From: Benjamin, Shenita A - OFCCP CTR [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9CB2432A12734A9BBDB85537FD322DFD-BENJAMIN, S]

Sent: 11/5/2020 11:42:44 AM

To: Leen, Craig - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5ffd4a5b3cc74f49a5d2bf4c747416d4-Leen, Craig]; Gaglione, Robert J - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1488b4650b734927906fed5870ab9642-Gaglione, R]; Davidson, Patricia J - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=881aff8bf6fb4a85ae33921a0cb1596b-Davidson, P]

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OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e7cbcd1acc4449dab853e5b28555d3fc-Price-Livin]

Subject: Thursday Morning Press Release/Daily News Clippings: November 5, 2020

Thursday Morning Press Release: November 5, 2020

Date of Press Release	Company Name	Hyperlink to Release
November 5, 2020	**Office of Federal Contract Compliance**	**U.S. Department of Labor Releases Final Rule Codifying Procedures To Resolve Potential Employment Discrimination**

Thursday Morning Daily News Clips: November 5, 2020

Article #	Paper	Title
1	Law360	JPMorgan To Pay $9.8M To End DOL's Sex Bias Probe
2	Law360	OFCCP Rule Broadening Bias Exemptions Nears Finish Line
3	Bloomberg Law	JPMorgan Settles Long-Running Pay-Bias Suit With DOL (1)
4	Lawyersandsettlements.com	Hewlett Packard Settles Gender Discrimination Wage Complaint
5	Niche Gamer	Phil Spencer Calls for More Black and African American "Visible Leaders" in Gaming Industry and Microsoft
6	JDSUPRA	New Federal Contractor Requirements under Executive Order 13950: Prohibiting Race or Sex Stereotyping or Scapegoating

Article 1 (back to top) – hyperlink to above

Article Title: JPMorgan To Pay $9.8M To End DOL's Sex Bias Probe

News Source: Law360

Reporter's Name: Lauren Berg

Date: November 4, 2020

JPMorgan To Pay $9.8M To End DOL's Sex Bias Probe

By Lauren Berg

Law360 (November 4, 2020, 10:31 PM EST) -- JPMorgan agreed this week to pay $800,000 in back pay and set aside $9 million for annual pay adjustments to resolve a U.S. Department of Labor lawsuit accusing the investment bank of paying female employees less than their male counterparts when carrying out its government contracts.

JPMorgan Chase & Co. agreed to pay the $9.8 million total, which includes back pay and interest plus reserves to provide for five years for pay adjustments, to end the bias suit brought by the DOL's Office of

Federal Contract Compliance Programs, according to the agreement that was reached Monday and filed Tuesday in the DOL's Office of Administrative Law Judges.

As part of the deal, beginning in 2021 and for four additional years, JPMorgan will conduct annual pay equity analyses of its U.S. employees to address pay equity for women and minorities. Then, beginning in 2022 and for four additional years, the bank will make annual pay equity adjustments, according to the agreement.

The bank will also be required to submit compliance reports to the OFCCP, according to the deal.

The deal — which isn't an admission of wrongdoing on JPMorgan's part — fully resolves all claims and the parties will bear their own costs, according to a proposed consent decree attached to the agreement.

A representative for JPMorgan declined to comment Wednesday evening, and counsel for the OFCCP did not immediately respond to a request for comment.

Since 2012, JPMorgan has paid female employees in its investment bank, technology and markets strategies business units less than their male counterparts in violation of an executive order that prohibits discrimination in federal contracting, the agency said in a notice of violation in 2015.

The bank argued in a motion for summary judgment that the complaint was filled with factual inaccuracies and that the agency violated the Fourth Amendment by continuing to investigate the alleged discrimination in order to get more company information that wasn't obtained during compliance reviews.

But the agency responded that the facts challenged by the bank have yet to be confirmed because of a lack of additional discovery and that it followed the proper standards.

Administrative Law Judge Jerry R. DeMaio in June denied JPMorgan's motion, saying questions remain about whether the bank corrected its allegedly discriminatory pay practices for female application developers and project managers.

The judge said that the agency has "some latitude to conduct discovery and offer evidence from the time period following the initiation of the review for the purposes of determining whether or not there has been remediation of the alleged discrimination."

But he cautioned that the litigation must remain within the appropriate scope, noting that he's "still uneasy with the allegation in the complaint that, upon information and belief, the alleged discrimination 'continues to the present.'"

The OFCCP is represented by Sudwiti Chanda, Anna Laura Bennett, Alexander M. Kondo and Molly J. Theobald of the U.S. Department of Labor's Office of the Solicitor.

JPMorgan is represented by William E. Doyle Jr., Elena D. Marcuss and Bruce M. Steen of McGuireWoods LLP.

The case is Office of Federal Contract Compliance Programs v. JPMorgan Chase & Co., case number 2017-OFC-00007, in the U.S. Department of Labor Office of Administrative Law Judges.

--Additional reporting by Kevin Stawicki. Editing by Michael Watanabe.

Article 2 (back to top)

Article Title: OFCCP Rule Broadening Bias Exemptions Nears Finish Line

News Source: Law360

Reporter's Name: Alexis Shanes

Date: November 4, 2020

OFCCP Rule Broadening Bias Exemptions Nears Finish Line

By **Alexis Shanes**

Law360 (November 4, 2020, 3:01 PM EST) -- A proposed rule that would ease anti-discrimination restrictions on religious employers that contract with the government has been sent to the White House for approval, signaling that finalized regulations making those changes official will likely be unveiled in the near future.

The U.S. Department of Labor's Office of Federal Contract Compliance Programs asked the federal Office of Management and Budget on Tuesday to approve the rule, which would broaden exemptions for religious organizations that contract with the federal government, easing anti-discrimination regulations for how those groups hire employees with respect to race, color, religion, sex and other protected characteristics.

The rule would expand the definition of the term "religion" to include not only religious belief but also "all aspects of religious observance and practice," according to the proposal. It also seeks to broaden the list of institutions to which the exemption applies, saying the federal contractor need only be organized for, hold itself out publicly as and engage in a "religious purpose" to qualify.

"It is also intended to make clear that religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases," the proposal said.

The OFCCP enforces Lyndon B. Johnson's Executive Order 11246, which established nondiscrimination requirements for federal contractors and was amended to include religious exemptions mirroring those in Title VII of the 1964 Civil Rights Act.

But the OFCCP **said the rule was necessary** to clarify the executive order because religious organizations previously said they were "reluctant" to become federal contractors because of "uncertainty" about the religious exemption.

The rule was published in the Federal Register in August 2019. The proposal that year received more than 109,000 responses during the month long public comment period and drew the **ire of**

Democratic senators.
Supporters of the American Civil Liberties Union delivered thousands of comments against the rule in public comments, while supports of the pro-life non-profit Family Research Council, which holds a "Christian worldview," were vocal in their support.

"Religious-affiliated entities could discriminate based on religion in their own hiring," Louise Melling, deputy legal director at the ACLU, told Law360 on Wednesday. "If the final rule looks like the proposed rule, it would be authorizing government-funded discrimination."

A spokesperson from the OFCCP did not immediately respond Wednesday to a request for comment.

A representative from the FRC also did not immediately return a request for comment.
--Additional reporting by Vin Gurrieri and Danielle Smith. Editing by Gemma Horowitz.

This story was updated to include comments from the ACLU.

Article 3 (back to top)

Article Title: JPMorgan Settles Long-Running Pay-Bias Suit With DOL (1)

News Source: Bloomberg Law

Reporter's Name: Paige Smith

Date: November 4, 2020

Daily Labor Report®

Signage is displayed at JPMorgan Chase & Co.'s headquarters in New York on Sept. 21, 2020.
Photographer: Michael Nagle/Bloomberg via Getty Images

JPMorgan Settles Long-Running Pay-Bias Suit With DOL (1)

Nov. 4, 2020, 4:37 PM ; Updated: Nov. 4, 2020, 6:27 PM

JPMorgan Chase & Co. agreed to pay at least $800,000 in back wages and allocate $9 million over five years for compensation adjustments as part of a broad settlement with the U.S. Labor Department that resolves a long-running lawsuit accusing the financial giant of underpaying women.

The Labor Department's Office of Federal Contract Compliance Programs originally sued JPMorgan in 2017, after it allegedly uncovered pay discrimination during a 2012 audit of the federal contractor. The agency's original complaint involved a class of at least 93 women in "Investment Bank and Technology & Market Strategies" roles, but the settlement includes only 67 class members.

The sweeping agreement settles that suit and closes "all pending, scheduled or in-person" compliance evaluations of the company, according to the Nov. 2 pact, which was made public Wednesday. It also requires annual pay adjustments of at least $1.8 million per year, for five years.

The settlement follows several Labor Department losses in pay-bias litigation, most recently to Oracle America Inc. In September, an administrative law judge ruled that Oracle didn't systemically discriminate against minorities and women in pay. Analogic Corp., a Boston-based federal contractor, also beat DOL pay bias claims in March 2019.

If JPMorgan complies with the pact's stipulations, the company will be exempt from OFCCP audits for at least seven years, according to the agreement.

Over the past year, Hewlett Packard, AT&T, Newport News Shipbuilding and other federal contractors have settled Labor Department allegations of compensation discrimination against workers. The OFCCP enforces anti-discrimination and affirmative action requirements for businesses that contract with the federal government.
In fiscal 2020, the agency collected $35.6 million from monetary discrimination settlements with federal contractors—its second-best year on record following a high of $40.6 million in fiscal 2019.
Neither JPMorgan nor the Labor Department immediately responded to emailed requests for comment.

The case is OFCCP v. JPMorgan Chase & Co. , Dep't of Labor A.L.J., No. 2017-OFC-00007, settlement signed 11/2/20 .
(Updated with additional reporting throughout.)

To contact the reporter on this story: Paige Smith in Washington at psmith@bloomberglaw.com
To contact the editors responsible for this story: Jay-Anne B. Casuga at jcasuga@bloomberglaw.com; John Lauinger at jlauinger@bloomberglaw.com

Article 4 (back to top)

Article Title: Hewlett Packard Settles Gender Discrimination Wage Complaint

News Source: Lawyersandsettlements.com

Reporter's Name: Anne Wallace

Date: November 4, 2020

Hewlett Packard Settles Gender Discrimination Wage Complaint

November 4, 2020, 10:30AM. By Anne Wallace

California labor law offers remedies in similar situations

San Diego, CAOn October 26, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced that Hewlett Packard Inc. and Hewlett Packard Enterprise (collectively "HP") have agreed to pay $1,450,000 to resolve systemic pay discrimination allegations involving 391 female employees. The affected employees worked at several locations including San Diego. Like federal law, the California Labor Code prohibits gender discrimination in wage rates for substantially similar work.

The allegations come against a background of California gender-based pay discrimination lawsuits against tech giants. These include at least one class action lawsuit against Hewlett Packard Enterprise based on allegations strikingly similar to those leveled in the recently resolved federal complaint.

FEDERAL LAW REACHES FEDERAL CONTRACTORS

The OFCCP agreement includes back pay and interest for the affected workers, as well as a promise by HP to "conduct compensation self-analyses, and take steps to ensure its personnel practices – including record-keeping and internal auditing procedures – meet legal requirements." The agreement relates specifically to alleged violations of Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

These laws make it illegal for contractors and subcontractors doing business with the federal government to discriminate in employment because of race, color, religion, sex, sexual orientation, gender identity, national origin, disability or status as a protected veteran. In addition, contractors and subcontractors are prohibited from discriminating against applicants or employees because they have inquired about, discussed or disclosed their compensation or the compensation of others subject to certain limitations, and may not retaliate against applicants or employees for engaging in protected activities. These laws also require that federal contractors provide equal employment opportunity through affirmative action.

Big tech companies, including HP, IBM, and Microsoft, have deep ties with the U.S. Department of Defense, among other federal contracting and subcontracting arrangements. Federal laws intended to protect workers on those contracts can thus be an effective way to enforce gender wage equity for them. For California employees who work entirely in and for private sector employers, however, the California Equal Pay Act and other provisions of California labor law may provide a more effective remedy.

CALIFORNIA EQUAL PAY ACT

The California Equal Pay Act, contained in California Labor Code 1197.5 and California Labor Code 432.3 prohibits an employer from paying any of its employees at wage rates that are less than what it pays employees of the opposite sex, or of another race, or of another ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. An employer may not base a wage differential on sex or any other protected class. Instead, the employer must show valid and legal grounds for the difference, including merit, seniority, quality of production or a bona fide factor such as training, education or experience.

In addition, the law also bans "wage secrecy" policies. An employer may not prohibit employees from asking or talking about coworkers' wages. Further, and particularly important to women who may have endured a long history of wage discrimination, the Equal Pay Act prohibits employers from using only an employee's

previous salary to justify a disparity in compensation. It thus limits the use of seniority or merit systems in determining wage increases. It does not, however, prevent a prospective employer from asking an applicant about his or her previous salary.

ROSS V. HEWLETT PACKARD ENTERPRISE

The 2018 class action lawsuit, *Ross v. Hewlett Packard Enterprise*, offers a tidy illustration of how California labor law might be applied to a situation similar to that now resolved through the recent OFCCP agreement. In that lawsuit, female employees alleged that HP's common, companywide policies and practices although facially uniform, did not result in equal pay for women and men who performed jobs that required equal skill, effort and responsibility and were performed under similar working conditions.

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Volkswagen Salespeople Claim Lost Income due to VW's Deceptive Practices

Google Worker Secrecy Agreements to face California Labor Lawsuit

MORE CALIFORNIA LABOR LAW NEWS

Among the discriminatory practices described were:

A policy that advised employees to keep their compensation to themselves, stating "Don't compare yourselves to your co-workers[.] Your compensation should be about you and your performance. By talking about your co-workers, you detract from that point."

Lack of transparency about pay grades and job levels available, leaving employees in the dark about what male counterparts may make and at what level of the pay grade women are as compared to men.

A promotion and compensation structure that heavily weighted existing common, centralized job codes and associated pay grades, with the result that historical patterns of wage discrimination were rolled forward into the future.

MORE THAN ONE WAY TO SKIN A CAT

What California tech workers need to take away from the latest OFCCP settlement and other wage discrimination lawsuits, is that they may have a variety of potential remedies, depending on the individual facts of the situation. In some, California labor law is the best alternative; in others federal laws are the better option. In any event, there are likely solutions to the persistent problem of wage discrimination.

Article 5 (back to top)

Article Title: Phil Spencer Calls for More Black and African American "Visible Leaders" in Gaming Industry and Microsoft

News Source: Niche Gamer

Reporter's Name: Ryan Pearson

Date: November 4, 2020

Phil Spencer Calls for More Black and African American "Visible Leaders" in Gaming Industry and Microsoft

by Ryan Pearson on November 4, 2020 at 12:27 PM, EST
Phil Spencer

Head of Xbox Phil Spencer has stated Microsoft's plans for more Black and African American "Visible Leaders" in the gaming industry and Microsoft.

During an interview with Kotaku, Spencer was asked about Microsoft's commitments to "addressing racial injustice" [1, 2] published in June. Microsoft's statement came after the protests and subsequent riots across the US over the death of George Floyd.

Other actions by publishers and developers included delays, postponements, removal of police cars from Fortnite, and in-game messages of support by PlayStation, EA [1, 2], EA Sports, IGN, Guerrilla Collective, along with Activision and Infinity Ward with the Call of Duty franchise [1, 2].

Microsoft stated they would donate an additional $150 million of diversity & inclusion investment, sought to double the number of Black and African American senior staff in the US by 2025, extending their "vision for societal change throughout [their] ecosystem," and using their technology and partnerships to help improve the lives of Black and African American US citizens.

Even so, former Mixer employee Milan Lee accused senior employees being racist that month. This allegedly included him being the only black employee at Mixer, and being hired because he was "street smart" and as part of a "diversity goal."

A manager also allegedly used an analogy using slaves and slave masters, and defended herself in using that analogy when confronted by Lee, even when "Google showed her it was NEVER okay to use that analogy".

Complaints to a skip manager (including how his ideas were ignored until white colleagues suggested similar) were allegedly not passed onto Microsoft. Lee had quit, but was allegedly told by Microsoft's legal team that he did not have a case as the manger "CANNOT be racist. The reason she CANNOT be racist is because she hired a black person."

Lee later stated he had spoken to Spencer, stating "what I believe is a correct course of action." This included releasing data on diversity statistics, and helping support Black developers, business owners, and communities.

Microsoft's plans to hire more Black employees even prompted comments from the Department of Labor Office of Federal Contract Compliance Programs (OFCCP); concerned Microsoft would engage in race discrimination (violating Title VII of the Civil Rights Act). Microsoft Corporate Vice President and General Counsel Dev Stahlkopf stated that they "emphatically" were not.

Kotaku had asked Spencer during an interview (in their words) "how Microsoft was following through on its pledges," and discussed "Black people's prominence—or lack thereof—in game studios and in leadership."

Spencer stated that while attentions may have shifted from how "hyper-focused" people were at the time, he felt it was an issue "that we should come back to."

"The area where I think we really need to focus more as an industry, including my own team, are, as you said, those visible leaders. Because there was a generation where this didn't happen."

Kotaku reports that Spencer explained that Black people had not been given many chances to lead gaming companies in the West compared to other people- in Kotaku's words "the implication being 'white people.'"

"As those people move up inside of the organization, you get a lot of people like me. And we don't need more people like me in our organization. We need a more diverse team. So I'd say, for our focus right now, I think about manager representation."

Kotaku notes Microsoft's 2020 diversity and inclusion report noted 4.7% of their US employees were Black; 0.3% more than 2019, and reportedly 1.1% more than 2016. This breaks down further, with those employees in the "core US workforce" contributing "5.2% of individual contributors, but only 2.9% of managers, 2.6% of directors, and 2.9% of partners + executives."

This year, 34.9% of Microsoft employees are Asian, and 6.3% are Hispanic, Latino, or Latina. The report also saw 2.3% of employees as multiracial, with 0.6% including Native American, Alaska Native, Native Hawaiian, and Pacific Islander.

Spencer also discussed the aforementioned allegations by Lee.

"Where we start is the makeup of our teams. What is it? And not just from 'how are our numbers in terms of representation?,' but the inclusion factor of our teams? How does it feel to work here? What's your lived experience?

We have work to do. I have work to do in that. You can look at the Milan Lee situation and the conversations he and I had in June. And, you know, PR won't love it that I bring those things up in conversation."

I think it's important that we are forthright and open about the lived experience of everybody on our team. Are we reaching the goals that we have for ourselves? And we have work to do in that space."

When asked if the manager had been fired, Spencer stated he did not "want to talk about specific employee relations."

Article 6 (back to top)

Article Title: New Federal Contractor Requirements under Executive Order 13950: Prohibiting Race or Sex Stereotyping or Scapegoating

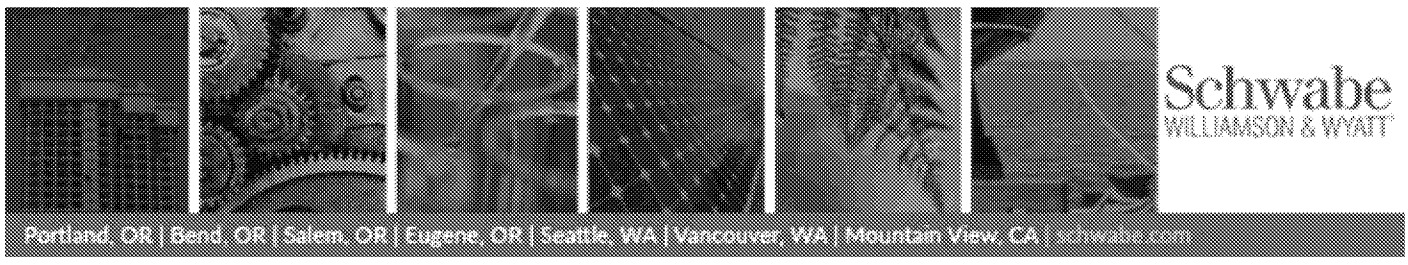
News Source: JDSUPRA

Reporter's Name: Jean Ohman Back

Date: November 4, 2020

November 4, 2020

New Federal Contractor Requirements under Executive Order 13950: Prohibiting Race or Sex Stereotyping or Scapegoating



On September 22, 2020, President Trump issued Executive Order 13950 (the "Order") Combating Race and Sex Stereotyping affecting all government contractors, those companies that contract with government contractors, and federal grant recipients. When first announced, the Order sent shockwaves through the government contracting community and those proponents calling for more diversity and implicit bias trainings in the wake of several high-profile police brutality incidents affecting individuals of color.

On October 7, 2020, the Department of Labor's ("DOL") Office of Federal Contract Compliance Programs ("OFCCP") issued its guidance to explain the Order, and to provide a set of requirements that the Order imposes on federal contractors. The guidance helps to dispel some of the concerns related to the Order's impact on diversity and implicit bias trainings by government contractors. However, the road ahead is far from clear because both DOL and OFCCP's top representatives have issued contradicting statements about the effect of the Order on a government contractor's ability to provide implicit and unconscious bias trainings.

On October 22, 2020, the OFCCP issued a Request for Information ("RFI") (discussed in more detail below) seeking "comments, information, and materials from the public relating to workplace trainings that involve race or sex stereotyping or scapegoating." The RFI does not require that federal contractors provide training or other materials, but instead "invites" the public to provide information.

The Order sets out the policy of the United States "'not to promote race or sex stereotyping or scapegoating' and prohibits federal contractors from inculcating such views in their employees in workplace diversity and inclusion trainings." The Order criticizes "people" who "are pushing a different vision of America" that is based on an ideology "rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people simply on account of their race or sex are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans." The Order warns that a "malign ideology" that "the country was created by white men for the benefit of white men" has migrated from the fringes of society and has been taken up by workplace diversity training "instructors and materials teaching that men and members of certain races … are inherently sexist and racist." The Order provides that federal contractors and grant recipients should continue to "foster environments devoid of hostility grounded in race, sex, and other federally protected classes," and recognizes that "[t]training employees to create an inclusive workplace is appropriate and beneficial," but criticizes "blame-focused diversity training [that] reinforces biases and decreases opportunities for minorities." The Order states that "it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or the Uniformed Services, and not to allow grant funds to be used for these purposes." The Order prohibits the teaching of "[d]ivisive concepts," including that:

- One race or sex is inherently superior to another race or sex;
- The United States is fundamentally racist or sexist;
- An individual because of his or her race or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
- Meritocracy or traits such as a hard work ethic are racist or sexist.

The OFCCP guidance clarifies that while the Order does not become effective until November 21, 2020, the OFCCP may immediately begin to investigate claims for race or sex stereotyping under Executive Order 11246, which provides anti-discrimination and anti-harassment requirements for contractors and subcontractors.

The guidance defines "race or sex stereotyping" as "ascribing character traits, values, moral and ethical codes, privileges, status or beliefs to an entire race or sex, or to individuals because of their race or sex." "'Race or sex scapegoating' means to assign fault, blame, or bias to a race or sex, or to members of a race or sex, because of their race or sex." This includes claims that people, because of their race or sex, are inherently racist or sexist, or inherently inclined to oppress others. The RFI quoted the Order stating that "[e]xamples of impermissible scapegoating or stereotyping include training materials stating 'that concepts like '[o]bjective, rational linear thinking,' '[h]ard work' being 'the key to success,' the 'nuclear family,' and belief in a single god are not values that unite Americans of all races but are instead 'aspects and assumptions of whiteness.'"

The Order places new requirements for federal contractors that include:

I. Federal contractors may not provide workplace training that teaches their employees any form of race or sex stereotyping or scapegoating. Trainings are prohibited only to the extent that they teach that a person, because of his or her race or sex, is inherently racist or sexist, oppressive, or biased, whether consciously or unconsciously. Trainings are allowed if they "foster discussions about pre-conceptions, opinions, or stereotypes that all people—regardless of their race or sex—may have about people who are different."

II. Federal contracts entered into after November 21, 2020, must include language that the contractor will not provide or use "any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating."

III. Federal contractors, sub-contractors, and grant recipients are invited to respond to an RFI regarding their training, workshops, or similar programming provided to employees to determine if they are in violation of either Executive Order 11246 or 13950. The RFI makes clear that if contractors voluntarily submit training materials, the OFCCP will, consistent with law, exercise its enforcement discretion and not take enforcement action. However, the OFCCP will take action if they obtain materials through employees or others.

The specific materials requested by the RFI include:

1. Workplace trainings that promote, or could be reasonably interpreted to promote, race or sex stereotyping.

2. Workplace trainings that promote, or could be reasonably interpreted to promote, race or sex scapegoating.

3. The duration of any workplace training identified in categories 1 or 2.

4. The frequency of any workplace training identified in categories 1 or 2.

5. The expense or costs associated with any workplace training identified in categories 1 or 2.

OFCCP additionally requests input on any or all of the following questions, if applicable:

6. Have there been complaints concerning this workplace training?

7. Have you or other employees been disciplined for complaining or otherwise questioning this workplace training?

8. Who develops your company's diversity training?

9. Is it developed by individuals from your company, or an outside company?

10. Is diversity training mandatory at your company?

11. If only certain trainings are mandatory, which ones are mandatory and which ones are optional?

12. Approximately what portion of your company's annual mandatory training relates to diversity?

13. Approximately what portion of your company's annual optional training relates to diversity?

IV. Federal contractors and sub-contractors must post a notice that will be provided by the contracting agency regarding the contractor's promises and commitments related to race and sex stereotyping and scapegoating. If the contractor is unionized, then the noticed must be provided to the union.

The OFCCP has set up a hotline for reporting race and sex stereotyping and scapegoating complaints. The OFCCP will immediately investigate such complaints "following the agency's standard procedures." Contractors who the OFCCP finds have violated the Order may have their contracts cancelled, terminated, or suspended in whole or in part, or may be declared ineligible to receive future contracts.

While the OFCCP guidance and RFI did provide some assurances that federal contractors could still provide implicit and unconscious bias trainings, federal contractors should move carefully, as statements from the Department of Labor have been mixed about how the OFCCP will address the trainings. Until we receive additional clarification from the DOL, the best practice is for federal contractors to review any new training materials or ask for legal assistance in reviewing materials. Federal contractors should contact their trusted legal advisor to determine whether voluntary compliance with the OFCCP RFI is in their best interest.

With Appreciation,

Shenita A. Benjamin
Sr. Executive Assistant
Office of Federal Contract Compliance Programs
U.S. Department of Labor
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OFCCP
U.S. DEPARTMENT OF LABOR

From: Benjamin, Shenita A - OFCCP CTR [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9CB2432A12734A9BBDB85537FD322DFD-BENJAMIN, S]

Sent: 11/10/2020 11:13:20 AM

To: Leen, Craig - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5ffd4a5b3cc74f49a5d2bf4c747416d4-Leen, Craig]; Davidson, Patricia J - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=881aff8bf6fb4a85ae33921a0cb1596b-Davidson, P]; Gaglione, Robert J - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1488b4650b734927906fed5870ab9642-Gaglione, R]

CC: LaJeunesse, Robert - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c9f3ffa568704a2db7b79e20a25c080e-LaJeunesse,]; Collins, Aida Y - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=32a0355e614f48fcaea5dc512773d16a-Collins, Ai]; Corbin, Jonide - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7562f2e8d23a437782a0ad40cc50cba9-Simon, Joni]; Harewood, Fiona A - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8b1d63f61a974190973f614c39868069-Harewood, F]; Hodge, Michele - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9a2682d410ed45deafdb13d08bcf7b39-Hodge, Mich]; Navarro, Carmen - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5666fc8d7dc041e1b2e5e3fe231df766-Navarro, Ca]; Rodriguez, Luis N - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f015694f022042afa0bcb2900374beed-Rodriguez,]; Sen Diana S - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e39e65e9739f4cfeb3368f451bfcc23a-Sen, Diana]; Suhr, Jane - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d86962c51c1d44aaa66fa16566997d4c-Suhr, Jane]; Smith, Kelley - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0cea2c4e5e114c0daafc5aabb237c96a-Smith, Kell]; Gaglione, Robert J - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1488b4650b734927906fed5870ab9642-Gaglione, R]; Gean, Lissette - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bbb9a13178c24aadb6b7613f2f9041f3-Gean, Lisse]; Kaiser, Javaid - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1e5f5c483d9741aa8d6ed6b0dadd6027-Kaiser, Jav]; Kraak, Margaret - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5d6c06403a2548b7a2fe40c35cc5e1f2-Kraak, Marg]; Spalding, Candice - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Spalding, Candice - OFCCP]; Williams, Tina T - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=de1ca1bb58004746a50104bd40a50623-Williams, T]; Leung, Kenneth - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e83ead72f1124a19a6565d1067874925-Leung, Kenn]; LaJeunesse, Robert - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c9f3ffa568704a2db7b79e20a25c080e-LaJeunesse,]; Seely, Christopher - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6b2b2010aaf743ceb373a758390001a1-Seely, Chri]; Parker, Walter - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a64fa9f8e7c7440ea9f69e2d2643fff2-Parker, Wal]; Tretheway, Andrea - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4bcdc1bd011a4f19a909b742d2b454dc-Tretheway,]; Speer, Melissa - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b53edd248cbd4e9a9e572bb94b966ece-Speer, Meli]; Stergio, Marcus - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=37788d9ffe5a46c58fe4cae3ce987968-Stergio, Ma]; Mimnaugh Matthew F - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cc2fb9589f364481a8c0395c315df87f-Matthew F.]; Price-Livingston, Glenda -

OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e7cbcd1acc4449dab853e5b28555d3fc-Price-Livin]

Subject: Tuesday Morning Press Releases/ Daily News Clippings: November 10, 2020

Tuesday Morning Press Releases: November 10, 2020- None to Report

Date of Press Release	Company Name	Hyperlink to Release

Tuesday Morning News Clips: November 10, 2020

Article #	Paper	Title
1	Bloomberg Law	Workplace Diversity—Getting It Right With Goals, Not Quotas
2	SHRM	OFCCP Codifies Rules for Resolving Discrimination Claims
3	Direct Employers	OFCCP Week In Review: November 9, 2020
4	JDSUPRA	Executive Order on Combating Race and Sex Stereotyping: 5 Things Contractors Should Do Now
5	Direct Employers	OFCCP's New MOU with the EEOC Could Dramatically Change OFCCP's Enforcement Program

Article 1 (back to top) – hyperlink to above

Article Title: Workplace Diversity—Getting It Right With Goals, Not Quotas

News Source: Bloomberg Law

Reporter's Name: Julie Levinson Werner

Date: November 10, 2020

The United States Law Week

Workplace Diversity—Getting It Right With Goals, Not Quotas

By Julie Levinson Werner

Nov. 10, 2020, 4:00 AM
Listen

Lowenstein Sandler LLP's Julie Levinson Werner explores workplace diversity and inclusion efforts and says adopting quotas of a fixed percentage of individuals in certain roles by a certain date based upon race, gender, or other characteristics is legally risky. She suggests steps employers can take to reconcile the prohibition on unlawful race discrimination with the undisputed value and goal of improving diversity of thought, perspective, and experience in the workplace.

Diversity, equity, and inclusion (DEI) are among the top corporate buzz words of 2020, perhaps having as much of an impact on race in 2020 as #MeToo had on sexual harassment just a few years ago. But what does DEI mean, and what are its legal limits?

DEI efforts are designed to increase the breadth of perspectives in the workplace by expanding opportunities for underrepresented groups through the development and promotion of equitable systems and initiatives to make sure historically underrepresented populations feel welcome, and have equal access to career development opportunities.

After George Floyd's death and resulting demonstrations of grief and rage, corporate America made efforts to further embrace DEI in various ways. Making a public statement against racism, check. Posting a "black empty square" on Blackout Tuesday, check. Encouraging employees during quarantine to participate in a Zoom "How to Be an Antiracist" book club, check.

But what about more meaningful and substantive changes to improve the number of underrepresented employees within an organization? How should a company set and measure DEI goals?

Over the summer, many prominent corporations publicly announced they would achieve a certain percentage increase in their number of Black executives and employees over the next five years. In October, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced that it had opened a legal inquiry into whether Wells Fargo and Microsoft had violated anti-discrimination laws in their public statements committing to increase Black leadership.

Is It Legal?

A commitment to increasing the presence of minorities in senior level positions is an admirable goal, to be sure, but is it legal? Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, religion, sex, or national origin. Employers may not engage in policies or practices that, while not intended to discriminate, have, in fact, a disproportionately adverse effect on minorities.

Before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe that it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action.

In 2009, in *Ricci v. DeStefano,* the U.S. Supreme Court held that the City of New Haven, Conn., could not disregard the results of a firefighter promotional test even though white candidates had outperformed minority candidates. Although the city had the noble goal of trying to limit the test's disparate impact upon minorities, the Supreme Court held that discarding the test results constituted unlawful discrimination against the white candidates based upon their race.

What Can Employers Do?

So how can an employer reconcile the prohibition on unlawful race discrimination with the undisputed value and goal of improving the diversity of thought, perspective, and experience in the workplace?

According to reports by McKinsey & Company and the Peterson Institute for International Economics, gender and ethnic diversity are clearly correlated with profitability. McKinsey, for example, concluded that "[c]ompanies in the top-quartile for ethnic/cultural diversity on executive teams were 33% more likely to have industry-leading profitability."

It may boil down to nuance.

There is a difference between committing to hire and promote a certain percentage of individuals on the basis of their skin color or other factors and committing to interview and/or consider these individuals for hire or promotion.

The "Rooney Rule" is a commitment, first used by the National Football League, and now by other businesses, to interview at least a certain number of minority candidates for certain positions. Many law firms have made a similar commitment through adoption of Diversity Lab's Mansfield Rule.

Expanding opportunities for everyone within all levels of an organization makes sense from a financial, legal, and moral perspectives. The question is how to achieve those financial and moral goals without running afoul of the law.

Suggestions for businesses include:

- Implement the framework of the Rooney Rule/Mansfield Rule by committing to meaningfully interview and consider at least a certain number of candidates from underrepresented populations.
- Evaluate methods of recruiting, and consider expanding outreach to underrepresented populations by, for example, including historically Black colleges and universities (HBCUs) and a broader range of schools in on-campus recruitment efforts.
- Be purposeful and intentional when creating internships, scholarships and other opportunities.
- Retain and nurture existing talent by creating training and mentorship programs, which are even more important now, when so many employees are working remotely and feeling isolated and unsupported.

Adopting quotas of a fixed percentage of individuals in certain roles by a certain date based upon race, gender, or other characteristics, however, is legally risky.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

Write for Us: Author Guidelines

Author Information

Julie Levinson Werner is a partner at Lowenstein Sandler LLP and a member of the firm's Employment Counseling & Litigation practice group.

Article 2 (back to top)

Article Title: OFCCP Codifies Rules for Resolving Discrimination Claims

News Source: SHRM

Reporter's Name: Lisa Nagele-Piazza, J.D., SHRM-SCP

Date: November 9, 2020

OFCCP Codifies Rules for Resolving Discrimination Claims

lisa.nagele-piazza@shrm.org

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published a final rule codifying its procedures on resolving employment discrimination claims.

The final rule will "increase clarity and transparency for federal contractors, establish clear parameters for OFCCP resolution procedures, and enhance the efficient enforcement of equal employment opportunity laws," according to the rule, which the department posted on Nov. 5. "The rule will help OFCCP to increase the number of contractors that the agency evaluates and focus on resolving stronger cases through the strategic allocation of limited agency resources."

We've rounded up articles and resources from *SHRM Online* and other trusted media outlets on the news.

Providing Transparency

The final rule formally codifies the use of notices that the OFCCP issues when the agency is resolving potential discrimination findings: the Predetermination Notice (PDN) and the Notice of Violation. By issuing PDNs, the OFCCP provides transparency to contractors and also facilitates early resolution of alleged violations, according to management attorneys. The rule finalizes a proposal that was published in December 2019.

(The National Law Review)

Establishing Evidentiary Standards

The rule "differentiates the procedures followed for disparate treatment and disparate impact theories of discrimination, which have separate, although similar, elements, and provides clarity on the evidentiary standards OFCCP will have to meet to issue pre-enforcement notices under each legal theory," according to the agency. With some exceptions, the rule requires the OFCCP to provide qualitative evidence to support a finding of intentional discrimination. For disparate impact claims, the rule requires the OFCCP "to identify the policy or practice of the contractor causing the adverse impact with factual support demonstrating why such policy or practice has a discriminatory effect." The rule also codifies the agency's "early resolution conciliation option," which allows contractors to proceed with a settlement agreement in the earlier stages of the process.

(Bloomberg Law)

Enforcing Anti-Discrimination Laws

The OFCCP enforces laws that make it illegal for federal contractors and subcontractors to make employment decisions that discriminate against workers based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability and status as a protected veteran. Contractors and subcontractors also are prohibited from discriminating against job applicants and employees for discussing their compensation and retaliating against workers for engaging in protected activities. Federal contractors must also provide equal employment opportunities through affirmative action.

(U.S. Department of Labor)

Seeking Comments on Affirmative Action Proposal

The OFCCP recently proposed that federal contractors annually certify to the agency their obligation to update affirmative action programs each year. Instead of verifying that they comply with their nondiscrimination and affirmative action obligations in the System for Award Management database, which is run by the General Services Administration, federal contractors would verify compliance with the OFCCP. Comments on the proposal are due Nov. 13.

(*SHRM Online*)

Promoting Compliance Assistance Programs and Tools

Through outreach efforts, the OFCCP heard that federal contractors wanted to bring back certain award programs that were designed to encourage employers to work in good faith to comply with employment laws. The agency started with the Excellence in Disability Inclusion Award, which is awarded to employers that excel in meeting their obligation to "recruit, hire, retain and advance qualified people with disabilities" under Section 503 of the Rehabilitation Act. "It's very important that companies are reaching out and seeking to include people with disabilities in all aspects of their employment processes," said OFCCP Director Craig Leen. "It's good for business. It's good for those with disabilities. It's good for the entire workforce."

(*SHRM Online*)

Article 3 (back to top)

Article Title: OFCCP Week In Review: November 9, 2020

News Source: Direct Employers

Reporter's Name: John Fox

Date: November 9, 2020

OFCCP Week In Review: November 9, 2020

by John C. Fox | Nov 9, 2020 | Week In Review (WIR) | 0 comments

The DE OFCCP Week in Review (WIR) is a simple, fast and direct summary of relevant happenings in the OFCCP regulatory environment, authored by experts John C. Fox, Candee Chambers and Jennifer Polcer. In today's edition, they discuss:

- ✓ OFCCP Grants National Interest Exemptions for Recent Natural Disasters
- ✓ USDOJ Touts Win in Disability-Related Childcare Case
- ✓ EEOC TO Meet on Religious Discrimination
- ✓ New Initiative to Help Americans Obtain Employment
- ✓ Controversial MOU Between OFCCP and EEOC Now Vests OFCCP With Authority to Investigate Title VII Charges and Apply Tilte VII Liability and Remedies
- ✓ Comment Now on HIRE Vets Medallion Program
- ✓ Two New WHD Opinion Letters
- ✓ OFCCP Released a Supply & Service Technical Assistance Guide
- ✓ OFCCP Compliance: Looking Back and Ahead
- ✓ OFCCP's "New Gold Standard" in Resolving Potential Discrimination
- ✓ The October Employment Situation Shows Slight Improvements
- ✓ Mark Your Calendar – Happening THIS week!

Monday, November 2, 2020: OFCCP Grants National Interest Exemptions for Recent Natural Disasters

The Office of Federal Contract Compliance Programs (OFCCP) granted several new **National Interest Exemptions** due to the country's recent hurricanes and fires. For those organizations signing federal contracts involving clean-up, recovery, and aid to these areas, some of your OFCCP administrative burdens are on hold.

New federal contracts to provide relief efforts for the respective incidents will be exempt from some obligations under Executive Order 11246, VEVRAA, and Section 503. All exemptions are subject to a possible extension.

- ✓ **Hurricane Zeta National Interest Exemption:** Oct 28, 2020, to Jan 28, 2021, **FAQs**
- ✓ **Hurricane Delta National Interest Exemption:** Oct 9, 2020, to Jan 9, 2021, **FAQs**
- ✓ **Hurricane Sally National Interest Exemption:** Sept 15, 2020, to Dec 15, 2020, **FAQs**
- ✓ **2020 Oregon Wildfire National Interest Exemption:** Sept 14, 2020, to Dec 14, 2020, **FAQs**
- ✓ **2020 California Wildfire National Interest Exemption:** Sept 11, 2020, to Dec 11, 2020, **FAQs**

Monday, November 2, 2020: USDOJ Touts Win in Disability-Related Childcare Case

The Nation **continues to celebrate** the 30th Anniversary of the Americans with Disabilities Act. As such, the U.S. Department of Justice (USDOJ) released another ADA-related **blog,** this one outlining a recent case promoting equal access to childcare.

The Agency recently entered into a settlement agreement with one of the country's largest child care providers. The United States alleged that Spring Education violated Title III of the ADA when it refused to make reasonable modifications to its toileting policy for children with disabilities. It expelled a child at one of its New Jersey centers, Margaret (Maggie) Miller, because she had toileting delays related to her disability, Down syndrome.

Monday, November 2, 2020: EEOC TO Meet on Religious Discrimination

The U.S. Equal Employment Opportunity Commission (EEOC) **announced** it will hold a remote, audio-only Commission meeting on Monday, November 9th at 1:00 PM (Eastern Time).

According to the Sunshine Act, the public may listen to the **meeting**. On November 8th, the Agency will post the listening instructions on its **website.** Closed captioning services will be available.

Agenda

✓ Update to the Compliance Manual Section on Religious Discrimination.

Meeting Attendance Details

The Commission's agenda is subject to revision. The Agency will post a recording and transcript of the meeting on its **website**.

For additional information, contact Kimberly Smith-Brown, (202) 663-4191 (voice) or (800) 669-6820 (TTY).

Monday, November 2, 2020: New Initiative to Help Americans Obtain Employment

The Trump Administration **announced** that the U.S. Departments of Health and Human Services (HHS), Labor, and Agriculture will be joining efforts "to put American workers first in a post-coronavirus economic recovery initiative to help more families experience the benefits of work."

Through the "Engaging as One Workforce for America" initiative, HHS' Administration for Children and Families (ACF), the Department of Labor's Employment and Training Administration (ETA), and **USDA's Food and Nutrition Service** (FNS) will work to increase the capacity of state and local governments to:

- ✓ engage unemployed individuals to shorten durations of unemployment and reduce disconnections from the workforce that make it harder for individuals to return; and
- ✓ connect individuals who were not working before the pandemic to the workforce through a comprehensive and coordinated public and private effort.

"We're doing everything we can to help struggling Americans secure the training, support resources, and job opportunities they need to provide for their families," said Assistant Secretary Lynn Johnson at the Administration for Children and Families at the U.S. Department of Health and Human Services. "Our goal in this partnership is to lift up our American workers and help set them up for success."

Concurrent with the initiative's announcement, a limited number of states will receive a **letter** proposing to partner and pilot a collaborative workforce program initiative to help more households enter, re-enter, and remain in the workforce.

Tuesday, November 3, 2020: Controversial MOU Between OFCCP and EEOC Now Vests OFCCP With Authority to Investigate Title VII Charges and Apply Title VII Liability and Remedies

As **reported last week**, the EEOC, the OFCCP, and the U.S. Department of Justice (DOJ) met to discuss the revision of the existing (2011) Memorandum of Understanding (MOU) between the EEOC and the OFCCP.

By a vote of 3-2, **EEOC voted to approve** entering into a **revised MOU** to include the U.S. Department of Justice. The MOU "has broadly promoted interagency coordination in the enforcement of equal employment opportunity (EEO) laws and has also served to maximize effort, promote efficiency, and eliminate conflict, competition, duplication, and inconsistency among the operations, functions, and jurisdictions of the parties to the MOU. It has included specific coordination and referral procedures for complaints/charges of employment discrimination filed with OFCCP under E.O. 11246. Further, the MOU has included provisions for sharing information as appropriate and to the extent allowable under law."

EEOC Chair Janet Dhillon said, "I am very pleased with the outcome of today's meeting and look forward to continuing the decades' long collaboration with our sister agencies."

OFCCP also released an **announcement** outlining the significant revisions to the MOU.

The MOU was **effective** November 3, 2020.

Take a deep dive to learn more in our exclusive bonus feature by clicking the image below, or navigate directly to the post here.

Tuesday, November 3, 2020: Comment Now on HIRE Vets Medallion Program

The USDOL's Veterans' Employment and Training Service (VETS) issued a **Notice** soliciting public comments regarding the extension, without changes, of the HIRE Vets Medallion Program.

The **HIRE Vets Medallion Program** is a voluntary employer recognition program which VETS administers. The awards recognize employer efforts to recruit, employ, and retain our Nation's veterans. All employers which employ at least one veteran are eligible to apply for the Award.

Comment on:

1. Whether the collection of information is necessary for the proper performance of the functions of the DOL, including whether the information will have practical utility;
2. if the information will be processed and used in a timely manner;
3. the accuracy of the DOL's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used;
4. ways to enhance the quality, utility, and clarity of the information collection; and
5. ways to minimize the burden of collecting information on those who are to respond, including automated collection techniques or other forms of information technology.

Comments are due on or before January 6, 2021.

Note: See "Mark Your Calendar" for the 2020 Awards Ceremony.

Tuesday, November 3, 2020: Two New WHD Opinion Letters

The U.S. Department of Labor's Wage & Hour Division announced two new Opinion Letters that address compliance issues related to the Fair Labor Standards Act (FLSA).

Note: An Opinion Letter is an official, written opinion by the Department's Wage and Hour Division (WHD) on how a particular law applies in specific circumstances presented by the person or entity that requested the letter.

The new Opinion Letters are:

- ✓ **FLSA2020-15**: Addresses the compensability of time that employees spend attending voluntary training programs in six different situations.
- ✓ **FLSA2020-16**: Addresses the compensability of employee travel time in certain situations involving construction sites located away from the employer's principal place of business.

"The opinion letters issued today demonstrate the Wage and Hour Division's commitment to providing clear guidance and compliance assistance to workers and employers," said Wage and Hour Administrator Cheryl Stanton. "As the workforce continues to reopen, it remains important that we provide clarity to ensure workers are paid all the wages they have legally earned, and that employers compete on a level playing field."

Tuesday, November 3, 2020: OFCCP Released a Supply & Service Technical Assistance Guide

OFCCP released the long-anticipated **Technical Assistance Guide** (TAG) for Supply and Service federal Government contractors. OFCCP believes the TAG may be used as a self-assessment tool when creating, reviewing, and updating affirmative action programs.

This 158-page resource outlines the various requirements under Executive Order 11246, Section 503 of the Rehabilitation Act, and VEVRAA (the Vietnam Era Veterans Readjustment Assistance Act) for covered contractors. It includes a breakdown of written requirements, recordkeeping requirements, and numerous other "to-do's." The TAG also contains the various types of Compliance Reviews ("audits") and how to prepare for each one.

The Agency now has three Technical Assistance Guides. See also:

- ✓ The **Construction TAG** (issued **November 13, 2019**)
- ✓ The **Educational Institutions TAG** (issued **October 11, 2019**)

DE will publish a Blog in coming weeks discussing the "new" advice and insight contained in this latest TAG.

Thursday, November 5, 2020: OFCCP Compliance: Looking Back and Ahead

For the 3rd year in a row, OFCCP Director Craig Leen spoke candidly to the National Employment Law Institute's (NELI) ***Affirmative Action Briefing*** audience. Co-Chaired by John Fox and DE's own Candee Chambers, this highly anticipated event brought as much education and discussion in this tumultuous year as it did during its debut 39 years ago!

In a whirlwind three hours, Candee and John laid the groundwork for Director Leen to discuss his legacy, the Agency's achievements, setbacks, and even late-breaking news (see the PDN story below which broke in the hour before the NELI Webinar conference began). At the same time, Director Leen's future remains up in the air. While his current appointment to OFCCP will terminate on January 20, 2021 when President-Elect Biden is sworn into office, Director Leen is still hoping the U.S. Senate will vote to confirm him between now and Monday January 3, 2021 when the 116th Congress will end. President Trump's nomination of Mr. Leen to become the next Inspector General of the U.S. Office of Personnel Management will also expire with the end of the 116th Congress.

That said, when asked about the legacy he hopes to leave, to no one's surprise, he answered that #1 was his primary focus and drive pursuant to OFCCP's Section 503 regulations, supporting individuals with disabilities. #2 is the new "PDN" Rule (see story below) and its approach to "transparent" and "fair" OFCCP treatment of contractors. Finally, #3 is "A LOT" of interaction with the affirmative action community in a myriad of events and activities over the past several years.

Additional topics included the recent, and quite controversial, Executive Order (EO) 13950, directed at Diversity and Inclusion (D&I) training (see our recent **blog**). Director Leen stressed that contractors should not stop D&I training, but rather review it against the prohibitions of EO 13950 and EO 11246 and make any necessary changes.

Director Leen's speech wouldn't be a speech without mention of the Agency's four "pillars" to success. Each initiative, Directive, Rule, and activity coming from the Agency is tied to one or more of the four core principles of the strategic plan to promote certainty, efficiency, recognition, and transparency. The NELI handout materials link to a DE Week In Review story about each of the hundreds of major OFCCP initiatives within each of the four "Pillars" and in turn contain a link to the underlying original documents of interest so you may read what was actually written.

Thursday, November 5, 2020: OFCCP's "New Gold Standard" in Resolving Potential Discrimination

OFCCP **announced** at the National Employment Law Institute's 39th annual Affirmative Action Briefing (see above story) that it will soon publish a **Final Rule** titled "Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination." OFCCP senior staffers informally describe the Rule among themselves as the "PDN Rule." PDN is a reference to a "Pre-Determination Notice." This is the document this Administration revived and changed from a prior Administration and now uses to put contractors on notice that OFCCP is alleging that the contractor is guilty of unlawful discrimination. OFCCP's Final "PDN Rule" not only describes the use of certain documents OFCCP must now use when seeking to resolve alleged unlawful discrimination claims, but also describes a process of engagement between OFCCP and the accused Contractor as well as the substantive law OFCCP will apply. Director Leen told the NELI audience that he is incredibly proud of the Final Rule and that it will be the "new gold standard" for the Agency to use hereafter when resolving potential discrimination findings.

When OFCCP originally proposed the Rule, it solicited written comments from the public. (only **34 received** in December 2019 despite the great importance of this Rule**: see our story for the essential details**). OFCCP invited comment on four policy issues, identified below. The Final Rule and supplementary information make up 79-pages. DE will publish in coming weeks a BLOG discussing what is new and what is important to know. Here is a short version outlining the content of OFCCP's Final Rule (which we expect to see in the *Federal Register* this week: our above embedded hyper-link copy is to the final draft OFCCP sent to the *Federal Register* to publish to the public):

1. **Proposal:** Codify procedures for two formal notices OFCCP uses when the agency finds potential violations: the Predetermination Notice (PDN) and the Notice of Violation (NOV).**Outcome:** The final rule "clarifies that issuance of NOVs is governed by the same evidentiary standards as issuance of PDNs; clarifies the standards OFCCP will use when determining whether to issue a pre-enforcement notice under a disparate treatment and/or disparate impact theory of discrimination; requires OFCCP to provide qualitative evidence (i.e. previously called anecdotal evidence) supporting a finding of discriminatory intent to proceed under a disparate treatment theory, subject to certain enumerated exceptions; requires OFCCP to identify the policy or practice of the contractor causing the alleged adverse impact with factual support demonstrating why the at-issue policy or practice has a discriminatory effect so as to warrant the issuance of a PDN or NOV under a disparate impact theory; requires OFCCP to explain in detail the basis for its finding (including, if applicable and as described further below, the reasons for any lack of qualitative evidence) and obtain the Director's (or acting agency head's) approval to issue a PDN or NOV; and provides that, upon the contractor's request, OFCCP will provide the model and variables used in its statistical analysis and an explanation for any variable that was excluded from the statistical analysis." (*pg 31-32)*
2. **Proposal:** Clarify that contractors have the option to expedite OFCCP's standard resolution procedures for discrimination findings and other "material violations" (not defined) by entering directly into a Conciliation Agreement before issuance of a PDN or NOV, including use of a so-called "expedited conciliation option." This accelerated option involves the use of (new to this Administration) "ERPs" (Early Resolution Procedures") and ERCAs (Early Resolution Conciliation Agreements) which OFCCP has been using for the last few years on an informal basis.

   Outcome: New section *60-1.33(d) Expedited Conciliation Option*. The option to bypass the PDN and NOV procedures to enter directly into a conciliation agreement when there are preliminary findings of material violations, regardless of whether those violations involve discrimination.In a reversal from its proposal, which had sought to codify the use of ERPs and ERCAs, OFCCP stopped short of hardening their use into the Final Rule: "While the Department fully endorses use of ERP and ERCAs as an expedited conciliation option, and

the agency intends to continue using this option where a contractor is interested, it declines to codify the procedures at this time."*(p. 46)*

3. **Proposal**: Addition of two definitions, "Nonstatistical evidence" and "Statistical evidence."**Outcome:** In response to comments on the proposed definitions, the Agency revised the terms to "qualitative evidence" and "quantitative evidence," respectively, and provides additional clarifying language to address commenters' issues. *(p. 9)*

✓ "Qualitative evidence" (previously "anecdotal evidence") is defined to include the various types of documents, testimony, and interview statements that OFCCP collects during its compliance evaluations relevant to a finding of discrimination and clarifies the purposes for which it will be used.

✓ "Quantitative evidence" is the support needed for OFCCP to determine that there is a statistically significant disparity in a contractor's employment selection or compensation outcomes affecting a group protected under OFCCP's laws. The definition of "quantitative evidence" includes quantitative analyses, such as cohort analyses, which compare similarly situated individuals or small groups of applicants or employees that are numerical in nature but do not use hypothesis testing techniques.

"OFCCP will issue a PDN or NOV only if there is quantitative (i.e., statistical or other numerical) evidence, practical significance, and qualitative evidence. The broader definition of quantitative evidence means that OFCCP does not necessarily need statistical evidence." *(p. 10)*

4. **Proposal:** Replace outdated references of OFCCP's agency head's official title from "Deputy Assistant Secretary" to "Director."**Outcome:** No comments received; the title is now officially "Director."

Friday, November 6, 2020: The October Employment Situation Shows Slight Improvements

As **stated** by U.S. Secretary of Labor Eugene Scalia, "The strong economic rebound continues, with approximately 900,000 private-sector jobs gained back in September and again in October, and the October unemployment rate dropping a full point, to 6.9 percent. Labor force participation increased, and Asian, Black, and Hispanic Americans all saw substantial decreases in unemployment…" and women (20+) currently enjoy the lowest unemployment rate at 6.5%.

The Employment Situation – October 2020

Unemployment Rate	October 2020	September 2020	October 2019
National (Seasonally adjusted)	6.9%	7.9%	3.6%

White	6.0%	7.0%	2.9%
Black	10.8%	12.1%	5.5%
Asian	7.6%	8.9%	2.8%
Hispanic	8.1%	8.7%	3.4%
Men (20+)	6.7%	7.3%	3.0%
Women (20+)	6.5%	7.7%	3.1%
Veterans (Not seasonally adjusted)	5.5%	6.4%	3.0%
Individuals with Disabilities (Not seasonally adjusted)	11.1%	12.5%	6.9%

Mark Your Calendar – Happening THIS week!

There are many events and resources for Veterans and Caregivers Month! See the U.S. Department of Veterans Affairs website for a full **calendar of activities**.

245th U.S. Marine Corps Birthday

As the 245th Marine Corps birthday draws near, Gen. David H. Berger reminds us how the Corps' legacy lives on in every Marine. Join us in celebrating the U.S. Marine Corps on November 10th!

2020 HIRE Vets Medallion Awards ceremony!

The OFCCP **announced** an open invitation to this year's HIRE Vets Award ceremony.

✓ Tuesday, November 10, 2020, @ 1:00 PM (Eastern Time)
✓ **Register** for the event, which will be live-streamed on the USDOL **YouTube page**.

What You Need to Know about Hiring Military Spouses

The Women's Bureau **announced** it will honor Veterans Day and National Veterans and Military Families Month with a live virtual event. The webinar will offer insights into best practices for how employers can connect with military spouses and veterans. Moderated by Director Laurie Todd-Smith, Ph.D., the discussion will answer essential questions for employers and open the door to resources offered through the U.S. Department of Labor, Hiring Our Heroes, and iRelaunch.

- Tuesday, November 10, 2020, 2:30 – 3:30 PM (Eastern Time)
- **Log-In** to join

THIS COLUMN IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE CURRENT LAW AND PRACTICE RELATING TO OFCCP. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.

Article 4 (back to top)

Article Title: Executive Order on Combating Race and Sex Stereotyping: 5 Things Contractors Should Do Now

News Source: JDSUPRA

Reporter's Name: Nichole Atallah, Sarah Nash, Sara Nasseri

Date: November 9, 2020

November 9, 2020

Executive Order on Combating Race and Sex Stereotyping: 5 Things Contractors Should Do Now

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PM Legal Minute

The Trump administration issued Executive Order (EO) 13950 on September 22, 2020. The order prohibits federal contractors, federal agencies and certain federal grant recipients, as well as the military, from using workplace training that "inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating." There are many uncertainties surrounding EO 13950, including whether it will survive legal

challenges and a potential change in presidential administration. ***This blog discusses measures that contractors should consider right now and identifies potential implications of noncompliance.***

The contractor obligations outlined in the order apply to federal contracts entered on or after November 21 (60 days after the issuance of EO 13950). However, in the Office of Federal Contract Compliance Programs' (OFCCP) guidance issued on October 7, it is made clear that the OFCCP "may investigate claims of sex and race stereotyping pursuant to its existing authority under EO 11246, which requires contractors and subcontractors to treat employees without regard to their race or sex, among other protected bases, and requires contractors to take affirmative action to ensure such discrimination does not occur." Additionally, pursuant to EO 13950, the OFCCP has already set up its hotline and will presumably begin investigating complaints received under both this order and EO 11246, alleging that a federal contractor is utilizing such training programs in violation of the contractor's obligations under those orders. All this to say, contractors should be prepared to comply and undertake various actions immediately to avoid, at the very least, potential for employee complaints to the hotline.

What Should Federal Contractors Do Now?

1. Review diversity trainings and identify any areas that may run afoul of EO 13950. While there is uncertainty surrounding how some of the terms may be defined and much of that interpretation will be subjective, we expect OFCCP to, at the very least, do a keyword search for such terms as "unconscious bias," "white privilege," "critical race theory," "positionality," "systemic racism," "racial humility," and "intersectionality." If possible and feasible, you may wish to put a pause on your diversity training programs while you and / or legal counsel review the trainings.
2. Be prepared for potential changes and modifications to procurement documents to include the necessary flow-down provisions.
3. Ensure that necessary protocols are in place to respond to any potential hotline complaints and potential OFCCP investigations.
4. Send and post to each labor union or representative of workers and employees the appropriate postings, as required.
5. Keep apprised of any and all updates, as well as further potential guidance from the Department of Labor.

What Should Federal Contractors Expect?

EO 13950 is clear about the consequences of noncompliance. Indeed, in the event of the contractor's noncompliance, the contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further government contracts under EO 13950, as well as under EO 11246.

While some of these consequences may seem overreaching and may, practically speaking, seem implausible in the near future, the OFCCP seems to be taking a harsh stance on enforcing provisions of EO 13950 immediately. That said, the order is still in its early stages and will have to overcome many legal challenges. Indeed, on October 29, the first of what is likely to be many lawsuits challenging EO 13950 was filed in DC district court. Additionally, the order does not technically come into effect until November 21, after an election that may result in an administration change come January 2021, which could cause the order to be revoked entirely.

Regardless of how EO 13950 is challenged moving forward, contractors should be prepared and take measures to ensure compliance over the next few weeks. Consulting with legal counsel regarding the implications of EO 13950 and best practices in diversity training is also recommended. If you need such assistance, the Labor and Employment team at PilieroMazza is here to help.

Article 5 (back to top)

Article Title: OFCCP's New MOU with the EEOC Could Dramatically Change OFCCP's Enforcement Program
News Source: Direct Employers
Reporter's Name: Jay J. Wang
Date: November 9, 2020

OFCCP's New MOU with the EEOC Could Dramatically Change OFCCP's Enforcement Program

by Jay J. Wang | Nov 9, 2020 | Week In Review (WIR) | 0 comments

The Office of Federal Contract Compliance Programs ("OFCCP"), the Equal Employment Opportunity Commission ("EEOC"), and the U.S. Department of Justice's Civil Rights Division ("DOJ CRD") executed and finalized on November 3, 2020 a dramatically different **(Memorandum of Understanding ("MOU")** than we have previously seen. The big change from the **2011 predecessor MOU** is that OFCCP will now become an "agent" of the EEOC stepping-into-its-shoes to investigate Title VII Charges and for the first time ever will be authorized to apply both Title VII liabilities and remedies to Charges arising pursuant to Title VII. The agencies will accomplish this jurisdiction-sharing authority with the EEOC through the device of what the agencies will now call "dual-filed" Complaints/Charges. NOTE: OFCCP calls the claims it receives "Complaints" while the EEOC calls them "Charges."

Previously, OFCCP referred to the EEOC all **individual** Complaints OFCCP received pursuant to its Executive Order 11246 authority. This allowed OFCCP to focus on systemic discrimination through its Compliance Review investigative tool. President Jimmy Carter had originally designed this division of labor to not cause OFCCP, which he birthed on October 1, 1978, to have its resources driven by the 70,000 to 90,000 Complaints and Charges the federal agencies typically intake each year. It is important to note, too, that OFCCP's Complaint investigation Rules, unlike the EEOC's Charge investigation procedures, *require* OFCCP to investigate each Complaint it receives and which meets its jurisdictional standards.

Speaking last Thursday (November 6) at the National Employment Law Institute's (NELI) 39th annual ***Affirmative Action Briefing***, outgoing OFCCP Director Craig Leen defended the OFCCP's interest in changing the MOU to investigate EEOC Charges by noting that the change would allow OFCCP to partner with the EEOC on large investigations. However, that remark seemed to bolster only another portion of the new MOU which recognizes, also for the first time ever, "joint investigations" to be undertaken with the EEOC. In an effort to defuse concern that the MOU would allow and cause OFCCP to be overrun with individual Complaint investigations, Director

Leen asserted OFCCP's continuing intent is to maintain Compliance Evaluations (Compliance Reviews; Focused Reviews; and Compliance Checks) as its primary investigative tools.

The concern that the new MOU will knock OFCCP off-mission is nonetheless very much on the minds of federal contractors covered by OFCCP's Rules and of civil rights' groups since the EEOC's current "inventory" (formerly "backlog") of Charges, even while it has fallen to a new modern low, is still about 50,000 per year. Moreover, the EEOC's backlog of Charges always swells to between 80,000 to 90,000 in poorer economic times. Annual new Charge filings are even higher.

To What Did the Agencies Specifically Agree Under the New MOU?

Pursuant to the new MOU executed last week, the signatory agencies, which for the first time included the DOJ CRD, agreed to:

- Continue to share information through inspection, copying, and/or loaning of documents relating to the employment policies and/or practices of federal contractors and subcontractors, such as affirmative action programs, annual employment reports, complaints, charges, investigative files, and compliance evaluation reports;
- Continue to honor the decision of the agency that initially collected the information in regard to whether it should share relevant information pursuant to request from another signatory agency;
- Continue to maintain confidentiality of the information shared pursuant to protections contained in Title VII, the Trade Secrets Act, and the Privacy Act, while adding consideration of the protections under the Freedom of Information Act;
- Continue to establish and/or update procedures to notify and consult with the other signatory agencies at various stages of any respective compliance activities to develop potential joint enforcement initiatives, increase efficiency, ensure collaboration, and minimize duplication;
- Consult with the "Appropriate Requesting Official" at the DOJ CRD (either the Attorney General, Deputy Attorney General, the Assistant Attorney General for the Civil Rights Division, the relevant Deputy Assistant Attorney General for the Civil Rights Division, or their designee) before OFCCP would issue a Notice of Violation or EEOC would make a reasonable cause determination when there are novel or unsettlement issues of law that may have significant precedential value for subsequent cases. This new requirement is to ensure that the "government's lawyers" in the DOJ CRD provide their legal expertise and input;
- Continue to refer misfiled complaints not within the agency's purview to the appropriate agency which has jurisdiction;
- Conduct annual reviews related to the implementation of the MOU;
- Continue to use a Coordination Advocate within each agency to ensure consistent compliance and enforcement standards and procedures; and
- DUAL-FILED CHARGES: Most importantly, comply with updated guidelines laid out in the MOU related to receipt, investigation, processing, and resolution of "dual-filed" Complaints and/or Charges.
    - The MOU's "dual-filed" Complaints/Charges provisions allows OFCCP to retain individual complaints of discrimination against Federal contractors while continuing to refer selected Complaints to the EEOC as a matter of OFCCP's discretion. (Previously, OFCCP had no discretion under its 2011 MOU. The 2011 MOU required OFCCP to refer ALL individual Complaints arising under Executive Order 11246 (relating to sex, race, color, religion, and/or national origin) to the EEOC, as a matter of course, to intake as Charges arising under Title VII.) According to the United States Department of Labor's press release announcing the new MOU, this change in the new MOU ensures that OFCCP will have a role to address discrimination against individual employees;

- The inclusion of the DOJ CRD as a signatory. The agencies assert that the DOJ's involvement will help ensure that the three pre-eminent federal agencies engaged in civil rights law take a consistent and coordinated approach to equal employment opportunity law, and ensures DOJ involvement regarding cases that raise

issues of law that are novel, unsettled, or may have significant precedential value. While this goes beyond the Complaint/Charge "load balancing" focus of prior MOUs (since USDOJ does not intake Complaints/Charges which overlap either the OFCCP's or the EEOC's Complaint/Charge authorities), OFCCP sought this expansion of the MOU. It is thought that OFCCP was motivated to seek this change since OFCCP has recently suffered a losing streak in the Courts attempting to apply Title VII principles to the very few lawsuits OFCCP brings on the merits of alleged unlawful discrimination claims;

* The adoption of several measures to ensure that senior officials in all three agencies are directly involved in the coordinated efforts the MOU contemplates; and

The inclusion of federal protections for religious liberty and conscience protections as an area of focus for coordination efforts. The agencies included this change to underscore the religious discrimination protections set out in the **October 6, 2017 Memorandum** then-Attorney General Jeff Sessions published. In that Memorandum, Attorney General Sessions instructed administrative agencies to proactively consider potential burdens on the exercise of religion and possible accommodations of those burdens when formulating rules, regulations, and policies. Thus, the Compliance Coordination Committee meetings occurring at least biannually must include in their discussion approaches to accommodating religious and conscience protections.

Potential Issues for Contractors to Consider, and OFCCP Director Leen's Public Response to Such Concerns

The revisions incorporated in the new MOU raise several concerns related to the administration of Complaints/Charges and investigations. This is because many in the Government contractor community and in civil rights groups worry that the MOU may be a "first-step" to converting the OFCCP into a "mini-EEOC" in preparation for merging it with the EEOC. This potential future merger was one of the areas of concern which drove EEOC Commissioner Charlotte A. Burrows to take the unusual step of issuing a public **"statement"** in opposition to the new MOU, even before it was public. Indeed, both Commissioner Burrows and Commissioner Jocelyn Samuels, (the other Democrat EEOC Commissioner), while dissenting during the EEOC's vote to adopt the new MOU on November 2nd, stressed the importance of the EEOC's independence as an agency. Both Commissioner Burrows and Samuels feared that the new MOU could chip away at that autonomy.

First, given the express authorization of OFCCP as an agent of EEOC and its discretion to investigate individual charges that have a Title VII claim against a covered federal Government contractor or subcontractor, one concern of the federal contractor and subcontractor communities is the imposition of the EEOC timeline for Charging Parties to file Charges vs the timeline to file OFCCP Complaints. Currently, an individual must file complaints with OFCCP alleging discrimination which is unlawful based on race, color, religion, sex, sexual orientation, gender identity, national origin, or based on compensation inquiries, discussions or disclosures, within **180 days from the date of the alleged unlawful discrimination**, unless the time for filing is extended for good cause. See 41 CFR § 60-1.21. However, under the **EEOC's Charge filing procedures**, the time limit to file a Charge with the EEOC is 180 calendar days, and is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis as Title VII pursuant to a "work sharing agreement" between the state and the EEOC insuring the state will apply legal prohibitions on discrimination at least as stringent as federal law. What will happen, as a result, is that OFCCP will investigate Complaints filed pursuant to Executive Order 11246 alleging violations more than 180 days before the filing (but not more than 300 days before the filing) pursuant to the OFCCP's new-found authority to investigate the Complaint as a Charge and proceed under Title VII. Previous to the new MOU, OFCCP would have merely declined to intake such an Executive Order Complaint as "untimely filed." Moreover, OFCCP may or may not have referred the Charging Party to the EEOC to file a fresh Charge arising under Title VII.

Second, given OFCCP's Rule at 41 CFR § 60-1.24(b) requiring OFCCP to conduct a thorough evaluation of the allegations of all Complaints OFCCP intakes as jurisdictional and to conduct a Complaint investigation during which it must develop a complete case record, contractors may face a situation where OFCCP becomes

"overwhelmed" investigating Complaints. For example, EEOC receives over about 70,000 Charges of discrimination per year. In fiscal year 2018, EEOC records **report** that the Commission received 76,518 charges of workplace discrimination (and that during a dynamic financial year where jobs were more plentiful than applicants for jobs. NOTE: Charge numbers drop in good economic times). The large number of Charges filed with EEOC has resulted in a backlog in the tens of thousands for the EEOC. If the OFCCP were to share even only a small portion of the EEOC's Charge workload, it would take up all of OFCCP's time and resources. OFCCP **reports**, for example, that it normally receives fewer than 1,500 individual Complaints each year. The ongoing overwhelming EEOC backlog thus raises questions whether OFCCP would have the discipline to exercise its discretion over the thousands of Complaints it is now likely to receive arising under Title VII and to refer them to the EEOC, at the risk of foregoing one Compliance Evaluation for about every five Charges, or so, which OFCCP intakes.

Third, the federal contractor community has legitimate concerns born from experience as to OFCCP's knowledge and experience applying Title VII law as it is, even before OFCCP managers now ask their OFCCP Compliance Officers to expand their knowledge and repertoire to also understand and make demand for "compensatory" and "punitive" damages with which they have absolutely no training or experience. Title VII's remedies are broader than the remedies available under Executive Order 11246. Moreover, Executive Order 11246 law has not kept up with amendments to Title VII which will cause OFCCP Compliance Officers confusion as they seek to apply the new things they bump into about Title VII law to Executive Order 11246 investigations which lack the full reach of Title VII liability and damages. (For example, the President has never amended Executive Order 11246 to imbue it with Pregnancy Discrimination authority as the Congress did in 1978 as to Title VII law. The Civil Rights Reform Act of 1991, which broadly amended Title VII, did not amend EO 11246 and the President has not doubled back to bring the Executive Order up to the same level of protections as the 1991 Amendments to Title VII. The Lilly Ledbetter Amendment to Title VII did not amend EO 11246 and no President has ordered a parallel amendment to EO 11246.)

And given recent case law decisions arising under Executive Order 11246 which held that OFCCP did not apply even the basic elements of proof necessary to prove up violations of unlawful discrimination pursuant to standard fare Title VII claims, the new authority the new MOU reposes with OFCCP will require a major education and training of OFCCP personnel as to Title VII law and principals.

Of concern, too, Director Leen told the NELI ***Affirmative Action Briefing*** audience that if no settlement could be reached releasing both Executive Order 11246 and Title VII claims during joint investigations of the two agencies, OFCCP would proceed only as to the Executive Order 11246 remedies in any suit alleging unlawful discrimination. As an aside, Director Leen confirmed that OFCCP did not intend to train its Compliance Officers regarding Title VII damages remedies unless it became a more routine part of OFCCP's workload. For now, Title VII damages remedy issues would only arise with OFCCP in situations involving settlement discussions seeking a complete release of claims (i.e. under both EO 11246 and pursuant to Title VII), in his view. This "no training" decision thus suggests that, for the moment, OFCCP intends to intake NO Title VII Charges, in fact. If so, this decision would greatly reduce the concern of knocking OFCCP off-mission. But, then, why amend the MOU to force Title VII Charges onto OFCCP's dockets and then require OFCCP to laboriously, one-by-one, exercise its discretion to refer them to the EEOC.

Finally, Director Leen stressed that the new MOU would not allow either OFCCP or the EEOC to act over the objection of the other agency; in other words, neither OFCCP nor EEOC can go "rogue" in the application of law or investigative authority.

Time will tell whether Director Leen's assurances will in fact come to fruition, especially given his current status as outgoing Director of OFCCP and in the face of the election of a new Democratic administration coming on board sometime after January 20, 2021. Given the uncertainty whether OFCCP will in fact begin to investigate Title VII Charges, the best recourse for federal contractors and subcontractors at this stage is to remain on high alert, and to be ready to gently and patiently teach OFCCP Compliance Officers Title VII law if the OFCCP does come knocking with Title VII Charges in hand.

With Appreciation,

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Sent: 12/8/2020 11:13:47 AM

To: Leen, Craig - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5ffd4a5b3cc74f49a5d2bf4c747416d4-Leen, Craig]; Gaglione, Robert J - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1488b4650b734927906fed5870ab9642-Gaglione, R]; Davidson, Patricia J - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=881aff8bf6fb4a85ae33921a0cb1596b-Davidson, P]

CC: LaJeunesse, Robert - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c9f3ffa568704a2db7b79e20a25c080e-LaJeunesse,]; Collins, Aida Y - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=32a0355e614f48fcaea5dc512773d16a-Collins, Ai]; Corbin, Jonide - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7562f2e8d23a437782a0ad40cc50cba9-Simon, Joni]; Harewood, Fiona A - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8b1d63f61a974190973f614c39868069-Harewood, F]; Hodge, Michele - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9a2682d410ed45deafdb13d08bcf7b39-Hodge, Mich]; Navarro, Carmen - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5666fc8d7dc041e1b2e5e3fe231df766-Navarro, Ca]; Rodriguez, Luis N - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f015694f022042afa0bcb2900374beed-Rodriguez,]; Sen Diana S - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e39e65e9739f4cfeb3368f451bfcc23a-Sen, Diana]; Suhr, Jane - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d86962c51c1d44aaa66fa16566997d4c-Suhr, Jane]; Smith, Kelley - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0cea2c4e5e114c0daafc5aabb237c96a-Smith, Kell]; Gaglione, Robert J - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1488b4650b734927906fed5870ab9642-Gaglione, R]; Gean, Lissette - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bbb9a13178c24aadb6b7613f2f9041f3-Gean, Lisse]; Kaiser, Javaid - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1e5f5c483d9741aa8d6ed6b0dadd6027-Kaiser, Jav]; Fort, Harvey D - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6f10edeb3ed442e3a4f1b0ef426f9703-Fort, Harve]; Kraak, Margaret - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5d6c06403a2548b7a2fe40c35cc5e1f2-Kraak, Marg]; Carter, Quintin - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a41f98b62d0c464289980d75f1dce342-Carter, Qui]; Spalding, Candice - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Spalding, Candice - OFCCP]; Williams, Tina T - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=de1ca1bb58004746a50104bd40a50623-Williams, T]; Leung, Kenneth - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e83ead72f1124a19a6565d1067874925-Leung, Kenn]; Seely, Christopher - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6b2b2010aaf743ceb373a758390001a1-Seely, Chri]; Parker, Walter - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a64fa9f8e7c7440ea9f69e2d2643fff2-Parker, Wal]; Tretheway, Andrea - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4bcdc1bd011a4f19a909b742d2b454dc-Tretheway,]; Speer, Melissa - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b53edd248cbd4e9a9e572bb94b966ece-Speer, Meli]; Stergio, Marcus - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=37788d9ffe5a46c58fe4cae3ce987968-Stergio, Ma]; Mimnaugh Matthew F - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=cc2fb9589f364481a8c0395c315df87f-Matthew F.]; Fort, Harvey D - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6f10edeb3ed442e3a4f1b0ef426f9703-Fort, Harve]; Price-Livingston, Glenda - OFCCP [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e7cbcd1acc4449dab853e5b28555d3fc-Price-Livin]; Rosser, Shamika M - OFCCP CTR [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bf4e9a794565427d8fb7320b1ccdff67-Rosser, Sha]

Subject: Tuesday Morning Press Releases/Daily News Clips: December 8, 2020

Tuesday Morning Press Releases: December 8, 2020- None to Report

Date of Press Release	Company Name	Hyperlink to Release

Tuesday Morning Daily News Clips: December 8, 2020

Article #	Paper	Title
1	Bloomberg Law	DOL Broadens Religious Exemptions for Federal Contractors (2)
2	National Law Review	OFCCP Publishes Final Regulation Clarifying Religious Exemption Under Executive Order 11246
3	LGBTQ Nation	New Trump rule gives federal contractors a license to discriminate against LGBTQ people
4	JDSUPRA	OFCCP Week In Review: December 2020
5	Lankford.Senate.gov	Lankford Applauds Department of Labor's Rule to Ensure Faith-Based Organizations Can Contract with the Federal Government

Article 1 (back to top) – hyperlink to above

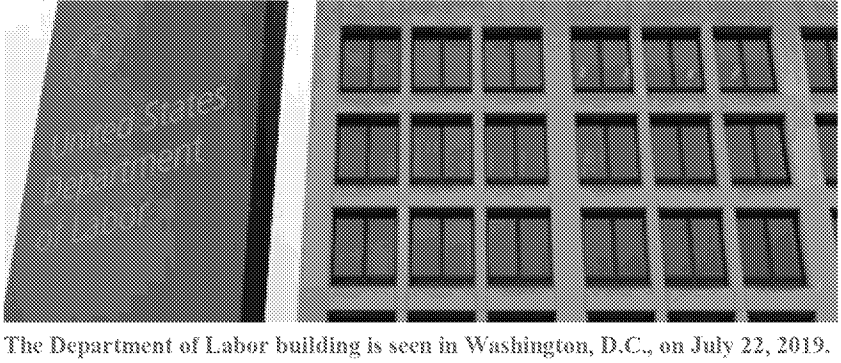
Article Title: DOL Broadens Religious Exemptions for Federal Contractors (2)

News Source: Bloomberg Law

Reporter's Name: Paige Smith

Date: December 7, 2020

Daily Labor Report®



The Department of Labor building is seen in Washington, D.C., on July 22, 2019.
Photographer: Alastair Pike/AFP/Getty Images

DOL Broadens Religious Exemptions for Federal Contractors (2)

Dec. 7, 2020, 9:12 AM ; Updated: Dec. 7, 2020, 3:30 PM

- Final rule extends exemption to "closely held" corporations
- Slated to take effect Jan. 8, a senior DOL official says

Religious defenses that federal contractors can raise when hit with a workplace discrimination claim have been expanded in a U.S. Labor Department final rule, sparking more friction between LGBT advocates and religious freedom proponents.

The rule, published on the Labor Department's website, cements for contractors the same kinds of exemptions that allow churches and other "religion-exercising organizations" to avoid discrimination liability for hiring, firing, or other employment decisions motivated by religious belief.

It also extends the defenses to "closely held" corporations—meaning businesses owned and operated by a small number of people also can rely on the exemptions if they act in accordance with an owner's religious beliefs.

The rulemaking previously triggered outcry from advocates for lesbian, gay, bisexual, and transgender individuals, Democratic attorneys general, and others who said it would weaponize religious liberties. But religious rights advocates applauded it for providing clarity for religious entities pursuing federal contracts.

"This rule is intended to correct any misperception that religious organizations are disfavored in government contracting by setting forth appropriate protections for their autonomy to hire employees who will further their religious missions, thereby providing clarity that may expand the eligible pool of federal contractors and subcontractors," the final rule states. "Recent Supreme Court decisions have addressed the freedoms and antidiscrimination protections that must be afforded religion-exercising organizations and individuals under the U.S. Constitution and federal law."

When asked whether the agency has previously fielded federal contractor requests for religious exemptions, a senior DOL official said during a Monday press call that he's "not aware of it being raised" in the past.

In its proposed form, the rule received more than 109,000 public comments, the most the agency has received since online commenting was launched in 2003. Many of the comments were spearheaded by the American Civil Liberties Union, a civil rights group, and the Family Research Council, a Christian public-policy ministry.

The rule was sent Nov. 4 to the White House for review, and cleared Nov. 25.

It will take effect Jan. 8, according to the senior DOL official, less than two weeks ahead of the inauguration of President-elect Joe Biden.

High Court Considerations

The Labor Department's Office of Federal Contract Compliance Programs took into account recent U.S. Supreme Court precedent on religious rights.

These include:

- *Burwell v. Hobby Lobby* , an employer contraceptive-mandate case in which the court held that the Religious Freedom Restoration Act's protections apply to closely held, for-profit corporations;
- *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Commission* , the same-sex wedding cake case that led the justices to rule that government agencies must neutrally analyze religious defenses employers raise before pursuing discrimination findings; and
- *Trinity Lutheran Church of Columbia, Inc. v. Comer* , which found that the government violated the First Amendment when it denied a grant to a religious school for playground resurfacing.

The final rule's publication comes after the high court ruled in June that discrimination against LGBT workers is outlawed under Title VII of the 1964 Civil Rights Act. That ruling has since teed up more debate about the balance between religious liberties and LGBT protections.

The agency acknowledges in the final rule that none of those Supreme Court decisions "specifically address government contracting," or even employment law, but "OFCCP noted the recent Supreme Court cases for the general and commonsense propositions that the government must be careful when its actions may infringe private persons' religious beliefs and that it certainly cannot target religious persons for disfavor."

"OFCCP has followed the Constitution, the Supreme Court, and the most persuasive lower court decisions," when formulating the final rule, the senior DOL official said.

Republican Reps. Virginia Foxx (N.C.) and Ben Cline (Va.) applauded the final rule's stance on religious liberty in an emailed statement. Both are members of the House Committee on Education and Labor.

"The cornerstone of America's representative republic is the First Amendment, which guarantees the free exercise of religion," their statement said. "Today's final rule upholds this precious right by ensuring that religious organizations doing business with the federal government as contractors are protected in the free exercise of their religion."

Americans United for Separation of Church and State President and CEO Rachel Laser called the final rule "unconscionable."

"This rule is a last-gasp effort by the outgoing administration to ignore the will of the people and cement a legacy of using religious freedom as a sword to harm people, rather than a shield to protect all of us," she said in an emailed statement. "We urge the Biden-Harris administration to restore and protect religious freedom and right the wrongs of the Trump administration, including by directing the Department of Labor to immediately begin the process of revoking this rule."

World Vision Test

When defining which organizations are eligible for the exemption that allows them to take religion into account in employment decisions, the DOL turned to a test established by the U.S. Court of Appeals for the

Ninth Circuit in a Title VII case, *Spencer v. World Vision Inc.* , with some modifications based on comments submitted on the proposed rule.

"This was for several reasons, including because the World Vision test generally prevents invasive inquiries into matters of faith, the uncertainty and subjectivity of a multifactor balancing test, and the inherently difficult and constitutionally suspect exercise of measuring the quantum of an organization's religiosity," the final rule states.

The agency enforces Executive Order 11,246, but relies on Title VII precedent when proceeding with enforcement of workplace discrimination allegations.

To qualify for the exemption, organizations must certify their nonprofit status, or otherwise present "strong evidence that it possesses a substantial religious purpose," according to the rule.

Religious organizations have invoked exemptions to Title VII as illustrated by the legal decisions referenced in the final rule, the senior DOL official said in a follow-up email statement.

"In light of this, it is notable that the EO 11246 religious exemption has *not* been used in the two decades since it was originally included in the Executive Order, even though OFCCP has received inquiries about it from time to time," the official said. "OFCCP was concerned that the lack of clarity regarding the exemption was leading religious organizations to not raise the exemption if they were federal contractors, or to not participate in federal contracting altogether."

Lawrence Lorber, a former OFCCP director under President Gerald Ford, said regulations should be written for a reason and not merely to express general views, pointing out that the agency "first defends these regulations by noting that they will have limited application." He added that the rule contains "confusing discussion" of Title VII precedent and obligations.

There may be enough confusion that a Biden administration could issue "a new guidance document to 'clarify' or overturn this purported regulation," Lorber, now counsel at management-side firm Seyfarth Shaw, said in an email.

Search for a Problem?

The final rule addressed criticism that it was a "regulation in search of a problem."

It won't affect "the vast majority of contractors" because they likely wouldn't qualify and wouldn't seek to claim the religious exemption, the agency said.

"Admittedly, OFCCP cannot perfectly ascertain how many religious organizations are government contractors, or would like to become such, and how those numbers compare to the whole of the contracting pool," the final rule states. "But neither does OFCCP find persuasive commenters' assertions that faith-based organizations are already well-represented among government contractors," given that they hold "only tens of millions, when the federal government expended $926.5 billion on contractual services in fiscal year 2019."

Jennifer Pizer, director of law and policy at Lambda Legal, a civil rights organization that advocates for LGBT people and those living with HIV/AIDS, said the rule takes a "sledgehammer" to anti-discrimination protections.

"This new rule uses religion to create an essentially limitless exemption allowing taxpayer-funded contractors to impose their religious beliefs on their employees without regard to the resulting harms, such as unfair job terms, invasive proselytizing and other harassment that make job settings unbearable for workers targeted on religious grounds," Pizer said in an emailed statement.

(Updated with additional reporting, including comments from a DOL official.)

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Article 2 (back to top)

Article Title: OFCCP Publishes Final Regulation Clarifying Religious Exemption Under Executive Order 11246

News Source: National Law Review

Reporter's Name: Laura A. Mitchell, Chris Chrisbens

Date: December 8, 2020

OFCCP Publishes Final Regulation Clarifying Religious Exemption Under Executive Order 11246

Tuesday, December 8, 2020

As anticipated, on December 7, 2020, OFCCP published on its Website a lengthy final rule clarifying the religious exemption found at Section 204(3) of Executive Order (EO) 11246 and codified at 41 C.F.R. 60-1.5(a)(5) (the Exemption).

The purpose of this final rule is to clarify the contours of the E.O. 11246 religious exemption and the related obligations of federal contractors and subcontractors to ensure that OFCCP respects religious employers' free exercise rights, protects workers from prohibited discrimination, and defends the values of a pluralistic society. This is the final version of OFCCP's proposed rule published in August 2019.

Importantly, the rule specifically acknowledges that

[t]he rule does not affect the overwhelming majority of federal contractors and subcontractors, which are not religious, and OFCCP remains fully committed to enforcing all E.O. 11246 nondiscrimination requirements, including those protecting employees from discrimination on the bases of sexual orientation and gender identity. Even for religious organizations that serve as government contractors or subcontractors, they too must comply with all of E.O. 11246's nondiscrimination requirements except in some narrow respects under some reasonable circumstances recognized by law.

The final rule is a culmination of a multi-year effort by OFCCP to reconcile the Exemption with Supreme Court cases, including those cited in the final rule:

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018) (holding the government violates the Free Exercise Clause of the First Amendment when its decisions are based on hostility to religion or a religious viewpoint);

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) (holding the government violates the Free Exercise Clause of the First Amendment when it decides to exclude an entity from a generally available public benefit because of its religious character, unless that decision withstands the strictest scrutiny);
Burwell v. Hobby Lobby Stores, , 573 U.S. 682, 719 (2014) (holding the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations);
Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012) (holding the ministerial exception, grounded in the Establishment and Free Exercise clauses of the First Amendment, bars an employment-discrimination suit brought on behalf of a minister against the religious school for which she worked);
Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) ("[T]he promise of the free exercise of religion . . . lies at the heart of our pluralistic society.");
Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2379–84 (2020) (holding the Departments of Labor, Health and Human Services, and the Treasury had authority to promulgate religious and conscience exemptions from the Affordable Care Act's contraceptive mandate);
*Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (*a state "cannot disqualify some private schools [from a subsidy program] solely because they are religious" without violating the Free Exercise clause*);* and,
Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020) (holding the ministerial exception applies "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith").

None of these cases specifically addressed the Exemption applicable to federal contractors, and some address the ministerial exception that is not part of the EO 11246 Exemption. Moreover, the 2020 cases were decided after OFCCP issued its initial proposed rule in August 2019. Nonetheless, OFCCP found a reconciliation of these cases and the Exemption to be necessary to protect religious organizations that may be reluctant to do business with the federal government. OFCCP specifically stated that the rule

is intended to correct any misperception that religious organizations are disfavored in government contracting by setting forth appropriate protections for their autonomy to hire employees who will further their religious missions, thereby providing clarity that may expand the eligible pool of federal contractors and subcontractors.

The primary clarifications of the Exemption are via new terminology definitions, including defining "particular religion" and "religious corporation, association, educational institution, or society," "exercise of religion" and "sincere." The final rule also provides a few examples of application of the exemption.

Finally, the Exemption is amended to dictate that it "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb et seq."

The Exemption, albeit having a significant potential impact in individual instances, is theoretically narrow in application from OFCCP's perspective. EEOC has weighed in on the topic separately and issued its own guidance. As noted in OFCCP's discussion of the many comments it received in response to the proposed rule, many groups opposed the proposed rule arguing, for example, that an expansion of the Exemption is but "a pretext to permit discrimination against or harm others." Given this, the publication of the final rule may prompt formal challenges.

It remains to be seen, of course, how OFCCP under a new presidential administration will interpret and enforce the final rule. We will keep you updated on any developments along this, or any other, front.

Article 3 (back to top)

Article Title: New Trump rule gives federal contractors a license to discriminate against LGBTQ people

News Source: LGBTQ Nation

Reporter's Name: Alex Bollinger

Date: December 8, 2020

New Trump rule gives federal contractors a license to discriminate against LGBTQ people

He just made it a lot easier for businesses to claim a "religious exemption" to LGBTQ discrimination laws.

By Tuesday, December 8, 2020

Donald Trump's Department of Labor issued a final rule yesterday allowing federal contractors increased rights to discriminate against racial minorities, women, and LGBTQ people if they claim that their business's religious beliefs would be violated by following anti-discrimination laws.

The new rule creates "a near-limitless license to discriminate," according to *Slate*'s Mark Joseph Stern. The new rule effectively takes job protections away from four million American workers.

The Office of Federal Contract Compliance Programs (OFCCP) at the Department of Labor has been working on this rule change since at least 2018, and in 2019 released an official proposal for a rule that would make it easier for for-profit businesses to claim that anti-discrimination rules violate their religious beliefs.

President Lyndon Johnson signed the first executive order that created the protections for employees of federal contractors and protections on the basis of sexual orientation and gender identity were later added to it. President George W. Bush then created a religious exemption to the executive order that allowed religious nonprofits to claim a religious exemption.

Trump's expansion allows for-profit businesses to also claim a religious exemption. In order to qualify, a business will have to show "evidence of a religious purpose on its website, publications, advertisements, letterhead, or other public-facing materials" or affirm "a religious purpose in response to inquiries from a member of the public or a government entity."

Effectively, any business that wants to discriminate will simply need to say that its religious beliefs require it to discriminate in order to get out of a lawsuit or avoid losing a federal contract.

Moreover, Bush's religious exemption focused on allowing religious nonprofits to favor hiring people of the same religion, like a Catholic charity preferring to hire Catholics to non-Catholics.

Trump's religious exemption allows businesses to discriminate against someone of the same religion but who doesn't share the exact same religious beliefs as the business does. For example, a Catholic business could fire a Catholic worker who takes birth control if the business claims that its version of Catholicism is anti-birth control, and the federal government couldn't take away the business's contract or the funds that come with it.

Title VII of the Civil Rights Act of 1964 still applies to businesses with more than 15 employees, but the executive order used to give small businesses a reason to follow federal anti-discrimination rules if they wanted to maintain a federal contract and more avenues with which to seek redress if they were the victim of discrimination.

In the final rule released yesterday, the OFCCP cites Supreme Court cases like *Burwell v. Hobby Lobby* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, both of which were about for-profit businesses claiming that their religious beliefs were being violated by being forced to follow the law.

"Religious organizations should not have to fear that acceptance of a federal contract or subcontract will require them to abandon their religious character or identity," Trump's Secretary of Labor Eugene Scalia said in a statement.

The rule change also requires employees of federal contractors who believe they were illegally discriminated against to file a complaint with the Equal Employment Opportunity Commission (EEOC). Previously, employees could try to pursue a claim with either EEOC or the OFCCP.

"This, in essence, closes a possible avenue for enforcement," American Atheists' Alison Gill told *The Advocate*.

"It is hard to overstate the harm that the Office of Federal Contract Compliance Programs is visiting on LGBTQ people, women, religious minorities, and others with the sledgehammer it is taking to federal nondiscrimination protections," said Jennifer Pizer of Lambda Legal in a statement.

"This new rule uses religion to create an essentially limitless exemption allowing taxpayer-funded contractors to impose their religious beliefs on their employees without regard to the resulting harms, such as unfair job terms, invasive proselytizing and other harassment that make job settings unbearable for workers targeted on religious grounds."

Article 4 (back to top)

Article Title: OFCCP Week In Review: December 2020

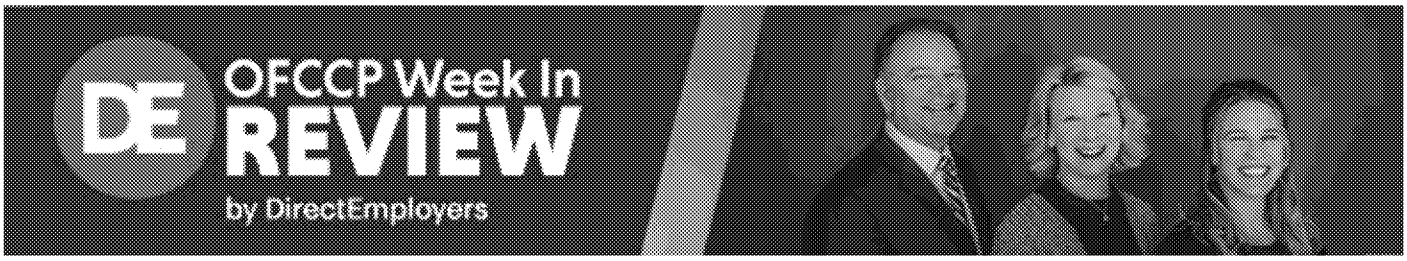
News Source: JDSUPRA

Reporter's Name: Candee Chambers, John Fox, Jennifer Polcer

Date: December 8, 2020

OFCCP Week In Review: December 2020

Candee Chambers, John Fox, Jennifer Polcer
DirectEmployers Association



The DE OFCCP Week in Review (WIR) is a simple, fast and direct summary of relevant happenings in the OFCCP regulatory environment, authored by experts John C. Fox, Candee Chambers and Jennifer Polcer. In today's edition, they discuss:

- Contract Language for EO 13950 Released
- WHD Issued Two New FLSA-related Opinion Letters
- Transgender Now Protected Under Title VII
- EEOC Released a Savvy New Employment Data Tool
- New TAG for Small Contractors
- OFCCP Concedes to Oracle
- November Employment Situation Shows Steady Improvement As Unemployment Drops To 6.7%
- Remembering Pearl Harbor

(Late Report) Friday, November 20, 2020: Contract Language for EO 13950 Released

The Principal Director of Defense Pricing and Contracting issued **Class Deviation 2021-O0001 – Combating Race and Sex Stereotyping** requiring all Department of Defense Contracting Officers to *immediately* begin to insert into all DoD contracts they execute a three-page "clause" largely regurgitating the controversial core elements of Executive Order 13950 (regarding limits on D&I training). The three-page clause appears in the form of an Attachment to the November 20, 2020 Deviation Notice. DoD will eventually codify the clause in the Federal Acquisition Regulations at FAR 52.222-26.

Inclusion of the clause in all DoD contracts not otherwise exempted from Executive Order 11246 and Executive Order 13950 means that violations not only violate one or both of those Executive Orders, but also now violate the contract the company signed with DoD and may be used in contract award challenges. Read your contract for breach remedies.

Class Deviation?

A class deviation is issued when necessary to allow organizations to deviate from the Federal Acquisition Regulation (FAR) and DFARS (Defense Federal Acquisition Regulation Supplement). In this case,

FAR **52.222-26 Equal Opportunity.** This class deviation was effective on November 20, 2020, and will remain in effect until either added to the FAR or rescinded.

Back Story

President Trump issued Executive Order 13950 on September 22, 2020. See our blog by John Fox titled, "**Trump Issues Executive Order 13950 to Combat Race and Sex Stereotyping Imposing New Requirements on Government Contractors.**" Section 4 of the Order, "Requirements for Government Contractors," requires covered Contractors to include a clause in new solicitations and resultant contracts that prohibits contractors from using any workplace training that instills in its employees any form of race or sex-stereotyping or any form of race or sex scapegoating.

Exemptions

Section 4 provides an exception for contracts exempted under EO 11246. FAR 22.807 includes a list of these exemptions and instructions for requesting the exemptions described at **FAR 22.807(a)(2) and (b)(5)**. These Rules are parallel to OFCCP's Executive Order 11246 Rules at **41 CFR Section 60-1.5**.

Editor's Note

There is a strong possibility that the new Biden Administration will rescind this Executive Order. (The heavy betting is whether the rescission will come on day 1 or day 2 of President Elect Biden's presidency.) However, as stated in an earlier OFCCP **press release**, "training programs prohibited by the new Executive Order may also violate a contractor's obligations under the existing Executive Order 11246, which prohibits discrimination based on race, color, religion, sex, sexual orientation, gender identity, national origin, and for inquiring about, discussing, or disclosing your compensation or the compensation of others." So, although EO 13950 may go away, do not forget the prohibitions on unlawful discrimination which OFCCP may pursue via EO 11246.

Monday, November 30, 2020: WHD Issued Two New FLSA-related Opinion Letters

The U.S. Department of Labor **announced** two new opinion letters that address compliance issues related to the Fair Labor Standards Act (FLSA).

The new opinion letters are:

- **FLSA2020-17**: Addresses when the regular rate of pay of an employee paid on a piece-rate basis may be calculated by dividing total earnings by the number of productive and nonproductive hours worked during the workweek in the absence of a specific agreement with the employee to use such a calculation. This particular example refers to truck unloaders, and given the facts presented, the conclusion was that the truck unloaders understood that the piece-rate was intended to cover all hours worked, including nonproductive hours.
- **FLSA2020-18**: Addresses whether insect farming qualifies as "agriculture" under Section 3(f) of the FLSA and whether certain workers employed by an insect farming operation may be exempt from overtime pay requirements under Section 13(b)(12). Given the facts in this situation, insect farming falls under "agriculture." Therefore, the individuals described are exempt from the overtime provision.

"The opinion letters issued today demonstrate the Wage and Hour Division's commitment to providing clear guidance and compliance assistance to workers and employers," said Wage and Hour Division Administrator Cheryl Stanton. "As the economy continues to recover, it may be more important than ever that we provide clarity to ensure workers are paid all the wages they have legally earned, and that employers compete on a level playing field."

Notes

- **Opinion Letter**: An official, written opinion by the Department's Wage and Hour Division (WHD) on how a particular law applies in specific circumstances presented by the person or entity that requested the letter.
- **Opinion Letters to Date:** The Wage and Hour Division has now issued **69 opinion letters** since Jan. 20, 2017.
- **Editor's Note:** The Biden Administration is expected to stop the issuance of Opinion Letters as almost all preceding Democrat controlled Wage-Hour Divisions have done. Democrats typically explain that Opinion Letters serve only to clarify the FLSA in ways favorable to employers. This position has historically been controversial since it then casts the WHD as a partisan agency favoring only workers as opposed to operating as a neutral enforcement agency interpreting and applying the FLSA with a blind eye as to who benefits or loses.

Tuesday, December 1, 2020: Reminder: Transgender Now Protected Under Title VII

The Equal Employment Opportunity Commission (EEOC) **announced** a $250,000 settlement with R.G. & G.R. Harris Funeral Homes Inc. This was the case that went to the SCOTUS. The case involved a transgender female, employed as a funeral director, who claimed that her employer terminated her after informing them that she would be transitioning from a biological male to a female.

The settlement is particularly significant since the EEOC's case on behalf of Ms. Stephens was one of the three before the SCOTUS which interpreted LGBT status under Title VII's protection of "sex." The case had been in limbo since 2018 when the **Sixth Circuit reversed** the District Courts' opinion in favor of Ms. Stephens

See our previous story on Monday, June 15, 2020: **BREAKING NEWS: Supreme Court Rules LGBT Employees are Protected from Discrimination on the Basis of Sex Under Title VII.**

Wednesday, December 2, 2020: EEOC Released a Savvy New Employment Data Tool

The EEOC **announced** a new interactive tool that allows users to explore and compare EEO-1 employment data trends across several categories, including location, sex, race and ethnicity, and industry sector. Currently, data from 2017 and 2018 are available. The EEOC has historically made these data available on its website. This tool is intended to make access easier, allow data aggregations at smaller levels of resolution (counties, for example), and allow for graphics depicting data tabulations.

"**EEOC Explore**" is a data query and mapping tool that gives users access to the most current, granular, and privacy protected aggregated EEO-1 data publicly available. It allows users to analyze aggregate data associated with more than 56 million employees and 73,000 employers nationwide. The tool also allows users to dive down to county-level details, surpassing the previously available static tabular format available on the EEOC's public website.

"The new mapping tool makes tracking employment trends as simple as a few clicks, particularly for those analyzing job patterns for minorities and women in private industry," said Dr. Chris Haffer, EEOC's Chief Data Officer. "Through its convenient filters, users now have access to privacy protected aggregate data at multiple layers of geography and can download the data for their own analyses."

EEOC collaborated with NORC at the University of Chicago as part of the EEOC's Data and Analytics Modernization Program led by the EEOC's Office of Enterprise Data and Analytics (OEDA) to create "EEOC Explore."

Thursday, December 3, 2020: New TAG for Small Contractors

OFCCP **announced** its latest Technical Assistance Guide (TAG). This 44-page TAG is for "small contractors." Although the Agency does not have a threshold that defines a "small contractor," it states that it has considered a contractor's size when developing many of its requirements. It is important to note that this Guide serves BOTH supply and service and construction contractors (unless otherwise indicated in the Guide).

In essence, this Guide is a combined and abridged version of the 158-page **Supply and Service TAG** and the 157-page **Construction Contractors TAG**, issued **November 3, 2020**, and **November 13, 2019**, respectively.

Thursday, December 3, 2020: OFCCP Concedes to Oracle

OFCCP Director Craig Leen issued a **statement** to announce that OFCCP was not appealing its loss in the Oracle compensation case. The statement is important, however, because Director Leen reported that OFCCP has also decided to change is compensation investigation practices to conform to the Title VII law principals that OFCCP had violated or ignored in the Oracle audit and in the ensuing litigation. While Director Leen's statement is not binding on OFCCP, contractors facing OFCCP audits which vary from the Title VII principals the Court enunciated in the Oracle case will nonetheless certainly want to point out to OFCCP that it must cease any further such departures from Title VII in deference to the instructions of Director Leen. Here are the critical outtakes from Director Leen's short announcement:

"After nearly four years of litigation and investing extensive resources, the Department of Labor has determined not to appeal the 278-page Recommended Decision and Order of the Administrative Law Judge in OFCCP v. Oracle America."

"The ALJ held a nine-day trial and based much of his opinion on credibility findings and a lack of supporting qualitative evidence. The Solicitor of Labor and I have decided not to pursue the case further because we believe the likelihood of prevailing on appeal is low and because OFCCP no longer evaluates compensation in the manner rejected by the ALJ in this case. Instead, OFCCP will learn from the decision in an effort to continue improving the efficacy of its critically important compensation program."

"In conjunction with the Department's decision not to appeal, Oracle has agreed to dismiss Oracle America, Inc. v. U.S. Department of Labor, a civil action in the U.S. District Court for the District of Columbia that challenged OFCCP's enforcement authority."

"OFCCP will also administratively close the pending audits for Oracle establishments started before the OFCCP v. Oracle America case but will continue other existing audits."

Friday, December 4, 2020: November Employment Situation Shows Steady Improvement As Unemployment Drops To 6.7%

As stated by U.S. Secretary of Labor Eugene Scalia, "The economy continued to add jobs in November, with a 344,000 increase in private-sector payrolls and labor demand continuing to grow in most sectors. However, jobs were lost in retail and food and beverage establishments in November, and a number of workers pulled away from the labor force amid rising coronavirus cases. We know from State-by-State data released two weeks ago that the employment situation varies significantly by State: in October, half the States were at 6% unemployment or lower, but two states—California and New York—were substantially above 9% that month. At 6.7%, the unemployment rate is lower than it was for the first five years of the last Administration following the Great Recession."

Blacks and women showed the greatest improvement in employment, with women again enjoying the lowest percentage of unemployment among all groups reported. The employment of Veterans and Individuals with Disabilities went backwards in November as their percentages of unemployment increased significantly.

The Employment Situation – November 2020			
Unemployment Rate	**November 2020**	**October 2020**	**November 2019**
National (Seasonally adjusted)	6.7%	6.9%	3.5%
White	5.9%	6.0%	3.2%
Black	10.3%	10.8%	5.6%
Asian	6.7%	7.6%	2.6%
Hispanic	8.4%	8.1%	4.2%
Men (20+)	6.7%	6.7%	3.2%
Women (20+)	6.1%	6.5%	3.2%
Veterans *(Not seasonally adjusted)*	6.3%	5.5%	3.4%
Individuals with Disabilities *(Not seasonally adjusted)*	12.3%	11.1%	6.9%

Monday, December 7, 2020: Remembering Pearl Harbor

Each year in the United States, National Pearl Harbor Remembrance Day honors all those who lost their lives when Japan attacked Pearl Harbor on **December 7, 1941**. It was a Sunday morning, and many military personnel had been given passes to attend religious services off base. At 7:02 a.m., two radar operators spotted large groups of aircraft in flight toward the island from the north, but, with a flight of B-17s expected from the United States at that time, officials told the operators not to sound an alarm. More than 3,500 Americans lost their lives or were wounded on that solemn day.

The day marked a turn in the United States' position regarding involvement in World War II. The Japanese attack damaged several battleships, permanently sinking both the USS Arizona and USS Oklahoma. Still, others capsized, taking crew members with them. One noted ship was the USS Utah. Along with naval vessels, the attack destroyed aircraft, too. As a result, the attack forced the U.S. into a war that had been raging for two years.

On August 23, 1994, the United States Congress by **Public Law 103-308**, designated December 7th, of each year, as National Pearl Harbor Remembrance Day.

Today, Pearl Harbor offers several sites in memory of those who served during the bombing. The **Pearl Harbor National Memorial** dedicates sites in memory of the crews lost on December 7th, 1941. For many of the USS Utah, USS Arizona, and USS Oklahoma crew, Pearl Harbor is their final resting place. The memorials serve as a place of honor to those service members lost during the attack. They also provide a moving reminder of the loss war causes.

Article 5 (back to top)

Article Title: Lankford Applauds Department of Labor's Rule to Ensure Faith-Based Organizations Can Contract with the Federal Government

News Source: Lankford.Senate.gov

Reporter's Name: NA

Date: December 7, 2020

Lankford Applauds Department of Labor's Rule to Ensure Faith-Based Organizations Can Contract with the Federal Government

WASHINGTON, DC – Senator James Lankford (R-OK) today applauded the finalization by the US Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) to clarify the equal participation of religious organizations as federal contractors. After six years of questions as to the scope of the religious exemption for entities that seek to contract with the federal government, today's rule makes clear that "the religious exemption allows religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor."

"Religious entities, just like thousands of non-religious entities, provide services and fulfill the needs of many in our communities. No one should be prohibited from participating in the public square because of their faith, and the government should not dictate certain conditions of participation on entities simply because of their faith," said Lankford. "This clarification is a significant step to ensure that religious organizations, many of which are small non-profits, will not have to surrender their sincerely held religious beliefs, including those related to employment decisions, to help their neighbor. This final rule makes clear that you can live your faith and still receive equal opportunity from the Department of Labor to serve as a federal contractor.

Our government should serve everyone equally under the law, and no one should have to abandon their faith to partner with their own government."

In 2017, the Supreme Court affirmed 7-2 in the *Trinity Lutheran* case that all organizations, whether religiously based or not, are constitutionally guaranteed the same right and opportunity to participate with the government. Lankford issued a statement in August 2019 when the OFCCP announced plans to clarify the civil rights protections for religious organizations that contract with the federal government.

Lankford has been the leader in the United States Senate in pursuing the goals of advancing religious liberty at home and abroad. Lankford has championed legislation to ensure that health care professionals are not forced to act contrary to their religious or moral beliefs, has worked to ensure that religious student groups have the same rights and privileges as secular student groups on college campuses and worked to ensure that houses of worship are eligible for FEMA disaster aid. During the pandemic, Lankford worked to ensure faith-based entities were protected and eligible for relief under the CARES Act and successfully advocated for a provision to increase charitable giving. Most recently, he signed an amicus brief in the *Danville Christian Academy v. Beshear* case to ensure that religious institutions are not unfairly restricted as compared to secular entities when it comes to public health regulations.

In his ongoing international religious freedom work, Lankford led a bipartisan letter to Secretary of State Pompeo and Ambassador-at-Large for International Religious Freedom Brownback to ask them to consider recommendations made by the US Commission on International Religious Freedom (USCIRF) when determining designations of Countries of Particular Concern (CPC) and placement on the Special Watch List (SWL). Earlier this year, Lankford applauded President Trump's Executive Order to advance international religious freedom and praised the release of the 2019 International Religious Freedom (IRF) Report. Lankford has also called for the global repeal of blasphemy, heresy, and apostasy laws, and has ensured that religious freedom is part of our trade negotiations with other nations.

Lankford is chairman of the Senate Values Action Team and co-chair of the Congressional Prayer Caucus and Senate Bipartisan Task Force for Combatting Anti-Semitism.

With Appreciation,

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