

CLIENT ALERT

OFCCP Final Rule on Sex Discrimination to Take Effect August 15, 2016

JULY 18, 2016

On June 15, 2016, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a [Final Rule](#) detailing federal government contractor and subcontractor obligations related to sex nondiscrimination under Executive Order 11246. The Final Rule updates the OFCCP's existing "Sex Discrimination Guidelines" – which have not been revised since 1970 – to reflect the current state of U.S. sex discrimination law. Titled "Discrimination on the Basis of Sex," the Final Rule takes effect on August 15, 2016.

Clarifying the OFCCP's position on sex discrimination, the Final Rule addresses: compensation discrimination; discrimination based on pregnancy, childbirth, or related medical conditions; discrimination in the provision of fringe benefits; discrimination on the basis of sex stereotypes; and sexual harassment. Additionally, the Final Rule provides a list of "best practices" that a contractor may follow to foster a workplace that complies with OFCCP requirements.

The Final Rule is intended to update the OFCCP guidelines for consistency with current U.S. sex discrimination law. As such, contractors will face few new obligations under the "Discrimination on the Basis of Sex" guidelines. Nonetheless, we recommend that contractors review their employment policies, practices, and procedures to ensure compliance.

The Final Rule Applies to Most Government Contractors

The Final Rule applies to businesses and organizations that: (1) hold a federal contract or subcontract valued in excess of \$10,000; (2) hold multiple federal contracts or subcontracts with a combined value in excess of \$10,000 in a 12-month period; or (3) hold government bills of lading, serve as a depository of federal funds, or are an issuing or paying agency for U.S. savings bonds or notes.

Summary of the OFCCP's Guidance

Sex Discrimination Generally. Under the Final Rule, contractors are prohibited from engaging in sex discrimination, which includes discrimination on the basis of pregnancy, childbirth, or related medical conditions; gender identity; transgender status; or sex stereotypes.

Contractors engage in sex discrimination when they treat employees disparately based on sex. “Disparate treatment” includes making sex-based distinctions in recruiting, hiring, firing, promotion, compensation, or other terms of employment. An example of disparate treatment would be offering men and women different options with regard to flexible work arrangements. Likewise, prohibiting transgender employees from using the restroom, changing room, or shower designated for use by the gender with which they identify would constitute unlawful disparate treatment.

Sex discrimination may also result from policies that impose a “disparate impact” on the basis of sex, and that are not job-related and consistent with business necessity. For example, unnecessary height and weight qualifications that disproportionately preclude females from certain positions would disparately impact female employees. According to the OFCCP, such job requirements are permitted only when “the contractor can meet the high bar of demonstrating that such requirements are a bona fide occupational qualification.”

Discrimination in Compensation. The Final Rule prohibits contractors from providing different wages, benefits, other forms of compensation, or access to earnings opportunities to similarly situated employees on the basis of sex. When determining whether employees are similarly situated, the OFCCP considers tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. The OFCCP defines discriminatory compensation to not only include wages and salaries, but also job classifications, work assignments, shifts, and development opportunities. Moreover, the OFCCP prohibits contractors from denying employees the opportunity to earn overtime or commissions on the basis of sex.

Discrimination based on Pregnancy, Childbirth, or Related Medical Conditions. Contractors may not treat employees who are affected by pregnancy, childbirth, or related medical conditions, or who are of childbearing capacity, differently for any employment-related purposes, including the provision of fringe benefits. The OFCCP’s definition of “other related medical conditions” includes lactation; disorders, symptoms, and complications directly related to pregnancy; and the after-effects of a delivery. Examples of such discrimination include the refusal to hire pregnant people or people of childbearing capacity, a requirement that pregnant employees provide doctors’ notes to continue working, or limitations of pregnant employees’ job duties based solely on the fact that the employees are pregnant.

Where an employee is affected by pregnancy, childbirth, or a related medical condition, the contractor must accommodate the employee, including by offering alternative job assignments, modified duties, and leave, to the extent that the contractor offers such accommodations to employees with other medical conditions. Further, contractor-provided health insurance must cover pregnancy and childbirth-related hospitalization and medical costs to the same extent that other medical conditions are covered.

Discrimination in the Provision of Fringe Benefits. The Final Rule prohibits contractors from discriminating based on sex in their provision of fringe benefits. “Fringe benefits” include, among other things, medical and hospital insurance, life insurance, retirement benefits, profit-sharing, bonus plans, leave, or other terms or conditions of employment. Medical insurance plans that categorically exclude coverage related to gender dysphoria or gender transition are “facially discriminatory” under the Final Rule.

Discrimination on the basis of Sex Stereotypes. Contractors may not base employment decisions on stereotypes about how males or females are expected to look, speak, or act. The Final Rule prohibits adverse treatment based on an employee’s failure to conform to gender norms and expectations related to appearance or behavior. Contractors may not discriminate against employees based on their actual or perceived gender identity or transgender status. Likewise, contractors may not adversely treat employees who do not conform to sex stereotypes about men or women working in particular jobs, sectors, or industries. Further, the Final Rule prohibits contractors from discriminating against employees based on stereotypes about caregiver responsibilities. For example, a contractor may not adversely treat a male based on his decision to take leave to care for his newborn or recently-adopted child.

Harassment on the Basis of Sex. The Final Rule prohibits harassment on the basis of sex, including requests for sexual favors, offensive remarks about a person’s sex, and other verbal or physical conduct of a sexual nature. The OFCCP defines “harassment based on sex” to include sexual harassment; harassment based on pregnancy, childbirth, or related medical conditions; and harassment because of sex-based stereotypes.

OFCCP-Recommended “Best Practices”

The OFCCP has recommended – but not required – that contractors implement the following list of “best practices”:

- Avoiding the use of gender-specific job titles such as “foreman” or “lineman” where gender-neutral alternatives are available;
- Designating single-user restrooms, changing rooms, showers, or similar single-user facilities as sex-neutral;
- Providing, as part of their broader accommodations policies, light duty, modified job duties or assignments, or other reasonable accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions;
- Providing appropriate time off and flexible workplace policies for men and women;
- Encouraging men and women equally to engage in caregiving-related activities;
- Fostering a climate in which women are not assumed to be more likely to provide family care than men; and
- Fostering an environment in which all employees feel safe, welcome, and treated fairly, by developing and implementing procedures to ensure that employees are not harassed because of sex. Examples of such procedures include:
 - Communicating to all personnel that harassing conduct will not be tolerated;
 - Providing anti-harassment training to all personnel; and
 - Establishing and implementing procedures for handling and resolving complaints about harassment and intimidation based on sex.

Recommendations for Government Contractors

With the implementation of the Final Rule, we recommend that contractors review their employment policies, practices, and procedures to ensure compliance with the Final Rule. Specifically, contractors should:

- Review their compensation and fringe benefit policies to confirm that one gender is not favored over another;
- Ensure that sex stereotypes do not factor into recruiting, hiring, or terms of employment;
- Confirm that they afford employees who are affected by pregnancy, childbirth, or related medical conditions the same reasonable accommodations that are afforded to employees with other medical conditions;
- Review their health care plans to ensure that they do not categorically discriminate against individuals based on their gender identity or transgender status;
- Consider implementing some or all of the OFCCP’s above-listed “best practices.”

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