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ARTICLES & INSIGHTS

ABOUT THE AUTHOR



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U.S. Department of Labor Clarifies Rules Relating to Gender Bias for Federal Contractors

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Gender issues have recently come to the forefront with laws like North Carolina's much-talked-about HB 2. In recognition of these issues, the U.S. Department of Labor's Office of Federal Contract Compliance Programs has enacted a new rule that protects against discrimination based on a variety of gender-based concerns.

The rule, published in the Federal Register on June 15, 2016, and effective on August 15, 2016, updated Executive Order 11246, which had not been revised in over forty years. Executive Order 11246 was signed by President Lyndon B. Johnson in 1965, establishing the Office of Federal Contract Compliance Programs with the goal of prohibiting discrimination against employees of federal contractors. Originally, it protected employees on the basis of race, color, religion, and national origin, and required federal contractors to "take affirmative action to ensure equal opportunity" based on those characteristics.

Executive Order 11246 has now been amended to prohibit "federal contractors and federally-assisted construction contractors and subcontractors, who do over \$10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin." The rule maintains the original order's goal of affirmative action and equal treatment during employment.

Patricia A. Shiu, director of the Office of Federal Contract Compliance Programs, said that the new guidelines help to bring the workforce "from the 'Mad Men' era to the modern era." Because the rule remained substantively unchanged since 1970, antiquated ideas about women in the workplace were still apparent in our laws for federal contractors. Executive Order 11246 is now consistent with other federal laws like Title VII in its protections against gender-related discrimination in the workforce. It clarifies that sick leave or family leave must be available to mothers and fathers and includes prohibitions against pay discrimination. It also protects against sexually hostile work environments and pregnancy bias.

In addition to these changes, the rule also requires that workplace accommodations be provided to employees who need them for pregnancy, childbirth, or other medical conditions. These accommodations follow guidelines established by the Equal Employment Opportunity Commission in 2015. Examples of discrimination based on pregnancy or childbirth include limiting an employee's job based on her pregnancy or failing to provide insurance that covers the costs of pregnancy-related medical expenses. Accommodations include modifications to assignments and duties similar to those be offered to someone with a medical condition other than pregnancy.

It also mandates that workers be allowed to use the bathroom, changing room, locker room, or shower consistent with their gender identity—not their biological gender as currently defined under North Carolina law. In response to comments on the proposed rule that challenged such requirements, the OFCCP stated that “[i]t is well established that private bias, prejudice, or fear ‘is not a legitimate basis for retaining the status quo,’” and compared such discrimination to separate-but-equal policies of the 1950s and 60s.

The OFCCP's new rule also contains a section which makes non-binding recommendations and suggestions to employers and contractors about the use of gender-neutral job titles; creating and designating individual restrooms, changing rooms, or showers as gender-neutral; and making job benefits available equally to men and women.

Despite what may seem to be major changes, the provisions of the new rule “articulate well-established case law and applicable requirements from other Federal agencies,” and the Department of Labor maintains that in practice, this rule will not drastically change what affected entities are already doing. The OFCCP hopes that this regulation will be yet another step towards gender equality in the United States. The new requirements will go into effect for all qualifying federal contractors on August 15, 2016.

If you have questions about the impact of this regulation or any other matter relating to employment practices, please contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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