

One Minute Memo®



OFCCP Issues Sweeping New Sex Discrimination Guidelines

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Seyfarth Synopsis: Today the OFCCP issued final sex discrimination regulations, which were updated for the first time since the 1970s. While the Final Rule seeks to align requirements in accordance with “current law,” many of the provisions go beyond existing legal parameters and instead address the Agency’s view of “the needs and realities of the modern workplace.” A webinar on these changes will be coming soon.

Today, the Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) announced a Final Rule that updates OFCCP’s sex discrimination regulations for the first time since the 1970s. The regulations apply to federal contractors and subcontractors, including those performing work under federally assisted construction contracts. While the Final Rule seeks to align requirements in accordance with “current law,” many of the provisions go beyond existing legal parameters and instead address the Agency’s view of “the needs and realities of the modern workplace.” Some of the key changes include:

- Applying the sex discrimination guidelines to cover decisions based not only on sex, but also on pregnancy, childbirth, or childbirth or pregnancy-related medical conditions; gender identity; transgender status; or sex stereotyping;
- A requirement that contractors provide job-guaranteed family leave, including any paid leave, for male employees on identical terms that family leave is provided for female employees;
- Requiring that employers provide light duty for pregnancy, childbirth or related medical conditions consistent with the provision of light duty for other conditions, such as accommodations for workplace injuries;
- More robust protections regarding compensation discrimination that go well beyond Title VII. Under the sex discrimination regulations, employees are deemed “similarly situated” if they are merely “comparable” in terms of some tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors, even if they are not similar on others;
- A requirement that contractors allow transgender people to use the restroom of his or her choice; and
- An obligation for employers to justify any employment policies or practices that have an adverse impact on the basis of sex as being job-related and consistent with business necessity. For example, the regulations prohibit having a “word-of-mouth” recruitment or “tap-on-the-shoulder” promotion system if it has an adverse impact on women and

the contractor cannot establish that the system is job-related and consistent with business necessity. The OFCCP also indicated that a performance review system used to make compensation decisions must be shown to be job-related and consistent with business necessity if it has an adverse impact on the basis of sex.

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 changes since aspects these regulations would create substantial additional compliance requirements. Importantly, while the Guidelines that had been in place since 1970 operated as guidance to contractors, the OFCCP takes the position that the Final Rule is 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.

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