FMLA leave time to an employee with GID on the (erroneous) ground that a sex transition is an elective procedure, rather than a necessary medical procedure.

For decades, the medical community has defined GID as a mental condition.¹⁶¹ There should be no debate that GID necessitating a sex transition is a serious health condition within the meaning of the FMLA. To ensure no debate over this point, LGBT AAPs should require contractors to clarify within their leave time policy that GID resulting in a sex transition is a serious health condition within the meaning of the FMLA.

c. Transgender-Inclusive Health Insurance Benefits

Treatments and services related to sex affirmation or reassignment are medically necessary.¹⁶² Nevertheless, “[t]he vast majority of

158. *Id.* at 309-10.

159. 29 U.S.C. § 2612(a)(1)(D) (2006) (emphasis added).

160. *Id.* § 2611(11).

161. See THE ICD-10 CLASSIFICATION OF MENTAL AND BEHAVIORAL DISORDERS: CLINICAL DESCRIPTIONS AND DIAGNOSTIC GUIDELINES § F64 (World Health Org. 10th ed. 1992); DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.85 (Am. Psychiatric Ass’n 4th ed. 1994).

162. See *Davidson v. Aetna Life & Cas. Ins. Co.*, 420 N.Y.S.2d 450, 453 (N.Y. Sup. Ct. 1979); Hazel Glenn Beh, *Sex, Sexual Pleasure, and Reproduction: Health Insurers Don’t Want You to Do Those Nasty Things*, 13 WIS. WOMEN’S L.J. 119, 153-54 (1998); *WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, 1 (June 17, 2008), available at <http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf>; *Transgender Medical Treatment: Medically Necessary and Not Cosmetic*, HUMAN RIGHTS CAMPAIGN (Apr. 28, 2010), <http://www.hrc.org/resources/entry/transgender-medical-treatment-medically-necessary-and->

commercial health insurance plans in the United States exclude all or most coverage for treatment related to gender transition.”¹⁶³ Therefore, LGBT AAPs should prohibit contractors from enrolling in any health insurance plan that does not cover treatments and services related to sex affirmation or reassignment.¹⁶⁴ Similarly, contractors should be barred from enrolling in plans that do not cover hormone therapy, orchidectomies, or vaginoplasties for employees undergoing sex affirmation or reassignment, coverage of which is often denied by insurance companies.¹⁶⁵

Moreover, transsexual employees can develop medical complications associated with their birth sex. For example, a male-to-female employee could develop prostate cancer and a female-to-male employee could develop cervical cancer.¹⁶⁶ However, insurance companies may deny claims for treatment of such diseases the insurer learns the employee is transsexual.¹⁶⁷ Contractors should be barred from enrolling in any plan that denies to transitioning or post-operative transsexual employees coverage for treatment associated with their pre-transitioning or pre-operative sex.

Transgender-inclusive health insurance benefits are not costly. As the Human Rights Campaign recognizes, only a small percentage of employees will require such benefits; the most significant costs (e.g., sex reassignment surgeries) are one-time costs; the total cost of transgender-specific care is estimated to be between \$25,000 and \$75,000, far less than other costly medical procedures or drugs; and transgender employees cost-prohibited from transitioning often suffer other costly conditions, such as depression, as a result of not being able to transition.¹⁶⁸ Providing transgender-inclusive health insurance benefits

not-cosmetic.

163. *Health Insurance Discrimination for Transgender People*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/health-insurance-discrimination-for-transgender-people> (last visited Dec. 12, 2012).

164. Whether an employer should provide health insurance benefits at all is beyond the scope of this article. This article argues merely that, if an employer opts to provide such benefits, it should not provide medically necessary benefits on the basis of whether an employer is transgender (e.g., by providing some medically necessary treatments and services, yet denying treatments and services related to sex affirmation or reassignment).

165. Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 96-98 (2002).

166. *Transgender Health Resources*, AM. MED. STUDENT ASS'N, <http://www.amsa.org/AMSA/Homepage/About/Committees/GenderandSexuality/TransgenderHealthCare.aspx> (last visited Dec. 12, 2012).

167. Hong, *supra* note 165, at 96-97 (“[E]xclusionary clauses . . . are being broadly applied to deny transsexuals medical care for non-transitional related conditions they will or have acquired.”).

168. *Are Transgender-Inclusive Health Insurance Benefits Expensive?*, HUMAN RIGHTS

would alleviate costs to transgender employees who disproportionately suffer from poverty and high unemployment rates as compared to non-LGBT employees.¹⁶⁹

d. Restroom Access for Transgender Employees

Most employee handbooks do not include guidelines on restroom access because, for most employees, the decision of which restroom to use has never been an issue. However, transgender employees face this question head-on. Ideally, contractors should provide sex-neutral restrooms for all employees so as to give any transgender employees full privacy and discretion when using the restroom. However, not all facilities have sex-neutral restrooms, and not all contractors have the financial capability to provide them. Therefore, the regulations implementing the ENDA Executive Order should require contractors to adopt a policy on restrooms that allows employees to use sex-segregated facilities corresponding to his or her gender expression.

e. Dress Code

Dress-code policies have long been used in workplaces.¹⁷⁰ However, the application of dress codes to transgender employees can be challenging.¹⁷¹ Many contractors enforce a sex-neutral dress code that requires all employees, regardless of sex, to wear certain clothing. Some contractors, however, enforce a sex-specific dress code – a policy that specifies how men should dress and how women should dress. In either case, transgender employees are often left without guidance. The regulations implementing the ENDA Executive Order should require contractors to adopt a policy that assures transgender employees the right to dress in conformance with their gender expression.¹⁷² Thus,

CAMPAIGN, <http://www.hrc.org/resources/entry/are-transgender-inclusive-health-insurance-benefits-expensive> (last visited Dec. 12, 2012).

169. Laura F. Redman, *Outing the Invisible Poor: Why Economic Justice and Access to Health Care is an LGBT Issue*, 17 GEO. J. ON POVERTY L. & POL'Y 451, 452-54 (2010).

170. Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance & Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535, 536 n.8 (2007).

171. See *id.* at 537 ("Mandating conformity to the gender paradigm through compulsory appearance codes . . . penalizes individuals who fail to conform to stereotypical norms and perpetuates the existence of traditional gender identity and behavioral norms that devalue women, feminize men, and sexual minorities.").

172. For a general discussion of the issues facing transgender employees with respect to dress codes and a discussion of how an employer could best address those issues, see *Workplace Dress Codes and Transgender Employees*, HUMAN RIGHTS CAMPAIGN,

dress codes should be sex-neutral to the extent possible. Contractors must be required to clarify that no employee shall be deemed to be noncompliant with the dress code on the basis of that employee's gender expression. Alternatively, where sex-specific dress codes are a business necessity, contractors should be required to allow employees to follow the dress code for the sex corresponding to the employee's gender expression.

f. Transitioning Policy

LGBT AAPs should require contractors to establish a policy for handling an employee who is undergoing a sex transition. Although the regulations should recognize that the details of such a policy will vary from contractor to contractor, most policies should include the following key elements. Foremost, contractors should assure transitioning employees that, pursuant to federal law, their medical information (including whether they have been diagnosed with GID) will be kept confidential.¹⁷³ Next, a supervisor should be in charge of helping the transitioning employee manage his or her transition; notify the transitioning employee, as well as his or her supervisors and colleagues, of what to expect during the transition and how to conduct themselves; and answer the employee's questions concerning transition (*i.e.*, restroom use and dress code).¹⁷⁴

Additionally, LGBT AAPs should require contractors to take steps to ensure that once the employee has completed transitioning, the employee's official personnel folder and other employee records are changed to reflect the employee's new sex and, as applicable, new name.¹⁷⁵ These policies will afford transgender employees the comfort and support of knowing that, if and when they transition sexes, their employer will support them throughout the process.

<http://www.hrc.org/resources/entry/workplace-dress-codes-and-transgender-employees> (last visited Dec. 12, 2012).

173. 5 U.S.C. § 552a(b) (2006).

174. See generally *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/diversity/Transgender/Guidance.asp> (last visited Dec. 12, 2012); *Workplace Gender Transition Guidelines*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/workplace-gender-transition-guidelines> (last visited Dec. 12, 2012); *Policy FAQ for Employers of Transgender Workers*, TRANSGENDER AT WORK, [http://www.tgender.net/taw/policyfaq.html#Transition Planning](http://www.tgender.net/taw/policyfaq.html#Transition%20Planning) (last visited Dec. 12, 2012).

175. See 5 U.S.C. § 552a(d).

IV. CONCLUSION

If the President's signature of the ENDA Executive Order precedes a federal law barring employment discrimination on the basis of sexual orientation and gender identity/expression, the regulations implementing the order should not require contractors to perform any statistical analyses with respect to LGBT applicants and employees. Similarly, no Utilization Analysis should be undertaken until accurate demographic data is available from the U.S. Census Bureau or a similarly reputable source.

The regulations implementing the ENDA Executive Order should require only that contractors create and maintain an AAP with five sections. Three – *Designation of Responsibility*, *Periodic Internal Audits*, and *Identification of Problem Areas* – should parallel their counterpart components required by the regulations implementing Executive Order 11,246. Moreover, the AAP should include an *Action-Oriented Programs* component that contains programs unique to the LGBT community.¹⁷⁶ Finally, the AAP should include a stand-alone section entirely devoted to LGBT discrimination.¹⁷⁷

If crafted properly, the regulations implementing the ENDA Executive Order will avoid overburdening contractors while taking a significant and necessary step towards nationwide equality for LGBT individuals.

176. See *supra* note 124 and accompanying text.

177. See *supra* Section II.C.2.

