



MODEL EMPLOYMENT POLICIES FOR FEDERAL CONTRACTORS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY



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OCTOBER 2015

This document provides model policies for federal contractors, subcontractors, and federally-assisted contractors (collectively, “federal contractors”) to comply with Executive Order (“EO”) 11246 and other laws prohibiting sexual orientation and gender identity discrimination in employment. As explained in Part I, federal contractors are prohibited by executive order from engaging in sexual orientation and gender identity discrimination. In addition, federal courts and agencies are increasingly concluding that Title VII’s prohibition on sex discrimination covers sexual orientation and gender identity discrimination and a growing number of state and local laws prohibit also such discrimination.

These model policies are intended to enable federal contractors to both comply with EO 11246 and its implementing regulations but also deter discrimination and harassment against lesbian, gay, bisexual, and transgender (“LGBT”) employees and create a workplace that is accepting of LGBT workers. Williams Institute research has shown that adopting LGBT-supportive policies makes good business sense. Specifically, LGBT-supportive policies have been linked to greater job commitment, improved workplace relationships, increased job satisfaction, and improved health outcomes among LGBT employees.¹ Employers often choose to adopt LGBT-supportive policies voluntarily because of these benefits and others such as the ability to recruit and retain the best talent. Research has found that among the top corporate employers with LGBT-supportive policies in the United States, over half stated that they adopted the policies for economic reasons.²

These model policies are based on our review and analysis of (1) applicable federal laws, including executive orders, regulations, and guidance from the Office of Federal Contract Compliance Programs of the U.S. Department of Labor; (2) decisional law from courts and the U.S. Equal Employment Opportunity Commission (“EEOC”), the federal agency charged with enforcing Title VII; (3) existing employment policies of fifty major federal contractors;³ and (4)

¹ M.V. Lee Badgett, Laura E. Durso, Angeliki Kastanis & Christy Mallory, *The Business Impact of LGBT-Supportive Workplace Policies* (The Williams Institute, 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-Report-May-2013.pdf>.

² Brad Sears & Christy Mallory, *Economic Motives for Adopting LGBT-Related Workplace Policies* (The Williams Institute, 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf>.

³ Specifically, we reviewed the employment policies of the following federal contractors: Lockheed Martin Corporation; The Boeing Company; Raytheon Company; General Dynamics Corporation; Northrop Grumman Corporation; Saic Inc.; Huntington Ingalls Industries Inc.; L-3 Communications Holdings Inc.; United Technologies Corporation; Bae Systems Plc; McKesson Corporation; Bechtel Group Inc.; Veritas Capital Fund II L.P.; Humana Inc.; Computer Sciences Corporation; Booz Allen Hamilton Holding Corporation; Urs Corporation; Health Net Inc.; Hewlett-Packard Company; Textron Inc.; General Electric Company; Babcock & Wilcox Company; Exelis Inc.; Harris Corporation; Fluor Corporation; General Atomic Technologies Corporation; Battelle Memorial Institute Inc.; Caci International Inc.; Bell Boeing Joint Project Office; Los Alamos National Security Llc; Supreme Group Holding Sarl; Honeywell International Inc.; Triwest Healthcare Alliance Corp.; Oshkosh

feedback from a number of stakeholders, including employment discrimination attorneys and human resource professionals.

I. BACKGROUND

A. Executive Orders 13672 and 11246 Prohibit Sexual Orientation and Gender Identity Discrimination by Federal Contractors, Subcontractors, and Federally-Assisted Contractors

In July 2014, President Obama signed Executive Order (“EO”) 13672, which prohibits employment discrimination based on sexual orientation and gender identity by federal contractors.⁴ EO 13672 amends EO 11246, which, as amended, prohibits employment discrimination based on race, color, religion, sex, sexual orientation, gender identity, and national origin by federal contractors.⁵ The Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) – which enforces EOs 13672 and 11246 – issued final regulations implementing EO 13672 on December 9, 2014.⁶ The regulations went into effect on April 8, 2015, meaning the rules apply to federal contractors with contracts entered into or modified on or after April 8, 2015.⁷

Under EO 11246 and the implementing regulations, federal contractors agree to not discriminate against any employee or applicant for employment because of sexual orientation or gender identity; agree to take affirmative action to ensure applicants and employees are treated without regard to sexual orientation or gender identity;⁸ and must include sexual orientation and

Corporation; California Institute Of Technology; Sierra Nevada Corporation; United Launch Alliance L.L.C.; Alliant Techsystems Inc.; Jacobs Engineering Group Inc.; Amerisourcebergen Corporation; Lawrence Livermore National Security Llc; Merck & Co. Inc.; Mantech International Corporation; Coins 'N Things Inc.; Refinery Associates Of Texas Inc; Unitedhealth Group Incorporated; International Business Machines Corporation; Ut-Battelle Llc; The Mitre Corporation; and Cardinal Health.

⁴ Exec. Order No. 13672, 79 Fed Reg. 42,971 (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf>

⁵ Exec. Order No. 11246, <http://www.dol.gov/ofccp/regs/statutes/eo11246.htm> (as amended).

⁶ Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72,985 (2014) (to be codified at 41 C.F.R. pt. 60-1, 60-2, 60-4, 60-50), <http://www.gpo.gov/fdsys/pkg/FR-2014-12-09/pdf/2014-28902.pdf>.

⁷ *Id.* at 72,985.

⁸ 41 C.F.R. part 60-1.4(a)(1) and (b)(1).

gender identity in the equal employment opportunity clause provided on all job solicitations and advertisements.⁹

Additionally, OFCCP issued a directive on August 19, 2014 clarifying that discrimination on the basis of gender identity or transgender status is a form of sex discrimination, consistent with the EEOC's decision in *Macy v. Holder* (discussed below in Part I.B).¹⁰ OFCCP is also currently updating the regulations implementing EO 11246's prohibition on sex discrimination. The proposed rule published in January 2015 would adopt OFCCP's directive on gender identity discrimination as sex discrimination noted above,¹¹ and would clarify that "employment decisions made on the basis of stereotypes about how males and/or females are expected to look, speak, or act are a form of sex-based employment discrimination."¹² The final version of the rule is expected in late 2015.

OFCCP is authorized to conduct evaluations to determine if a federal contractor is in compliance with EO 11246.¹³ OFCCP also accepts and will investigate complaints alleging sexual orientation or gender identity discrimination by a federal contractor.¹⁴ Such a complaint generally must be filed within 180 days from the date of the alleged discrimination.

If a contractor fails to comply with the requirements of EO 11246, OFCCP can impose a range of sanctions, including the suspension or termination of a contract and the debarment of a company from receiving future government contracts.¹⁵ OFCCP may also obtain relief to victims of discrimination such as back pay for lost wages.¹⁶ Other federal agencies, such as the

⁹ 41 C.F.R. part 60-1.4(a)(1) and (b)(2); *see also* 41 C.F.R. part 60-1.41.

¹⁰ Office of Federal Contract Compliance Programs, U.S. Department of Labor, "Gender Identity and Sex Discrimination," Dir 2014-02, http://www.dol.gov/ofccp/regs/compliance/directives/Directive_2014-02_508c.pdf.

¹¹ 80 Fed. Reg. 5246, 5253 (2015), <http://www.gpo.gov/fdsys/pkg/FR-2015-01-30/pdf/2015-01422.pdf>.

¹² *Id.* at 5258.

¹³ 41 C.F.R. part 60-1.20.

¹⁴ 41 C.F.R. part 60-1.21. Complaints to OFCCP can be filed electronically here: <http://www.dol.gov/ofccp/regs/compliance/pdf/pdfstart.htm>.

¹⁵ 41 C.F.R. part 60-1.27; EO 11246 § 209.

¹⁶ 41 C.F.R. part 60-1.26(a)(2).

EEOC and the Department of Justice, may also have jurisdiction over a complaint of discrimination by a federal contractor.¹⁷

B. An Increasing Number of Courts and Agencies Are Concluding that Gender Identity and Sexual Orientation Discrimination Are Forms of Sex Discrimination Prohibited by Title VII

Title VII of the Civil Rights Act of 1964 is the federal statute that prohibits employment discrimination by private employers. At present, Title VII does not explicitly enumerate sexual orientation or gender identity as prohibited bases of discrimination.¹⁸ Title VII does, however, prohibit sex discrimination, such as denying someone a job or a promotion because she is a woman or he is a man.¹⁹ For many years, courts consistently rejected discrimination claims under Title VII brought by LGBT people, concluding that they had been discriminated against on account of their sexual orientation or gender identity, and that such discrimination was not unlawful and could not be bootstrapped to protections against sex discrimination.²⁰

In 1989, in *Price Waterhouse v. Hopkins*, the Supreme Court held that sex discrimination includes gender discrimination, such as penalizing or harassing someone for not conforming to gender norms and stereotypes.²¹ After *Price Waterhouse*, gender must be irrelevant to employment decisions (except in narrow exceptions) and employers cannot consider gender-based norms, stereotypes, expectations, or preferences in making employment decisions.²² In 1998, in *Oncale v. Sundowner Offshore Services*, the Supreme Court held that sex discrimination

¹⁷ See, e.g., EO 11246 § 209(2)-(4); see also Memorandum of Understanding and Coordination of Functions Between the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, 76 Fed. Reg. 71,029 (2011), <http://www.gpo.gov/fdsys/pkg/FR-2011-11-16/pdf/2011-29568.pdf>.

¹⁸ See 42 U.S.C. § 2000e-2(a)(1).

¹⁹ *Id.*

²⁰ See, e.g., *Williamson v. A.G. Edward and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (“Title VII does not prohibit discrimination against homosexuals.”); *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1985) (holding Title VII “is not so expansive in scope as to prohibit discrimination against transsexuals”); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979) (concluding that “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality” and rejecting argument that Title VII prohibited sex-stereotyping related to “effeminacy”).

²¹ 490 U.S. 228, 239, 241-42 (1989).

²² *Id.* at 240-42 & 250-51; see, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

includes same-sex sexual harassment, and observed that Title VII may “go beyond the principal evil” Congress contemplated when enacting that law.²³

Following *Price Waterhouse* and *Oncale* – and as our understanding of gender identity and expression has increased – a growing number of courts and government agencies are concluding that discrimination based on an individual’s gender identity or expression – including transition from one gender to another, identification as transgender, or non-conformity with gender norms – is a form of sex discrimination prohibited by Title VII.²⁴ As the U.S. Court of Appeals for the Eleventh Circuit explained, “the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.”²⁵ Most courts and agencies that have interpreted existing sex discrimination protections to cover discrimination based on gender identity or expression have relied on a gender stereotyping theory that transgender and gender non-conforming individuals are protected from discrimination based on their deviation, or perceived deviation, from gender stereotypes. In 2012, however, the EEOC clarified in *Macy v. Holder* that a person facing gender identity or expression discrimination may (but need not) rely on evidence of gender stereotyping.²⁶ The ultimate question under Title VII is whether sex or gender was a motivating factor of the discrimination. Thus, for example, a transgender job applicant may prove sex discrimination with evidence that her prospective employer was willing to hire her when the employer thought she was a man, but was unwilling to hire her once discovering she was now a woman, regardless of whether the employer acted upon gender stereotypes.²⁷

Similarly, courts and government agencies have regularly held post-*Price Waterhouse* and *Oncale* that LGB people are protected by Title VII from sex discrimination including sexual harassment and gender stereotyping.²⁸ And while some of those courts have stated that “a

²³ 523 U.S. 75, 78-80 (1998).

²⁴ See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 736-37 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 571-75 (6th Cir. 2004); *Schwenk*, 204 F.3d at 1201-02; *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Lopez v. River Oaks Imaging Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008).

²⁵ *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

²⁶ *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *10 (E.E.O.C. Apr. 20, 2012).

²⁷ *Id.*

²⁸ See, e.g., *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 289-92(3d Cir. 2009); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 463-64 (6th Cir. 2006); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1065-68 (9th Cir. 2002) (*en banc*); *id.* at 1068-69 (Pregerson, J. concurring); *Nichols v. Azteca Rest. Enterprises Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037-38 (N.D. Ohio 2012).

gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII,”²⁹ an increasing number courts and agencies are revisiting that view and holding that discrimination related to an individual’s sexual orientation can be driven by gender-based norms and stereotypes. As one court explained, “sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms . . . [and] stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women.”³⁰ Similarly, the EEOC has ruled in several federal-sector cases that discrimination on the basis of sexual orientation could establish violations of Title VII based on the gender-stereotyping theory that men and women should be sexually attracted to (and should marry) individuals of a different sex.³¹ And in 2015, in *Baldwin v. Foxx*, the EEOC went further and held that sexual orientation discrimination is per se sex discrimination.³² In this line of decisions, courts and others recognize that sexual orientation cannot be defined or understood without reference to sex and gender; discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms; and sexual orientation discrimination is sex discrimination because it is associational discrimination on the basis of sex.³³

Additionally, in a separate line of inquiry, a small but growing number of courts recognize that individuals who complain about sexual orientation discrimination are protected from retaliation under Title VII, because they have at least an objectively reasonable belief that

²⁹ *Vickers*, 453 F.3d at 764 (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)).

³⁰ *Centola v. Potter*, 183 F. Supp. 2d 403, 406-410 (D. Mass. 2002); see, e.g., *Videckis v. Pepperdine University*, No. CV 15-00298, 2015 WL 1735191, at *8 (C.D. Cal. 2015) (Title IX) (“The law is rapidly developing and far from settled insofar as determining where sexual orientation discrimination lies within the framework of gender-based discrimination. Recent Ninth Circuit cases suggest that the distinction between sexual orientation discrimination and sexual discrimination is illusory. Furthermore, discrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination even if such discrimination were not based explicitly on gender stereotypes.”); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (holding sufficient to state a Title VII claim plaintiffs’ allegation that he is “a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles” (quoting complaint)); *Boutillier v. Hartford Pub. Sch.*, No. 3:13CV1303 WWE, 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014) (similar); *Hall v. BNSF Ry. Co.*, No. 13-2160, 2014 WL 4719007 (W.D. Wash., Sept. 22 2014).

³¹ See, e.g., *Baker v. Soc. Sec. Admin.*, Appeal No. 0120110008, 2013 WL 1182258, at *5-*6 (E.E.O.C. Jan 11, 2013); *Veretto v. Donahoe*, Appeal No. 0120110873, 2011 WL 2663401, at *3 (E.E.O.C. July 1, 2011).

³² *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *4-*8 (E.E.O.C. July 15, 2015).

³³ *Id.* (collecting and discussing cases).

Title VII prohibits such discrimination (even if that belief is wrong).³⁴ In *Birkholz v. City of New York*, for example, the court denied summary judgment to an employer on a retaliation claim, holding that “making a complaint against discrimination based on sexual orientation can constitute protected activity under Title VII.”³⁵

C. Other Applicable Laws

The above discussion focuses on two principal sources of federal law prohibiting sexual orientation and gender identity discrimination in private employment (EO 11246 and Title VII). In addition to these sources of law, sexual orientation and gender identity employment discrimination may be prohibited by other applicable laws, including state and local laws. At present, 22 states and Washington, D.C. prohibit by statute sexual orientation discrimination in private employment;³⁶ and 19 states and Washington, D.C. prohibit by statute gender identity discrimination in private employment.³⁷ In addition, hundreds of counties and cities across the country have local ordinances prohibiting sexual orientation and gender identity discrimination in employment.

II. MODEL POLICIES

The following model policies are intended to assist federal contractors in complying with the federal prohibitions on sexual orientation and gender identity discrimination discussed above. Below, we provide the following model policies: (A) general non-discrimination policies, an Equal Employment Opportunity (EEO) clause, and definitions of sexual orientation, gender identity, gender expression, and transgender; (B) policy for benefits; (C) policy regarding non-marital statuses; (D) policy regarding data collection; (E) policies for implementation and outreach; and (F) policies specific to gender identity and transgender individuals.

³⁴ See, e.g., *Dawson v. Entek Int'l*, 630 F.3d 928, 936 (9th Cir. 2011) (“Title VII prohibits an employer from discriminating against an employee for opposing an unlawful employment practice, such as filing a complaint alleging sexual orientation harassment and hostile work environment.”); *Bennefield v. Mid-Valley Healthcare, Inc.*, No. 6:13-cv-oo252-MC, 2014 WL 4187529, at *3 (D. Or. Aug. 21, 2014); cf. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987) (holding plaintiff had a reasonable belief that an English-only workplace directive violated Title VII and, therefore, opposing that directive constituted protected activity, even though directive was not actually prohibited).

³⁵ 2012 WL 580522, at *9 (E.D.N.Y. Feb. 22, 2012).

³⁶ CA, CO, CT, DC, DE, HI, IL, IA, MA, MD, ME, MN, NH, NJ, NM, NV, NY, OR, RI, UT, VT, WA, and WI.

³⁷ CA, CO, CT, DC, DE, HI, IL, IA, MA, MD, ME, MN, NJ, NM, NV, OR, RI, UT, VT, and WA.

A. Model Non-Discrimination Policy³⁸

COMPANY is committed to providing a workplace free from discrimination, harassment, and retaliation.

COMPANY is subject to federal, state, and local laws and presidential executive orders that protect employees and applicants from discrimination, harassment, retaliation, and other prohibited practices. As such, no employee or applicant will be denied equal opportunity because of race, color, religion, sex (including but not limited to pregnancy), national origin, age, disability (physical or mental), genetic information, military or veteran status, sexual orientation, gender identity or expression, or any other basis prohibited by law.

In order to maintain a workplace free from discrimination and harassment, COMPANY will:

1. Recruit, hire, and promote without regard to race, color, religion, sex (including but not limited to pregnancy), national origin, age, disability (physical or mental), genetic information, sexual orientation, gender identity or expression, or any other basis prohibited by law.
2. Administer on a non-discriminatory basis all other aspects of employment including but not limited to compensation, assignments, benefits, transfers, layoffs, demotions, terminations, company-sponsored training programs, social and recreational programs, and other personnel actions.
3. Prohibit, investigate, and remedy discrimination in any form, including but not limited to harassment, threats, violence, bullying, intimidating conduct, and slurs or jokes, based on any protected characteristic.

Further, it is COMPANY's policy to undertake affirmative action in compliance with all federal, state, and local requirements to recruit a diverse pool of applicants, to undertake additional steps to recruit a diverse applicant pool, and to ensure that our employment practices are in fact non-discriminatory.

To better protect all employees and applicants in the exercise of their rights under federal, state, and local laws and presidential executive orders, COMPANY also prohibits its managers,

³⁸ The model non-discrimination policy and EEO statement are based on existing policies of top federal contractors and the U.S. Department of Labor's internal non-discrimination policy. For the U.S. Department of Labor's internal non-discrimination policy, see Thomas E. Perez, Secretary of Labor, U.S. Dep't of Labor, U.S. Dep't of Labor Policy on Equal Employment Opportunity, Feb. 24, 2015, available at <http://www.dol.gov/oasam/programs/crc/crc-internal/2015EEOPolicy.pdf>.

supervisors, and employees from retaliating against any person because they engaged in or may engage in any of the following activities:

1. Filing a complaint.
2. Assisting or participating in an investigation, compliance review, hearing, or any other activity related to the administration of federal, state, or local laws, or presidential executive orders, requiring equal opportunity.
3. Opposing any act or practice made unlawful by – or reasonably reviewed as unlawful under – federal, state, or local laws, or presidential executive orders, requiring equal opportunity.
4. Exercising any other right protected by federal, state, or local laws, or presidential executive orders, requiring equal opportunity.

Every employee is responsible for maintaining a work environment free from discrimination, harassment, and retaliation. Any employee who is found to have violated this policy shall be subject to disciplinary action up to and including termination of employment.

Any employee who feels that he or she has been treated contrary to this policy should follow the complaint process established by the COMPANY or otherwise contact his or her supervisor, any member of the Human Resources Department, or any member of management, up to and including the CEO.

All concerns regarding violations of these policies will be thoroughly investigated, and appropriate corrective action will be taken. All personnel are required to support our commitment to COMPANY's policies by preventing and addressing discrimination and harassment. Leaders should understand and communicate COMPANY policies and procedures, identify potential problems, and implement effective and corrective action when indicated.

COMPANY is a federal contractor subject to Executive Order 11246 (as amended), Section 4212 of the Vietnam Era Veteran's Readjustment Assistance Act of 1974 (as amended), and Section 503 of the Rehabilitation Act of 1973 (as amended). As a government contractor, COMPANY is also obliged to keep records, make reports to the federal government, develop written Affirmative Action Programs, and otherwise document the results of our good faith efforts to ensure equality of employment opportunity.

Model Equal Employment Opportunity Clause:

COMPANY is an equal opportunity employer. We provide equal opportunities to all qualified employees and applicants for employment without regard to race, color, religion, sex (including but not limited to pregnancy), national origin, age, disability (physical or mental), genetic information, military or veteran status, sexual orientation, gender identity or expression, or any

other basis prohibited by law. We prohibit discrimination in recruitment, hiring, compensation, benefits, training, termination, promotions, or any other condition of employment or career development.

Definitions:

Sexual orientation: A person's physical and/or emotional attraction to the same and/or different gender.

Gender identity: An individual's internal, deeply-felt sense of being male, female, or something other or in-between, regardless of the sex the person was assigned at birth.

Gender expression: An individual's characteristics and behaviors (such as appearance, dress, mannerisms, speech patterns, and social interactions) that may be perceived as masculine or feminine.

Transgender: A term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth.

B. Benefits

COMPANY will provide any and all benefits (medical and non-medical) without regard to race, color, religion, sex (including but not limited to pregnancy), national origin, age, disability (physical or mental), genetic information, sexual orientation, gender identity or expression, or any other basis prohibited by law, unless medical need dictates otherwise.³⁹

C. Non-Marital Statuses⁴⁰

COMPANY will not discriminate between lawful marriages, civil unions, or registered domestic partnerships. COMPANY will provide any and all benefits provided to, or related to, the spouse

³⁹ For example, some insurance policies require the insured to try unprotected heterosexual intercourse for a period of time before assisted reproduction technologies (ART) would be covered. *See, e.g.*, http://www.aetna.com/cpb/medical/data/300_399/0327.html. With respect to heterosexuals and bisexuals in heterosexual relationships, this requirement establishes the "medical need" for the ART treatment. With respect to lesbians, gay men, and bisexuals partnered with someone of the same sex, however, this requirement serves no purpose.

⁴⁰ While EO 11246 does not explicitly require federal contractors to treat civil unions and registered domestic partnerships as equal to marriages, not doing so may open employers to liability under a disparate impact theory as well as under state laws that prohibit marital status discrimination or otherwise require equal treatment for those in civil unions or registered domestic partnerships. *See, e.g.*, Cal. Ins. Code § 381.5. In any event, providing equal treatment to civil unions and registered domestic partnerships is a best practice in order for employers to recruit and retain top talent.

of an employee (or a child of the spouse of an employee) to those employees in other legal statuses such as civil unions or registered domestic partnerships.

D. Model Policy for Data Collection on Sexual Orientation and Gender Identity⁴¹

COMPANY may collect data on applicants' and employees' sexual orientation and gender identity when collecting other demographic information, such as race, sex, and national origin. Providing information about sexual orientation and gender identity is voluntary, and refusal to do so will not subject an applicant or employee to adverse treatment. If an employee or applicant declines to provide this information, COMPANY will not attempt to identify the applicant's or employee's sexual orientation or gender identity through visual observation or any other method. Information about applicants' and employees' sexual orientation and gender identity will be kept confidential and used only in ways that are in accordance with federal, state, and local laws, presidential executive orders, and regulations.

E. Implementation and Outreach

COMPANY shall review its employment practices to ensure that employees and applicants for employment are being treated without regard to their sexual orientation and gender identity.⁴² Based upon the findings of such reviews, COMPANY shall undertake appropriate implementation, outreach, and positive recruitment activities, which may include (but are not limited to):

- (1) Internal communication of COMPANY's obligation to provide equal employment opportunity without regard to sexual orientation or gender identity in such a manner as to foster understanding, acceptance, and support among COMPANY's executive, management, supervisory, and all other employees and to encourage such persons to take the necessary action to aid COMPANY in meeting this obligation.

⁴¹ EO 11246 and the implementing regulations do not require federal contractors to collect and submit data regarding employees' and applicants' sexual orientation and gender identity; however, employers may choose to voluntarily collect the data for internal use. Such data collection can be a powerful tool for employers to evaluate whether LGBT applicants and employees are receiving fair consideration for job opportunities. Even employers that already have sexual orientation and gender identity inclusive non-discrimination policies in place may consider adopting our data collection policy as a "best practice."

⁴² See 41 C.F.R. part 60-1.4(a)(1) ("The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin."). The model policy provided here is based on regulations issued by the Office of Federal Contract Compliance Programs, which implement non-discrimination requirements for federal contractors with respect to religion and national origin. 41 C.F.R. § 60-50.2 (2015).

- (2) Development of reasonable internal procedures to ensure that COMPANY's obligation to provide equal employment opportunity without regard to sexual orientation or gender identity is being fully implemented.
- (3) Periodically informing all employees of COMPANY's commitment to equal employment opportunity for all persons, without regard to sexual orientation or gender identity.
- (4) Enlisting the assistance and support of all recruitment sources (including but not limited to employment agencies, college placement directors, and business associates) for COMPANY's commitment to provide equal employment opportunity without regard to sexual orientation or gender identity.
- (5) Reviewing employment records to determine the availability of promotable LGBT employees and to otherwise ensure that LGBT employees are receiving fair consideration for employment opportunities.
- (6) Establishment of meaningful contacts with LGBT organizations and leaders for such purposes as advice, education, technical assistance, and referral of potential employees.
- (7) Engaging in significant recruitment activities with LGBT students enrolled at educational institutions, including campus student groups and associations and conferences for LGBT students.
- (8) Use of the LGBT media for institutional and employment advertising.

F. Gender Identity-Related Policies (adapted from the Transgender Law Center⁴³)

Privacy

Transgender employees have the right to discuss their gender identity or expression openly, or to keep that information private. The transgender employee gets to decide when, with whom, and how much to share their private information.

⁴³ These gender-identity-related model policies are adapted/modified from those of the Transgender Law Center (TLC), which are available <http://translaw.wpengine.com/issues/employment/modelpolicy>. TLC's model policies are utilized here with permission.

Information about an employee's transgender status (such as the sex they were assigned at birth) can constitute confidential medical information under privacy laws like HIPPA.

Management, human resources staff, or coworkers should not disclose information that may reveal an employee's sexual orientation or transgender status to others. That kind of personal or confidential information may only be shared with the employee's consent and with coworkers who truly need to know to do their jobs.

Official Records

COMPANY will change an employee's official record to reflect a change in name or gender upon request from the employee. Certain types of records, like those relating to payroll and retirement accounts, may require a legal name change before the person's name can be changed. Many records, however—such as staff directories, business cards, ID badges, and email addresses—should be changed to reflect a person's preferred name without proof of a legal name change.

In the case of a transitioning employee, COMPANY will, as quickly as possible, make every effort to update any photographs at the transitioning employee's workplace so the transitioning employee's gender identity and expression are represented accurately.

If an employee has questions about company records or ID documents, the employee should contact NAME/DEPARTMENT.

Names/pronouns

An employee has the right to be addressed by the employee's preferred name and by pronouns and other terms of address consistent with the employee's gender identity. A court-ordered name or gender change or other official documentation is not required. The intentional or persistent refusal to respect an employee's gender identity (for example, intentionally referring to the employee by a name or pronoun that does not correspond to the employee's gender identity) can constitute harassment and is a violation of this policy. If you are unsure which pronoun a transitioning co-worker prefers, you can politely ask your co-worker how they would like to be addressed.

Transitioning on the Job

Employees who transition, shift gender expression, or have other matters related to their gender identity on the job can expect the support of management and human resources staff (HR). HR will work with each transitioning employee individually to ensure a successful workplace

transition.⁴⁴ [Insert specific guidelines appropriate to your organizational structure here, making sure they address:

- Who is charged with helping a transitioning employee manage a workplace transition,
- What a transitioning employee can expect from management,
- What management's expectations are for staff, transitioning employees, and any existing lesbian, gay, bisexual, transgender (LGBT) employee resource group in facilitating a successful workplace transition, and
- What the general procedure is for implementing transition-related workplace changes, such as adjusting personnel and administrative records, and developing an individualized communication plan to share information, as appropriate with coworkers and clients.]

Sex-Segregated Job Assignments

For sex-segregated jobs or duties, employees will be classified and assigned in a manner consistent with their gender identity, not their sex assigned at birth. Assignment of job duties or disqualification from a position on the basis of an individual's transgender status, related medical history, or non-conformity with gender stereotypes is not permitted.

Restroom Accessibility

All employees have a right to safe and appropriate restroom facilities, including the right to use a restroom consistent with the employee's gender identity, regardless of the employee's sex assigned at birth. If an employee's gender identity is not male or female, the determination of the appropriate facilities rests with the employee. No proof of gender shall be required to access a facility consistent with one's gender identity. For example, transgender women must be permitted to use the women's restroom, and transgender men must be permitted to use the men's restroom. That decision should be left to the transgender employee to determine the most appropriate and safest option for them.

COMPANY will take steps where practicable to provide single-user restroom facilities when possible, and all single-user facilities will have unisex/gender neutral signage and be available to all employees. These facilities can provide additional privacy for any employee who, regardless of the underlying reason, desires additional privacy. No employee, however, shall be restricted from using common restrooms that are available to other employees.

⁴⁴ A sample transition plan is available at: Transgender Law Center, Model Transgender Employment Policy, <http://translaw.wpengine.com/issues/employment/modelpolicy>.

Locker Room Accessibility

Where locker rooms are provided, all employees have the right to use the locker room consistent with their gender identity. Any employee who requests increased privacy, regardless of the underlying reason, shall be provided with a reasonable alternative, which may include:

- a. Use of a private area within the public area of the locker room (e.g. nearby restroom stall with a door or an area separated by a curtain).
- b. Use of another nearby private area (e.g. nearby restroom).
- c. Separate changing schedule.

Any alternative arrangement for an employee will be provided in a way that allows the employee to keep the reason for the request for increased privacy, such as an employee's transgender status, confidential.

Dress Code

COMPANY does not have dress codes that restrict employees' clothing or appearance on the basis of gender. All employees have the right to comply with company dress codes in a manner consistent with their gender identity or gender expression. Dress codes and/or grooming standards cannot prohibit an individual from maintaining a gender –neutral appearance.

Health Insurance Benefits

COMPANY will only enter into health insurance contracts that include coverage of transition-related care, without any arbitrary or discriminatory restriction. Healthcare plans must provide access to the same benefits for transgender and non-transgender employees, must include coverage for transition-related care, and must not deny or exclude services on the basis of gender identity or related medical conditions.