

# **FACT SHEET**

## **Notice of Proposed Rulemaking: Discrimination on the Basis of Sex**

### **Background**

On January 28, 2015, the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) issued a Notice of Proposed Rulemaking (NPRM) that would rescind the existing Sex Discrimination Guidelines found at 41 C.F.R. part 60-20 and propose provisions that address current workplace practices and issues and align contractors’ obligation with current law and legal interpretations.

The existing Sex Discrimination Guidelines have not been substantively updated since their adoption in 1970. Employer policies and practices, the nature and extent of women’s participation in the labor force, and statutory and case law have changed significantly since 1970, leaving part 60-20 outdated and inaccurate. In fact, some of the guidelines’ provisions deviate from well-established law, and the agency no longer enforces outdated provisions. As a result, the existing regulations may, in some cases, confuse contractors as to their legal obligations. Meanwhile, significant and pervasive workplace discrimination and other barriers to equal opportunity for women continue to persist, requiring strong and clear regulations that contractors can understand and that OFCCP can enforce effectively.

Thus, the proposed rule is necessary to address current workplace practices and issues and to support the economic interests of women, families, and others impacted by discrimination based on sex. In addition, by clarifying contractors’ obligations under current law and removing conflicting regulatory provisions, the new provisions support voluntary compliance and strong enforcement – thus promoting economy and efficiency in procurement, and simple good governance.

Executive Order 11246, as amended (E.O. 11246), prohibits covered contractors and subcontractors from discriminating in employment on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. It also requires contractors to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. OFCCP interprets the nondiscrimination provisions of E.O. 11246 as being consistent with the principles of Title VII of the Civil Rights Act of 1964, which is enforced by the Equal Employment Opportunity Commission (EEOC).

### **Need for the Proposed Rule**

The current guidelines are outdated. For example, jobs are no longer advertised in sex-segregated newspaper columns (i.e., separate “Men” and “Women” job ads). Yet the current guidelines explicitly prohibit sex-segregated want-ads. Similarly, contractors today rarely adopt or implement explicit rules that prohibit hiring of women for certain jobs. Yet the current guidelines explicitly address facial “male only” hiring policies.

At the same time, the current guidelines fail to address practices that do continue to pose discriminatory barriers to equal opportunity and equal pay for women. For example —

- The current guidelines do not address the full range of discriminatory wage practices that contribute to the wage gap. While the wage gap between the average earnings of men and women is significantly narrower today than in 1970, full-time women workers' average annual earnings in 2013 were still only 78 percent of their male counterparts' earnings — and even less for black and Hispanic women and women with disabilities. A gap persists even when differences in occupation, skills, job characteristics, and labor market experience are taken into account.
- The current guidelines do not address accommodations for workers affected by pregnancy, childbirth, or related medical conditions. Such workers face a serious and too-often unmet need for reasonable, low- or no-cost workplace accommodations, such as being permitted to take more frequent bathroom breaks, sit down during their shifts, or temporarily perform light-duty assignments to accommodate lifting or bending restrictions. Without such workplace accommodations, workers affected by pregnancy, childbirth, or related medical conditions may be forced to go on leave or even quit their jobs.
- The current guidelines do not address sex-based stereotyping related to caregiving. Mothers with children living at home participate in the labor force at a much higher rate today than in 1970, but the outdated sex-based stereotype that women's family caretaking responsibilities interfere with their work performance still significantly limits women's employment opportunities.

Since the Sex Discrimination Guidelines were issued, Title VII has been amended several times, including by the Pregnancy Discrimination Act (PDA), which was enacted in 1978. The current guidelines do not reflect the significant changes that Congress has made to Title VII since 1970. In addition, Title VII case law has developed in important ways since the guidelines were adopted. For example:

- The current guidelines do not address pregnancy insurance issues. However, the PDA requires an employer to provide health or disability insurance to its employees for pregnancy-related conditions if it provides such insurance for other conditions.
- The current guidelines make no reference to sexual harassment or hostile work environments. However, the Supreme Court has long recognized that harassment on the basis of sex and the existence of a work environment that is hostile to members on the basis of sex may give rise to violations of Title VII.
- The current guidelines allow equal contributions *or* equal benefits in fringe-benefit plans. However, the Supreme Court has interpreted sex discrimination in fringe-benefit plans to require women and men to receive equal contributions *and* equal benefits.

## Highlights of the Proposed Rule

The rule proposes to eliminate current provisions that are outdated, revises others to align them with current law and interpretations, and includes new provisions that address contemporary problems. Specifically, the proposed rule would:

- Clarify that adverse treatment of an employee because of gender-stereotyped assumptions about family caretaking responsibilities is discrimination.
- Clarify that leave for childcare must be available to men on the same terms as it is available to women.
- Confirm that contractors must provide workplace accommodations, ranging from extra bathroom breaks to light-duty assignments, to women affected by pregnancy, childbirth, and related medical conditions comparable to the accommodations that they provide to other workers similar in their ability or inability to work, such as workers with disabilities or occupational injuries.<sup>1</sup>
- Clarify that compensation discrimination can result from job segregation or classification on the basis of gender, not just unequal pay for equal work, and thus may violate E.O. 11246.
- Confirm that contractors must provide equal benefits and equal contributions for male and female employees participating in fringe-benefit plans.
- Address both *quid pro quo* and hostile-environment sexual harassment, and include as a best practice that contractors develop and implement procedures to ensure an environment in which all employees feel safe and welcomed, are treated fairly, and are not harassed because of sex.
- Clarify that adverse treatment of employees because they do not conform to gender norms and expectations about appearance, attire, and behavior is unlawful sex discrimination.
- Clarify that discrimination based on an individual's gender identity is unlawful sex discrimination.
- Change the "Sex Discrimination *Guidelines*" to *regulations* about "Discrimination on the Basis of Sex" to make clear that they have the force and effect of law.

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<sup>1</sup> The approach set forth here with respect to pregnancy accommodation aligns OFCCP's regulations implementing E.O. 11246 with EEOC guidance in this area and with the position taken by the Federal government in *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4<sup>th</sup> Cir. 2013), *cert. granted* (U.S. No. 12-1226, July 1, 2014), a case currently pending before the Supreme Court.

## **Benefits and Costs**

This proposal would benefit 65 million employees who work for Federal contractors by updating the sex discrimination rules – benefitting both female and male employees who may suffer sexual harassment or other forms of sex discrimination. The proposal would provide many of the more than two million women in the Federal contractor workforce who are likely to become pregnant each year with reasonable accommodations for their pregnancy – potentially protecting them from losing their jobs, wages, and health care coverage. It would provide clear and consistent regulatory protection to transgender employees, the vast majority of whom report that they have experienced discrimination in the workplace. Finally, by clarifying legal requirements and eliminating confusion, the new provisions would make compliance and enforcement easier to achieve – ultimately, as noted above, promoting economy and efficiency in federal contracting and good governance.

The proposed rule would cost federal contractors approximately \$26 million in one-time administrative costs and approximately \$10 million annually to provide pregnancy-related accommodations.