

OFCCP 1970 Sex Discrimination Guidelines and 2016 Final Rule

Section Number	Title in Guidelines	Guidelines (1970)	Title in Final Rule	Final Rule (2016)
60-20.1	Title and purpose	Stated that interpretations are to be read in connection with part 60-1.	Purpose	Clarifies that contractors are subject to <i>all</i> the relevant parts related to the implementation of Executive Order 11246, not only part 60-1, and that the Final Rule’s prohibitions do not conflict with a contractor’s good faith efforts to expand employment opportunities for women.
60-20.2	Recruitment and advertisement	Addressed nondiscrimination requirements related to recruiting and advertising and the bona fide occupational qualification (BFOQ) defense.	General prohibitions	<p>Articulates the general prohibition against sex discrimination in employment (both disparate treatment and discrimination under disparate-impact analysis), defines “sex,” and gives examples.</p> <p>Specific provisions of note:</p> <ul style="list-style-type: none"> • Defines “sex” to include gender identity, transgender status, pregnancy, and sex stereotyping. • Examples of disparate treatment: <ul style="list-style-type: none"> ○ Denying transgender employees access to the restrooms, changing rooms, showers, and similar facilities designated for use by the gender with which they identify; ○ 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; ○ Restricting job classifications and maintaining seniority lines or lists on the basis of sex; ○ Recruiting or advertising for certain jobs on the basis of sex; ○ Imposing any differences in terms, conditions, or privileges of retirement on the basis of sex. • Example of disparate impact: <ul style="list-style-type: none"> ○ Relying on recruitment or promotion methods, such as “word-of-mouth” recruitment, that have an adverse impact on women where the contractor cannot establish that they are job-related and consistent with business necessity. <p>BFOQ defense is addressed in § 60-20.3.</p>

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60-20.3	Job policies and practices	Addressed contractors' general obligation to ensure equal opportunity in employment on the basis of sex except where sex is a BFOQ, and gave examples involving the provision of physical facilities (including bathrooms), the impact of state "protective" laws, leave for childbearing, and retirement age.	Sex as a bona fide occupational qualification (BFOQ)	Adopts the BFOQ language of Title VII, 42 U.S.C. § 2000e-2(e). Examples of sex discrimination are found in §§ 60-20.2, 60-20.4, 60-20.5, 60-20.6, 60-20.7, and 60-20.8.
60-20.4	Seniority system	<p>§ 60-20.4 addressed discrimination in seniority systems.</p> <p>Discriminatory wages and discriminatory job classifications that give rise to sex-based wage differentials were addressed in § 60-20.5. While not on its face limited to Equal Pay Act standards, the section stated that "the more obvious cases of discrimination exist" when Equal Pay Act standards for "equal work" (substantially equal skill, effort, and responsibility performed under similar working conditions) are met.</p>	Discriminatory compensation	<p>Seniority systems are addressed in § 60-20.2.</p> <p>Clarifies that contractors may not "pay different compensation to similarly situated employees on the basis of sex" or otherwise "discriminate[] in wages, benefits, or any other forms of compensation or ... access to earnings opportunities, on the basis of sex," capturing Title VII's and the Executive Order's broad approach to wage discrimination.</p> <p>Clarifies that OFCCP applies both disparate-treatment and disparate-impact analyses to compensation practices.</p> <p>Adopts the Lilly Ledbetter Fair Pay Act standard that compensation discrimination occurs "any time" a contractor "pays wages, benefits, or other compensation that is the result in whole or in part of the application of any discriminatory compensation decision or other practice."</p>
60-20.5	Discriminatory wages	<p>Discriminatory wages: see above.</p> <p>§ 60-20.3(g) was the only provision related to pregnancy, childbirth, or related medical conditions.</p>	Discrimination on the basis of pregnancy, childbirth, or related medical conditions	<p>Discriminatory wages are addressed in § 60-20.4.</p> <p>Incorporating the language of Title VII as amended by the Pregnancy Discrimination Act, prohibits contractors from discriminating on the basis of pregnancy, childbirth, or related medical conditions and requires them 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."</p> <p>Provides specific examples of unlawful pregnancy discrimination, including:</p> <ul style="list-style-type: none"> • Refusing to hire pregnant workers or workers of childbearing capacity

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		<ul style="list-style-type: none"> • § 60-20.3(g)(1) required contractors to consider childbearing a justification for leave under their leave policies “for a reasonable period of time.” • § 60-20.3(g)(2) required contractors to provide maternity leave “for a reasonable period of time” if they did not have a leave policy. 		<ul style="list-style-type: none"> • Requiring employees to go on leave because they become pregnant or have a child; • Requiring a doctor’s note in order for a pregnant employee to continue or resume working; and • Providing 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. <p>Sets out disparate-treatment and disparate-impact approaches to the provision of accommodations and leave, as described below.</p> <p>To reflect the Supreme Court decision in <i>Young v. UPS</i>, specifies that denying accommodations for pregnancy, childbirth, or related medical conditions is unlawful disparate treatment where (i) the contractor denies accommodations only to employees affected by pregnancy, childbirth, or related conditions; (ii) the contractor provides accommodations to other employees whose abilities or inabilities to perform their job duties are similarly affected, the denial of accommodations to employees affected by pregnancy, childbirth, or related medical conditions imposes a significant burden on those employees, and the contractor’s asserted reasons for denying accommodations do not justify that burden; or (iii) intent to discriminate is otherwise shown.</p> <p>Also clarifies that OFCCP applies disparate-impact analysis to policies and practices that 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. If such policies or practices have an adverse impact on the basis of sex, contractors must show that they are job-related and consistent with business necessity.</p> <p>To the extent that a contractor provides family, medical, or other leave, provides that such leave must not be denied or provided differently on the basis of sex, and, specifically, that:</p> <ul style="list-style-type: none"> • Contractors must provide job-guaranteed medical leave, including paid sick leave, for employees’ pregnancy, childbirth, or related medical conditions on the same terms that medical or sick leave is provided for medical conditions that are similar in their effect on employees’ ability to work; and • Contractors must provide job-guaranteed family leave, including any paid leave, for male employees on the same terms that family leave is provided for female employees.

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				Includes a disparate-impact provision in the section governing leave, which requires contractors that have employment policies or practices under which insufficient or no medical or family leave is available to ensure that such policies or practices do not have an adverse impact on the basis of sex unless they are shown to be job-related and consistent with business necessity.
60-20.6	Affirmative action	<p>Established an affirmative action requirement for recruiting women and prohibited sex discrimination in access to management trainee and other training programs.</p> <p>§ 60-20.3(c) addressed fringe benefits; it provided that there was no violation of the Executive Order if either the employer provided equal contributions to pension or other fringe-benefit plans on behalf of men and women or the resulting benefits were equal.</p>	Other fringe benefits	<p>The requirements related to affirmative action programs are set forth in other parts of OFCCP's regulations (parts 60-2 and 60-4). Access to training programs is addressed in § 60-20.2.</p> <p>Sets forth the general principle that contractors may not discriminate on the basis of sex in the provision of fringe benefits, even if the cost of providing a fringe benefit to members of one sex is greater than the cost of providing it to members of the other sex.</p> <p>Defines "fringe benefits" to reflect the definition in the EEOC's Guidelines on Discrimination Because of Sex, 29 CFR § 1604.9.</p> <p>Preamble states that, under this section, denying or limiting access to health-care benefits based upon an employee's gender identity or transgender status constitutes impermissible disparate-treatment discrimination based on sex.</p>

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60-20.7	No section	N/A	Employment decisions made on the basis of sex-based stereotypes	<p>Provides that employment decisions made on the basis of stereotypes — including failure to conform to gender norms and expectations for dress, appearance, and/or behavior; actual or perceived gender identity or transgender status; and caregiver responsibilities — are a form of sex discrimination.</p> <p>Some examples:</p> <ul style="list-style-type: none"> • Adverse treatment of employees or applicants based on their sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes. • Adverse treatment of a female employee or applicant because she does not conform to a sex stereotype about women working in a particular job, sector, or industry. • Adverse treatment of a male employee because he has taken leave to care for his newborn or recently adopted child based on the sex-stereotyped belief that women and not men should care for children. <p>Discrimination based on sexual orientation or gender identity is expressly prohibited independently by Executive Order 11246, as amended by Executive Order 13672. See http://www.dol.gov/ofccp/LGBT.html.</p>
60-20.8	No section	N/A	Harassment and hostile work environments	Incorporates the substance of EEOC's Guidelines on Discrimination Because of Sex relating to sexual harassment, 29 CFR § 1604.11(a).
Appendix	No section	N/A	Appendix -- Best practices	<p>Examples of best practices:</p> <ul style="list-style-type: none"> • Designating single-user restrooms or similar facilities as sex-neutral; • Providing, as part of broader accommodations policies, 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.