Insight

IN-DEPTH DISCUSSION

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OFCCP Issues Final Regulations on Sex Discrimination for Government Contractors

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On June 15, 2016, the U.S. Office of Federal Contract Compliance Programs ("OFCCP") published a final rule detailing the obligations of federal contractors to ensure nondiscrimination on the basis of sex, and to take affirmative action to treat all applicants and employees equally without regard to sex.[1]

Replacing the Sex Discrimination Guidelines, which the OFCCP published in 1970 and never revised, this new rule—*Discrimination on the Basis of Sex*—as a matter of law represents OFCCP's interpretation of Executive Order 11246 only. As a practical matter, however, the final rule appears to be more than such a limited interpretation. As finalized, the rule summarizes the Obama administration's positions regarding the interpretation of multiple federal laws relating to discrimination on the basis of sex, sexual orientation, or gender identity, as articulated through regulatory actions, sub-regulatory pronouncements, and arguments asserted by government lawyers.

Sex Discrimination and Sex as BFOQ

The stated purpose of the new rule is to set forth federal contractors' obligations to ensure nondiscrimination on the basis of sex.

This general prohibition of discrimination on the basis of sex is explicitly defined as extending to pregnancy, childbirth, or related medical conditions, gender identity, transgender status, and sex stereotyping.

The new rule provides a number of examples of unlawful discrimination that will seem very familiar to most employers, such as:

- Making a distinction between married and unmarried persons that is not applied equally to men and women;

1 OFCCP, *Discrimination on the Basis of Sex*, 81 Fed. Reg. 39107 -39169 (June 15, 2016).

- Denying women with children an employment opportunity that is available to men with children;
- Treating men and women differently with regard to the availability of flexible work arrangements;
- Firing, or otherwise treating adversely, unmarried women, but not unmarried men, who become parents; and
- Applying different standards in hiring or promoting men and women on the basis of sex.[2]

The rule also provides examples of conduct that have only recently begun to be recognized as unlawful, such as:

- Making any facilities and employment-related activities available only to members of one sex, except that if the contractor provides restrooms, changing rooms, showers, or similar facilities, the contractor must provide same-sex or single-user facilities;
- Denying transgender employees access to the restrooms, changing rooms, showers, or similar facilities designated for use by the gender with which they identify; and
- Treating employees or applicants adversely 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.

The new rule emphasizes that contractors "may not hire and employ employees on the basis of sex unless sex is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the contractor's particular business or enterprise."[3] In its discussion of the new rule, the OFCCP notes that instances in which being a particular sex is a BFOQ are rare.[4]

Compensation

The new rule follows clearly established law in providing that compensation may not be based on sex, but includes language that may indicate the OFCCP's intention to make comparisons between employees who would not have been treated as similarly situated under a standard Title VII analysis for determining pay discrimination.

The OFCCP must follow Title VII standards in looking to remedy federal contractor pay discrimination. Title VII prohibits employers from paying similarly situated employees differently based on sex. To be similarly situated, employees generally must be working in the same job and usually in the same facility.

Although the new rule explicitly recognizes the general Title VII standard – "[c]ontractors may not pay different compensation to similarly situated employees on the basis of sex[5] – there also appears to be an attempt to create some room in which to redefine the meaning of "similarly situated":

> For purposes of evaluating compensation differences, the determination of similarly situated employees is case specific. Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.[6]

2 41 C.F.R. §60-20.2(b).

3 41. C.F.R. §60-20.3.

4 81 Fed. Reg. at 39109.

5 41 C.F.R. §60-20.4(a).

6 *Id.*

Even if the agency does try to expand the concept of being similarly situated, there are clear limits to its intentions. In its discussion of the new rule, the OFCCP has stated unequivocally that it will not seek to

> compare jobs because they have comparable worth even if they do not involve similar duties or working conditions. *OFCCP does not conduct comparable worth assessments when reviewing contractors' compensation systems.*[7]

(emphasis added)

Taking all of this into account, contractors will want to see how the OFCCP attempts to apply this language in the context of future compliance reviews and enforcement actions to make sure that the agency is adhering to the applicable judicial interpretations of Title VII.

Pregnancy, Childbirth and Related Conditions

The new rule explicitly prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions (including lactation), and admonishes federal contractors 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."[8] Examples of prohibited conduct include refusing to hire pregnant women or women in general because of their child-bearing capacity, forcing employees to take leave due to pregnancy or childbirth, limiting pregnant employees' job duties based on pregnancy or requiring a doctor's note to continue working. The section also requires that federal contractors supply health insurance covering hospitalization and other medical costs for pregnancy, childbirth, or related medical conditions to the same extent such costs are covered for other medical conditions.

This section also requires employers to provide pregnancy-related accommodations, such as alternative job assignments and modified duties, to the extent they are provided to employees with other medical conditions. In addition, it mandates provision of accommodations for pregnancy-related limitations where such accommodations must, under employer policy or any relevant law, be supplied to other employees with medical conditions.

Under unlawful disparate impact, the section prohibits policies and practices that deny alternative job assignments, modified duties, and other accommodations for pregnancy-related conditions, unless they are job related, consistent with business necessity, and do not have a disparate impact based on sex.[9] Thus, the OFCCP elaborates that federal contractors' policies permitting light duty only for employees who suffer an on-the-job injury are impermissible if they have an adverse impact on employees with pregnancy-related medical conditions, unless the policies are shown to be job-related and consistent with business necessity. Because the focus of this analysis is not on the impact to all women, but rather the impact on just those employees who are "affected by pregnancy, childbirth, or related medical conditions," a finding of disparate impact would appear to be almost inevitable. This result is consistent with an intention to increase the availability of reasonable accommodations for pregnancy.[10] In its discussion of the rule, the OFCCP further indicated that it may, in the future, consider an explicit requirement that federal contractors "provide 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."[11]

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7 Fed. Reg. at 39127.

8 41 C.F.R. §60-20.5.

9 41 C.F.R. §60-20.5(c)(2).

10 81 Fed. Reg. at 39134.

11 *Id.*

Fringe Benefits

The new rule also affirms the already well-established principle that federal contractors may not discriminate on the basis of sex with regard to fringe benefits, including medical, hospital, accident, life insurance, and retirement benefits, profit-sharing and bonus plans, leave, and other terms, conditions, and privileges of employment. However, further review of the commentary accompanying the final rule reveals some potentially significant implications.[12]

First, though not necessarily evident on its face, the final rule requires federal contractors' medical plans to cover treatments, such as hormone therapy, designed to change transgender employees' physical characteristics to match those of their gender identity.[13] In its discussion of the new rule, the OFCCP notes that it received comments in response to the proposed rule urging the OFCCP to revise the fringe benefits section to prohibit contractors from providing health insurance plans that deny insurance coverage for health care related to gender transition (which it referred to as "trans-exclusive plans"). The OFCCP responded to these comments by stating that such express provisions were unnecessary because "the term 'fringe benefits' is defined to include medical benefits and the term 'sex' is defined to include gender identity." According to the OFCCP, therefore, the "logical reading of the [final rule] is that certain trans-exclusive health benefits offerings may constitute unlawful discrimination."[14] This interpretation is consistent with the mandates of the Affordable Care Act's nondiscrimination rule, which takes effect in July 2016, and which provides that employers may not limit or deny coverage for health services that are ordinarily available to individuals of one sex, to a transgender individual based on the fact that an individual's sex assigned at birth is different from the one to which such health services are ordinarily available, and may not limit or exclude from coverage health services related to gender transition.[15]

Sex Stereotyping

The new rule provides that federal contractors must not make employment decisions on the basis of sex stereotypes. This includes, for example, adverse treatment of women because they do not wear jewelry, make-up, or high heels, and adverse treatment of male employees because they are perceived to be effeminate.[16] Consistent with the EEOC's recent position, federal contractors are cautioned they must not treat employees or applicants adversely because of their sexual orientation. This is consistent with the mandate of Executive Order 13672, which amended Executive Order 11246 to prohibit employment discrimination by contractors based on sexual orientation.

Adverse treatment is also prohibited based on transgender status, as well as numerous other illustrative sex-based stereotypes, such as expectations about women working in particular jobs, sectors, or industries and stereotypes about caregiver responsibilities.

Sexual Harassment

The new rule also briefly summarizes the law prohibiting quid pro quo and hostile environment sexual harassment. "Harassment based on sex" is explicitly defined to include harassment based on gender identity, transgender status, pregnancy, childbirth, or related medical conditions, and harassment that is not sexual in nature, but that is because of sex or sex-based stereotypes.[17]

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12 41 C.F.R. §60-20.6.

13 81 Fed. Reg. at 39135-39137.

14 *Id.*

15 45 C.F.R. § 92.207.

16 41 C.F.R. § 60-20.7.

17 41 C.F.R. § 60-20.8.

Appendix of "Best Practices"

The final rule also includes an appendix[18] listing seven practices the OFCCP states are not required but which constitute "best practices."

- Changing gender-specific workplace language, such as "foreman" and "lineman" to gender neutral alternatives where they exist;
- Designating single-user restrooms, changing rooms and showers as sex neutral;
- Providing accommodations policies that include light duty, modified job assignment, and other reasonable accommodations to employees unable to perform some job duties because of pregnancy, childbirth, or related conditions;
- Providing time off and flexible workplace policies to both men and women;
- "Encouraging" men and women equally to engage in caregiving responsibilities;
- "Fostering a climate" in which women are not assumed to be more likely than men to provide family care; and
- Developing policies and procedures to ensure employees are not harassed based on sex, including prohibiting harassment, providing training, and establishing complaint procedures.

Impact and Recommendations

As noted above, though the OFCCP's position in the final rule is consistent with that espoused by other federal agencies in recent years, it contains several noteworthy interpretations that do not necessarily track the actual practices of most employers, or even most federal contractors.

As a result, contractors should not merely read the final rule at face value, but should reflect on the pervasive effect of certain key definitions. First, federal contractors should carefully consider OFCCP's definition of "sex" to include "pregnancy, childbirth, or related conditions; gender identity; transgender status; and sex stereotyping." This means that any reference in the rule to discrimination "because of sex" must also be read to include these characteristics. Though consistent with the EEOC's position, as well as OFCCP's previously articulated stance,[19] this might not be consistent with all employers' policies and practices. Additionally, federal contractors should take note of Executive Order 13672, which prohibits contractor discrimination on the bases of sexual orientation.

Federal contractors should also evaluate their provision of fringe benefits. Although the final rule does not require coverage of abortion or pregnancy termination, it does require medical insurance benefits to cover hormone treatments and gender reassignment for transgender employees. This is also required under the Affordable Care Act.

Finally, contractors need to be aware of the OFCCP's concerns, as reflected throughout the final rule, that individuals may be guided or "steered" into lower-paid jobs either as applicants or new hires based on a protected class status. Federal contractors can expect that OFCCP will continue to focus on this theory when assessing representation within job titles and otherwise when conducting audits of affirmative action plans.

18 *Id.*

19 OFCCP Dir. 2014-02 (Aug. 19, 2014), http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.