

NWX-DOL ESA OFCCP

Coordinator: Brenda Stewart
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Operator: Welcome and thank you for standing by. At this time, all participants are in a listen-only mode for the duration of today's call. Today's conference is being recorded. If you have any objections, you may disconnect at this time. I would now like to turn the meeting over to Ms. Brenda Stewart. You may begin.

Brenda Stewart: Thank you (Brandon) and good afternoon everyone. Again, my name is Brenda Stewart and welcome to today's webinar on the new OFCCP Rule on Sex Discrimination. As many of you may have already seen, the announcement has come out about the final rule being published in the Federal Register. And you've seen a lot of the things going on this week, on the Women's Summit going on with the White House, so we're very timely, I think, in making this announcement.

Our presenters will review the final rule updates to the sex discrimination guidelines, including how and why they were changed, so that they reflect current law and workplaces. In addition to the presenters, we have subject matter experts and representatives from the Solicitor's Office that will be participating so that they can review your questions and prepare responses.

We will try to answer as many questions as possible. But of course, there may be some that we cannot get to today. But all of the questions that are submitted will be reviewed. And we use them to develop our frequently asked questions that are published on OFCCP's Web site. When submitting questions, make sure you do that through the chat box, located to the right of your screen, if you click on the diamond next to the word chat.

And make sure when submitting your questions, send them to all panelists. Also note that closed captioning is available in the media viewer located at the bottom right of your screen. And there's an arrow at the lower left of your screen that will allow you to expand your viewing area. And now I would like to introduce our presenters.

So joining us today we have Donna Lenhoff and Anna Laura Bennett. Anna is an attorney in the Civil Rights and Labor-Management Division of the Office of the Solicitor in the Department of Labor. She joined the department in 2012 as an attorney in the Honors Program of the Solicitor's Office. She earned her law degree from Harvard, where she was an executive editor of the Harvard Law Review.

She has a bachelor's degree in psychology and a master's degree in English from the University of Kentucky. Welcome, Anna Laura.

Anna Laura Bennett: Thank you.

Brenda Stewart: Since 2011, Donna Lenhoff has been a Civil Rights — Senior Civil Rights — Advisor to Director Pat Shiu, in the Office of Federal Contract Compliance Programs. In that role, she provides strategic, cross-functional advice, consultation and leadership on key agency priorities and implements strategies to engage civil and employment rights advocates and other stakeholders.

Ms. Lenhoff has more than 30 years' experience advocating for workers' rights before the executive, legislative and judicial branches of federal and state government, including as general counsel and vice president of the National Partnership for Women and Families.

Her proudest professional accomplishment was leading the diverse coalition that got the Family and Medical Leave Act of 1993 enacted into law. Ms. Lenhoff has her law degree from the University of Pennsylvania and her BA from the University of Chicago. Now I'll be turning the presentation over to Donna.

I just want to remind you that you can submit questions throughout the presentation and we will review those at the end. Donna?

Donna Lenhoff: Thank you, Brenda. Thank you very much. I'm really delighted to be here today to talk about our final sex discrimination rule, which as you know, was published in the Federal Register yesterday. First, I'm going to start with a little history though. This slide I think is self-explanatory.

Fifty-plus years ago the — President Johnson signed Executive Order 11246 to prohibit discrimination by federal contractors and subcontractors on the bases of race, color, creed as it was called then, and national origin. But there was one basis that was left out, and that was sex. Next slide.

But LBJ did amend the executive order to include sex two years later. And in 1970 OFCCP adopted guidelines on sex discrimination. Those guidelines have not been substantively updated since then. And they read today like a history textbook. For example, they prohibited separate want ads for women's and men's jobs, which was a hot topic in 1970. Not so much today. They directed

OFCCP to coordinate Equal Pay Act enforcement with Wage and Hour, which was appropriate then and was — and until 1978. But in 1978 Congress transferred Equal Pay enforcement to the EEOC. They dealt with state protective legislation like laws prohibiting women from working in certain occupations. Again, that was a hot topic in 1970, but those laws have virtually all been repealed since then. The guidelines dealt with pension discrimination by permitting either equal contributions or equal benefits to be made, even though the Supreme Court rejected that approach in 1978.

And on the other hand, there were a lot of things that the guidelines didn't do. They didn't mention sexual harassment. They didn't mention compensation discrimination except for within the limited context of unequal pay for equal work. They didn't mention pregnancy accommodations except very specifically, with regard to leave for maternity. In fact, since 1970, Title VII, which as you know, we follow in interpreting the executive order, was amended four times, but the sex discrimination guidelines were not changed. In fact, to the extent that the guidelines deviated from Title VII, OFCCP didn't even follow them. We followed Title VII as it developed, and we explained as much in our compliance manual. Next slide, please.

So finally, last year we published an NPRM to revise the guidelines to align them with sex discrimination law as currently recognized by the courts and the EEOC and to address the realities of today's workplaces.

And as you know, the federal rule was — the final rule has now been finally published. Its effective date is August 15, 2016. And although that is its technical effective date, because the regulation is almost entirely a restatement of current law, we expect that contractors are already complying with most, if not all, of its provisions. Next slide, please. Are we on slide...

Anna Laura Bennett: Six.

Donna Lenhoff: ...6? Good. Okay. Sorry. So here are the ways in which, I guess that this is a little more about the ways in which the guidelines were not adequate to provide guidance to contractors and employees about sex discrimination, and not even totally relevant today. Some of the specific developments in the law regarding sex discrimination in employment that were not reflected in the guidelines included the Pregnancy Discrimination Act, which was enacted in '78; the Supreme Court's rulings that sexual harassment and sex stereotyping discrimination are unlawful forms of sex discrimination, which were decided in 1986 and 1989, respectively; the Civil Rights Act of 1991, which codified disparate impact analysis; and the Lilly Ledbetter Fair Pay Act, enacted in 2009, which dealt with the timing for finding compensation discrimination violations. As you will see, we addressed all of these issues in the final rule. Next slide.

In other words, it was past time to update this regulatory anachronism, as Pat said, to — actually her quote was to DNA Bloomberg when the notice of proposed rulemaking was put out back in January of 2015. And I hope we have been able to do most of what it was that we wanted to do in terms of updating the law and updating to reflect modern conditions. Next slide.

Now we're going to go through the rule section by section and starting with 41 CFR Section 60-20.1. This is the sort of introductory section that clarifies that contractors are subject not only to 60-20, that is this part having to do with sex discrimination, but to all of the regulations interpreting Executive Order 11246 with regard to sex discrimination.

But I also want to point out that in the final rule, we added a sentence saying that under no circumstances will a contractor's good faith efforts to comply

with the affirmative action requirements of Part 60-2 be considered a violation of this part. That's the second bullet on this slide. And this was in response to concerns that some contractors had expressed, in their comments on the notice of proposed rulemaking, that the prohibitions of sex discrimination could be read to conflict with contractors' obligations to undertake good faith efforts to expand employment opportunities for women that are contemplated by our affirmative action requirements. So we wanted to make that very clear. Next slide, please.

Section 20.2 is the provision that sets out the general prohibition. And like the notice of proposed rulemaking, the final rule reorganizes various provisions that have been scattered in different sections of the guidelines a bit more coherently, starting with 20.2.

First, this section, 20.2(a), defines sex to include pregnancy, gender identity, transgender status and sex stereotyping. This definition reflects the Pregnancy Discrimination Act, OFCCP's 2014 directive on gender identity and transgender status discrimination and the Supreme Court's Price Waterhouse ruling on sex stereotyping.

Then a number of disparate treatment examples are brought together under Section 20.2(b) and specific disparate impact examples under Section 20.2(c). We didn't list them in the slide. There are too many. In fact, there are 14 disparate treatment examples. But here are a few for you to note. Next slide.

This one — denying women with children an employment opportunity that is available to men with children — you would think that would be something that we didn't need to say in 2016, but we thought that it was such a basic principle that we should include it. And in fact, it has been clear that this practice is unlawful under Title VII since 1971, when the Supreme Court in

Phillips v. Martin Marietta tells that Martin Marietta's rule against hiring women with preschool-aged children, but not men with preschool-aged children, was discrimination on the basis of sex. Next slide.

Here's another disparate treatment example, in Section 20.2(b). Steering women into lower-paying or less desirable jobs on the basis of sex. This is a very current issue. OFCCP has found evidence of unlawful discrimination in the form of steering women into lower-paying or less desirable jobs in a number of recent compliance evaluations of contractors.

For example, we have found evidence of a sandwich production plant steering men into the dumper/stacker jobs and women into the biscuit assembler jobs, i.e., cooking, despite the fact that the positions required the same qualifications. Another example: A parking company steering women into lower-paying cashier jobs and away from the higher-paying jobs as a parking valet. Next slide, please.

This example is recruiting or advertising for individuals for certain jobs on the basis of sex. Well, sex-segregated want ads may be long gone, but we decided to keep this example in the final rule, because sex-based recruitment in advertising may continue today but in different, perhaps more subtle, forms. Anna Laura is now going to cover the next group of slides. Anna Laura?

Anna Laura Bennett: Thank you, Donna. Next slide.

The final rule includes two disparate treatment examples relating to restrooms. The first example, on this slide, is making facilities and employment related activities available only to members of one sex. It contains an exception for restrooms, changing rooms, showers or similar facilities.

In the case of these facilities, the final rule requires the contractor to provide same-sex or single-user facilities. This is consistent with 41 CFR Section 60-1.8, segregated facilities, which similarly applies to restrooms, washrooms, locker rooms and other storage or dressing areas and requires contractors to ensure that such facilities are provided in such a manner that segregation on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin cannot result. And like this final rule, Section 60-1.8 has an exception requiring separate or single-user restrooms and necessary dressing or sleeping areas to be provided to assure privacy between the sexes.

Note that there is an important difference from the guidelines on this issue. The guidelines in former Section 20.3(e) actually allowed contractors to discriminate in hiring and job assignment on the basis of sex when there were no restroom or associated facilities if the contractor could show that the construction of the facilities would be unreasonable for such reasons as excessive expense or lack of space. No such provision appears in the final rule. Whether reasonable or not, the cost of providing restrooms and associated facilities to women is not a defense to a discrimination finding. Next slide, please.

The second example of disparate treatment relating to restrooms, on this slide, Section 20.2(b)(13), is denying transgender employees access to the restrooms, changing rooms, showers or similar facilities designated for use by the gender with which they identify. As you know, this issue has been in the news lately. The final rule requires contractors to allow transgender employees and applicants to use the bathrooms for the gender with which they identify. No doctor's note or other proof of gender identity is required.

This policy is consistent with guidance documents issued by the Office of Personnel Management, or OPM, regarding the employment of transgender

individuals in the federal workplace and the Department of Labor's Occupational Safety and Health Administration's best practices guide relating to restroom access for transgender workers. It's also consistent with Title IX guidance recently issued by the Department of Justice and the Department of Education.

A number of commenters wanted OFCCP to require that single-user restrooms be sex neutral, as a way of preventing harassment of transgender employees. OFCCP did not adopt this as a requirement, but it did add a provision in a new appendix, saying that it's a best practice for contractors to designate single-user restrooms, changing rooms, showers and similar single-user facilities as sex neutral. Next slide, please.

On this slide are two examples of practices that may have a disparate impact on women applicants and, if so, are unlawful if they are not job related and consistent with business necessity. The first one, height and/or weight qualifications, is a classic example taken from a 1977 Supreme Court case, *Dothard v. Rawlinson*, in which the court invalidated a facially neutral requirement that Alabama prison guards be at least five feet two inches tall and weigh at least 120 pounds.

The second example was added to the final rule at the suggestion of a commenter, to illustrate this common practice: relying on recruitment or promotion methods such as word of mouth recruitment or tap on the shoulder promotion that have an adverse impact on women where the contractor cannot establish that they are job related and consistent with business necessity. Next slide, please.

Section 20.3 consolidates the several places that the guidelines had dealt with a bona fide occupational qualification, or BFOQ, defense into one place. The

language of the BFOQ defense is on this slide. BFOQs are the only times that explicit sex discrimination is permitted. The classic examples are wet nurses and sperm donors — jobs that only people who have certain sex characteristics can perform. Next slide, please.

The guidelines addressed discriminatory wages and discriminatory job classifications that give rise to sex-based wage differentials in old Section 20.5. As to wages, that section said that contractors' wage schedules must not be related to or based on the sex of the employee and then referred to the situation of when Equal Pay Act standards for equal work — that is, substantially equal skill, effort and responsibility performed under similar working conditions — are met as an example of such discrimination.

The final rule is not limited to practices that violate the Equal Pay Act. As this slide says, the final rule states that contractors may not pay different compensation to similarly situated employees on the basis of sex or otherwise discriminate in wages, benefits or any other forms of compensation or access to earnings opportunities because of sex, capturing Title VII's and the Executive Order's broad approach to wage discrimination.

This section also clarifies that OFCCP applies not just disparate treatment but also disparate impact analysis to compensation practices. And it adopts the Lilly Ledbetter Fair Pay Act standard that compensation discrimination occurs any time a contractor pays wages, benefits or other compensation that is the result in whole or in part of the application of any discriminatory compensation decision or other practice. Next slide, please.

Next, in Section 20.5, we come to the topic of discrimination on the basis of pregnancy, childbirth and related medical conditions. This topic was

addressed in the guidelines only with respect to leave. The final rule is much broader.

First, it adopts language from Title VII as amended by the Pregnancy Discrimination Act, or PDA, requiring contractors to, and I quote, “treat people of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected, but similar in their ability or inability to work.”

This language is taken directly from the PDA, and it’s the touchstone for analyzing pregnancy-related discrimination. It applies by its terms not only to the provision of leave but to all aspects of employment. The final rule includes a specific subsection, applying this principle to the provision of leave as well as one applying it to the provision of workplace accommodations during pregnancy. Next slide, please.

So here is the specific provision regarding disparate treatment in the provision of accommodations. It’s about the circumstances in which contractors may or may not deny certain accommodations to employees or applicants who are unable to perform some of their job duties because of pregnancy, childbirth or related medical conditions. I’m just going to call them pregnant employees for purposes of this presentation. You’ll know that I really mean employees or applicants who are unable to perform some of their job duties because of pregnancy, childbirth or related medical conditions.

Now an example of alternative job assignments is light duty assignments. An example of modified duties is reducing lifting requirements. Other accommodations may be as minor as being allowed to sit on a stool, drink water during shifts or take more frequent bathroom breaks.

The NPRM had required contractors to provide these or other accommodations to pregnant employees whenever such accommodations are provided to other workers similar in their ability to or inability to work. Following the Supreme Court's 2015 decisions in *Young v. United Parcel Service*, the final rule requires contractors to provide accommodations to pregnant employees only when one of the three specified conditions is met. Note that these three conditions are disjunctive, joined by an "or," which means if any one of them is met, OFCCP will consider failure to provide accommodations to be discrimination on the basis of sex.

The first condition is similar to this proposed provision in the NPRM. It is when the contractor provides accommodation for all other workers who need them, and denies them only to employees affected by pregnancy, childbirth or related medical conditions. That's a clear case of pregnancy discrimination. Pregnancy is singled out for worse treatment. The second condition will be presented on the next slide, and the third condition is a kind of catchall: when there is other evidence that a contractor is intentionally discriminating on the basis of pregnancy. Next slide, please.

This slide sets out the second circumstance in which contractors must provide accommodations to pregnant employees, or I should say the set of circumstances.

This is the test that the Supreme Court articulated in the *Young* case. It has three parts and these are in the conjunctive. They are joined by an "and," which means all of them must be met for OFCCP to find that a denial of accommodations is sex discrimination. Here they are: A, the contractor provides accommodations to other employees whose abilities or inability to perform their job duties are similarly affected; and B, the denial of

accommodations imposes a significant burden on employees affected by pregnancy, childbirth or related medical conditions; and C, the contractor's asserted reasons for denying accommodations to such employees do not justify that burden. Next slide, please.

Section 20.5(c) also applies disparate impact analysis to failure to provide accommodations to pregnant employees. This analysis applies when the failure to provide accommodations is facially neutral. Even in that circumstance, if it has an adverse impact on the basis of sex and is not shown to be job related and consistent with business necessity, it is discrimination on the basis of sex.

Finally, the final rule includes a best practices provision on this topic. It recommends as a best practice that contractors just go ahead and provide these accommodations to employees who need them. The best practices section will be discussed later in the presentation. Next slide, please.

Now we turn to the specific provision in the final rule regarding leave. The guidelines had required contractors to provide maternity leave for a reasonable period of time.

The final rule is different. It does not affirmatively require that contractors provide maternity or any other kind of leave. Instead, following both the Pregnancy Discrimination Act and the Family and Medical Leave Act, it approaches the issue of leave from a nondiscrimination perspective. Section 20.5(d)(1), on this slide, states the general principle. To the extent that a contractor provides family, medical or other leave, such leave must not be denied or provided differently on the basis of sex.

So what does this principle mean? Well, OFCCP applies both disparate treatment and disparate impact analyses to this kind of discrimination, just as it does to other kinds of discrimination. And under the disparate treatment approach, it means contractors must compare apples to apples. Next slide, please.

And that's the approach laid out in Section 20.5(d)(2), which contains two subparagraphs. The first, subparagraph 1 on this slide, is about medical leave. It provides: A contractor must provide job guaranteed medical including paid sick leave for employees' pregnancy, childbirth or related medical conditions on the same terms that medical or sick leave is provided for medical conditions that are similar in their effect on employees' ability to work.

The term "medical leave" is used here in the same way that the term is used in the FMLA — that is, leave for a serious health condition that makes an employee unable, temporarily, to work. Pregnancy and childbirth are both serious health conditions that may affect an employee's ability to work. So to the extent that an employee is temporarily unable to work because of pregnancy, childbirth or related medical conditions, she must be treated the same as other employees who are temporarily unable to work, for other medical or health reasons.

So she must be entitled to sick leave at the same rate of pay for the same length of time with the same disability insurance coverage, health insurance and other benefits continuation during this period, and so forth. If a contractor provides no such leave or benefits, then the pregnant employee isn't entitled to them either, unless insufficient leave causes a disparate impact, which we'll discuss in a moment. And, of course, this is the analysis under the Executive Order and Title VII. She might be entitled to medical leave under the FMLA. Next slide, please.

Here we have subparagraph 2, which is about family leave. The provision is on the slide: A contractor must provide job-guaranteed family leave, including any paid leave, for male employees on the same terms that family leave is provided for female employees.

Again, the term “family leave” is used in the same way that it is used in the FMLA. It refers to time off to care for a newborn or newly adopted baby or a child or other family member who has a serious health condition. During family leave, the employee is physically able to work but cannot do so because she or he is taking care of the family member.

In the context of childbirth, this generally happens after the mother has recovered from childbirth but needs or wants to stay home with her baby during its first weeks or months of life. What is generally referred to as maternity leave often consists of both medical leave and family leave — some weeks of medical leave followed by some weeks of family leave.

If mothers are permitted to take, say, four weeks of job-guaranteed family leave to care for their newborns after they have recovered from childbirth, then this subsection says that fathers must similarly be permitted to take four weeks of such family leave for that reason. In common parlance, we’d call that paternity leave. Fathers must receive that leave on the same conditions — for example, at the same rate of pay if it’s paid, with or without health insurance and other benefits continued, and so forth. If, however, an employee who is a mother is required to return to work as soon as her health permits and gets no leave purely for childcare, then an employee of the same company who is a father gets no paternity leave.

The principle is the same for family leave to care for children or other family members with serious health conditions. If women get it, so must men, and on the same terms. Again, of course, this is the analysis under the Executive Order and Title VII. Employees might be entitled to family leave under the FMLA. Next slide, please.

As with pregnancy accommodations, disparate impact analysis applies to leave as well. So if a contractor's policy or practice is to provide insufficient or no medical or family leave, it must ensure that its policy or practice does not have an adverse impact on the basis of sex, unless it is shown to be job related and consistent with business necessity.

In a way, this provision is similar to the provision in the old guidelines at Section 60-20.3(g)(2) that had required contractors to provide maternity leave for a reasonable period of time if they did not have a leave policy. But now it is grounded in discrimination law. So if the policy of not providing leave is job related and necessary to the business, then it does not violate this provision.

Now we're going to move onto Section 20.6 on fringe benefits. Donna?

Donna Lenhoff: Thank you, Anna Laura. Section 20.6 deals with fringe benefits: medical, hospital, accident, life insurance and retirement benefits, profit-sharing and bonus plans, leave and other terms, conditions and privileges of employment. This list is taken from the definition of the term "fringe benefits" in the EEOC's Guidelines on Discrimination Because of Sex.

In OFCCP's old guidelines, Section 20.3(c) was the only subsection dealing with fringe benefits. And it provided that there was no violation of the executive order if either the employer provided equal contributions to pension

or other fringe benefit plans on behalf of men and women or the resulting benefits under those plans were equal — so either equal contributions or equal benefits.

But the Supreme Court has specifically ruled against this interpretation, ruling that it is unlawful sex discrimination to pay lower monthly retirement benefits to female than to male employees, or to require larger contributions from female than male employees to obtain the same level of benefit. The final rule articulates the general sex discrimination principle here: The greater cost of providing a fringe benefit to members of one sex is not a defense to a contractor's failure to provide benefits equally to members of both sexes. In general, this means that contractors must use sex-neutral actuarial tables to calculate pension benefits. Next slide, please.

Discrimination and fringe benefits on the basis of gender identity or transgender status, may arise as well, under a number of different scenarios. No examples of this are included in the regulatory text itself, but the preamble to the final rule and the FAQs on OFCCP's Web site explaining the rules do discuss one such scenario which may come up: gender identity discrimination in healthcare coverage. That such discrimination is prohibited is a logical consequence of the prohibition of sex discrimination in fringe benefits in Section 20.6. Let me explain how.

Since sex discrimination includes gender identity discrimination and fringe benefits include healthcare coverage, combining the two, it follows that gender identity discrimination in healthcare coverage is prohibited. Quite easily done.

In other words, denying or limiting access to health insurance benefits based on an employee's gender identity or transgender status violates Executive

Order 11246's prohibition on sex discrimination. That's consistent with OFCCP's directive 2014-02 on gender identity discrimination, and it also is consistent with the Executive Order's independent prohibition on gender identity discrimination.

This means, as the first bullet on slide 28 says, that contractors may not offer health insurance policies that explicitly exclude healthcare related to transgender employees undergoing gender transition, including gender-affirming surgery.

It also means, as the second bullet on this slide says, that transgender individuals may not be denied coverage for medically appropriate sex-specific healthcare services because they are enrolled in their health plans as one gender, where the medical care is generally associated with another gender. For example, where a transgender man has ovarian cancer, a contractor may not deny coverage based on his identification as a male.

Note that these are just some examples of the application of Section 20.6 to gender identity discrimination. In evaluating whether the denial of coverage of a particular healthcare service is discrimination where an individual is seeking a service as part of a gender transition, OFCCP will apply the same basic principles of antidiscrimination law as it does with other terms and conditions of employment, inquiring whether there is a legitimate nondiscriminatory reason for such denial or limitation that is not a pretext for discrimination.

A couple more things you should know about this: First, we are not saying that all gender-affirming surgeries must be covered under all circumstances. We are simply saying that gender identity may not be a reason that coverage for gender-affirming surgery is denied. So, for example, if the exclusion of coverage of gender-affirming surgeries were part of an explicit categorical

exclusion of coverage for all care related to gender transition, that would be facial discrimination. Or if all surgeries that doctors certify as medically necessary are covered, and if a transgender employee's doctors certify that gender-affirming surgery for him or her is medically necessary, then the contractor's plan would have to cover that gender-affirming surgery. On the other hand, if coverage of major non-cancer-related surgeries is denied for people who have terminal cancer, denial of coverage for gender-affirming surgery for a transgender employee who has terminal cancer would not be discrimination.

A second thing you should know about this general area is that OFCCP recognizes that there has been some uncertainty among contractors and other stakeholders who may have not understood this nondiscrimination obligation under our existing authorities. Some nondiscriminatory benefits policies may be difficult to implement immediately. While the specific facts of each case will vary, OFCCP will consider, for example, good faith progress to take steps to change benefits, policies and practices in analyzing whether enforcement action is appropriate, particularly in the period immediately following the rule's effective date. Next slide, please.

In any event, as this chart from the Human Rights Campaign's corporate equality index shows, the number of companies offering transgender-inclusive health benefits has been increasing in recent years. The chart on this slide goes through 2015, and as you see, the maximum number of Fortune 500 companies offering transgender healthcare in 2015 was 169.

In the 2016 survey, which is not shown on this chart, HRC found that this number had more than tripled — 511 companies offered at least one plan that pays for transgender-inclusive health benefits. So the landscape here is

changing very quickly. Now Anna Laura is going to finish out the presentation.

Anna Laura Bennett: Thank you, Donna. On the next slide, Section 20.7 is an entirely new section. There was no equivalent in the guidelines. This section deals with employment decisions made on the basis of sex stereotypes and lays out four categories of such stereotypes.

The first one, Section 20.7(a), gender norms and expectations for dress, appearance, and/or behavior, itself gives three examples. Number one, failing to promote a woman or otherwise subjecting her to adverse employment treatment based on sex stereotypes about dress, including wearing jewelry, makeup or high heels. Number two, harassing a man because he is considered effeminate or insufficiently masculine. Or three, treating employees or applicants adversely based on their sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

Note that with number three here, OFCCP is not taking the position that sexual orientation discrimination is a form of sex discrimination. Rather, what is set forth in number three, adverse treatment of an applicant or employee based on sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes, may be an example of unlawful sex stereotyping as recognized by federal courts. In any event, sexual orientation discrimination is already prohibited by Executive Order 11246 as amended by Executive Order 13672, as you know.

The second category in Section 20.7 is adverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status. Next slide, please.

The next category of sex-based stereotype is in Section 20.7(c): adverse treatment of female employees and applicants because they do not conform to sex stereotypes about women working in particular jobs, sectors or industries. OFCCP continues to see quite a bit of this kind of discrimination in compliance evaluations. Donna mentioned some examples earlier. Another recent compliance evaluation found evidence that a call center steered women into lower-paying positions that assisted customers with cable services rather than higher-paying positions providing customer assistance for internet services, because the latter positions were considered technical and there was evidence that the contractor relied on a sex-based stereotype that technical jobs are for men. Next slide, please.

The last category of sex-based stereotype is Section 20.7(d), expectations about caregiver roles. The classic example is adverse treatment of a female employee because of the sex-based assumption that she has or will have family caretaking responsibilities and that those responsibilities have interfered or will interfere with her work performance.

These stereotypes can also work to the disadvantage of men. A couple of examples are given in the final rule, including adverse treatment of a male employee because he has taken or is planning to take leave to care for his newborn or recently adopted child, based on the sex-stereotyped belief that women and not men should care for children. And adverse treatment of a male employee who is not available to work overtime or on weekends because he cares for his elderly father, based on the sex-based stereotype that men do not have family caregiving responsibilities that affect their availability for work or that men who are not available for work without constraint are not sufficiently committed, ambitious or dependable. Next slide, please.

Section 20.8 concerns sexual harassment. The old guidelines did not address sexual harassment, though the Federal Contract Compliance Manual does do so. Section 20.8 articulates the legal standard for sexual harassment based on the EEOC's guidelines and relevant case law. It explicitly includes hostile work environments based on sex and explains that sexual harassment includes harassment based on gender identity; harassment based on pregnancy, childbirth or related medical conditions; and harassment that is not sexual in nature but that is because of sex or sex-based stereotypes. Next slide, please.

Finally, the final rule contains an appendix that lists, for contractors' consideration, a number of practices that may contribute to the establishment and maintenance of workplaces that will help to eliminate unlawful sex discrimination. As the slide says, these practices are not required.

They include avoiding gender-specific job titles where there are gender-neutral alternatives; designating single user restrooms or similar facilities as sex neutral; providing light duty, modified job duties or assignments or other reasonable accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth or related medical conditions; and, continuing on the next slide, providing flexible workplace policies for men and women; encouraging men and women equally to engage in caregiving-related activities; fostering a climate in which women are not assumed to be more likely to provide family care than men; and fostering an environment in which all employees feel safe and welcome through procedures to ensure that employees are not harassed because of sex.

Now in a moment we're going to take a five-minute break and then it will be time for your questions. First, I want to point out that there are extensive FAQs covering all the topics we discussed today on our Web site. From

OFCCP's homepage, dol.gov/OFCCP, click on the sex discrimination final rule on the scrolling highlights page. You'll find a link to the FAQs there.

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