



## OFCCP proposes update to sex discrimination guidelines

by Nichole Atallah, associate, PilieroMazza PLLC

Addressing gender equality and pay equity has been central to the Obama Administration's agenda since the president took office in 2009. In continuing to further this agenda, on Jan. 30, the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) published proposed regulations that would require that covered government contractors and subcontractors must meet certain requirements in fulfilling obligations under Executive Order 11246, which, in part, seeks to ensure nondiscrimination in employment on the basis of sex.

OFCCP's proposed rule would substantially revise its existing Sex Discrimination Guidelines, found at 41 CFR Part 60-20—guidelines that have not been substantively updated since 1970.

The existing guidelines predate the substantial increase in women in the workforce as well as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

Although the proposed revisions would primarily clarify well-established case law or other requirements of federal agencies, certain sections of the proposed regulations, such as pregnancy accommodation, pay equity and gender identity, offer insight into the direction of OFCCP's enforcement priorities.

### **Pregnancy accommodation**

OFCCP's proposed rule with respect to pregnancy accommodation is consistent with the Equal Employment Opportunity Commission's interpretation of the Pregnancy Discrimination

Act as well as case law in the Fourth Circuit. Both have determined that the pregnancy discrimination law prohibits an employer from denying an accommodation to pregnant workers that is available to other employees, even if it is available only to other employees who are disabled.

The Supreme Court is currently considering this issue on appeal. If the Supreme Court reverses the Fourth Circuit, the ruling may impact OFCCP's proposed rule. The OFCCP has also proposed guidelines consistent with various state laws including providing accommodations for additional bathroom and hydration breaks and light duty assignments.

### **Equal pay**

Consistent with the Obama Administration's 2014 executive order requiring contractors to evaluate pay disparities among genders and institution of new reporting requirements, the proposed regulations identify several factors consider in determining if employees are "similarly situated" for the purposes of equal employment opportunity analysis, including tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty and minimum qualifications.

Employees may be considered comparable even if they are not comparable on all factors. Contractors should be prepared to justify compensation decisions in the face of an OFCCP audit given the rules already in effect and the new proposed guidance.

OFCCP's regulations not only seek to protect women, but also contain provisions to protect against sex stereotypes of other genders. The OFCCP's approach brings to the forefront concerns regarding gender identity and transgendered employees. The proposed rules prohibit disparate treatment based on dress or personal appearance, including employment actions that are based on stereotypes about how a gender speaks acts or looks.

The proposed regulation also mandates employee benefits and personnel decisions be made without regard to stereotypes about caregiving responsibilities. For example, the regulations recognize that employers have denied male employees opportunities available to working women who make requests for childcare leave. Employers should carefully review their policies with respect to personal appearance and employee benefits to ensure compliance.

The proposed regulation, coupled with the recent implementation of pay equity rules, make it abundantly clear that OFCCP will continue to prioritize gender equality and non-discrimination in the workplace. The public will have until March 31 (60 days) to provide comments.

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