

OFCCP Issues Final Rule on Sex Discrimination

June 14, 2016

On June 14, 2016, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a final rule revising the requirements that covered contractors must meet under the provisions of Executive Order 11246 prohibiting sex discrimination in employment. The final rule "Discrimination on the Basis of Sex" substantially updates OFCCP's sex discrimination guidelines from 1970 at 41 C.F.R. Part 60-20 with new regulations that align with current Title VII jurisprudence to facilitate contractor understanding and compliance, potentially reduce contractor costs, and increase labor-market efficiency.

The final rule is organized into eight sections outlining prohibited sex discrimination in the workplace and an appendix of non-mandatory best practices. The key aspects of the rule include:

- **General prohibition on sex discrimination (§ 60-20.2).** The rule defines "sex" to include pregnancy, childbirth, or related medical conditions; gender identity; transgender status; and sex stereotyping. The rule describes employment practices that may unlawfully treat men and women disparately, such as treating men and women differently with regard to the availability of flexible work arrangements. It also provides examples of employment practices that are unlawful because they have a disparate impact on the basis of sex and are not job-related and consistent with business necessity.
- **Provides protections for transgender workers (§ 60-20.2).** The rule makes clear that sex discrimination includes discrimination because of an employee's or applicant's gender identity or transgender status. The rule requires contractors to allow employees to use restrooms, changing rooms, showers, and similar facilities consistent with the gender with which the

Practice Areas

Government Contracts

workers identify. In addition, the rule prohibits the adverse treatment of employees or applicants because they have received, are receiving, or are planning to receive transition-related medical services designed to facilitate the adoption of a sex or gender other than the individual's designated sex at birth.

- **Prohibits pay discrimination (§ 60-20.4).** Contractors may not pay different compensation to similarly situated employees because of their sex. For instance, contractors may not deny opportunities for overtime work, training, work assignments, or higher-paying positions because of a worker's sex.
- **Provides protections related to pregnancy, childbirth, and related medical conditions (§ 60-20.5).** Incorporating the language of Title VII as amended by the Pregnancy Discrimination Act, the rule prohibits contractors from discriminating on the basis of pregnancy, childbirth, or related medical conditions and requires them to treat people of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, including receipt of benefits under fringe-benefit programs, as other persons not so affected, but similar in their ability or inability to work. The rule further requires that contractors provide job-guaranteed medical leave, including paid sick leave, for employees' pregnancy, childbirth, or related medical conditions on the same terms that medical or sick leave is provided for medical conditions that are similar in their effect on employees' ability to work. Notably, this includes providing job-guaranteed family leave, including any paid leave, for male employees on the same terms that family leave is provided for female employees.
- **Provides equal benefits to male and female employees participating in fringe benefit plans (§ 60-20.6).** The rule prohibits discrimination on the basis of sex with regard to fringe benefits such as medical, hospital, accident, life insurance, and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment. The increased cost of providing a fringe benefit to members of one sex is not a defense to a contractor's failure to provide benefits equally to members of both sexes.
- **Prohibits discrimination based on sex stereotypes (§ 60-20.7).** Contractors may not treat employees or applicants adversely because they fail to comply with expectations about how women and men should look, speak, or act. The rule discusses four types of gender norms that may form the basis of a sex discrimination claim under the Executive Order: (1) dress, appearance, and/or behavior; (2) gender identity or transgender status; (3) jobs, sectors, or industries within which it is considered appropriate for women or men to work; and (4) caregiving roles.
- **Prohibits harassment and hostile work environments based on sex (§ 60-20.8).** The rule articulates the legal standard for sexual harassment based on the Equal Employment Opportunity Commission's (EEOC) guidelines and relevant case law and explains that sexual harassment includes harassment based on gender identity or transgender status; harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but that is because of sex or sex-based stereotypes.

The rule becomes effective on August 15, 2016. Because these regulations generally align with existing case law and agency interpretations, most contractors are already subject to many of the rule's requirements. As a best practice, contractors should review their employment policies and programs to ensure compliance with the final rule.