
LABOR & EMPLOYMENT

THE OFCCP CONTINUES TO ADD TO ITS REGULATORY ARSENAL

By Lynn White*

Note from the Editor:

This article is about the Office of Federal Contract Compliance Programs' new sex discrimination regulations. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. Generally, the Federalist Society refrains from publishing pieces that advocate for or against particular policies. However, when we do, as here, we will offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

• ACLU, *ACLU Comments in Support of OFCCP's Proposed Regulations Prohibiting Discrimination on the Basis of Sex*, ACLU.ORG, (April 13, 2015), https://www.aclu.org/sites/default/files/field_document/aclu_comments_ofccp_sex_discrimination_nprm-final_4-13-15.pdf.

• The Leadership Conference on Civil and Human Rights, *Discrimination on the Basis of Sex*, CIVILRIGHTS.ORG, (April 2, 2015), <http://www.civilrights.org/advocacy/letters/2015/sex-discrimination-comments.html>.

Federal contractors are reeling trying to keep up with the steady stream of regulations from the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). Although it is a relatively small office, the OFCCP has jurisdiction over approximately 500,000 employer establishments with millions of employees. The agency has made no secret of the fact that it is trying to add more "teeth" to existing regulations in order to more effectively root out employment discrimination and enforce the requirements of Executive Order 11,246. This 1965 order prohibits federal contractors and subcontractors and federally assisted construction contractors from discriminating on the basis of race, color, religion, sex, or national origin and requires them to take affirmative action to prevent discrimination based on these protected categories.¹

The OFCCP recently issued final rules strengthening the nondiscrimination and affirmative action regulations for protected veterans and individuals with disabilities. The agency also issued final rules implementing the requirements of Executive Order 13,672, which added "sexual orientation" and "gender identity" to the list of protected classes under the Executive Order 11,246 regulations.² The OFCCP has several more regulations slated to come out in the coming year, including a requirement for federal contractors to report summary data on employee compensation to the agency.

One of the OFCCP's most recent proposed rules would eliminate the Sex Discrimination Guidelines (Guidelines) and replace them with regulations outlining the agency's current sex discrimination enforcement principles.³ Rather than being "guidelines," the proposed regulations would have the force and effect of law.⁴ The OFCCP suggested that this action was long overdue as there have been significant changes to sex discrimination statutory and case law under Title VII of the Civil Rights Act of 1964, and that revisions are needed to more accurately

reflect current sex discrimination jurisprudence.⁵ With little quantifiable benefit, this proposal will likely be much more costly than the agency estimated and create a significant amount of confusion for the federal contractor community.

A. COSTS LIKELY UNDERESTIMATED

The OFCCP asserted that since the proposal would only bring its regulations in line with existing requirements, it would impose minimal costs. Specifically, the OFCCP only assigned costs for becoming familiar with the rule's requirements and minimal costs for new pregnancy accommodation requests that may result from the rule. The estimated costs identified by the OFCCP are likely at the low end of potential costs in a number of respects. For example, the agency estimated that it would essentially cost less than \$100 for an Equal Employment Opportunity Manager of a federal contractor establishment to familiarize herself with the rule. Given the complexity of the proposed rule, and its intersection with related laws, this estimate is unrealistically low. This estimate also does not take into account the cost and amount of time it will take to train managers and other employees to inform them of their rights and responsibilities under the new rule.

Similarly, the OFCCP's cost estimates regarding the proposed rule's requirements for providing pregnancy accommodation were off the mark in many respects. These estimates assumed, first, that only women who are working in laborer positions would request pregnancy accommodations, and also that accommodations would cost approximately \$500 each. This estimate does not reflect the realities that women in any job category can request a pregnancy accommodation and that those accommodations will often cost much more than \$500. It also fails to take into account that pregnant women may request light duty, telework, or medical leave as an accommodation, requests that could last anywhere from a few weeks to the full duration of the pregnancy.

The OFCCP also neglected to assign any costs to the new provisions regarding gender-neutral bathroom facilities in contractor establishments. The proposed rule would make it unlawful sex discrimination to deny a transgender employee

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“access to bathrooms used by the gender with which they identify.”⁶ These requirements prompted the White House to add gender-neutral restroom facilities “in keeping with the administration’s guidance on this issue and consistent with what is required by the executive order that took effect [April 8, 2015] for federal contractors.”⁷ Rather than being costless, as the OFCCP assumes, this requirement could lead to millions of dollars in construction costs for each contractor, particularly those who may have multiple buildings at one establishment.

B. CREATING MORE CONFUSION

The OFCCP asserted that regulation was necessary to save federal contractors the effort of trying to reconcile the existing Guidelines with more recent Title VII jurisprudence and avoid a “vacuum of guidance for contractors.”⁸ However, it is highly unlikely that contractors even consult the Guidelines any more since they have been outdated for decades. The OFCCP also admitted that the proposal did not even include the full scope of Title VII sex discrimination principles, leaving a vacuum of guidance regarding the principles that the agency chose not to address in this rulemaking.⁹ As a result, the proposed rule would not create the authoritative source for Title VII compliance as it relates to sex discrimination, which is the primary justification that the agency offers.

The OFCCP also made the interesting decision to base parts of the proposed rule on areas of law that were not only unsettled, but also under review by the U.S. Supreme Court. The proposed rule relied heavily on the Equal Employment Opportunity Commission’s (EEOC) *Enforcement Guidance: Pregnancy Related Discrimination and Related Issues*, despite the fact that the Court had not yet issued its *Young v. UPS* decision (which was later issued in March 2015).¹⁰ The EEOC acknowledged that portions of this guidance may need to be updated in light of the Court’s decision.¹¹ While the OFCCP stated that the final rule would be consistent with the Supreme Court’s ruling in *Young v. UPS*, the agency did not address precisely how the final rule may be different, nor did it provide opportunity for notice and comment on such changes. The EEOC subsequently revised the Pregnancy Discrimination Guidance in June 2015, two months after the comment period closed for OFCCP’s proposed rule. Given the complex and ever-changing nature of Title VII case law, it is foreseeable that other landmark rulings may impact the validity of these rules, thus creating more confusion.

Preventing sex discrimination in the workplace is a critical mandate. However, as in some of its previous rulemakings, the OFCCP’s sex discrimination proposed rule would heap costs on employers while providing little quantifiable benefit. The agency seems content to create myriad technical requirements that sound good, but do little to get at the root of employment discrimination. What they will do is make the jobs of those who have dedicated their careers to this pursuit a paperwork nightmare. Hopefully the OFCCP will more fully explore the true cost of these proposals in the final rule and attempt to quantify the benefit consistent with standard rulemaking practice.

Endnotes

1 Exec. Order No. 11,246, as amended (September 24, 1965).

2 Exec. Order No. 13,672 (July 21, 2014).
3 Discrimination on the Basis of Sex, 80 Fed. Reg. 5,246 (January 30, 2015).
4 *Id.* at 5,252.
5 *Id.* at 5,247.
6 80 Fed. Reg. at 5,277.
7 Sara Wheaton, *Latest White House Feature: Gender-Neutral Restroom*, Politico, April 8, 2015, available at <http://www.politico.com/story/2015/04/white-house-gender-neutral-bathroom-116779.html>; see also David McCabe, *White House Adds Gender-Neutral Bathroom to Office Building*, The Hill, April 9, 2015, available at <http://thehill.com/blogs/blog-briefing-room/news/238342-administration-adds-gender-neutral-bathroom>.
8 80 Fed. Reg. at 5,264.
9 *Id.* at 5,248.
10 *Young v. UPS*, No. 12-1226 (March 25, 2015).
11 Questions and Answer About the EEOC’s Enforcement Guidance on Pregnancy Discrimination and Related Issues (http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm) (last visited April 6, 2015).

