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## **NY Executive Order Expands Anti-Discrimination Policies; Creates New Government Contracting Requirements**

On Feb. 3, 2018, Governor Andrew Cuomo issued a new executive order (EO 177 or the Order) pertaining to State contracts. After a recitation of New York’s history of taking steps to prevent discrimination of various kinds, EO 177 formally declares a New York State policy regarding civil rights, and imposes this policy on State contracting. The Order seeks to “ban all state agencies and authorities from doing business with companies that promote or tolerate discrimination,” and directs “Affected State Entities” to implement new procurement practices in order to achieve this goal. The Order directs the Office of General Services (OGS) and the Division of Human Rights (DHR) to issue guidelines on or before May 1, 2018, and mandates that all new contracts and contract renewals entered into on or after June 1, 2018, include new language that accounts for EO 177. The Governor has expressed that these State actions are necessary in light of changes in federal policy. Regardless of the Executive’s goal, the Order presents many legal questions that will need to be answered in a relatively short time.

### **What Does the Order Require?**

EO 177 builds on the existing prohibition against contracting with entities that have discriminatory employment practices in violation of the Human Rights Law. For decades, New York’s Human Rights Law has prevented discrimination based on age, race, creed, color, national origin, sexual orientation, gender identity, military status, sex, marital status, disability, or other protected basis, whether in: making employment decisions, housing, issuance of credit, a wide range of places of public accommodation, and non-sectarian educational institutions. There are also a wide range of anti-

discrimination statutes included in the Public Health Law, Insurance Law, and Civil Rights Law. Notably, all State contracts already include, as part of the mandatory “standard clauses” commonly referred to as “Appendix A,” provisions that would prohibit any State contractor from violating the Human Rights Law employment protections.

Pursuant to the Order, the State will also not contract with entities that “*have institutional policies or practices that fail to address the harassment and discrimination of individuals,*” based on any of the statutorily protected classes and in any setting. In furtherance of this effort, OGS and DHR are to develop guidelines no later than May 1, 2018. One month later, all new or extended State contracts are to include a “binding agreement” – potentially as part of the traditional standard clauses – confirming that the vendor is complying with the prohibition against “policies or practices that fail to address” harassment and discrimination.

### What State Entities are Subject to the Order?

The Order defines “Affected State Entities” as

- all agencies and departments that are subject to the Governor’s oversight; and
- all New York public-benefit corporations, public authorities, boards, and commissions, that have the Chair, Chief Executive, or a majority of the Board appointed by the Governor.

### Legal Questions

There are many unanswered questions related to the application and implementation of the Order. For example:

1. EO 177 provides no guidance as to what would be considered a “policy or practice that fails to address harassment and discrimination.” Is the Governor seeking to implement requirements that are broader than what already exists in statute? Alternatively, is the plan to expand the penalties for violating existing statutory protections to include being barred from State contracting?
2. Until guidelines are issued, there is no ability to determine what activity will be considered inappropriate. Existing State contractors and entities seeking new State contracts should be concerned that, without more information, there is no way to prepare for the implementation of the Order. There also is no indication as to who would be tasked with making that determination. The Human Rights Law empowers DHR to take action where there are allegations of discrimination. Will the guidelines similarly task DHR to evaluate the actions and policies of every State contractor? Will each contracting governmental body be empowered to make such determinations? What role, if any, will the Attorney General play, considering that his office currently is tasked with approving the form of State contracts and the standard clauses?
3. Existing laws exempt certain sectarian institutions from aspects of the anti-discrimination law, but there is no such accommodation acknowledged in the Order. Will these new procurement rules apply to contracts with religious and faith-based organizations? Notably, the accompanying press release indicated that one of the reasons for taking this action was that “the federal government rescinded a contraceptive coverage mandate under the Affordable Care Act.”
4. Even if “guidelines” are issued, such guidelines – which are not subject to the State Administrative Procedures Act – will not have the force of statute or regulations.

5. Will the new standards only apply to procurements contemplated by the State Finance Law, or will the policies be included in other types of agreements for the disbursement of State funds such as grants?

State contractors, and potentially grant beneficiaries, have reasons to be concerned about the Order and should monitor any developments regarding EO 177 closely. Greenberg Traurig’s attorneys and directors have a broad range of experience advising for-profit and not-for-profit entities that seek to navigate New York’s complex legal landscape, and are available to assist organizations that may need assistance in determining how to comply with the Executive Order or to seek clarifications before this change is implemented.

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