

The future of executive order banning LGBT discrimination by federal contractors

Thomas Reese | Jun. 20, 2014 Faith and Justice

As the U.S. bishops begin their Fortnight for Freedom, the White House is drafting an [executive order to ban discrimination against gays by federal contractors](#) [1], which will give the bishops heartburn. President Barack Obama wants to issue an executive order because he knows that the Employment Non-Discrimination Act, which passed the Senate last year, is going nowhere in the House. [The bishops opposed ENDA as passed by the Senate](#) [2].

The White House has not said when the order will be issued. The process is in its initial stages, with the White House just beginning to consult interested parties like the bishops.

The timing of the White House announcement was inopportune, to say the least, but the White House was so eager to please gay supporters prior to a fundraiser in New York that it did not care that its announcement came right before the bishops' annual campaign for religious freedom, which begins Saturday and runs through July 4.

Federal contracts involve everything from building multibillion-dollar weapons systems to taking care of refugees accepted into the U.S. Only an extremely small percentage of the U.S. budget involves contracts with religiously affiliated organizations, but it is of great importance to the religious community.

So far, the executive order deals only with contracts, not grants. This is important because most of the money going to Catholic charities to help the poor comes in the form of grants, not contracts. But there is little doubt that if the administration is successful dealing with contracts, grants will soon be on the firing line.

The goal of the White House order is laudable. It would ban discrimination against LGBT people in hiring or employment. There are not many Catholic organizations that discriminate against lesbian, gay, bisexual or transgender applicants in hiring, and those organizations probably don't have federal contracts. Discrimination in hiring because of sexual orientation would, in fact, be against Catholic teaching, which holds that everyone should be treated with respect, recognizing their dignity as a child of God.

Nor, in the past, would most Catholic organizations concern themselves over the sexual activity of gay employees, especially if it was not public. Even if management and fellow employees knew the gay person was in a relationship, most would ignore it since the activity occurred outside of work. Some Catholic organizations, however, would consider such sexual activity grounds for dismissal if it became public.

Now with gay marriage a growing reality, Catholic organizations are faced with job applicants and employees who are in gay marriages, which, by definition, are public. We now hear of diocesan organizations, especially schools, adding language to their employee contracts making clear that such a marriage would be grounds for dismissal.

We also hear of employees, both gay and straight, being fired for advocating gay marriage. This advocacy is rarely for changes in church sacramental practice, but in support of civil gay marriage.

Most importantly, nondiscrimination against gay employees would mean that spousal benefits must be given to spouses of gay employees. This is a bridge too far for the bishops.

"Any nondiscrimination requirement that the church can reasonably interpret as affirming the equal dignity of all persons will likely be fine," explained Professor Cathleen Kaveny of Boston College. "It is when a requirement is perceived as backing the church into a corner, as mandating that it approve of same-sex relations, that the conflicts will start. So a likely flash point will be a requirement to provide health benefits to same-sex married couples."

Cardinal Donald Wuerl of Washington faced this issue in 2010, when the Washington city council ordered city contractors to provide the same benefits to gay spouses that were provided to heterosexuals. Faced with the possibility of losing city contracts that helped pay for services for the poor, [Cardinal Wuerl eliminated spousal benefits for all future employees](#) [3]. This was a solution that pleased no one, including Wuerl, but he felt that giving benefits to gay spouses would be church recognition of these marriages.

Nondiscrimination rules may also create conflict in the workplace. "For example, one might wonder whether a Catholic institution's explicit presentation of official teaching on sexual morality amounts to a hostile work environment for gay and transgendered persons," Kaveny explained. "I see more religious liberty lawsuits on the horizon."

What is unknown at this point is what kind of exemption will be allowed for religious organizations. In rolling out the contraceptive mandate under the Affordable Care Act, [Health and Human Services fumbled the ball badly](#) [4] on exemptions in 2012. Ultimately, churches were exempted, hospitals and universities were covered, and a complicated system was created to make insurance companies (rather than employers) pay for contraceptives if the religious organizations were "integrated auxiliaries," a technical definition under the tax code.

Based on this experience, the administration would have no problem with exempting dioceses and churches. It is doubtful that the administration would go for any exemption that applied to hospitals, colleges and universities, which employ hundreds of thousands of people. But life is not simple. What about colleges that have seminaries as part of their institutions?

The biggest concern will be for Catholic charities with federal contracts to serve the poor and marginalized. Losing these contracts would mean laying off scores of employees and eliminating programs helping the poor. In 2011, the bishops' Migration and Refugee Services [lost a contract with HHS](#) [5] to take care of trafficked people because it would not provide contraceptive and abortion counseling to its clients.

Getting the church out of the business of helping the poor with federal dollars would please secularists who don't think religious groups should be providing social services with government money, but it would be devastating for the poor themselves.

"This would also be a surprising gift by the Obama administration to Republican opponents of social programs and foreign aid," said Professor Vincent Miller of Dayton University. The bishops lobby against cutting foreign aid and programs for the poor. The Republicans "would love to see the bishops get out of the business of assisting and supporting these government programs," he said.

Most of these charities would be considered "integrated auxiliaries," but it is hard to see how the administration

could come up with a plan to have gay spousal benefits paid for by some third party as it did with the contraceptive mandate.

What will be the bishops' reaction to this proposal? Judging by their reaction to the contraceptive mandate, they will want exemptions not only for all religiously affiliated organizations but also for for-profit corporations, like Hobby Lobby, run by believers. Hobby Lobby, a large, family-owned corporation, [went to court](#) [6] challenging specific contraceptives under the contraceptive mandate because the owners consider them abortive and contrary to their evangelical faith.

The U.S. Supreme Court will be deciding this case soon, and if it decides in favor of Hobby Lobby, then it is hard to see how the executive order could survive court scrutiny without the widest possible exemption for believers. If the company loses, we will still have to wait for court review of challenges to the contraceptive mandate from religious organizations.

Many Catholics, including theologians, wonder why the bishops are making such a big deal about gay marriage. These critics point out that Catholic institutions employ heterosexual people who are living in contradiction to church teaching about divorce and cohabitation. Current spouses of divorced and remarried Catholics are not denied benefits, but no one considers this a church endorsement of divorce and remarriage. Why is gay marriage different? they ask.

Theologians also note that the church has long moral tradition on "cooperation with evil," distinguishing between formal and material cooperation, that could allow the bishops to provide spousal benefits in good conscience, especially under compulsion by the state. If the bishops ultimately lose in the courts, this moral tradition could keep Catholic institutions from closing.

But since the bishops do have a problem of conscience, the executive order should provide as wide an exemption as possible. At a minimum, churches and integrated auxiliaries should be exempted. Even a five-year exemption while the question is given further study would be better than nothing. By then, perhaps tempers might have cooled so that wiser heads could find a permanent solution. If not, the temporary exemption could be extended.

"Catholic organizations are on the front line in providing needed public service to the world's poor, sick, and homeless," explained Professor Stephen Schneck of The Catholic University of America. "They provide education for millions of families, from preschool through doctoral programs." He noted that "they do this in part with federal contracts, and it would be really impossible to replace many of these Catholic organizations with new secular ones."

"The coming executive order is wonderfully promising for progress toward ending LGBT discrimination," Schneck said. "But the order should be crafted in such a way that does not undermine the very religious identity that inspires Catholics to create their institutions of public service in the first place. It would be catastrophic for America's and the world's neediest if Catholic institutions had to shut down large portions of their mission because the Obama administration could not figure out how to balance the anti-discrimination rights of both religious identity and LGBT identity."

Schneck noted that the proposed Employment Non-Discrimination Act, as crafted by the late Sen. Edward Kennedy and former Rep. Barney Frank, included exemptions that respected the values of religious communities.

"A good executive order should be informed by what they included in the ENDA bill," Schneck said. But since the bishops opposed ENDA, those exemptions will not satisfy them.

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