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OFCCP Issues Anticipated Notice of Proposed Rules Revising the Sex Discrimination Guidelines

BY THE FEDERAL CONTRACTOR COMPLIANCE GROUP

On January 30, 2015, the Office of Federal Contract Compliance Programs (OFCCP) published a Notice of Proposed Rulemaking (NPRM) that essentially rewrites 41 CFR Part 60-20, the Sex Discrimination Guidelines (Guidelines). [The NPRM](#) was anticipated, as it has always been on OFCCP Director Shiu's regulatory agenda. The Guidelines, which the NPRM retitled "Discrimination on the Basis of Sex," were in great need of updating, having gone without substantive revision since their promulgation in June 1970. As discussed in the NPRM, "there have been historic changes to sex discrimination law, [] both statutory and case law" since 1970 and the proposed regulations are intended "to align the sex discrimination standards under Executive Order 11246 with developments and interpretations of existing title VII principles[.]" (p. 5).

No Changes Seen for Most Contractors

Given its intent, the proposed rules should not require policy or practice changes for most federal contractors. The NPRM provides many well accepted examples of the types of activities that will be considered sex discrimination. For example, unlawful sex-based disparate treatment practices include making distinctions between married and unmarried persons that are not applied equally to both sexes; denying women with children an employment opportunity that is available to men; and restricting job classifications on the basis of sex. Similarly, employment policies or practices that may violate EO 11246 based on disparate impact include minimum height and/or weight requirements that are not necessary to the performance of the job or conditioning entry into an apprenticeship program based on a scored test that has not been validated according to the Uniform Guidelines.

The proposal rules also specify examples of unlawful pregnancy discrimination, such as limiting a pregnant employee's job duties based solely on the fact that she is pregnant or requiring a doctor's note in order to continue to work when such notes are not required for similarly situated employees. Likewise, the NPRM specifies that contractors must not make employment decisions on the basis of sex-based stereotypes: how males or female are "expected to look, speak, or act."

Finally, the NPRM provides that harassment on the basis of sex violates EO 11246 (consistent with developments under Title VII) and enumerates best practices for mitigating harassment liability, including communicating broadly that harassment will not be tolerated, providing anti-harassment

training, and implementing procedures for promptly handling and resolving complaints of harassment and intimidation based on sex. Many of these are widely employed by the contractor community.

Continued Focus on Gender-Based Compensation Discrimination

The most interesting aspect of the NPRM is Section 60-20.4, which addresses gender-based compensation discrimination, is the section that will likely be a battleground between contractors and the OFCCP in the years to come. The section starts by addressing the relevant factors to be considered in determining if employees are “similarly situated” for purposes of EEO pay analysis. Those factors include “tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, [and] minimum qualifications[.]” The NPRM goes on to provide that employees may be similarly situated “where they are comparable on some of these factors, even if they are not similar on others.” As contractors prepare for OFCCP compliance evaluations, a developed rationale on what constitutes similarly situated pay measurement groups is increasingly important given the agency’s use of so-called “pay analysis groups” as discussed in Directive 307. Section 60-20.4(b) also reinforces the OFCCP’s current focus on “steering” claims as a form of compensation discrimination. Finally, Section 60-20.4(d) raises the specter of a new agency focus on performance review systems that have an adverse impact and are not shown to be job-related and consistent with business necessity.

The comment period for the NPRM is 60 days, ending on March 31, 2015. We will be following developments and provide alerts as warranted.



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