

OFCCP's Sex Discrimination Final Rule

OFCCP brings guidelines from the “Mad Men” era to the modern era. Regulations will protect women and men from discrimination on the job.

Fact Sheet

Introduction

Women are a vital element of our workforce and our economy. Moreover, most women today are financially responsible for themselves and their families. It is more important than ever that women have equal access to jobs and fair treatment while on the job. The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is updating its sex discrimination guidelines to ensure that federal contractors (including subcontractors)—companies that do business with the federal government—do not discriminate against applicants or employees because of their sex.

OFCCP enforces Presidential Executive Order 11246 (E.O. 11246), which prohibits sex discrimination in employment by federal contractors. The prohibition is well-established, but the guidelines implementing it date back to 1970. The guidelines are out of touch with current law and with the realities of today's workforce and workplaces.

OFCCP is revising the outdated guidelines and adopting regulations that are in line with modern laws and modern times. The new Final Rule, “Discrimination on the Basis of Sex,” explains contractors' responsibilities and clarifies protections for millions of employees of federal contractors and subcontractors—both men and women. The Final Rule addresses many of the barriers to equal opportunity and fair pay that workers face in the workplace today, such as pay discrimination; sexual harassment; lack of accommodations for pregnancy, childbirth, and related medical conditions; discrimination because of employees' gender identity; and discrimination based on stereotypes about sex roles, such as who the primary caregiver is in a family. By harmonizing OFCCP's outdated regulations with current Title VII jurisprudence, the Final Rule will also facilitate contractor understanding and compliance, potentially reduce contractor costs, and increase labor-market efficiency.

OFCCP published a Notice of Proposed Rulemaking on January 30, 2015. OFCCP received 553 comments on the proposed rule, representing the diverse perspectives of its stakeholders, including the regulated community. OFCCP considered all of the comments carefully in developing the Final Rule that was announced today.

Summary of the Final Rule

Each year, federal contractors and subcontractors receive billions of dollars, funded by taxpayers, to supply goods and services and to perform construction work for government agencies. E.O. 11246 prohibits these companies from discriminating against employees and applicants because of their race, color, religion, sex, sexual orientation, gender identity, or

national origin, or because they have discussed, disclosed, or inquired about compensation. Discrimination can occur in many aspects of employment, including recruitment, hiring, job assignments, training, benefits, promotion, pay, discipline, or other workplace conditions, such as a hostile or harassing work environment.

The Final Rule provides examples of prohibited sex discrimination in the workplace to ensure that contractors understand their obligations. It also offers contractors examples of best practices for prevention of this discrimination. The rule:

- **Brings the sex discrimination guidelines up to date.** The Final Rule aligns OFCCP's regulations with current law and addresses the realities of today's workplaces. It, therefore, provides more accurate and relevant guidance to contractors than the outdated guidelines.
- **Provides protections related to pregnancy, childbirth, and related medical conditions.** More than two million employees of federal contractors give birth every year. This rule protects them against discriminatory treatment because of pregnancy, childbirth, or related medical conditions, including loss of jobs, wages, or health care coverage. Workers and their families will benefit from this economic security. Contractors will also benefit from increased retention and lower turnover and absenteeism.
 - The Final Rule requires that contractors provide workplace accommodations, such as extra bathroom breaks and light-duty assignments, to an employee who needs such accommodations because of pregnancy, childbirth, or related medical conditions, in certain circumstances where those contractors provide comparable accommodations to other workers, such as those with disabilities or occupational injuries.
- **Promotes fair pay practices.** Contractors may not pay workers differently because of their sex. For instance, contractors may not deny opportunities for overtime work, training, better pay, or higher-paying positions because of a worker's sex. The rule also includes a provision that enables employees to recover lost wages any time a contractor pays compensation that is the result of discrimination, not only when the decision to discriminate is made.
- **Provides equal benefits to male and female employees participating in fringe-benefit plans.** The rule prohibits discrimination on the basis of sex with regard to fringe benefits such as medical, hospital, accident, life insurance, and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.
- **Prohibits sexual harassment.** The rule prohibits unwelcome sexual advances, requests for sexual favors, offensive remarks about a person's sex, and other verbal or physical conduct of a sexual nature when such conduct unreasonably interferes with an individual's work performance, becomes the basis for employment decisions, or creates a hostile working environment.
- **Gives men and women equal access to jobs and workforce development opportunities.** A contractor may not set requirements for jobs or training that are based on an applicant's or employee's sex unless the contractor can meet the high bar of demonstrating that such requirements are a bona fide occupational qualification. Additionally, a contractor may not set requirements, such as height or weight qualifications, that adversely affect applicants

because of their sex unless it demonstrates that the qualifications are job-related and consistent with business necessity.

- **Safeguards workers who provide caregiving to their loved ones.** Contractors may not treat female or male employees or applicants differently based on the stereotypical assumption that women are more likely to have caregiving responsibilities. For instance, contractors may not deny mothers employment opportunities that are available to fathers based on the faulty assumption that mothers' childcare responsibilities will conflict with their job performance. Similarly, contractors may not deny fathers flexible workplace arrangements that are available to mothers based on the faulty assumption that men do not have and do not assume childcare responsibilities.
- **Protects transgender workers.** The rule makes clear that sex discrimination includes discrimination because of an employee's gender identity. Also, the rule requires contractors to allow workers to use bathrooms, changing rooms, showers, and similar facilities consistent with the gender with which the workers identify. In addition, the preamble to the rule notes that an explicit, categorical exclusion of coverage for all care related to gender dysphoria or gender transition is facially discriminatory because such an exclusion singles out services and treatments for individuals on the basis of their gender identity or transgender status.
- **Prohibits discrimination based on sex stereotypes.** Contractors may not treat employees or applicants adversely because they fail to comply with expectations about how women and men should look or act or what kinds of jobs they should do.
- **Is consistent with the Religious Freedom Restoration Act and other protections for religiously affiliated contractors.** While there is no formal process for invoking the Religious Freedom Restoration Act as a basis for an exemption from E.O. 11246, the preamble to the Final Rule states that insofar as the application of any requirement under this part would violate RFRA, such application shall not be required. OFCCP also notes that E.O. 11246 specifically allows religiously affiliated contractors (religious corporations, associations, educational institutions, or societies) to favor individuals of a particular religion when making employment decisions. In addition, OFCCP follows Supreme Court precedent recognizing that the First Amendment to the Constitution requires a "ministerial exception" from employment discrimination laws, which prohibits the government from interfering with the ability of a religious organization to make employment decisions about its "ministers."

Effective Date

The Final Rule will go into effect August 15, 2016. Because the rule generally aligns with current law under Title VII of the Civil Rights Act of 1964 as interpreted by courts and the EEOC, most contractors are already subject to many of these provisions.

For more information about the rule, please go to www.dol.gov/ofccp/sexdiscrimination.html.