
THE GEORGE WASHINGTON UNIVERSITY

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Public Interest Comment¹ on
The U.S. Department of Labor's Proposed Rule:

Discrimination on the Basis of Sex

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Lynn White²

The George Washington University Regulatory Studies Center

The George Washington University (GW) Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the U.S. Department of Labor's (DOL) proposed rule that would outline Federal contractors' and subcontractors' and federally assisted construction contractors' equal employment opportunity (EEO) requirements as they relate to sex does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of DOL's proposal on overall social welfare.

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or GW. The Center's policy on research integrity is available at <http://research.columbian.gwu.edu/regulatorystudies/research/integrity>.

² Lynn White, writing in her personal capacity, is an EEO Associate for the GW, Division of Human Resources, Office of EEO. Ms. White is also a former compliance officer at the U.S. DOL, Office of Federal Contract Compliance Programs. She can be reached at lwhiteesq@gmail.com or (240) 351-7813. Many thanks to the Regulatory Studies Center for their generous assistance and willingness to share their expertise in the preparation of this comment.

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Introduction

The DOL Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11,246 (Executive Order), a 1965 order that prohibits Federal contractors and subcontractors and federally assisted construction contractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin and requires them to take affirmative action to prevent discrimination based on these protected categories.³ The OFCCP uses title VII of the Civil Rights Act of 1964 (title VII) principles and case law to guide its enforcement of the Executive Order.⁴ The Sex Discrimination Guidelines (Guidelines) found in 41 CFR Part 60-20 outlines the OFCCP's enforcement principles as they relate to sex discrimination.

In the proposed rule, the OFCCP asserts that since the Guidelines were first issued in 1970, there have been “historic changes to sex discrimination law, in both statutory and case law, and to contractor policies and practices as a result of the nature and extent of women’s participation in the labor force.”⁵ As such, the OFCCP issued the proposed rule to “revise the Sex Discrimination Guidelines to align the sex discrimination standards under Executive Order 11246 with developments and interpretations of existing title VII principles and the OFCCP’s corresponding interpretation of the Executive Order.”⁶ The proposed rule would eliminate the existing Guidelines and replace them with regulations “with the full force and effect of law.”⁷ The proposal would remove outdated provisions in the Guidelines, clarify others, and add new protections that have been established since 1970.

Statutory Authority

Executive Order 11,246 outlines the EEO requirements for Federal contractors and subcontractors and federally assisted construction contractors. Contractors are prohibited from discrimination against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.⁸ Contractors must also take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.⁹ This includes, but is not limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay

³ Exec. Order No. 11,246, as amended (September 24, 1965).

⁴ Discrimination on the Basis of Sex, 80 Fed. Reg. 5246 (January 30, 2015).

⁵ *Id.* at 5247.

⁶ *Id.*

⁷ *Id.* at 5252.

⁸ Exec. Order No. 11,246, *supra* note 3.

⁹ *Id.*

or other forms of compensation; and selection for training, including apprenticeship.¹⁰ The Executive Order 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.”¹¹

The Guidelines found at 41 CFR Part 60-20 describe the EEO requirements under the Executive Order as they relate to sex discrimination. This includes outlining effective recruitment and advertising and job policies and practices, and prohibiting discriminatory wage practices. The proposed rule would create an entirely new structure for Part 60-20 that covers the following categories: sex as a bona fide occupational qualification (BFOQ); discriminatory compensation; discrimination on the basis of pregnancy, childbirth, or related medical conditions; other fringe benefits; employment decisions made on the basis of sex-based stereotypes; and harassment and hostile work environments. The proposed rule would establish the legal requirements for contractors in the described categories to ensure compliance with title VII principles and case law.

Compliance with Regulatory Analysis Requirements

According to longstanding presidential guidance,

Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.¹²

The OFCCP provided a number of reasons for substantially revising the Guidelines. First, women participate in the workforce at a much higher rate than when the Guidelines were first promulgated in 1970.¹³ There have also been extensive changes to the law regarding sex-based employment discrimination that are not reflected in the existing Guidelines.¹⁴ The OFCCP further noted that many contractors’ employment policies have changed in light of these factors,

¹⁰ *Id.*

¹¹ 80 FR 5247; *see* 41 CFR 60-1.5a.

¹² Exec. Order No. 12,866, Regulatory Planning and Review, §1(a).

¹³ 80 FR 5249.

¹⁴ *Id.*

rendering parts of the Guidelines moot.¹⁵ Given all these changes in the workplace and law, the OFCCP stated the proposed rule would create a substantial benefit by facilitating “contractor understanding and compliance [of title VII sex discrimination jurisprudence] and thus reduce contractor costs.”

Regulatory Analysis

The OFCCP assigned minimal cost to the proposed rule. The OFCCP estimated that contractors will have to expend resources to become familiar with the new rule.¹⁶ The agency will help minimize this burden by publishing compliance assistance materials, hosting webinars for the contractor community, and conducting listening sessions to identify any specific challenges contractors may incur in light of the new rule.¹⁷ The OFCCP estimated it will take 1 hour for a management professional at each contractor establishment to become familiar with the proposed rule.¹⁸ Assuming there are approximately 500,000 contractor establishments, utilizing a total compensation rate of \$51.58 for a management professional, the OFCCP estimated a total cost of \$25,790,000 (500,000 contractors x 1 hour x \$51.58) for rule familiarization.¹⁹

The OFCCP also estimated the cost of complying with Section 60-20.5(b), which would provide a non-exhaustive list of examples of pregnancy discrimination, including failing to provide accommodations and light duty under title VII. Acknowledging that some courts disagree on whether employers are required to provide accommodations and light duty for pregnant employees, the OFCCP estimated that there will be some burden associated with the provision for contractors that do not currently provide accommodations or light duty for pregnancy related conditions.²⁰ The agency admitted that there is no one data source that can be used to estimate the cost of pregnancy accommodations or light duty.²¹

In order to estimate the burden of this provision, the OFCCP utilized a number of different sources related to the total contractor workforce, women in the workforce, childbearing women, and pregnancy rates to ultimately determine that 2,046,850 women in the federal contractor workforce would be pregnant in a year.²² The agency then assumed that not every pregnant employee will require an accommodation that will involve more than a *de minimis* cost and limited its analysis of the provision’s costs to just those employees who are in positions that

¹⁵ *Id.*

¹⁶ *Id.* at 5261.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 5262.

²² *Id.*

require physical exertion such as craft workers, operatives, laborers, and service workers.²³ The OFCCP estimated that 21 percent of pregnant women in the Federal contractor workforce, or 429,839, are in such positions that would require accommodations that might involve more than *de minimis* cost.²⁴ The OFCCP further estimated that, of the 429,839 women, 214,920 may require some type of an accommodation during pregnancy.²⁵ Assuming that many will not ask for an accommodation and most employers already provide some form of accommodation when requested, the OFCCP stated that the proposed rule would only require contractors to provide accommodations to nine percent of the 214,920 women employed as craft workers, operatives, laborers and service workers at a cost \$500 per accommodation. The OFCCP's estimated total cost for the provision is \$9,671,000.²⁶

The precision of the numbers presented suggests more certainty than is possible, however. Indeed, and as explained below, the costs identified by the OFCCP are likely at the low end of estimated costs in a number of respects. At minimum, and given the number of unknown variables the OFCCP identified in the regulatory analysis, the estimated costs should be presented as a range.

Regarding the OFCCP's estimation of the time (and cost) for employers to become familiar with the proposed rules, it is unlikely that even a highly skilled EEO Manager for a contractor could fully familiarize herself with the rule in one hour; however, this is probably a rare scenario. Given the complexity of the proposed rules, and its intersection with related laws, contractors will have to invest a significant amount of time familiarizing themselves with the rule and reconciling the rule's requirements with what is currently considered established title VII case law and principles. This could take at least five hours for an experienced EEO Manager or human resources professional responsible for regulatory compliance. Following the OFCCP's methodology for developing the cost estimate, this would make the high burden for this provision 2,500,000 hours, or approximately \$128,950,000. And that does not take into account the training that such EEO professionals will need to conduct to ensure that managers and other employees are aware of their rights and responsibilities.

Similarly, the OFCCP cost estimates regarding the proposed rules relating to pregnancy accommodation are off the mark in many respects, and should be provided as a range. For instance, the need for pregnancy accommodation can arise in virtually every job category, not just positions that require physical exertion such as craft workers, operatives, laborers, and service workers and may greatly exceed \$500.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 5262-63.

Even assuming the proposal relating to pregnancy accommodation does not change in light of the U.S. Supreme Court's recent decision in *Young v. UPS, Inc.*,²⁷ which is discussed in more detail below, the estimated \$500 cost for pregnancy accommodations is unreasonable, particularly for women in positions like craft workers, operatives, laborers, and service workers. The report the OFCCP cited to develop the \$500 cost estimate analyzed accommodation costs for all types of disabilities.²⁸ Some of the accommodations cited in the report included purchasing a white board, amplifier, or air purifier.²⁹ These are not likely sufficient to accommodate a pregnant employee. Specifically, it does not take into account that pregnant women may request light duty, telework, or medical leave as an accommodation, requests that could last anywhere from a few weeks to the full duration of an employee's pregnancy. A widely cited Cleveland Clinic article states that nearly 20 percent of pregnant women are prescribed some form of bed rest each year.³⁰ These types of accommodations create a much more substantial cost to the employer in lost productivity, paid leave, overtime for other employees who must fill employment gaps, and/or hiring temporary employees. Further, the need for these kinds of accommodations can arise in virtually any job category, not just the job categories that require manual labor.

Given the factors discussed above, the OFCCP should consider a range of cost estimates for pregnancy accommodations that account for the fact that women in all job categories may need an accommodation and the percentage of women who may need an accommodation that is significantly more than \$500. Following the OFCCP's analysis, as many as 2,046,850 women in the federal contractor workforce will be pregnant in a year. Of those, approximately half will need accommodation, or 1,023,425 women. Assuming, as the OFCCP did, that many will not ask for an accommodation and most employers already provide some form of accommodation when requested, the high estimate would require contractors to provide accommodations to nine percent of the total 1,023,425 women who would become pregnant in a year and need an accommodation, or 92,108. Eighty percent of those women, or 73,686, may need an accommodation that is in the range of \$500 per accommodation, or \$36,843,000. The remaining 18,422 may need a bed rest accommodation for at least the duration of their third trimester, or 13 weeks.³¹

²⁷ *Young v. UPS*, No. 12-1226 (March 25, 2015) (http://www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf)

²⁸ Beth Loy, Job Accommodation Network, *Workplace Accommodations: Low Cost, High Impact*, available at <http://askjan.org/media/lowcosthighimpact.html> (last updated September 1, 2014) (last visited April 8, 2014).

²⁹ *Id.* at 6-7.

³⁰ Cleveland Clinic, *Pregnancy Bed Rest*, available at http://my.clevelandclinic.org/health/diseases_conditions/hic_Am_I_Pregnant/hic_Coping_with_the_Physical_Changes_and_Discomforts_of_Pregnancy/hic_Pregnancy_Bed_Rest (last visited April 8, 2015).

³¹ Studies suggest that cervical length between 20-24 weeks of pregnancy may be the best indicator of whether a pregnant woman may go into pre-term labor and subsequently be prescribed some form of prevention intervention like bed rest for the remainder of the pregnancy. www.KeepEmCooking.com, *Prevention & Treatment*, available at <http://www.keepemcookin.com/prevention.aspx> (last visited April 14, 2015).

The true cost of this accommodation will vary greatly depending on the benefits package offered by the employer and the type of leave the employee takes during the accommodation (i.e. unpaid leave, short term disability, etc.) and is very difficult to quantify. However at a minimum, all contractors will have to maintain these employees’ benefits packages during their accommodation. According to the Bureau of Labor Statistics the average hourly cost for employees’ benefits packages is \$10.49 per hour, or approximately \$420 per week.³² A pregnant employee on full bed rest for 13 weeks could cost an employer as much as \$5,460 in benefit costs alone. This would cost federal contractors approximately \$100,584,120 in a year (18,422 employees x \$5,460 = \$100,584,120). Given these assumptions, a very conservative estimated cost for this provision would total \$137,427,120.

Table 1 – Proposed Rule Range of Costs

	Lower Range Burden Hours	Higher Range Burden Hours	Lower Range Costs	Higher Range Costs
<i>Estimated One Time Burden</i>				
Regulatory Familiarization	500,000	2,500,000	\$25,790,000	\$128,950,000
Total One-Time Burden	500,000	2,500,000	\$25,790,000	\$128,950,000
<i>Estimated Recurring Burden</i>				
41 CFR 60-20.5: Light Duty or Accommodation	0	0	\$9,671,000	\$137,427,120
Total Annual Recurring Burden	0	0	\$9,671,000	\$137,427,120

The OFCCP should also quantify the estimated cost for adding gender-neutral bathroom facilities to contractor establishments. The proposed rule would make it unlawful sex discrimination to deny a transgender employee “access to bathrooms used by the gender with which they identify.”³³ This provision appears to be consistent with Executive Order 13,672, which added “sexual orientation” and “gender identity” as protected classes under the Executive Order 11,246 regulations.³⁴ These requirements prompted the Administration, for example, to add gender-neutral-restroom facilities to the White House “in keeping with the administration’s guidance on this issue and consistent with what is required by the executive order that took effect [April 8, 2015] for federal contractors...”³⁵

³² Press Release, Bureau of Labor Statistics, U.S. Department of Labor, Employer Costs for Employee Compensation – December 2014, Table 1, available at <http://www.bls.gov/news.release/ecec.t01.htm> (last visited April 8, 2015).

³³ 80 FR 5277.

³⁴ Exec. Order No. 13,672 (July 21, 2014)

³⁵ Sara Wheaton, *Latest White House Feature: Gender-Neutral Restroom*, www.Politico.com, April 8, 2015, available at <http://www.politico.com/story/2015/04/white-house-gender-neutral-bathroom-116779.html>; see also

The OFCCP did not quantify these costs in the final rule implementing Executive Order 13,672, but rather made an unsupported assertion that the rule “would not require contractors to modify or construct additional facilities, but rather only provide equal access to any facilities that exist.”³⁶ However, contractors may need to take the added step of adding gender-neutral restrooms, as the White House did, to give employees options regarding facilities use. Obviously, this could lead to millions of dollars in construction costs for each contractor, particularly those who may have multiple buildings at one establishment. In order to accurately access the cost of the rule, the OFCCP should quantify new construction costs for gender-neutral bathroom facilities and clarify the agency’s expectations regarding complying with this requirement.

Finally, there is the issue of whether the proposed rule is needed. The OFCCP considered two alternatives to the proposed rule: maintaining the existing Guidelines (appearing at 41 CFR Part 60-20) or rescinding but not replacing the Guidelines. The OFCCP rejected maintaining the current Guidelines because they are extremely outdated.³⁷ The agency stated that because of conflicts in the Guidelines and existing law, contractors may incur costs to reconcile these conflicts. The OFCCP rejected completely rescinding, but not replacing, the Guidelines because this would “create a vacuum of guidance for contractors, requiring them to expend resources for a different reason – for example to pay for lawyers’ or human resource professionals’ time to provide guidance regarding their nondiscrimination obligations.”³⁸

Fully rescinding the Guidelines, or issuing new “Guidelines” rather than “regulations,” may be a better option than the proposed rule. The proposed rule noted that the Guidelines have been outdated since a 1978 Supreme Court ruling. Given that, it is highly unlikely that contractors routinely consult Part 60-20 for guidance on title VII sex discrimination compliance. Rather, most, if not all contractors, use other resources to ensure compliance with title VII obligations.

Further, the OFCCP provided little quantifiable benefit to the proposed rule in the regulatory analysis. The agency provided some anecdotal information regarding benefits in the preamble. The OFCCP asserted that by “consolidating, updating, and clearly and accurately stating the existing law by the EEOC and the OFCCP’s corresponding interpretation of the Executive Order, the proposed rule will facilitate contractor understanding and compliance and thus reduce

David McCabe, *White House Adds Gender-Neutral Bathroom to Office Building*, www.thehill.com, April 9, 2015, available at <http://thehill.com/blogs/blog-briefing-room/news/238342-administration-adds-gender-neutral-bathroom>.

³⁶ Implementation of Executive Order 13,672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72985, 72989 (December 9, 2014).

³⁷ 80 FR 5264.

³⁸ *Id.*

contractor costs.”³⁹ It is unclear whether the proposed rule would meet the agency’s objective. The OFCCP noted that the proposed rule doesn’t even include the full scope of title VII sex discrimination principles because the agency feels that some have no practical effect.⁴⁰ As a result, the proposed rule would not create the authoritative source for title VII compliance as it relates to sex discrimination the agency purports to develop.

The proposed rule could in fact create more confusion for contractors. For example, the OFCCP relied heavily on the Equal Employment Opportunity Commission’s recent *Enforcement Guidance: Pregnancy Related Discrimination and Related Issues* to support the provisions in the proposed Section 60-20.5(b)(5).⁴¹ However, the EEOC acknowledged that portions of this guidance may need to be updated in light of the U.S. Supreme Court’s recent decision in *Young v. UPS*.⁴² The OFCCP could be creating yet another regulation that will soon be outdated.

Further, while the OFCCP stated that the final rule would be consistent with the Supreme Court’s ruling in *Young v. UPS*, the agency did not address precisely how the final rule may be different and provide opportunity for notice and comment. Without sufficient notice and opportunity to comment on the modifications the agency may make to the final rule because of the *Young v. UPS* decision, there are concerns that the final rule may not meet the “logical outgrowth” requirement for the docket.

Conclusion

The OFCCP’s proposed rule would completely revise 41 CFR Part 60-20, or the Sex Discrimination Guidelines. The proposal attempts to clarify the requirements contractors must fulfill to ensure nondiscrimination on the basis of sex. The OFCCP acknowledged that some of the areas of law it attempts to clarify are currently under review by the courts, which may change some of the proposed revisions in light of the Supreme Court’s recent decision in *Young v. UPS*. The OFCCP estimated minimal costs for the proposed rule, limiting the regulatory analysis to rule familiarization and new costs associated with providing pregnancy accommodations to a limited number of contractor employees. However, these costs are understated, with actual costs reaching an estimated \$130 million or more per year. The agency rejected two possible alternatives, leaving the rule as it is or rescinding, but not replacing, the outdated Guidelines.

Given the complex and ever-changing nature of title VII case law, the OFCCP should consider rescinding but not replacing the outdated Guidelines or issuing new “Guidelines” instead of

³⁹ *Id.* at 5248.

⁴⁰ *Id.*

⁴¹ *Id.* at 5257.

⁴² Questions and Answer About the EEOC’s Enforcement Guidance on Pregnancy Discrimination and Related Issues (http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm) (last visited April 6, 2015).

“regulations.” The OFCCP admitted that the Guidelines have been outdated since 1978 so they have had little utility for decades. Assuming the agency moves forward with issuing a final rule, the OFCCP’s current cost estimates are likely the minimum costs associated with the proposed rule. The agency should consider at minimum presenting a range of costs, to more accurately reflect the proposed rule’s financial burden to contractors. Given the uncertainties in its estimates of both costs and benefits, the OFCCP should plan now, before issuing a final rule, how it will measure the effects of the regulation.⁴³

⁴³ The Office of Management and Budget stated “future regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses. To the extent consistent with law, agencies should give careful consideration to how best to promote empirical testing of the effects of rules both in advance and retrospectively.” Office of Mgmt. & Budget, Executive Office of the President, M-11-19, Retrospective Analysis of Significant Regulations (April 25, 2011), *available at* <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf>.