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**NEW REGULATIONS AND FACT SHEETS PUBLISHED BY THE OFCCP AND EEOC
ON SEX, PREGNANCY AND PAY DISCRIMINATION**

June 22, 2016

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New OFCCP Rules on Sex Discrimination to Take Effect August 15, 2016 for Covered Employers

On June 14, 2016, the Office of Federal Contract Compliance Programs (OFCCP) published its highly anticipated final rule on sex discrimination. The final rule will become effective August 15, 2016.

Covered Employers

The final rule covers any business or organization that:

- Holds a single federal contract, subcontract, or federally assisted construction contract or subcontract in excess of \$10,000;
- Holds federal contracts or subcontracts that have a combined total in excess of \$10,000 in any 12-month period; or
- 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.

Background

The OFCCP is charged with enforcing Executive Order 11246, which prohibits federal contractors and other covered employers from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. The Executive Order also requires covered employers to take affirmative action to recruit, hire, train, and retain qualified applicants and employees in these protected categories.

The OFCCP first promulgated Sex Discrimination Guidelines in 1970. It had not substantively updated them since that time, despite dramatic changes in sex discrimination law and societal practices.

According to the OFCCP's fact sheet regarding the final rule, it is intended to bring the OFCCP's 1970 guidelines "from the 'Mad Men' era to the modern era" and to "adopt[] regulations that are in line with modern laws and modern times." The OFCCP's fact sheet regarding the regulations is available at: https://www.dol.gov/ofccp/SexDiscrimination/SexDiscrimFinalRuleFactSheet_JRFQA508c.pdf.

The final rule – which totals 193 pages – can be found at:

<https://www.federalregister.gov/articles/2016/06/15/2016-13806/discrimination-on-the-basis-of-sex>.

The OFCCP's answers to frequently answered questions can be found on its website at:

https://www.dol.gov/ofccp/SexDiscrimination/sexdiscrimination_faqs.htm

Prohibited Sex Discrimination

As a general matter, the final rule prohibits discrimination against any employee or applicant because of sex. The final rule defines “sex discrimination” broadly to include discrimination on the bases of:

- Pregnancy, childbirth, or related medical conditions;
- Gender identity or transgender status; or
- Sex stereotyping.

During the comment period, the OFCCP was urged to add sexual orientation discrimination to the types of sex discrimination prohibited by the final rule. The OFCCP declined to do so. Instead, the final rule states that the OFCCP will “continue to monitor the developing law” in this area. 81 Fed. Reg. at 39,120.

The final rule gives several examples of what the OFCCP considers unlawful sex-based discriminatory practices. These include:

- Steering women into lower-paying or less desirable jobs on the basis of sex or sex stereotypes;
- Adverse treatment of unmarried women, but not unmarried men, who become parents;
- Imposing any differences in retirement age or other terms, conditions or privileges of retirement on the basis of sex;
- Restricting job classifications or training on the basis of sex unless such requirements are a bona fide occupational qualification;
- Sex-based harassment; and
- Conduct having an adverse impact based on an employee's sex, which potentially includes:
 - Setting requirements for jobs or training, such as height or weight qualifications, that adversely affect applicants because of their sex unless such qualifications are job-related and consistent with business necessity.
 - Using strength tests in hiring that exceed the actual demands of the job (i.e., are not job related or consistent with business necessity) and negatively impact women more than men.
 - “Word-of-mouth” recruitment and “tap-on-the-shoulder” promotion decisions when they have an adverse impact on women and the employer cannot establish that they are job-related and consistent with business necessity.

Below, we highlight specific topics of interest addressed by the final rule.

Protection of Transgender Individuals and Gender Identity

The final rule defines “sex” to include gender identity and transgender status, and prohibits discrimination on those bases. The final rule provides examples of conduct that the OFCCP believes would constitute prohibited sex discrimination based on gender identity. For example, the final rule

prohibits treating employees or applicants adversely because they have received, are receiving, or are planning to receive transition-related medical services.

The final rule also specifically requires covered employers to allow workers to use bathrooms, changing rooms, showers, and similar facilities consistent with the gender with which the workers identify. Failure to do so is an unlawful sex-based discriminatory practice under the final rule. The final rule addresses the concern that such a requirement would impact other employees' privacy expectations as follows:

To begin with, this [submitted] comment [raising concerns about employees' expectation of privacy] assumes that non-transgender employees will react to the presence of transgender employees based on the transgender employees' birth-assigned gender, rather than on the gender with which they identify in their daily interactions with co-workers. It also assumes that non-transgender employees' reactions will be based on fear, ignorance, or prejudice about transgender individuals. It is well established that private bias, prejudice, or fear is not a legitimate basis for retaining the status quo. Non-transgender co-workers' fears, ignorance, or prejudice about transgender individuals can no more be permitted to trump the right of transgender employees to equal workplace treatment than white co-workers' prejudices against sharing restrooms or drinking fountains with black employees would have been permitted to trump black employees rights after [certain civil rights laws] went into effect 50 years ago.

81 Fed. Reg. 39,108, 39,123.

The final rule preamble further states that the OFCCP likely would regard an explicit, categorical exclusion of coverage for all care related to gender transition or gender dysphoria as facially discriminatory because such an exclusion singles out services and treatments for individuals on the basis of their gender identity or transgender status.

Sex Stereotyping Expressly Prohibited

The final rule is the first federal law or regulation expressly prohibiting discrimination on the basis of "sex-based stereotypes." The final rule prohibits employment decisions based on stereotypes such as how males and females are expected to look, speak, act, or other gender norms and expectations. The OFCCP provides several examples of what it "may" consider to be sex stereotyping, including:

- Adverse employment action because of a woman's choice of clothing, including whether or not she wears jewelry, make-up, or high heels; and
- Harassment of a man because he "is considered effeminate or insufficiently masculine."

The final rule further prohibits treating female or male employees or applicants differently based on the assumption that women are more likely to have caregiving responsibilities, including:

- Denying mothers employment opportunities that are available to fathers based on the assumption that mothers' childcare responsibilities will conflict with their job performance; and
- Denying fathers flexible workplace arrangements that are available to mothers based on the assumption that men do not have childcare responsibilities.

Discrimination on the Basis of Pregnancy, Childbirth, or Related Medical Conditions Prohibited

Consistent with existing law, the final rule prohibits discriminatory treatment because of pregnancy, childbirth, or related medical conditions. The final rule expressly notes the OFCCP's care in using gender neutral language to discuss pregnancy discrimination issues, recognizing that "some persons who have the physiology necessary to have a chance of becoming pregnant do not identify as women." 81 Fed. Reg. at 39,131.

Under the final rule, covered employers must treat the following individuals the same for all employment-related purposes: (1) people of childbearing capacity; (2) those affected by pregnancy, childbirth, or related medical conditions; and (3) other persons not so affected but similar in their ability or inability to work. The final rule defines pregnancy/childbirth-related medical conditions to include lactation; disorders directly related to pregnancy such as preeclampsia, placenta previa, and gestational diabetes; symptoms such as back pain; complications requiring bed rest; and the "after-effects" of a delivery.

As examples of prohibited discrimination, the final rule states the OFCCP's position that it would be unlawful to provide an employee with health insurance that does not cover hospitalization and other medical costs for pregnancy, childbirth, or related medical conditions to the same extent that hospitalization and other medical costs are covered for other medical conditions. Contrary to the OFCCP's original proposed rule, the final rule does not specifically address abortion.¹

The final rule also does not include any requirement that employers cover contraception to the same extent that medical costs for other conditions are covered. However, the final rule does state the OFCCP's position that employment decisions based on complications related to conception, such as treatment for infertility, may constitute sex discrimination when those decisions are sex-specific.

The final rule also prohibits contractors from "limiting pregnant employees' job duties based solely on the fact that they are pregnant, or requiring a doctor's note in order for a pregnant employee to continue working." 81 Fed. Reg. at 39,168.

Accommodations for Pregnant Workers

The regulations state that it is a violation of Executive Order 11246 "for a contractor to deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions in three circumstances":

- "Where the contractor provides, or is required by its policy or by other relevant laws [such as the Americans with Disabilities Act] to provide, such assignments, modifications, or other accommodations to other employees whose abilities or inability to perform their job duties are similarly affected and the denial of accommodations imposes a significant burden on employees affected by pregnancy, childbirth, or related medical conditions, and the contractor's asserted reasons for denying accommodations to such employees do not justify the burden";

¹ The original proposed rule exempted employers from having to pay for health insurance benefits for abortion, "except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion." 81 Fed. Reg. at 39,129.

- “Limiting pregnant employees’ job duties based solely on the fact that they are pregnant, or requiring a doctor’s note in order for a pregnant employee to continue working”; and
- “Providing employees with health insurance that does not cover hospitalization and other medical costs for pregnancy, childbirth, or related medical conditions, including contraception coverage, to the same extent that such costs are covered for other medical conditions.”

Gender-Neutral Family and Medical Leave

The final rule states that a covered employer that provides family, medical, or other leave may not deny or provide such leave differently on the basis of gender. In other words, under the final rule, family leave must be made available to fathers on the same terms as it is available to mothers. According to the OFCCP, policies offering fewer weeks of “paternity” leave than “maternity” leave may be “evidence of discriminatory practices in the provision of family or medical leave.” 81 Fed. Reg. at 39,114-15.

The final rule also requires covered employers to provide job-guaranteed medical leave for employees’ pregnancy, childbirth, or related medical conditions on the same terms that medical leave is provided for medical conditions that have a similar impact on an employee’s ability to work. Although the final rule does not require paid leave,² it does require any covered employer that chooses to offer paid leave to provide such leave on the same basis for women as for men.

The final rule also states the OFCCP’s position that failing to provide sufficient parental or medical leave to a worker who is temporarily unable to work due to pregnancy, childbirth, or related medical conditions may be unlawful if it has an adverse impact on the worker, unless the employer can show that the failure to provide leave was job-related and consistent with business necessity.

Relationship to Affirmative Action

The final rule states explicitly that “under no circumstances will a contractor’s good faith efforts to comply” with its affirmative action requirements be considered a violation of the final rule. 81 Fed. Reg. at 39,167. According to the OFCCP, covered employers should not interpret the new rule as prohibiting them from using targeted efforts to recruit and advance women to comply with their affirmative action obligations.

Discriminatory Compensation

As part of affirmative action requirements, federal contractors already must evaluate their compensation systems to determine whether similarly-situated employees are paid differently based on sex, national origin, or race. The final rule does not create new obligations in that regard, but does provide specific factors that might be relevant to help covered employers assess compliance. According to the final rule, relevant factors to consider in determining whether employees are “similarly situated” include “tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors.” The final rule states that the OFCCP may deem

² However, the Obama administration has announced plans to issue a Final Rule implementing the Establishing Paid Sick Leave for Contractors Executive Order (the “EPSL”) by September 2016. The EPSL requires federal contractors to provide up to 56 hours (7 days) of paid sick leave per year to their employees on new contracts entered into after January 1, 2017.

employees to be “similarly situated where they are comparable on some of these factors, even if they are not similar on others.”

The final rule also prohibits certain specific sex-based pay practices, including:

- Denying women an equal opportunity to obtain regular and/or overtime hours;
- Granting or denying training, apprenticeships, or other opportunities on the basis of sex; and
- Sex-based discrimination with regard to profit-sharing, bonus plans, or fringe benefits such as medical, hospital, accident, life insurance, and retirement benefits.

Best Practices

The final rule lists a number of “best practices” that, while not mandatory, the OFCCP recommends to ensure compliance. These include:

- Designating single-user restrooms, changing rooms, showers, or similar facilities as sex-neutral;
- As part of broader accommodations policies, providing 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;
- Avoiding use of gender-specific job titles such as “foreman” or “lineman” where gender-neutral alternatives are available;
- Encouraging men and women to engage equally in caregiving-related activities;
- Fostering a climate in which women are not assumed to be more likely to provide family care than men;
- 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;
 - Establishing and implementing procedures for handling and resolving complaints about harassment and intimidation based on sex;
- The OFCCP recommends that covered employers pay particular attention to actions and decisions that can be considered sex-based stereotyping, including:
 - Deciding not to assign a project involving travel to a pregnant employee, even though the employee has not identified any travel restriction;
 - Asking an unmarried worker without children to handle an emergency project because he or she does not want to inconvenience other workers who are married or have children;
 - Declining to assign an employee to a particular client or account because the employee does not have “the right look” or may not be able to “connect” because of his or her clothing style or gender affiliation;
 - Changing work hours or locations (e.g., telecommuting) only for employees who are pregnant or have children; and
- The final rule recommends that employer training programs explicitly address more subtle forms of discrimination, which may run counter to managers’ attempts to, in their view, “do the right thing.”

Enforcement

Individuals who believe they have been the subject of discrimination prohibited by the final rule may file a discrimination or harassment charge with the OFCCP.

A covered employer found in violation of the final rule “may be liable for make-whole and injunctive relief and subject to suspension, cancellation, termination and debarment of its contract(s) after the opportunity for a hearing.” 81 Fed. Reg. at 39,109.

New EEOC Fact Sheets on Pregnancy Discrimination

On June 14, 2016, the Equal Employment Opportunity Commission (EEOC) issued two new fact sheets on pregnancy discrimination.

- “Legal Rights for Pregnant Workers under Federal Law,” available at: https://www.eeoc.gov/eeoc/publications/pregnant_workers.cfm
- “Helping Patients Deal with Pregnancy-Related Limitations and Restrictions at Work,” available at: https://www1.eeoc.gov//eeoc/newsroom/wysk/pay_data.cfm?renderforprint=1

In its fact sheet on “Legal Rights for Pregnant Workers under Federal Law,” the EEOC states that the Pregnancy Discrimination Act (PDA) not only protects women who are or were pregnant, but also those who could become pregnant, intend to become pregnant, have a pregnancy-related medical condition, had an abortion, or are considering having an abortion.

Listed prohibited actions include harassment, termination, rejection for a job or promotion, lesser assignments, or forced leave. In particular, the EEOC emphasizes that employers “cannot remove [an employee] from [her] job or place [her] on leave because it believes that work would pose a risk to [her] or [her] pregnancy.”

The fact sheet also lists possible accommodations for pregnant employees, including:

- altered break and work schedules (e.g., breaks to rest or use the restroom)
- permission to sit or stand
- ergonomic furniture
- shift changes
- elimination of marginal job functions
- permission to work from home

The EEOC further opines that pregnant employees “might be able to get altered job duties . . . [d]epending on how [the] employer treats non-pregnant employees with similar limitations,” such as reduced workload, removal of an essential job function, or temporary assignment to a different position.

In “Helping Patients Deal with Pregnancy-Related Limitations and Restrictions at Work,” the EEOC provides guidance to healthcare providers on how to help pregnant employees obtain accommodations, with particular emphasis on accommodations of “reduced workload, removal of an essential job function, or a temporary reassignment.”

New EEOC Fact Sheet Provides Update on EEOC Proposal to Collect Equal Pay Data

Also on June 14, 2016, the EEOC issued a new fact sheet on its efforts to enforce equal pay laws: “What You Should Know: Equal Pay and the EEOC’s Proposal to Collect Pay Data,” available at: https://www1.eeoc.gov/eeoc/newsroom/wysk/pay_data.cfm?renderforprint=1.

The fact sheet summarizes the EEOC’s prior proposal, published on February 1, 2016, to annually collect pay data by gender, race, and ethnicity from federal contractors and employers with 100 or more employees.³ The EEOC describes the purpose of the proposal as enabling it to “assess complaints of discrimination at the initial stages of an investigation, focus agency investigations, and identify existing pay disparities that may warrant further examination.”

The EEOC held a public hearing on the proposal in March 2016. The fact sheet notes that the EEOC will submit any revisions to the proposal this summer, after reviewing testimony and public comment. If revised, employers and other stakeholders will have a second comment period as to the new proposal.

Conclusion

The OFCCP’s final rule is sweeping in its scope and generally favors employees. Employers covered by the OFCCP’s final rule who offer health insurance should review their plans for categorical exclusions, which may be deemed facially discriminatory under the final rule. Employers also should review their pay practices, policies, procedures, and training to ensure they are non-discriminatory, gender-neutral, and otherwise compliant with the final rule. Federal contractors and other covered employers also should be prepared for OFCCP desk audits and onsite visits to focus on compliance issues raised by the final rule.

Employers not covered by the OFCCP’s final rule still may see an increase in sex discrimination charges flowing from the heightened public attention on these issues.

There has been increased attention on pregnancy discrimination and pay equity in recent years. The EEOC fact sheets on pregnancy discrimination and pay discrimination signal the EEOC’s continued enforcement focus in these areas.

If you have questions about the OFCCP’s final rule or the EEOC’s fact sheets, please contact us.

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³ The proposal is available at: <https://www.federalregister.gov/articles/2016/02/01/2016-01544/agency-information-collection-activities-revision-of-the-employer-information-report-eeo-1-and>.