

NWX-DOL ESA OFCCP

Moderator: Lisa Burns
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Coordinator: Thank you for standing by. At this time all participants are on a listen-only mode. Today's conference is being recorded. If you have any objections you may disconnect at this time. And now I would like to turn the meeting over to Ms. Lisa Burns. You may begin.

Lisa Burns: Thank you Brittany. Welcome to OFCCP's webinar on Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption Final Rule.

I am Lisa Burns with the Training Branch at OFCCP. During today's briefing our goal is to walk you through the final rule. We will refer to this as the Religious Exemption Final Rule.

We will be answering questions at the end of the call that we receive through the chat function. Please submit your questions in the chat during the presentation. There will be a short break after the presentation before we begin answering questions so please do not disconnect during that period. Questions submitted but not answered during the webinar today will be reviewed by OFCCP and the solicitor's office staff and may be answered on the Frequently Asked Questions page on the OFCCP website.

Now I'd like to introduce Craig Leen, OFCCP Director, for some brief opening remarks. Craig?

Craig Leen: Thank you very much Lisa. Hello everyone. It's good to be here with you today. I'm Craig Leen, the OFCCP Director, and I'm here today to tell you about the release of OFCCP's Religious Exemption Rule.

This rule will encourage the full and equal participation of religious organizations as federal contractors. Religious organizations, many of them small nonprofits, provide such essential services as feeding the hungry, supporting refugees and educating our nation's students.

Executive Order 11246 requires federal contractors to comply with nondiscrimination and affirmative action requirements. The order also expressly acknowledges in the order itself that religious organizations may prefer in employment "individuals of a particular religion" so that they can maintain their religious identity and integrity.

In other words, religious organizations can be religious and still be federal contractors. The religious exemption is not a new concept by any means, and I want that to be clear. Indeed, the language I just quoted has been part of the executive order for almost two decades. The language is patterned after a nearly identical provision that has been part of Title VII of the Civil Rights Act for over a half century.

The language is also consistent with the First Amendment of the US Constitution as the Supreme Court held unanimously over 35 years ago. OFCCP believes this rule will benefit the federal government and the stakeholder community.

OFCCP has received feedback that some religious organizations have been hesitant to offer services to the federal government because of a lack of certainty over their religious exemption.

Indeed, as I mentioned when we initially rolled the Religious Exemption Rule out, the religious exemption language that's in the executive order and the prior language that was in our regulations has not been used in the 20 years that it has been on the books, so we realize that there was an issue and that religious organizations were not using this provision in part - the feedback we received was because of its uncertainty and vagueness.

So to clarify - to provide clarity, which has been offered by this rule, we believe this clarity will help religious organizations understand the exemption and may encourage a broader pool of organizations to compete for government contracts, which is good for everyone.

Additionally, the rule will promote consistency and OFCCP's administration of the religious exemption and help achieve consistency with this administration's policy to enforce federal law's robust protections of religious freedom.

And I wanted to make a few points very clear. There have been assertions that I've seen online, in the media, in comments that I want to address and I think it's important to address so here's a few points I wanted to make.

First, this rule does not authorize invidious discrimination against protected classes or cause those protections to categorically disappear. That includes the protections for sexual identity - pardon me - for sexual orientation and gender identity, the LBGTQ plus protections.

Second, it does not exempt religious organizations from OFCCP compliance reviews. I want to be very clear about that. Religious organizations continue to be subject to neutral auditing like anyone else.

Three, it does not apply to the vast majority of the 25,000 federal contractors in the United States and this is an important point. To be clear, very few contractors will meet the final rule's definition of a religious organization.

This does not apply to secular organizations, to public corporations, things like that that people think about. Please keep that in mind. It applies to religious organizations.

Fourth, it does not favor religious organizations over nonreligious organizations in federal contracting. It simply helps ensure religious organizations can participate in federal contracting.

And so I just want to emphasize again that the purpose of the rule is to ensure that religious organizations can fully participate in procurement and be federal contractors and continue to adhere to religious principle.

And I want to also say that the purpose of the rule, and I want to be very clear about this - the purpose of the rule is not to allow discrimination based on a protected status or protected class basis and that includes sexual orientation and gender identity, the LBGTQ plus protections.

OFCCP believes this rule will benefit the federal government and the contractor community as I've said, and we believe that in the end it provides needed clarity in this area.

Finally, I want to conclude by emphasizing, as I do in almost every speech to stakeholders, OFCCP's commitment to the principles of certainty, efficiency, recognition and transparency.

OFCCP will continue to be engaged with the contractor community and be transparent regarding all of its programs. This approach has helped OFCCP be more successful than ever.

In fact, as many of you know OFCCP has recently experienced record years in both civil rights recoveries and compliance assistance. Indeed, OFCCP's combined recoveries from the most recent four fiscal years exceeded the combined recoveries from the prior nine combined and in saying that I want to be clear.

OFCCP in my view is an organization that is apolitical with both Republican and Democratic administrations that have been focused on its welfare and that the success of OFCCP, the success of its mission is something that all of us should strongly believe in.

And, you know, I'm nearing the end of my time as OFCCP Director as you all know. It ends on January 20 and as I hand OFCCP off to my successor I am hopeful to hand it off in as strong a position as possible, and I wish my successor well and I hope that the agency continues to become stronger and stronger in what it does.

I think it is such an important agency and I have tried to build on what my predecessor in the Obama administration did, former Director Shiu, and I have hoped and I hope that my successor will build on what I have done.

I think that it is so important that OFCCP always remain apolitical and that everyone support OFCCP's critical mission for the welfare of our country. Likewise, I wanted to make the point that OFCCP has responded to more inquiries and provided more compliance assistance in this administration than ever before, and that's something again that we've built on from the prior administration and I'm hopeful will be built on in the next.

These record enforcement and compliance assistance numbers illustrate OFCCP's strong commitment to ensuring equal employment opportunity throughout the American workforce.

So we look forward to more religious organizations participating in federal contracting and to reaching out to OFCCP for compliance assistance regarding equal employment opportunity requirements.

And before I conclude and turn it - and turn this over to our wonderful career staff at OFCCP and the Solicitor of Labor's office, I also just wanted to say a couple of other things.

You know, one thing about the Religious Exemption Rule is it is a very long preamble and there's a lot of law that's in there, so some of these issues about how the rule applies can be complex.

And, you know, I have informed my agency that it is very important to me as the Director that OFCCP always applies this rule in a manner that's consistent with its historical mission to protect against discrimination.

So one point that I think is very important here - we are going to have a question and answer session at the end and we want you to ask questions.

Any question you'd like to have answered please ask, but please also be aware that we may not be able to answer them in the call today.

In fact, we may have to come back to you and publish a - an FAQ or get back to you directly with the answer to your question simply because it is a new regulation that updates the prior one, and it is one where there is a lot of law involved including RFRA, the Religious Freedom Restoration Act, and we want to make sure at OFCCP that we are following the law.

So one thing that you will likely see in the questions and answers is that there are some questions that ultimately companies will have to seek legal advice, religious organizations will have to seek legal advice about just like the agency will seek legal advice from SOL and I - the Solicitor of Labor's office and I think we've made it very clear in the preamble that we will be involving the solicitor's office in all issues related to this exemption.

And the reason I emphasize that is because I want religious organizations to know one thing: that if you raise the religious exemption with OFCCP we are going to treat you as a religious organization with great respect, and we are going to ensure that that exemption request or the compliance assistance request or whatever it may be is brought to the highest level of the agency as well as the Solicitor of Labor's office who will give us legal advice as to how to apply this in a manner that complies with the Religious Freedom Restoration Act, with the First Amendment, with all applicable law, with Title VII, with EO 11246 and that is very important to me.

I wanted this to be a balanced rule that got the law right and I hope that we've done that, and I understand that there's been different opinions in the media but that was the goal of the rule.

It was to help religious organizations be federal contractors and the purpose and goal was not to allow discrimination against protected classes. That was the purpose of what we tried to do here. So with that I would like to turn it over to my career staff.

Lisa Burns: Thank you Craig. Now it's my pleasure to introduce your presenters for today's briefing: Sarah Carson, Senior Regulatory Analyst from OFCCP's Division of Policy and Program Development, and Drew Hall, Regulatory Analyst from OFCCP's Division of Policy and Program Development.

In addition, attorneys from the Office of the Solicitor Civil Rights and Labor-Management Division are here to help address your questions after the presentation. Thank you. Sarah?

Sarah Carson: Thanks Lisa. The final rule amends regulations implementing Executive Order 11246. This law prohibits covered federal government contractors and subcontractors from discriminating in their hiring and other employment actions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin.

Contractors are also prohibited from discriminating against applicants or employees because they inquire about, discuss or disclose their compensation or that of others subject to certain limitations.

Executive Order 11246 also requires contractors to engage in affirmative action to ensure equal employment opportunity for employees and applicants of employment.

Section 202 of Executive Order 11246 requires that federal contracting agencies include in all covered contracts and that contractors include in their subcontracts an equal opportunity clause.

Though religious organizations must still comply with all the other requirements in Executive Order 11246, Section 204(c) exempts certain religious organizations from Section 202 with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of those religious organizations' activities.

The exemption is codified in OFCCP's regulations at 41 CFR 60-1.5(a)5. The religious exemption in Section 204(c) of Executive Order 11246 and at 41 CFR 60-1.5(a)5 parallels the religious exemption in Section 702(a) of Title VII of the Civil Rights Act of 1964 as amended, 42 USC 2000e-1a.

OFCCP generally interprets the nondiscrimination provisions of Executive Order 11246 consistent with the principles of Title VII. On August 15, 2019 OFCCP published a notice of proposed rulemaking or NPRM to clarify the scope and application of the religious exemption in Section 204(c) of Executive Order 11246 consistent with recent legal developments.

We received 109,726 public comments on the proposed rule. After careful consideration of the comments OFCCP revised certain aspects of the proposal in the final rule, which was published on December 9, 2020 and takes effect today.

We will discuss the changes between the NPRM and the final rule shortly. Overall, the clarifications to the religious exemption made in the final rule will help organizations with federal government contracts and subcontracts

and federally-assisted construction contracts and subcontracts better understand their obligation.

The final rule will also ensure that OFCCP respects religious employers' free exercise rights, protects workers from prohibited discrimination and defends the values of a pluralistic society.

The rule is intended to correct any misperceptions 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.

In the final rule OFCCP has chosen a path consistent with the Supreme Court's religion and Title VII jurisprudence as well as what we view to be the more persuasive reasoning of the federal courts of appeals in these areas of the law.

Drew Hall: In at least some regards the scope and application of the Title VII religious exemption have not been given a uniform interpretation across the federal circuit courts, and many of the relevant Title VII decisions predate recent and relevant Supreme Court precedent.

Because OFCCP regulates federal contractors the agency must apply Title VII principles in a manner that best fits its unique field of regulation, including when applying the Executive Order 11246 religious exemption.

The recent Supreme Court decisions listed on this slide have shed light on the proper interpretation of the religious exemption and address the freedoms and

anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the US Constitution and federal law.

We noted these recent Supreme Court cases in the final rule for the general and common sense propositions that the government must be careful when its actions may infringe private persons' religious beliefs and that it certainly cannot target religious persons or disfavor.

These principles are not new but these recent cases show that those principles remain vital. The final rule retains the same basic structure as the NPRM with a few changes.

First, OFCCP removed the definition of exercise of religion from the final rule. Second, we modified the definition of Religious Corporation, association, educational institution or society including by adding several examples to better illustrate which organizations qualify for the religious exemption. Finally, the final rule added severability clauses.

Sarah Carson: OFCCP's definition of religion in the final rule provides that the term is not limited to religious belief but also includes all aspects of religious observance and practice.

The definition is identical to the first part of the definition of religion in Title VII. The definition of religion is intended to apply generally to both employers and employees.

The definition of religious corporation, association, educational institution or society determines which contractors are entitled to the Executive Order 11246 religious exemption.

Clarity on this topic under Executive Order 11246 is essential because federal courts of appeals have used a confusing variety of tests in Title VII cases, and the tests themselves often involve unclear or constitutionally suspect criteria.

The final rule's test can be viewed as generally adopting Judge O'Scannlain's concurrence in a Title VII religious exemption case decided by the US Court of Appeals for the 9th Circuit, *Spencer v. World Vision, Inc.*

The final rule defines religious corporation, association, educational institution or society as follows: a corporation, association, educational institution, society, school, college, university or institution of learning that, one, is organized for a religious purpose; two, holds itself out to the public as carrying out a religious purpose; three, engages in activity consistent with and in furtherance of that religious purpose; and four, either A, operates on a not-for-profit basis, or B, presents others' evidence that its purpose is substantially religious.

Satisfaction of this test will be sufficient to qualify for the exemption. OFCCP believes that most organizations that qualify for the exemption will be nonprofit.

However, we acknowledge that in certain rare circumstances an organization might not operate on a not-for-profit basis yet still presents strong evidence that it possesses a substantial religious purpose.

The regulatory text, therefore, includes an alternative means of satisfying the fourth prong. When an organization does not operate on a not-for-profit basis it must present other strong evidence that it possesses a substantial religious purpose.

The final rule also adds a clarifying provision regarding the meaning of consistent with and in furtherance of a religious purpose, a phrase used in one of the test prongs, and adds several examples to illustrate how the test will be applied.

Drew Hall: To be covered by the religious exemption the religious tenets that a religious contractor applies to its employees must be sincere. The final rule provides that OFCCP will use the meaning of sincere as that term is applied by courts when determining the sincerity of a party's religious exercise or belief.

In line with court precedent and OFCCP's principles the critical inquiry for the agency is whether a particular employment decision was, in fact, a sincere exercise of religion.

OFCCP like courts merely asks whether a sincerely held religious belief actually motivated the institution's actions. In assessing sincerity we will take into account all relevant facts, including whether the contractor had a preexisting basis for its employment policy and whether the policy has been applied consistently to comparable persons.

Although absolute uniformity is not required we will also evaluate any evidence that indicates an insincere sham such as acting in a manner inconsistent with that belief, or evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.

The Executive Order 11246 religious exemption permits religious organizations to make employment decisions on the basis of an employee's particular religion.

In the final rule OFCCP defines particular religion to clarify 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.

This definition flows directly from the broad definition of religion in the final rule to include all aspects of religious belief, observance and practice as understood by the employer.

The definition is consistent with the Title VII case law as well as Supreme Court case law holding that the government burdens religious exercise when it conditions benefits on the surrender of religious identity.

In a change from the NPRM, OFCCP made some adjustments in its explanation regarding how it views and will apply this definition. These include applying the same motivating factor, standard of causation that we apply to all claims of discrimination under Executive Order 11246.

They also include providing additional clarification particularly on the interaction of the religious exemption with other protected categories including the importance of the Religious Freedom Restoration Act or RFRA.

The word sincere has been inserted into the phrase acceptance of or adherence to sincere religious tenets as understood by the employer as a condition of employment to make clear both the requirement of sincerity and by reference to the definition of sincere how sincerity is tested.

The religious exemption does not permit religious employers to discriminate on the basis of other protected characteristics unrelated to religious considerations.

Courts have used a variety of approaches and doctrines to distinguish claims of religious discrimination from other claims of discrimination while avoiding entangling inquiries under the First Amendment and OFCCP will do the same.

Sarah Carson: The final rule add Paragraph E to 41 CFR 60-1.5 to establish a rule of construction for Subpart A of 41 CFR Part 60-1 that provides for the broadest protection of both employers' and employees' religious exercise permitted by the Constitution and laws including the Religious Freedom Restoration Act.

RFRA applies to all government conduct, not just to legislation or regulation. Paragraph E is clarifying since the Constitution and federal law including RFRA already bind OFCCP.

We provide multiple resources for additional information including frequently asked questions. You may also wish to review the final rule itself, which has been published in the Federal Register.

As always you are also welcome to reach out to us through our Contact Us page on our Web site, which includes our help desk contact information, if you have further questions. Lisa?

Lisa Burns: Oh, I'm sorry. I was on mute. Thank you. I'm sorry. Sarah and Drew, thank you. We hope this briefing successfully walked you through the Religious Exemption Final Rule.

Now we're going to turn to some questions coming through the chat box. If you haven't already, please submit your questions in chat. As we noted at the beginning whatever questions we don't get through today will start - will be - still be reviewed, excuse me, and we will update our Frequently Asked Questions on the OFCCP Web site accordingly.

Please stand by as we take a short break. When we return we will begin addressing questions. Thank you. Please...

Coordinator: Welcome back to our conference. It will now resume and I'm turning the call back over to Ms. Lisa Burns. You may begin.

Lisa Burns: Thank you (Brittany). Thank everyone for standing by. We're going to begin our questions and answers, so Sarah if you want to begin.

Sarah Carson: Sure. So one of the questions we received is, "What is the process for requesting an OFCCP determination that we are a religious entity that qualifies for the religious exemption?"

An answer for that is there is no specific process to request an exemption from OFCCP. Whether the religious exemption applies is a highly fact-specific inquiry that depends on the particular employment scenario at issue, and OFCCP would typically only make such an inquiry during the course of a compliance evaluation or a complaint investigation based on the facts present.

However, OFCCP is committed to providing compliance assistance whenever possible to contractors with questions about their obligations and have created a - and supported a variety of ways to contact the agency to seek that assistance.

Contractors with questions about their obligations in light of the final rule can avail themselves of these avenues such as submitting a question to the OFCCP help desk.

Depending on the nature of the question, contractors may also want to seek advice from their legal counsel to ensure any employment preferences extended do not permit discriminations based on other protected classes.

And now I'm going to turn it over to CRLM for a couple of other questions they received.

Man: So one question received was, "Are religious organizations also required to comply with the Fair Labor Standards Act regulations and for a church or non-clergy staff subject to the FLSA?"

There - there's another agency - the Department of Labor outside of OFCCP, the Wage and Hour Division, that enforces the Fair Labor Standards Act and Wage Hour Division has a toll-free help line that you can call with questions about FLSA and how that is - how that question would be resolved so we would encourage you to reach out to the Wage Hour Division with the Department of Labor for that.

We also received a question. "I work in a public agency human resources department and it sounds like the presentation is not applicable for public agencies regarding employees. Is this correct?"

The - those who may be eligible for the religious exemption are limited by the rule and by the religious exemption in the Executive Order 11246 itself to religious corporations, associations, educational institutions or societies and so

a public agency would not fall within the - that definition and it would not be eligible for the religious exemption.

We did receive a number of questions - a flood of questions at the very end which were very good and highly technical and we're going to need some time to work through those to provide responses, but we just wanted to let you know that we did receive those and we will be working through those in the days to come.

Lisa Burns: Thank you. If there aren't any more questions - and we will conclude today's briefing. I'd like to thank everyone for participating today. Thank you and have a great day.

Coordinator: Thank you for your participation in today's conference. All participants may disconnect at this time.

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