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Office of Federal Contract Compliance Programs  
U.S. Department of Labor  
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Room C-3325  
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Dear Ms. Carr:

The Equal Employment Advisory Council (“EEAC”), Society for Human Resource Management (“SHRM”), and College and University Professional Association for Human Resources (“CUPA-HR”) welcome the opportunity to submit the following comments in response to the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) Notice of Proposed Rulemaking (“NPRM”), Discrimination on the Basis of Sex, soliciting public input on the agency’s proposed revisions to its Sex Discrimination Guidelines (hereinafter, “the Guidelines”). OFCCP intends to overhaul and replace the Guidelines, which “set forth the interpretations and guidelines” it uses in implementing Executive Order 11246’s prohibition against sex discrimination, with regulations that have “the full force and effect of law.”

OVERVIEW AND SUMMARY OF RECOMMENDATIONS

The NPRM states that the decades-old Guidelines “fail to conform to or reflect current Title VII [of the 1964 Civil Rights Act] jurisprudence or to address the needs and realities of the modern workplace.” 1  OFCCP’s NPRM states further that the Guidelines must now be revised (rather than rescinded) in order to avoid a “vacuum of guidance for contractors” that would force them instead to “pay for lawyers’ or human resource professionals’ time to provide guidance regarding their nondiscrimination obligations.” 2

EEAC, SHRM, and CUPA-HR support OFCCP’s stated objective of applying longstanding Title VII principles to the administration and enforcement of Executive Order

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11246, and we agree with the agency’s conclusion that the Guidelines no longer completely reflect current Title VII jurisprudence. Indeed, where the Guidelines have not been updated to reflect statutory amendments to Title VII and binding judicial interpretations of that law that have occurred since they were written more than 40 years ago, revisions to the Guidelines are not only appropriate, they are necessary.

As set forth below, however, we respectfully submit that the rule now proposed by OFCCP goes well beyond the agency’s stated objective for this rulemaking, and purports instead to interpret Title VII in ways that are contrary to Congressional intent. Put simply, Congress has not authorized any federal agency to promulgate Title VII interpretive regulations that have “the full force and effect of law.” Despite this lack of delegation, the NPRM nevertheless meanders through a mix of well-established law (e.g., incorporating hostile work environment theories of sexual harassment), developing law (e.g., mandating that employers affirmatively provide pregnancy accommodations), and novel, unsupported theories of discrimination (e.g., drawing a de facto conclusion that all gender-specific job names constitute sex discrimination) to categorically label some conduct as per se unlawful, all without any legal basis for doing so.

While OFCCP may, indeed should, rely on Title VII case law principles when enforcing Executive Order 11246 and apply the facts of those cases in its enforcement efforts, it does not follow that the agency can use those same fact patterns to define, as a matter of law, what is or is not sex discrimination. Tellingly, even the Equal Employment Opportunity Commission (“EEOC”), the independent federal commission charged with enforcing Title VII, lacks the authority to promulgate substantive regulations under that law. OFCCP may not use this rulemaking as a means of exercising even greater rulemaking authority than that granted by Congress to the EEOC.

EEAC, SHRM, and CUPA-HR respectfully submit that the NPRM should be substantially revised to make clear that OFCCP is providing examples of employer conduct that might constitute sex discrimination under certain circumstances (notably, where employment decisions are made because of sex), rather than suggesting that certain conduct, regardless of fact or intent, amounts to an automatic violation of Executive Order 11246 or Title VII. As set forth below, to that end we offer several practical alternatives for the agency’s consideration:

- Maintaining the Guidelines’ classification as guidelines, rather than regulations having the full force and effect of law;
- Revising the pregnancy discrimination section in a manner that is consistent with Title VII jurisprudence, including the Supreme Court’s recent decision in Young v. United Parcel Service;
- Making clear that the examples of unlawful conduct listed in the rule are just that—examples that under certain circumstances might constitute sex discrimination;
- Using gender-neutral terminology to make clear that both women and men are protected under Executive Order 11246 and Title VII;
• Avoiding the implication that Executive Order 11246 and Title VII mandate across-the-board pay equity even where legitimate, nondiscriminatory reasons justify pay differentials between employees of different sexes; and

• Reserving guidance on sexual orientation and gender identity discrimination, which Executive Order 11246 lists as stand-alone protected characteristics apart from sex, for a separate guidance or rulemaking.

STATEMENT OF INTEREST

Equal Employment Advisory Council

EEAC is the nation’s largest nonprofit association of major employers dedicated exclusively to the advancement of practical and effective programs to eliminate employment discrimination. Formed in 1976, EEAC’s membership includes more than 270 of the nation’s largest private-sector corporations, all of which are firmly committed to the principles of equal employment opportunity. EEAC’s member companies are major employers subject to the requirements of Title VII and other federal laws and regulations prohibiting workplace discrimination, and nearly all are federal contractors subject to Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, and their implementing regulations.

EEAC’s directors and officers include many of American industry’s leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements.

Society for Human Resource Management

Founded in 1948, SHRM is the world’s largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

College and University Professional Association for Human Resources

CUPA-HR serves as the voice of human resources in higher education, representing more than 18,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master’s institutions, 57 percent of all bachelor’s institutions, and 600 two-year and specialized institutions. Higher education employs over 3.7 million workers nationwide, with colleges and universities in all 50 states.
BACKGROUND AND OVERVIEW

As amended, Executive Order 11246 prohibits covered federal contractors and subcontractors from discriminating against employees and applicants because of race, color, religion, sex, sexual orientation, gender identity, or national origin, and requires these covered employers to take affirmative action to ensure that applicants and employees are treated equally without regard to these characteristics.\(^3\) OFCCP’s “Sex Discrimination Guidelines,” which were first adopted in 1970 and which have not been materially revised since that time, set forth interpretations and guidelines for implementing the Executive Order’s nondiscrimination and affirmative action requirements pertaining to sex.

As noted in the Preamble to the NPRM, Title VII itself has been amended several times since the Guidelines were issued. For example, the Pregnancy Discrimination Act of 1978 (“PDA”) amended Title VII to clarify that discrimination because of pregnancy, childbirth or related conditions constitutes discrimination “because of sex.” In addition, the U.S. Supreme Court has decided a number of seminal cases involving sex discrimination issues since 1970, including its 1986 landmark ruling in *Meritier Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), which concluded that workplace harassment is a form of sex discrimination when it is severe or pervasive enough to affect the terms or conditions of employment.

Of particular note, the NPRM’s proposed Section 60-2.5 would clarify, consistent with the PDA, that sex discrimination includes discrimination on the basis of pregnancy, childbirth, or related medical conditions. The NPRM, however, also adopts the controversial interpretation outlined last summer by the EEOC that would require contractors to treat individuals “of childbearing capacity,” and those affected by pregnancy, childbirth, or related conditions, the same as all others “not so affected but similar in their ability or inability to work” — including with respect to workplace accommodations.\(^4\)

In other words, OFCCP is proposing to adopt the EEOC’s position that contractors and subcontractors have an affirmative obligation to provide workplace accommodations on the basis of pregnancy to the same extent as such accommodations are provided for individuals with disabilities and others with similar work limitations. This is the very issue recently decided by the United States Supreme Court in *Young v. United Parcel Service*,\(^5\) where the Court concluded that the EEOC’s interpretation did not represent a consistent, informed, or persuasive interpretation of the PDA, and therefore was not entitled to any judicial deference. EEOC has committed to revising its guidance on this issue in light of the *Young* decision, and OFCCP should do the same.

\(^3\) Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965), as amended.
CONGRESS HAS NOT DELEGATED TO OFCCP THE AUTHORITY TO ISSUE REGULATIONS INTERPRETING TITLE VII

The Preamble reiterates OFCCP’s longstanding position that it follows Title VII principles in implementing Executive Order 11246. This position must encompass the specific sex discrimination principles born from Title VII case law, a position which the existing Guidelines make abundantly clear.

But Congress has not given OFCCP or any other agency, including the EEOC, the authority to issue substantive rules implementing or interpreting Title VII. Indeed, that law confers upon the EEOC only the right to issue “suitable procedural regulations.”6 EEAC thus respectfully submits that OFCCP’s proposed changes to the Guidelines’ title (from “Sex Discrimination Guidelines” to “Discrimination on the Basis of Sex”) and purpose (from OFCCP “interpretations and guidelines” to “specific requirements” that contractors must meet) are not authorized by Title VII, Executive Order 11246, or relevant federal case law.

The Preamble states that these proposed changes are meant to “make clear that the provisions in part 60-20 are regulations implementing Executive Order 11246 with the full force and effect of law.”7 While it is certainly appropriate for OFCCP to issue updated guidance summarizing the state of Title VII law in light of judicial decisions over the years, OFCCP’s substantive interpretations of Title VII are not entitled to deference under the well-established legal standards set forth by the Supreme Court.8 We therefore urge OFCCP to make clear that the proposed revisions represent compliance guidelines which do not carry the full force and effect of law.

NEITHER EXECUTIVE ORDER 11246 NOR TITLE VII IMPOSES AN AFFIRMATIVE PREGNANCY ACCOMMODATION REQUIREMENT

The Supreme Court Has Rejected the NPRM’s Pregnancy Accommodation Mandate

Proposed section 60-20.5 of the NPRM reiterates that discrimination on the basis of pregnancy, childbirth, or related conditions constitutes unlawful sex discrimination. This section also would require 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…as other persons not so affected, but similar in their ability or inability to work.” Sec. 60-20.5(a) (emphasis added).

Proposed subsection 60-20.5(b) provides several examples of unlawful pregnancy discrimination, including an employer’s failure to provide:

An alternative job assignment, modified duties, or other accommodations to a pregnant employee who is temporarily unable to perform some of her job duties because of pregnancy, childbirth, or related medical conditions when such assignments, modifications, or other accommodations are provided, or are required to be provided by a contractor’s policy or by other relevant laws, to other employees whose abilities or inabilities to perform their jobs are similarly affected.

OFCCP explains that its “approach with respect to pregnancy accommodations” is consistent with the (now invalidated) interpretation of the Pregnancy Discrimination Act adopted by the EEOC and by the government in Young. In Young, the government contended that the EEOC’s interpretation of the PDA — as expressed in the Commission’s July 2014 revised enforcement guidance — should be given “special, if not controlling, weight.” Indeed, in its ruling, the Supreme Court acknowledged that agency interpretations ordinarily are entitled to some measure of respect by the courts, but only to the extent that they have the power to persuade.

The Court then went on to conclude, however, that the timing, inconsistency with longstanding agency guidance, and overall lack of thoroughness all cautioned against relying on the EEOC’s July 2014 guidance. Among other things, the Court observed that the EEOC issued the guidance very recently, after the Court agreed to take up the case. “In these circumstances, it is fair to say that the EEOC’s current guidelines take a position about which the EEOC’s previous guidelines were silent.” Moreover, the Court found that the new position was inconsistent with positions for which the government has long advocated.

Specifically with respect to the issue of pregnancy accommodation, the Court found the government’s position untenable because it suggested that the PDA confers upon pregnant women “a most-favored-nation status,” under which they are automatically entitled to workplace accommodations to the same extent as anyone else who is similarly limited, “irrespective of the nature of their jobs, the employer’s need to keep them working, their ages, or any other criteria.” The Court found that such an approach was unsupported by the text of the PDA and otherwise inconsistent with basic disparate treatment law.

Accordingly, in light of Young, EEAC respectfully urges OFCCP to refrain from following the EEOC’s invalidated approach, and instead emphasize and clarify, consistent with the plain text of Title VII and the EEOC’s own sex discrimination procedural regulations, that disparate treatment discrimination on the basis of pregnancy, childbirth, or related medical conditions is strictly prohibited.

Title VII Does Not Provide a Right to Pregnancy Accommodations

The PDA amended Title VII expressly to provide that discrimination because of pregnancy is a form of unlawful sex discrimination. In other words, Title VII proscribes treating a woman differently than a non-pregnant person similar in his or her ability to work because of pregnancy or a related condition. Although the PDA requires employers to treat women
“affected by pregnancy, childbirth, or related medical conditions” the same in all aspects of employment – including the provision of health insurance and other benefits – as other employees, it stops short of imposing an affirmative duty on employers to provide pregnancy-related workplace accommodations to the extent that they are not offered categorically to all other employees.

Importantly, in rejecting the plaintiff’s argument to the contrary, the Supreme Court in Young expressed serious doubt “that Congress intended to grant pregnant workers an unconditional most-favored-nation status. The language of the statute does not require that unqualified reading.”

Nevertheless, proposed Section 60-20.5 of the NPRM would purport to impose that very extra-statutory obligation on contractors by regulatory fiat. A careful analysis of the issue will confirm that the EEOC’s discredited position, repeated in the Proposed Rule and now rejected by the Supreme Court, is incompatible with Title VII and the weight of federal appeals court authority.

**OFCCP Has Never Interpreted Executive Order 11246 To Require an Affirmative Pregnancy Accommodation Obligation**

As noted, the Proposed Rule adopts the EEOC’s now-discredited position that employers have an affirmative duty to provide pregnant employees with the same accommodations as are provided to any non-pregnant employee similar in the ability or inability to work, regardless of the reason for the accommodation. To our knowledge, OFCCP has never before asserted this position in any formal or informal guidance. Nor is there any mention of pregnancy-related accommodations in the agency’s comprehensive Federal Contract Compliance Manual (“FCCM”), which was revised less than 2 years ago. Indeed, while the FCCM contains multiple references to a covered employer’s obligation to refrain from discriminating on the basis of pregnancy and related conditions, it says nothing about failing to accommodate pregnancy being a violation of either Executive Order 11246 or Title VII. Rather, the only FCCM references to “accommodations” pertain exclusively to the obligation to provide reasonable accommodations to qualified individuals with disabilities under the Americans with Disabilities Act (“ADA”), Section 503, and Section 4212, or the obligation under Title VII to accommodate religion.

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9 135 S. Ct. at 1350.
10 Indeed, even the FCCM’s definition of “reasonable accommodation” is expressed in terms of the ADA: Reasonable Accommodation (Section 503 and Section 4212). The term reasonable accommodation means: (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such applicant desires; or (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (iii) Modifications or adjustments that enable the contractor’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by the contractor’s other similarly situated employees without disabilities. 41 CFR 60-741.2(v)(1); see also 29 CFR 1630.2(o)(1); 41 CFR 60-250.2(t)(1)(definition of reasonable accommodation for “special disabled veterans”); 41 CFR 60–300.2(t)(1)(definition of reasonable accommodation for “disabled veterans”). For examples of reasonable accommodations, see 41 CFR 60–741.2(v)(2), 250.2(t)(2), and 300.2(t)(2).

FCCM, Key Words and Phrases, p. 316.
11 FCCM, Sec. 2G01, Religious Accommodation, pp. 78-79.
any event, the OFCCP’s position on this issue has now been squarely foreclosed by the *Young* decision.

The FCCM explains in detail the scope of a covered employer’s reasonable accommodation obligation, as well as the circumstances under which a covered employer is not required to provide reasonable accommodations for disability and religion. There is no similar explanation for evaluating a purported failure to provide pregnancy accommodations. Nor does the FCCM attempt to advise compliance officers on determining, for instance, whether and under what circumstances: (1) a pregnant worker needs a reasonable accommodation; (2) the pregnant employee is similar in her “ability or inability to work” to other non-pregnant employees receiving workplace disability or religious accommodations; (3) the proposed accommodation is, in fact, reasonable; and/or (4) any defenses might exist to justify the employer’s failure to accommodate, such as undue hardship (under either the “minimal” or “substantial” burden standards).

The fact that the OFCCP’s recently revised FCCM contains a detailed discussion of pregnancy discrimination but does not contain any discussion of a right to non-disability related pregnancy accommodations suggests that the agency only recently decided to follow the EEOC’s now-invalidated position that such an affirmative obligation exists under Title VII. To the extent that *Young* rejects this interpretation of the PDA, OFCCP should delete that corresponding language from the NPRM in its entirety.

*Pregnancy Status Alone Does Not Confer the Same Rights as ADA-Covered Disabilities or Statutory Entitlement to FMLA Leave*

Section 60-20.5 of the Proposed Rule would make it unlawful for a contractor to fail to provide non-disability-related workplace accommodations to women on the basis of pregnancy, childbirth, or related medical conditions, so long as any other employee similar in the “ability or inability to work,” whether *similarly situated* or not, is provided an accommodation. Thus, any contractor providing even one “light duty” accommodation to a qualified individual with a disability pursuant to the ADA, or having even one employee utilizing her Family and Medical Leave Act (“FMLA”) statutory entitlement to leave for pregnancy and related medical conditions, then would be obligated to provide the same accommodation to a non-disabled or FMLA-ineligible worker based solely on pregnancy.

The NPRM’s Preamble reinforces this, stating explicitly that denying such accommodations to a pregnant worker where they are provided to others pursuant to a company policy or other law (such as the ADA or FMLA) constitutes disparate treatment sex discrimination in violation of E.O. 11246. “For example, employers may not impose a shorter maximum amount of pregnancy leave as compared to the maximum time off allowed for other types of medical or short-term disability leave,” OFCCP explains.

The comparison that OFCCP purports to draw between the right to non-disability pregnancy accommodations and an employer’s duty to treat individuals with pregnancy-related disabilities the same as those with non-pregnancy related disabilities is especially tenuous.
Qualified individuals with disabilities, whether pregnancy-related or not, are entitled to workplace reasonable accommodations under the ADA. It follows that denying an ADA accommodation to a woman with a disability because of the nature of her disability (i.e., because it is pregnancy related) is impermissible. Title VII, in contrast, does not require workplace accommodations based on pregnancy or related conditions, nor had that law been interpreted to require such accommodations prior to the EEOC’s July 2014 guidance.12

Whether and to what extent employers are required to provide workplace reasonable accommodations based on pregnancy-related disabilities under the ADA is well beyond the scope of OFCCP’s regulatory authority. Accordingly, OFCCP should refrain from incorporating ADA reasonable accommodation principles into its sex discrimination guidance under Executive Order 11246.

OFCCP SHOULD REVISE THE NPRM TO MAKE CLEAR THAT THE EXAMPLES USED REPRESENT ONLY CONDUCT THAT MIGHT BE DISCRIMINATORY UNDER CERTAIN CIRCUMSTANCES

In addition to properly reclassifying the NPRM as “guidelines,” OFCCP should also make clear that the examples of discrimination listed in the Proposed Rule are just that — examples. The NPRM unnecessarily confuses this issue and includes a list of “unlawful sex-based discriminatory practices,” some of which are discriminatory on their face (e.g., maintaining seniority lines and lists based upon sex) and others of which have no basis in Title VII jurisprudence (e.g., concluding that the job title “lineman” is per se unlawful in the absence of a bona fide occupational qualification (“BFOQ”)).

While OFCCP uses qualifiers such as “on the basis of sex,” “based upon sex,” or “because of sex” for many (but not all) of its examples, it would be less confusing and far simpler to simply list employment processes and decisions that, if applied differently to men and women because of sex, likely would constitute sex discrimination. In the alternative, should the agency insist on providing specific examples of what OFCCP believes to be discrimination, those examples would be better suited for an appendix to the Final Rule.

OFCCP Should Use Gender-Neutral Terms

With the exception of pregnancy and pregnancy-related conditions, the examples of discriminatory conduct listed in the NPRM should be gender-neutral, to make clear that both women and men are protected under Executive Order 11246. While this principle may be clear to the lawyers and human resources professionals charged with ensuring that their companies remain compliant with the Executive Order, the gender-specific language used in the NPRM would be highly confusing to contractors that have limited or no access to these professionals (the same employers whom the agency states should not be forced to use lawyers and human resources professionals to comply with its rules and regulations).

12 Not insignificantly, Title VII does explicitly speak to the obligation to provide reasonable accommodations on the basis of religion. See 42 U.S.C. § 2000e(j).
Nearly all of the examples listed in the NPRM pertain to discrimination against women. In fact, the NPRM’s examples of disparate impact discrimination exclusively illustrate conduct that disadvantages women. OFCCP has emphasized in recent years that Executive Order 11246’s nondiscrimination protections apply equally to men and women, and the NPRM should be revised to eliminate any confusion on this issue.\(^\text{13}\)

\textit{Not All Sex-Referent Job Names Constitute Discrimination}

OFCCP is proposing to include, in its list of unlawful discriminatory practices, the “recruiting or advertising for individuals for certain jobs on the basis of sex, including through use of gender-specific terms for jobs (such as ‘lineman’).” This is not an accurate reflection of the current state of the law and we recommend that OFCCP modify this provision.

The EEOC has published policy guidance on the use of sex-referent language in advertising and recruitment. That guidance properly notes that the state of the law is more nuanced than OFCCP appears to believe:

On its face, sex-referent language appears to express a sex-based preference that, in the absence of a sex BFOQ, violates Title VII. The Commission recognizes, though, that many sex-referent terms have become colloquial ways of denoting particular jobs, rather than the sex of the individuals who perform those jobs.\(^\text{14}\)

The EEOC guidance goes on to acknowledge the possibility that an employer might use sex-referent language to describe a job without intending to express a sex-based preference or to discriminate on the basis of sex, and notes correctly that the use of sex-referent language in advertising or recruiting is “suspect but is not a per se violation of Title VII.” The guidance further states that “where sex-referent language is used in conjunction with prominent language clearly indicating the employer’s intent to include applicants or prospective applicants of both sexes, no violation of Title VII will be found.”\(^\text{15}\)

While the EEOC’s guidance was issued in 1990, a more recent EEOC informal discussion letter takes the same approach. In 2008, the Office of Legal Counsel issued an informal discussion letter responding to a request about whether the Commission had a “definitive policy on gender-specific job titles” specifically related to use of the title “journeyman.” In the letter, the Commission staff distinguished narrow terms, like “waitress” that would “implicate[] federal EEO laws because the term is likely to deter members of protected groups – in this case, men – from applying for such jobs.” The discussion letter noted

\(^{13}\) “‘When we tell our daughters that there are no limits to what jobs they can pursue, we should be mindful that those same aspirations apply to our sons,’ said OFCCP Director Patricia A. Shiu. ‘Outdated stereotypes about women being better suited to caregiving jobs than men perpetuate unlawful and unfair sex discrimination. At OFCCP, we are committed to combating sex stereotyping whenever it gets in the way of equal employment opportunities for qualified workers.’” OFCCP News Release 13-1572-SEA (September 12, 2013).


\(^{15}\) Id.
that while the use of the term “journeyman” can be considered gender-specific, its use probably would not implicate federal EEO laws to the extent that it is a term of art designating a particular skill level.”

The EEOC acknowledges that Title VII has not been interpreted to prohibit all use of sex-referent job titles. To the extent that OFCCP believes it has to address sex-referent job titles, the agency should make it clear that there is no bright line prohibition. For example, OFCCP could choose an approach similar to that used in the EEOC’s 2008 discussion letter that provides an example of a sex-referent term and an explanation as to why use of that term is likely unlawful, along with an example and explanation of a term that is not likely to be unlawful.

*The NPRM’s Rigid Approach to Sex Discrimination Could Chill Contractor Good Faith Efforts and Outreach to Women*

We respectfully submit that the NPRM might reasonably be interpreted to prohibit (or at least discourage) many of the important affirmative action programs and initiatives that federal contractors have developed under OFCCP’s existing regulations. In particular, the NPRM would prohibit:

Distinguishing on the basis of sex in apprenticeship or other formal or informal training programs; in other opportunities such as networking, mentoring, sponsorship, individual development plans, rotational assignments, and succession planning programs; or in performance appraisals that may provide the basis of subsequent opportunities.

Many federal contractors devote a significant amount of time and resources towards developing and implementing networking, mentoring, and training opportunities for women, minorities, veterans, and persons with disabilities to help ensure that there are no barriers to equal employment opportunities in the workplace. We do not believe that OFCCP intends the NPRM to prohibit the very practices it seeks to promote elsewhere in its rules. If implemented with “the full force and effect of law” that the agency intends, however, we believe the rule will do just that.

*The NPRM’s Section on Discriminatory Compensation is Repetitive and Should Be Removed*

Executive Order 11246 prohibits discriminatory compensation practices on account of race, color, religion, sex, sexual orientation, gender identity, or national origin. This prohibition is correctly accounted for in the NPRM section regarding “general prohibitions,” which states that contractors may not discriminate “in recruitment, hiring, firing, promotion, compensation, hours, job assignments, training, benefits, or other terms, conditions, or privileges of employment” (emphasis added). With compensation properly accounted for in this portion of
the NPRM, there is no need to add an additional redundant section to the rulemaking (the “discriminatory compensation” section) that simply restates that contractors may not discriminate against females and males in administering these personnel functions and that repeats in separate paragraphs the numerous items elsewhere contained in the NPRM.

Furthermore, this section’s blanket statement that contractors “may not engage in any employment practice that denies equal wages, benefits, or any other forms of compensation, or equal access to earnings opportunities, on the basis of sex,” is confusing and implies that Executive Order 11246 and Title VII somehow mandate across-the-board pay equity, even where legitimate, nondiscriminatory reasons justify pay differentials between employees of different sexes. Executive Order 11246 and Title VII require equal opportunity, not equal pay. The NPRM’s categorical statement that employers may not engage in practices that deny “equal wages” is misleading. At a minimum, the NPRM’s references to equal pay or wages should be removed and the Final Rule should state, consistent with Executive Order 11246 and Title VII, that contractors may not “deny wages, benefits, or any other forms of compensation, or equal access to earnings opportunities, on the basis of sex.”

**Gender Identity and Sexual Orientation Are Now Protected Characteristics Separate and Apart From Sex and Should Be Addressed in Separate Guidance**

Federal contractors are prohibited from discriminating against employees and applicants on the basis of sexual orientation and gender identity. That prohibition is most clearly stated in Executive Order 13672, which amends Executive Order 11246 and the OFCCP’s implementing regulations. The OFCCP’s proposed revisions to its sex discrimination guidelines take the position that Title VII’s prohibition against sex-based discrimination also applies to discrimination based on sexual orientation and gender identity. While this may be consistent with the EEOC’s current interpretation of Title VII, it is not a theory that has been well tested in, much less settled by, the federal courts.

While courts have found that employment decisions based on sex-based stereotypes can constitute sex discrimination prohibited by Title VII, it is simply not accurate to say that the federal judicial system has fully embraced this theory. Indeed, if it were clear that Title VII principles prohibited discrimination based on sexual orientation and gender identity, there would have been no need for Executive Order 13672.

Because Executive Order 11246 now lists sex, sexual orientation, and gender identity as three separate bases of discrimination, it seems confusing for OFCCP to now classify sexual orientation and gender identity discrimination as subsets of sex discrimination. It would be clearer to have separate guidance on sexual orientation and gender identity discrimination rather than combining them as the agency has proposed.
CONCLUSION

EEAC, SHRM, and CUPA-HR appreciate this opportunity to comment. We would welcome further opportunity to discuss our views with agency officials at any time.

Sincerely,

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Equal Employment Advisory Council

Michael P. Aitken
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cc: Chad Lallemand, Office of Information and Regulatory Affairs