

OFCCP Expands Sex Discrimination Guidance

The OFCCP recently updated its sex discrimination guidelines for federal contractors and subcontractors that have been in place since 1970. New regulations increase protections against workplace sex discrimination and impose additional obligations on employers, effective August 15, 2016. Covered contractors will want to review their employment policies, leave policies, compensation and benefit plans, and make any changes needed to ensure compliance.

Background

On September 24, 1965, President Lyndon B. Johnson issued Executive Order 11246, barring discrimination in employment by the federal government and by its contractors and subcontractors “against any employee or applicant for employment because of race, creed, color, or national origin.” Amended over time, [Executive Order 11246](#) now prohibits discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin.

In addition to Executive Order 11246, the Office of Federal Contract Compliance Programs (OFCCP) enforces Section 503 of the Rehabilitation Act of 1973 (Section 503) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). These laws protect individuals with disabilities and covered veterans against employment discrimination by employers doing business with the government.

New Rules

On January 30, 2015, OFCCP [proposed](#) changes to the regulations prohibiting sex discrimination in the workplace under Executive Order 11246. On June 15, the OFCCP issued a [final rule](#) detailing federal contractors' and subcontractors' nondiscrimination obligations toward both applicants and employees. The final rule revises [guidelines](#) that have largely been in place since 1970 and creates additional compliance requirements for employers, effective August 15, 2016.



Comment. The final rule does not alter any obligations to ensure equal employment opportunity or take affirmative action under other OFCCP regulations, Section 503, or VEVRAA. Similarly, the rule does not affect the prohibition against discharging or discriminating against an employee or job applicant because the individual asks about, discusses, or discloses his or her compensation or the compensation of other employees or applicants.

Covered Contractors

The final rule applies to most government contractors. It covers businesses and organizations that: (1) have a single federal contract, subcontract, or federally assisted construction contract in excess of \$10,000; (2) have a total of more than \$10,000 in federal contracts or subcontracts in any 12-month period; or (3) hold government bills of lading, serve as a depository of federal funds, or are an issuing and paying agency for U.S. savings bonds and notes.

Sex-based Barriers

The new rule generally prohibits employment discrimination on the basis of sex, and addresses “sex-based barriers to equal employment and fair pay.” It focuses on disparities in employee compensation and benefits, sexual harassment and hostile work environments, pregnancy accommodations, sex stereotyping, and sexual orientation, gender identity, and transgender protections.

Compensation and Benefits. The final rule generally prohibits sex-based disparities in employee compensation and benefits. It expands the definition of discriminatory compensation beyond wages and salary to include job classifications, work assignments, shifts, and development opportunities. Examples of sex-based discriminatory practices include treating men and women differently regarding the availability of flexible work arrangements, “steering” women into lower-paying or less desirable jobs, and assigning workplace facilities on the basis of sex.



While the final rule does not require equal wages for all employees, it does prohibit contractors from providing “similarly situated” employees with different wages, benefits, or other forms of compensation or denying opportunities to earn overtime or commissions because of their sex.

Whether employees are similarly situated is fact-specific and requires a case-by-case assessment. Potentially relevant factors in determining similarly situated status and evaluating pay disparities include: tasks performed; skill and responsibility levels; working conditions; job difficulty; minimum qualifications; and other objective factors. As the final rule makes clear, employees may be considered similarly situated when they are comparable on some of these factors but not similar on others.

In addition to barring discriminatory treatment based on sex, the final rule also provides that contractors are prohibited from implementing compensation practices that have an adverse impact on the basis of sex unless they are job related and consistent with business necessity. Such practices may include selection procedures for apprenticeships or training programs, “word-of-mouth” recruiting, or “tap-on-the-shoulder” promotion methods.

Comment. In view of potential exposure to both disparate treatment and disparate impact discrimination claims, contractors should carefully evaluate their compensation systems, pay practices, and any planned changes to determine whether there are any sex-based pay disparities.

The final rule also prohibits sex-based discrimination in the provision of fringe benefits. Like the EEOC’s [Guidelines on Discrimination Because of Sex](#), it defines “fringe benefits” broadly to include: medical, hospital, accident and life insurance; retirement benefits; profit-sharing and bonus plans; leave; and other terms and conditions of employment. The final rule makes clear that contractors cannot rely on cost considerations to justify a failure to provide equal benefits to both sexes. OFCCP notes that contractors must ensure that health insurance

coverage offered to their employees does not discriminate on the basis of sex, including gender identity or transgender status. Thus, plans with categorical exclusions of coverage for all health services associated with gender dysphoria or gender transition would be facially discriminatory.

Sexual Harassment and Hostile Work Environment. The final rule prohibits sexual harassment, including unwelcome sexual advances, 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 based on gender, gender identity or transgender status; harassment based on pregnancy, childbirth, or related medical conditions; and harassment because of sex-based stereotypes. Sexual harassment violates Executive Order 11246 when: submission to the conduct is made explicitly or implicitly a term or condition of employment; submission to or rejection of the conduct is used as the basis for employment decisions; or the conduct is intended to — or actually does — interfere with an individual's work performance or create an intimidating, hostile, or offensive work environment.

Accommodations for Pregnancy and Related Conditions. The final rule makes clear that sex discrimination includes discrimination on the bases of pregnancy, childbirth, and other related medical conditions (including childbearing capacity). Incorporating the protections of the Pregnancy Discrimination Act, it prohibits contractors from treating employees who are affected by pregnancy, childbirth, or related medical conditions differently for employment-related purposes, including for the provision of benefits.

The final rule generally requires covered contractors to accommodate employees who are unable to perform some of their job duties because of pregnancy or related conditions, by offering alternative or light-duty job assignments, modified duties, and leave on the same terms provided for other medical conditions. It further clarifies that any job-guaranteed family leave offered by the contractor must be provided to male and female employees on the same terms. Contractors must also provide health insurance that covers hospitalization and other medical costs for pregnancy and related medical conditions to the same extent as other medical conditions. Requiring a doctor's note simply to continue working while pregnant, or limiting job duties solely because the employee is pregnant would constitute sex-based discrimination.

Stereotyping. The final rule prohibits contractors from basing employment decisions on sex-based stereotypes. Discrimination based on such stereotyping may include adverse treatment because of an applicant's or employee's failure to conform to gender norms and expectations related to dress, appearance, or behavior; actual or perceived gender identity or transgender status; nonconformance to a sex stereotype about working in a particular job, sector, or industry; or sex stereotype about caregiver responsibilities.

Sexual Orientation, Gender Identity and Transgender Protections. Last year, [Executive Order 13672](#) amended Executive Order 11246 to prohibit employment discrimination by federal contractors and subcontractors on the basis of sexual orientation and gender identity. The new rule adopts an expansive definition of sex discrimination that includes discrimination based on an employee's or applicant's sexual orientation, gender identity, or transgender status. Under OFCCP's broader definition, contractors will be required to allow individuals to use bathrooms, changing rooms, showers, and other facilities that are consistent with the gender with which the individual identifies.



OFCCP Best Practices

In an Appendix to the final rule, OFCCP has recommended — but not required — the following best practices for contractors:

- Avoid gender-specific job titles where gender-neutral alternatives are available
- Designate single-user restrooms, changing rooms, showers, or similar single-user facilities as sex-neutral
- Provide, as part of 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
- Provide appropriate time off and flexible workplace policies for men and women
- Encourage men and women equally to engage in caregiving-related activities
- Foster a climate in which women are not assumed to be more likely to provide family care than men
- Develop and implement procedures to ensure that employees are not harassed because of sex, such as:
 - Communicating to all personnel that harassing conduct will not be tolerated
 - Providing anti-harassment training to all personnel
 - Establishing and implementing procedures for handling and resolving harassment complaints

In Closing

The final rule clarifies OFCCP's current interpretation of Executive Order 11246 as it relates to sex discrimination in the workplace. It adopts many of the changes that were proposed last year, and adds some new provisions as well. Employers will want to review their employment practices and policies, pay practices, and benefit plans to determine whether they are gender neutral and make any changes necessary to ensure compliance.

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