

LEGAL UPDATES

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# Sex Discrimination Guidelines for Contractors Are Updated

On June 14, 2016, the Office of Federal Contract Compliance Programs (OFCCP) published its final rule substantially revising the sex discrimination guidelines for federal contractors and subcontractors. The new rule brings the sex discrimination guidelines implemented in 1970 “from the ‘Mad Men’ era to the modern era.”

The final rule applies to any business or organization that (1) holds a single federal contract, subcontract or federally assisted construction contract in excess of \$10,000; (2) has federal contracts or subcontracts that, combined, total in excess of \$10,000 in any 12-month period; or (3) holds government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

Important changes in the final rule include:

### **Fair Pay Practices**

The rule’s fair pay practices dictate that “similarly situated employees” must be paid similarly, regardless of sex. To aid in determining whether employees in a given case are “similarly situated,” the OFCCP has articulated relevant factors such as tasks performed, skills, effort, level of responsibility, working conditions, job difficulty and minimum qualifications.

Notably, employees may be deemed “similarly situated” when they are comparable on some of these factors but not on others. How the analysis of similarly situated employees will be enforced in practice remains to be seen.

### **Pregnancy**

Employers may not discriminate due to pregnancy status or related medical conditions and must provide health insurance that covers pregnancy, childbirth and related costs to the same extent other medical conditions are covered.

Workplace accommodations—such as extra bathroom breaks, modified job duties or light-duty assignments—must be provided when necessary.

Unlawful discrimination practices include imposing mandatory leave due to pregnancy or requiring a doctor's note to continue working while pregnant.

### **Gender Identity**

The final rule establishes gender identity and transgender status as bases for sex discrimination consistent with Executive Order 13672. This mandates that employees use the restroom and shower facility aligned with their gender identity, regardless of their sex.

Exclusion of medical coverage for gender dysphoria or transition-related services is facially discriminatory.

### **Additional Areas**

Discrimination is prohibited with respect to fringe benefits such as medical insurance, life insurance, retirement benefits, bonus plans and leave.

Employers may not utilize job requirements based explicitly on sex, or requirements such as height and weight that may adversely affect one sex substantially more than another, when said requirements are not job-related or consistent with business necessity.

Discrimination through sex-based stereotypes, such as caregiving responsibility assumptions, is prohibited. Employers may not deny jobs to mothers assuming they take care of children or deny flexible work arrangements to fathers assuming they do not.

Methods like “word-of-mouth” recruiting or “tap-on-the-shoulder” promotion with a disparate impact on women may be deemed discriminatory.

To the extent family leave programs for child care are provided, they must be made available to men and women on the same terms.

### **Best Practices**

The final rule sets forth “best practices” that, while not required, the OFCCP recommends be implemented. These include:

Avoiding gender-specific job titles such as “foreman” or “lineman.”

Designating single-user restrooms or shower facilities as sex-neutral.

Providing flexible workplace policies and appropriate leave options for men and women.

### **What This Means to You**

The final rule becomes effective August 15, 2016. The good news is that federal contractors and subcontractors are likely following many of these guidelines already, because many are consistent with current Title VII and Equal Employment Opportunity Commission interpretations of sex discrimination. When determining compliance with these regulations, employers may choose to be proactive by implementing the “best practices” found in the appendix of the final rule.

### **Contact Us**

For more information on how OFCCP guidelines affect your organization, contact Sonni Nolan, Molly Kurt, Kayt Kopen or another member of Husch Blackwell’s Labor & Employment group.