

GLOBAL CONSTRUCTION

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CONTRACTOR GUIDE TO COMPLIANCE WITH OFCCP'S NEW FINAL RULE ON SEX DISCRIMINATION

A new [Final Rule](#) addressing sex discrimination in employment by federal contractors and subcontractors will go into effect on August 15, 2016. The new Final Rule was published by DOL's Office of Federal Contract Compliance Programs. It implements [Executive Order 11246](#), which has been essentially unchanged since it was first issued in 1970. OFCCP's new rules and guidelines include several significant changes from the 1970 version, but the changes are primarily intended to update DOL requirements so that they conform to well-established federal caselaw and other more recently enacted federal requirements.

WHO IS AFFECTED?

OFCCP's new Final Rule on sex discrimination 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.

WHAT DOES THE FINAL RULE ADDRESS?

As they have for many years, DOL's regulations require contractors to ensure nondiscrimination in employment on the basis of sex and to take affirmative action to ensure that they treat applicants and employees without regard to their sex. The new Final Rule is much more specific.

OFCCP's new Final Rule addresses several specific types of conduct constituting sex discrimination and a number of very specific examples of prohibited conduct. An appendix to the new Final Rule proposes policies that may be considered "best practices" for contractors. The new Final Rule addresses five distinct categories of conduct that may be deemed sex discrimination—

1. Sex-based discrimination in compensation. Contractors may not discriminate in wages, benefits, or other types of compensation, based on an employee's sex. This includes denying training opportunities, apprenticeships, or other similar advancement opportunities on the basis of sex; or failing to provide equal opportunities for overtime hours or commissions to women and men. One example the rule provides is that contractors may not set requirements, such as height or weight qualifications, that adversely affect applicants because of their sex, unless the qualifications are job-related and consistent with business necessity. The rule adds that a pay violation occurs every time an employer pays employees in a discriminatory way.

2. Discrimination related to pregnancy, childbirth, and related medical conditions. Employers may not discriminate against employees because of pregnancy-related conditions, including, for example: lactation; medical disorders directly related to pregnancy; symptoms such as back pain; complications requiring bed rest; and the after-effects of a delivery. The rule lists examples of prohibited discriminatory conduct, including:

- Refusing to hire pregnant people or people of childbearing capacity;
- Firing female employees or requiring them to go on leave because they become pregnant or have a child;
- Limiting pregnant employees' job duties based solely on the fact that they are pregnant, or requiring a doctor's note in order for a pregnant employee to continue working; and
- Providing employees with health insurance that does not cover hospitalization and other medical costs for pregnancy, childbirth, or related medical conditions to the same extent that hospitalization and other medical costs are covered for other medical conditions.

The rule also requires employers to provide accommodations, like light or modified duty assignments, for pregnancy-related conditions in the same way they would for a disability or other injury. Similarly, employers must provide leave, including paid sick leave, for pregnancy in the same way they do for other similar medical conditions.

3. Discrimination in fringe-benefit plans. The Final Rule prohibits discrimination on the basis of sex with regard to fringe benefits such as medical, hospital, accident, life insurance, and retirement benefits; profit-sharing and bonus plans; and leave. The rule also states that incurring higher costs to offer fringe benefits to one sex is not a defense.

4. Discrimination through sex-based stereotypes. Contractors may not make employment decisions based on sex-based stereotypes, of which the rule provides four different categories: (a) dress, appearance, or behavioral stereotypes based on gender norms; (b) gender identity; (c) job sector or industry norms; and (d) caregiving stereotypes. Some examples the rule identifies from each of these categories are:

- Failing to promote a woman, or otherwise subjecting her to adverse employment treatment, based on sex stereotypes about dress, including wearing jewelry, make-up, or high heels;
- Harassing a man because he is considered effeminate or insufficiently masculine;
- Adverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status;
- Adverse treatment of a female employee or applicant because she does not conform to a sex stereotype about women working in a particular job, sector, or industry; and
- Adverse treatment of a female employee because of a sex-based assumption that she has (or will have) family caretaking responsibilities, and that those responsibilities will interfere with her work performance, is discrimination based on sex.

5. Sexual harassment. The section on sexual harassment brings the rule in line with generally-established prohibitions on sexual harassment in the workplace, including: prohibiting unwelcome sexual advances, requests for sexual favors, offensive remarks about a person's sex, and other verbal or physical conduct of a sexual nature when such conduct unreasonably interferes with an individual's work performance, becomes the basis for employment decisions, or creates a hostile working environment. The rule also explains that harassment because of sex is not necessarily sexual in nature, but can include harassment based on pregnancy and related conditions, as well as harassment based on sex-based stereotypes.

EXCEPTIONS FOR EXPANDING OPPORTUNITIES FOR WOMEN AND BFOQS

The rule specifically states that good faith efforts to expand opportunities for women is not considered sex discrimination. It also acknowledges that there are some legitimate circumstances—albeit rare—where treating sexes differently in employment may be lawful, such as when sex is a bona fide occupational qualification.

NEXT STEPS FOR CONTRACTORS

OFCCP's new rules and guidelines are likely in line with the policies and practices of most federal contractors and subcontractors. But given their scope and detail, the new rule means that contractors and subcontractors should take steps to ensure that they are compliant. They should review not only their policies on sex discrimination and harassment, but also any policies or practices that could result in unfair treatment of employees or applicants based on sex or sex stereotypes—e.g., hiring, compensation, training and advancement opportunities, workplace injury accommodations, and medical leave policies.