

## Beware the Ides of August: OFCCP's Revised Sex Discrimination Guidelines Effective August 15, 2016

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### PRACTICE AREAS

Employment and Labor

Last month, the Office of Federal Contract Compliance Programs ("OFCCP") issued its final rule titled "Discrimination on the Basis of Sex" (the "Final Rule"), which represents the first major changes to the sex discrimination guidelines for federal contractors since they were issued in 1970. The OFCCP's revisions address many hot topics on the current federal regulatory agenda, such as wage disparities, sex-based occupational segregation, sex-based stereotyping, and discrimination based on pregnancy/family caregiving responsibilities, gender identity and transgender status. The OFCCP states that "[b]ecause the [Final Rule] generally aligns with current law under Title VII of the Civil Rights Act of 1964 as interpreted by courts and the EEOC, most contractors are already subject to many of these provisions." However, contractors should review the Final Rule, paying careful attention to the sections highlighted below and consult with legal counsel to update employment policies and practices.

#### *Who is a Federal Contractor?*

The Final Rule generally applies to any business or organization that: 1) holds a single federal contract, subcontract, or federally assisted construction contract or subcontract in excess of \$10,000; 2) holds federal contracts or subcontracts that have a combined total in excess of \$10,000 in any 12-month period; or 3) holds government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

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### *Sex Discrimination*

Under the Final Rule, "sex discrimination" includes, but is not limited to, disparate treatment on the basis of sex, pregnancy, childbirth, or related medical conditions, gender identity, transgender status, and sex stereotyping<sup>1</sup>, as well as policies or practices that have an adverse impact on the basis of sex. Some examples of unlawful disparate treatment include: making distinctions between married and unmarried persons that are not applied equally to men and women; steering women into lower-paying/less desirable jobs; denying transgender employees access to restrooms or similar facilities designated for use by the gender with which they identify; adversely treating employees on the basis of past, present, or future receipt of transition-related medical services (e.g. hormone therapy); and imposing any differences in the terms, conditions, or privileges of retirement on the basis of sex.

The Final Rule also prohibits employment policies or practices that have an adverse impact on the basis of sex, and are not job-related and consistent with business necessity, such as using height and/or weight qualifications not necessary for job performance; establishing physical requirements, such as strength or agility, that exceed actual job requirements; and requiring written tests, interviews, recruitment or promotional methods that have an adverse impact on women.

### *Compensation Discrimination*

Contractors may not discriminate in wages, benefits, or any other forms of compensation or deny access to earning opportunities, because of sex, on either an individual or systemic basis. Compensation discrimination occurs any time wages, benefits, or other compensation are paid "that is the result in whole or in part of the application of any discriminatory compensation decision or other practice." Examples of prohibited practices include: paying different compensation to similarly situated<sup>2</sup> employees on the basis of sex, or granting or denying training or other opportunities that may lead to advancement to higher-paying positions on the basis of sex.

### *Pregnancy, Childbirth, and Related Conditions*

In addition to prohibiting discrimination on the basis of pregnancy, childbirth, or related medical conditions (e.g. refusing to hire pregnant workers or requiring pregnant employees to take leave), the Final Rule specifies that denying accommodations for employees in such circumstances is unlawful disparate treatment where 1) the contractor denies accommodations only to employees affected by pregnancy, childbirth, or related conditions (including lactation); 2) the contractor provides accommodations to other employees whose ability or inability to perform their job duties is similarly affected, the denial of accommodations to employees

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affected by pregnancy, childbirth, or related medical conditions imposes a significant burden on those employees, and the contractor's asserted reasons for denying accommodations do not justify that burden; or 3) intent to discriminate is otherwise shown.

Policies and practices having a disparate impact on employees affected by pregnancy, childbirth or related medical conditions are also unlawful (e.g. offering light duty only to employees with on-the-job injuries but not to employees with non-job-related issues who are similarly limited in their ability to work) unless they are shown to be job-related and consistent with business necessity.

### *Fringe Benefits*

Contractors must not discriminate 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, even though the cost of providing a fringe benefit to members of one sex may be greater. As noted above, discrimination on the basis of sex includes gender identity and transgender status. Thus, insurance coverage that categorically excludes medical care related to gender dysphoria or gender transition are prohibited under the Final Rule. Indeed, the OFCCP stated in the preamble to the Final Rule that "[c]ontractors thus must ensure that all of the health insurance plans that are offered to their employees provide services to all employees in a manner that does not discriminate on the basis of sex, including gender identity or transgender status."

Recognizing that changes to benefit plans may take time to implement, the OFCCP indicated that, while specific facts may vary, it "will consider...good faith progress to take steps to change benefits policies and practices in this area in analyzing whether enforcement action is appropriate - particularly in the period immediately following the [Final] Rule's effective date."

### *Sex Stereotyping*

The Final Rule prohibits contractors from making employment decisions on the basis of sex-based stereotypes (i.e. expectations about how men or women should appear, speak, or act). Such discrimination may be found in adverse treatment because an individual does not comply with gender norms and expectations (e.g. a man perceived as "effeminate"), because of an individual's actual or perceived gender identity or transgender status, or because of a failure to conform to stereotypes about caregiver responsibilities (e.g. demoting a male employee because he took leave to care for a newborn child).

### *Sexual Harassment*

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The Final Rule briefly reiterates existing guidelines from the EEOC regarding sexual harassment (quid pro quo and hostile work environment sexual harassment), and specifies that harassment because of sex includes sexual harassment based on gender identity, transgender status, pregnancy, childbirth or related medical conditions, as well as non-sexual harassment based on sex or sex-based stereotypes.

### *Appendix of "Best Practices"*

The Final Rule's appendix provides a list of voluntary best practices, including:

- Avoiding gender-specific job titles (e.g. "foreman") where gender neutral alternatives are available;
- Designating single-user restrooms or similar single-user facilities as sex-neutral;
- Providing light duty, modified job duties or assignments or other accommodations for pregnant employees on a non-discriminatory basis;
- Providing equal access for men and women to appropriate time off and flexible workplace policies and encouraging men and women equally to engage in caregiving-related activities;
- Developing, implementing, and communicating policies and procedures for the prevention of sex-based harassment.

### *Takeaways*

As noted above, contractors should review/update policies and practices to comply with the Final Rule. Particular focus should be directed to provisions regarding hiring, recruitment, evaluation, and promotion; insurance coverage; family and/or medical leave; injury/disability accommodation; discrimination and harassment; and compensation. Please contact an attorney in Koley Jessen's Employment, Labor & Benefits Practice Group to discuss this issue further.

*1 While the Final Rule does not prohibit discrimination on the basis of "sexual orientation," sexual orientation is already a protected category under E.O. 11246 (as amended by E.O. 13672 and its implementing regulations).*

*2 Although the determination of whether employees are "similarly situated" is fact-specific, the OFCCP will examine the tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors.*