

One Minute Memo®



Federal Contractors Should Be Concerned About The OFCCP's NPRM Revising its Sex Discrimination Guidelines

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On January 28, 2015, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") announced a Notice of Proposed Rulemaking ("NPRM") to update its Sex Discrimination Guidelines (the "Guidelines"). The NPRM will be published in the Federal Register on January 30, 2015, followed by a sixty-day comment period.

The proposed regulations modify the requirements for federal contractors to fulfill their obligations under Executive Order 11246. The OFCCP had not substantively updated the Guidelines since 1970 despite forty-five years of changes in discrimination laws through legislation and court decisions. While the proposed regulations seek to update requirements in accordance with "existing law and policy," many of the provisions go beyond the parameters of current statutory and other legal obligations, including:

- The adoption of the "implicit bias" theory of discrimination because "[r]esearch clearly demonstrates that widely held social attitudes and biases can lead to discriminatory decisions, even where there is no formal sex-based (or race-based) policy or practice in place" despite the Supreme Court's explicit rejection of the implicit bias theory in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-54;
- A new requirement that aligns with the EEOC's controversial guidance that contractors must provide light duty to all pregnant employees regardless of whether an impairment substantially limits a major life activity even though the issue is pending before the Supreme Court in *Young v. UPS*;
- A new requirement that contractors allow transgendered individuals to use the restroom of his or her choice (despite Congress's decision not to enact Employment Nondiscrimination Act);
- A prohibition on contractors imposing a shorter maximum amount of pregnancy leave as compared to the maximum time off allowed for other types of medical or short-term disability leave;
- More robust protections regarding compensation discrimination (despite Congress's decision not to enact the Paycheck Fairness Act), in addition to the current proposals regarding a new compensation form ([link](#)), pending regulation regarding transparency and non-retaliation ([link](#)) and the new scheduling letter requiring substantial submission of compensation data.

This Administration continues to aggressively implement its agenda via Executive Orders and regulations in the face of its deadlock with Congress. Contractors should take special note of these proposed regulations since aspects of these regulations would create substantial additional burdens. Importantly, while the Guidelines that have been in place since 1970 operated as guidance to contractors, the proposed regulations, if finalized in their current form, would be binding on federal contractors and subcontractors. There is a significant legal question as to whether OFCCP has the authority to transform “guidance” to the status of “regulation” and this question may fuel legal challenges. There is also a legal question as to whether the agency has the authority to create requirements for federal contractors that may be at odds with the state of the law as defined by some courts. Contractors should consider submitting comments to the proposed regulations to ensure that their views are heard during the rulemaking process. Comments must be received by March 31, 2015.

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Seyfarth Shaw LLP One Minute Memo® | January 30, 2015

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