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DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60-20

RIN 1250-AA05

Discrimination on the Basis of Sex

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor's Office of Federal Contract Compliance Programs publishes this final rule to detail obligations that covered Federal Government contractors and subcontractors and federally assisted construction contractors and subcontractors must meet under Executive Order 11246, as amended, to ensure nondiscrimination in employment on the basis of sex and to take affirmative action to ensure that applicants and employees are treated without regard to their sex. This rule substantially revises the existing Sex Discrimination Guidelines, which have not been substantively updated since 1970, to align them with current law and legal principles and address their application to contemporary workplace practices and issues. The provisions in this final rule articulate well-established case law and/or applicable requirements from other Federal agencies and therefore the requirements for affected entities are largely unchanged by this rule.

DATES: Effective Date: These regulations are effective [Insert date 60 days after date of publication in the FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) is promulgating regulations that set forth the obligations that covered[1] Federal Government contractors and subcontractors and federally assisted construction contractors and subcontractors (contractors) must meet under Executive Order 11246, as amended[2] (the Executive Order or E.O. 11246). These regulations detail the obligation of contractors to ensure

[1] Employers with Federal contracts or subcontracts totaling $10,000 or more over a 12-month period, unless otherwise exempt, are covered by the Executive Order. See 41 CFR 60-1.5(a)(1). Exemptions to this general coverage are detailed at 41 CFR 60-1.5.

[2] E.O. 11246, September 24, 1965, 30 FR 12319, 12935, 3 CFR, 1964–1965, as amended.

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.

OFCCP is charged with enforcing E.O. 11246, which prohibits employment discrimination by contractors on the basis of race, color, religion, sex, sexual orientation, gender identity,[3] or national origin, and requires them to take affirmative action to ensure that applicants and employees are treated without regard to these protected bases. E.O. 11246 also prohibits contractors from discharging or otherwise discriminating against employees or applicants because they inquire about, discuss, or disclose their compensation or the compensation of other applicants or employees.[4] OFCCP interprets the nondiscrimination provisions of the Executive Order consistent with the principles of title VII of the Civil Rights Act of 1964 (title VII),[5] which is enforced, in large part, by the Equal Employment Opportunity Commission (EEOC), the agency responsible for coordinating the Federal Government's enforcement of all Federal statutes, executive orders, regulations, and policies requiring equal employment opportunity.[6]

OFCCP's Sex Discrimination Guidelines at 41 CFR part 60-20 (Guidelines) have not

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[3] Executive Order 13672, issued on July 21, 2014, added sexual orientation and gender identity to E.O. 11246 as prohibited bases of discrimination. It applies to covered contracts entered into or modified on or after April 8, 2015, the effective date of the implementing regulations promulgated thereunder.

[4] Executive Order 13665, issued on April 8, 2014, added this prohibition to E.O. 11246. It applies to covered contracts entered into or modified on or after January 11, 2016, the effective date of the implementing regulations promulgated thereunder.

[5] Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2000e-17; U.S. Department of Labor, Office of Federal Contract Compliance Programs, Federal Contract Compliance Manual, ch. 2, § 2H01, available at http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf (last accessed March 25, 2016) (FCCM); see also OFCCP v. Greenwood Mills, Inc., No. 00-044, 2002 WL 31932547, at *4 (Admin. Rev. Bd. December 20, 2002).

[6] Executive Order 12067, 43 FR 28967, 3 CFR 206 (1978 Comp.). The U.S. Department of Justice also enforces portions of title VII, as do state Fair Employment Practice Agencies (FEPAs).

been substantively updated since they were first promulgated in 1970.[7] The Guidelines failed to conform to or reflect current title VII jurisprudence or to address the needs and realities of the modern workplace. Since 1970, there have been historic changes to sex discrimination law, in both Federal statutes 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. Issuing these new regulations should resolve ambiguities, thus reducing or eliminating any costs that such contractors previously may have incurred to reconcile conflicting obligations.

It is long overdue for part 60-20 to be updated. Consequently, OFCCP issued a Notice of Proposed Rulemaking (NPRM) on January 30, 2015 (80 FR 5246), to revise this part to align the sex discrimination standards under E.O. 11246 with developments and interpretations of existing title VII principles and to clarify OFCCP's corresponding interpretation of the Executive Order. This final rule adopts many of those proposed changes, with modifications, and adds some new provisions in response to issues implicated in, and comments received on, the NPRM.

Statement of Legal Authority

Issued in 1965, and amended several times during the intervening years — including once in 1967, to add sex as a prohibited basis of discrimination, and most recently in 2014, to add sexual orientation and gender identity to the list of protected bases — E.O. 11246 has two purposes. First, it prohibits covered contractors from discriminating against employees and applicants because of race, color, religion, sex, sexual orientation, gender identity, or national origin; it also prohibits discrimination against employees or applicants because they inquire

[7] 35 FR 8888, June 9, 1970. The Guidelines were reissued in 1978. 43 FR 49258, October 20, 1978. The 1978 version substituted or added references to E.O. 11246 for references to E.O. 11375 in paragraphs 60-20.1 and 60-20.5(c), but otherwise did not change the 1970 version.

about, discuss, or disclose their compensation or the compensation of other employees or applicants. Second, it requires covered contractors to take affirmative action to ensure that applicants are considered, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. The nondiscrimination and affirmative action obligations of contractors cover a broad range of employment actions.

The Executive Order generally 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.

The requirements of the Executive Order promote the goals of economy and efficiency in Government contracting, and the link between them is well established. See, e.g., E.O. 10925, 26 FR 1977 (March 8, 1961) (nondiscrimination and affirmative employment programs ensure "the most efficient and effective utilization of all available manpower"). The sex discrimination regulations adopted herein outline the sex-based discriminatory practices that contractors must identify and eliminate, and they clarify how contractors must choose applicants for employment, and treat them while employed, without regard to sex. See, e.g., § 60-20.2 (clarifying that sex discrimination includes discrimination on the bases of pregnancy, childbirth, related medical conditions, gender identity, transgender status,[8] and sex stereotyping, and that disparate treatment and disparate impact analyses apply to sex discrimination); § 60-20.3 (clarifying

[8] A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth. Throughout this final rule, the term "transgender status" does not exclude gender identity, and the term "gender identity" does not exclude transgender status.

application of the bona fide occupational qualification (BFOQ) defense to the rule against sex discrimination); § 60-20.4, § 60-20.5, § 60-20.6, and § 60-20.8 (clarifying that discrimination in compensation; discrimination based on pregnancy, childbirth, or related medical conditions; discrimination in other fringe benefits; and sexual harassment, respectively, can be unlawful sex-discriminatory practices); and § 60-20.7 (clarifying that contractors must not make employment decisions based on sex stereotypes).

Each of these requirements ultimately reduces the Government's costs and increases the efficiency of its operations by ensuring that all employees and applicants, including women, are fairly considered and that, in its procurement, the Government has access to, and ultimately benefits from, the best qualified and most efficient employees. Cf. Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 170 (3d Cir. 1971) ("[I]t is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority [workers]."). Also increasing efficiency by creating a uniform Federal approach to sex discrimination law, the regulations' requirements to eliminate discrimination and to choose applicants without regard to sex are consistent with the purpose of title VII to eliminate discrimination in employment.

Pursuant to E.O. 11246, the award of a Federal contract comes with a number of responsibilities. Section 202 of this Executive Order requires every covered contractor to comply with all provisions of the Executive Order and the rules, regulations, and relevant orders of the Secretary of Labor. A contractor in violation of E.O. 11246 may be liable for make-whole and

injunctive relief and subject to suspension, cancellation, termination, and debarment of its contract(s) after the opportunity for a hearing.[9]

Major Revisions

OFCCP replaces in significant part the Guidelines at part 60-20 with new sex discrimination regulations that set forth Federal contractors' obligations under E.O. 11246, in accordance with existing law and policy. The final rule clarifies OFCCP's interpretation of the Executive Order as it relates to sex discrimination, consistent with title VII case law and interpretations of title VII by the EEOC. It is intended to state clearly contractor obligations to ensure equal employment opportunity on the basis of sex.

The final rule removes outdated provisions in the current Guidelines. It also adds, restates, reorganizes, and clarifies other provisions to incorporate legal developments that have arisen since 1970 and to address contemporary problems with implementation.

The final rule does not in any way alter a contractor's obligations under any other OFCCP regulations. In particular, a contractor's obligations to ensure equal employment opportunity and to take affirmative action, as set forth in parts 60-1, 60-2, 60-3, and 60-4 of this title, remain in effect. Similarly, inclusion of a provision in part 60-20 does not in any way alter a contractor's obligations to ensure nondiscrimination on the bases of race, color, religion, sexual orientation, gender identity, and national origin under the Executive Order; on the basis of disability under Section 503 of the Rehabilitation Act of 1973 (Section 503);[10] or on the basis of protected veteran status under 38 U.S.C. 4212 of the Vietnam Era Veterans' Readjustment

[9] E.O. 11246, sec. 209(5); 41 CFR 60-1.27.

[10] 29 U.S.C. 793.

Assistance Act.[11] Finally, it does not affect a contractor's duty to comply with the prohibition of discrimination because an employee or applicant inquires about, discusses, or discloses his or her compensation or the compensation of other applicants or employees under part 60-1.

The final rule is organized into eight sections and an Appendix.

The first section (§ 60-20.1) covers the rule's purpose.

The second section (§ 60-20.2) sets forth the general prohibition of sex discrimination, including discrimination on the bases of pregnancy, childbirth, related medical conditions, gender identity, transgender status, and sex stereotypes. It also describes employment practices that may unlawfully treat men and women disparately. Finally, the second section describes employment practices that are unlawful if they have a disparate impact on the basis of sex and are not job-related and consistent with business necessity.

The third section (§ 60-20.3) covers circumstances in which disparate treatment on the basis of sex may be lawful – i.e., those rare instances when being a particular sex is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor's particular business or enterprise.

The fourth section (§ 60-20.4) covers sex-based discrimination in compensation and provides illustrative examples of unlawful conduct. As provided in paragraph 60-20.4(e) of the final rule, compensation discrimination violates E.O. 11246 and this regulation "any time [contractors] pay[ ] wages, benefits, or other compensation that is the result in whole or in part of the application of any discriminatory compensation decision or other practice."

The fifth section (§ 60-20.5), discrimination on the basis of pregnancy, childbirth, and related medical conditions, recites the provisions of the Pregnancy Discrimination Act of 1978

[11] 38 U.S.C. 4212.

(PDA);[12] lists examples of "related medical conditions;" and provides four examples of discriminatory practices. This section also discusses application of these principles to the provision of workplace accommodations and leave.

The sixth section (§ 60-20.6) sets out the general principle that sex discrimination in the provision of fringe benefits is unlawful, with pertinent examples, and clarifies that the increased cost of providing a fringe benefit to members of one sex is not a defense to a contractor's failure to provide benefits equally to members of both sexes.

The seventh section (§ 60-20.7) covers employment decisions on the basis of sex stereotypes and discusses four types of gender norms that may form the basis of a sex discrimination claim under the Executive Order: dress, appearance, and/or behavior; gender identity; jobs, sectors, or industries within which it is considered appropriate for women or men to work; and caregiving roles.

The eighth section (§ 60-20.8), concerning sexual harassment, including hostile work environments based on sex, articulates the legal standard for sexual harassment based on the EEOC's guidelines and relevant case law and explains that sexual harassment includes harassment based on gender identity; harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but that is because of sex or sex-based stereotypes.

Finally, the final rule contains an Appendix that sets forth, for contractors' consideration, a number of practices that contribute to the establishment and maintenance of workplaces that are free of unlawful sex discrimination. These practices are not required.

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[12] Amendment to Title VII of the Civil Rights Act of 1964 to Prohibit Sex Discrimination on the Basis of Pregnancy, Public Law 95–555, 995, 92 Stat. 2076 (1978), codified at 42 U.S.C. 2000e(k).

Benefits of the Final Rule

The final rule will benefit both contractors and their employees in several ways. First, by updating, consolidating, and clearly and accurately stating the existing principles of applicable law, including developing case law and interpretations of existing law by the EEOC and OFCCP's corresponding interpretation of the Executive Order, the final rule will facilitate contractor understanding and compliance and potentially reduce contractor costs. The existing Guidelines are extremely outdated and fail to provide accurate or sufficient guidance to contractors regarding their nondiscrimination obligations. For this reason, OFCCP no longer enforces part 60-20 to the extent that it departs from existing law. Thus, the final rule should resolve ambiguities, reducing or eliminating costs that some contractors may previously have incurred when attempting to comply with part 60-20.

The final rule will also benefit employees of and job applicants to contractors. This final rule will increase and enhance the promise of equal employment opportunity envisioned under E.O. 11246 for the millions of women and men who work for contractor establishments. Sixty-five million employees work for the contractors and other recipients of Federal monies that are included in the U.S. General Service Administration's (GSA) System for Award Management (SAM) database.[13]

More specifically, the final rule will advance the employment status of the more than 30 million female employees of contractors in several ways.[14] For example, it addresses both quid

[13] U.S. General Services Administration, System for Award Management, data released in monthly files, available at https://www.sam.gov/portal/SAM/#1.

[14] Bureau of Labor Statistics data establishes that 47 percent of the workforce is female. Women in the Labor Force: A Databook 2, BLS Reports, available at http://www.bls.gov/cps/wlf-databook-2012.pdf (last accessed March 27, 2016) (Women in the Labor Force). Based on these data, OFCCP estimates that 30.6 million of the employees who work for contractors and other recipients of Federal monies in the SAM database are women.

pro quo and hostile work environment sexual harassment. It clarifies that adverse treatment of an employee resulting from gender-stereotypical assumptions about family caretaking responsibilities is discrimination. It also confirms the requirement that contractors provide equal retirement benefits to male and female employees, even if the contractor incurs greater expense by doing so.

In addition, by establishing when workers affected by pregnancy, childbirth, and related medical conditions are entitled to workplace accommodations, the final rule will protect such employees from losing their jobs, wages, and health-care coverage. OFCCP estimates that 2,046,850 women in the contractor workforce are likely to become pregnant each year.[15]

The final rule will benefit male employees of contractors as well. Male employees, too, experience sex discrimination such as sexual harassment, occupational segregation, and adverse treatment resulting from gender-stereotypical assumptions such as notions about family caregiving responsibilities. The final rule includes several examples of such gender-stereotypical assumptions as they affect men. For example, final rule paragraph 60-20.5(d)(2)(ii) clarifies that family leave must be available to fathers on the same terms as it is available to mothers, and final rule paragraph 60-20.7(d)(4) includes adverse treatment of a male employee who is not available to work overtime or on weekends because he cares for his elderly father as an example of potentially unlawful sex-based stereotyping.

Moreover, by clarifying that discrimination against an individual because of her or his gender identity is unlawful sex discrimination, the final rule ensures that contractors are aware of their nondiscrimination obligations with respect to transgender employees and provide equality

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[15] OFCCP's methodology for arriving at this estimate was described in the preamble to the NPRM. 80 FR at 5262.

of opportunity for transgender employees, the vast majority of whom report that they have experienced discrimination in the workplace.[16]

Finally, replacing the Sex Discrimination Guidelines with the final rule will benefit public understanding of the law. As reflected in Section 6(a) of E.O. 13563, which requires agencies to engage in retrospective analyses of their rules "and to modify, streamline, expand, or repeal [such rules] in accordance with what has been learned," removing an "outmoded" and "ineffective" rule from the Code of Federal Regulations is in the public interest.

Costs of the Final Rule

A detailed discussion of the costs of the final rule is included in the section on Regulatory Procedures, infra. In sum, the final rule will impose relatively modest administrative and other cost burdens for contractors to ensure a workplace free of sex-based discrimination.

The only new administrative burden the final rule will impose on contractors is the one-time cost of regulatory familiarization — the estimated time it takes to review and understand the instructions for compliance — calculated at $41,602,500, or $83 per contractor company, the first year.

The only other new costs of this rule that contractors may incur are the costs of pregnancy accommodations, which OFCCP calculates to be $9,671,000 annually or less, or a maximum of $19 per contractor company per year.

[16] Jaime M. Grant, Lisa M. Mottet, & Justin Tanis, National Center for Transgender Equality & National Gay and Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 3 (2011), available at http://www.transequality.org/issues/resources/national-transgender-discrimination-survey-executive-summary (last accessed March 25, 2016) (Injustice at Every Turn).

Together, these costs amount to a maximum of $51,273,500, or $103 per contractor company, in the first year, and a maximum of $9,671,000, or $19 per contractor company, each subsequent year. These costs are summarized in Table 1, "New Requirements," infra.

Overview

Reasons for Promulgating this New Regulation

As described in the NPRM, since OFCCP's Sex Discrimination Guidelines were promulgated in 1970, there have been dramatic changes in women's participation in the workforce. Between 1970 and February, 2016, women's participation in the labor force grew from 43 percent to 57 percent.[17] This included a marked increase of mothers in the workforce: the labor force participation of women with children under the age of 18 increased from 47 percent in 1975 to 70 percent in 2014.[18] In 2014, both adults worked at least part time in 60 percent of married-couple families with children under 18, and 74 percent of mothers heading single-parent families with children under 18 worked at least part time.[19]

Since 1970, there have also been extensive changes in the law regarding sex-based

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[17] U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 588, Civilian Population – Employment Status by Sex, Race, and Ethnicity: 1970–2009, available at https://www.census.gov/library/publications/2011/compendia/statab/131ed/labor-force-employment-earnings.html (last accessed March 27, 2016) (1970 figure); Bureau of Labor Statistics, U.S. Department of Labor Statistics, Data Retrieval: Labor Force Statistics (Current Population Survey), Household Data, Table A-1, Employment status of the civilian population by sex and age, available at http://www.bls.gov/news.release/empsit.t01.htm (last accessed March 25, 2016) (2016 figure).

[18] Bureau of Labor Statistics, U.S. Department of Labor, TED: The Economics Daily, Labor force participation rates among mothers, available at http://www.bls.gov/opub/ted/2010/ted_20100507.htm (last accessed March 26, 2016) (1975 data); Press Release, Bureau of Labor Statistics, U.S. Department of Labor, Employment Characteristics of Families – 2013 (April 23, 2015), available at http://www.bls.gov/news.release/famee.nr0.htm (last accessed February 21, 2016) (Employment Characteristics of Families – 2014) (2014 data).

[19] Employment Characteristics of Families – 2014, supra note 18.

employment discrimination and in contractor policies and practices governing workers. For example:

- Title VII, which generally governs the law of sex-based employment discrimination, has been amended four times: in 1972, by the Equal Employment Opportunity Act;[20] in 1978, by the PDA; in 1991, by the Civil Rights Act;[21] and in 2009, by the Lilly Ledbetter Fair Pay Act (FPA).[22]
- State "protective laws" that had explicitly barred women from certain occupations or otherwise restricted their employment conditions on the basis of sex have been repealed or are unenforceable.[23]
- In 1993, the Family and Medical Leave Act (FMLA)[24] was enacted, requiring employers with 50 or more employees to provide a minimum of 12 weeks of annual, unpaid, job-guaranteed leave to both male and female employees to recover from their own serious health conditions (including pregnancy, childbirth, or related medical conditions); to care for a newborn or newly adopted or foster child; or to care for a child, spouse, or parent

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[20] Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972).

[21] Civil Rights Act of 1991, Pub. L. No. 102-166, 1745, 105 Stat. 1071 (1991).

[22] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

[23] See, e.g., Conn. Gen. Stat. § 31-18 (repealed 1973) (prohibition of employment of women for more than nine hours a day in specified establishments); Mass. Gen. Laws ch. 345 (1911) (repealed 1974) (outright prohibition of employment of women before and after childbirth); Ohio Rev. Code Ann. § 4107.43 (repealed 1982) (prohibition of employment of women in specific occupations that require the routine lifting of more than 25 pounds); see also Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977) (invalidating public employer requirement that pregnant employees take a leave of absence during which they did not receive sick pay and lost job seniority); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (striking rules requiring leave from after the fifth month of pregnancy until three months after birth); Somers v. Aldine Indep. Sch. Dist., 464 F. Supp. 900 (S.D. Tex. 1979) (finding sex discrimination where school district terminated teacher for not complying with requirement that pregnant women take an unpaid leave of absence following their third month or be terminated).

[24] 29 U.S.C. 2601 et seq.

with a serious health condition.

- In 1970, it was not uncommon for employers to require female employees to retire at younger ages than their male counterparts. However, the Age Discrimination in Employment Act was amended in 1986 to abolish mandatory retirement for all employees with a few exceptions.[25]

Moreover, since 1970, the Supreme Court has determined that numerous practices that were not then widely recognized as discriminatory constitute unlawful sex discrimination under title VII. See e.g., City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (prohibiting sex-differentiated employee pension fund contributions, despite statistical differences in longevity); Cnty. of Washington v. Gunther, 452 U.S. 161 (1981) (holding that compensation discrimination is not limited to unequal pay for equal work within the meaning of the Equal Pay Act); Newport News Shipbldg. & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (holding that employer discriminated on the basis of sex by excluding pregnancy-related hospitalization coverage for the spouses of male employees while providing complete hospitalization coverage for female employees, resulting in greater insurance coverage for married female employees than for married male employees); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (recognizing cause of action for sexually hostile work environment); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (upholding California law requiring up to four months of job-guaranteed leave for pregnant employees and finding law not inconsistent with title VII); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (finding sex discrimination on basis of sex stereotyping); Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) (recognizing cause of action for "same

[25] 29 U.S.C. 621–634.

sex" harassment); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187 (1991) (holding that possible reproductive health hazards to women of childbearing age did not justify sex-based exclusions from certain jobs); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (holding employers vicariously liable under title VII for the harassing conduct of supervisors who create hostile working conditions for those over whom they have authority); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (clarifying broad scope of prohibition of retaliation for filing charge of sex discrimination); and Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015) (Young v. UPS) (holding that the plaintiff created a genuine issue of material fact as to whether the employer accommodated others "similar in their ability or inability to work" when it did not provide light-duty accommodations for pregnancy, childbirth, or related medical conditions, but did provide them for on-the-job injuries, disabilities within the meaning of the Americans with Disabilities Act,[26] and loss of certain truck driver certifications).

In response to these legal and economic changes, the landscape of employment policies and practices has also changed. Contractors rarely adopt or implement explicit rules that prohibit hiring of women for certain jobs. Jobs are no longer advertised in sex-segregated newspaper columns. Women have made major inroads into professions and occupations traditionally dominated by men. For example, women's representation among doctors more than doubled, from approximately 16 percent in 1988[27] to 38 percent in 2015.[28] Executive suites are no longer

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[26] Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq., as amended (ADA).

[27] E. More, "The American Medical Women's Association and the role of the woman physician, 1915-1990," 45 Journal of the American Medical Women's Association 165, 178 (1990), available at 95th Anniversary Commemorative Booklet, https://www.amwa-doc.org/about-amwa/history/ (last accessed March 17, 2016).

[28] Bureau of Labor Statistics, U.S. Department of Labor, Labor Force Statistics from the Current Population Survey,

predominantly segregated by sex, with all the executive positions occupied by men while women work primarily as secretaries. Indeed, in 2015, women accounted for 39 percent of all managers.[29] Moreover, the female-to-male earnings ratio for women and men working full-time, year-round in all occupations increased from 59 percent in 1970 to 79 percent in 2014.[30]

Employer-provided insurance policies that provide lower-value or otherwise less comprehensive hospitalization or disability benefits for pregnancy-related conditions than for other medical conditions are now unlawful under title VII.[31] Generous leave and other family-friendly policies are increasingly common. As early as 2000, even employers that were not covered by the FMLA routinely extended leave to their employees for FMLA-covered reasons: two-thirds of such employers provided leave for an employee's own serious health condition and

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Table 11, Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, Household Data Annual Averages, available at http://www.bls.gov/cps/cpsaat11.htm (last accessed March 17, 2016) (BLS Labor Force Statistics 2015).

[29] Id.

[30] U.S. Census Bureau, Income and Poverty in the United States: 2014, Current Population Reports 10 (2015) 41 (Table A-4, Number and Real Median Earnings of Total Workers and Full-Time, Year-Round Workers by Sex and Female-to-Male Earnings Ratio: 1960 to 2014), available at https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf (last accessed March 25, 2016) (Income and Poverty Report 2014).

[31] These practices, common before the PDA, were prohibited when the PDA became effective with respect to fringe benefits in 1979. As the EEOC explained in guidance on the PDA issued in 1979:

> A woman unable to work for pregnancy-related reasons is entitled to disability benefits or sick leave on the same basis as employees unable to work for other medical reasons. Also, any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions.

Appendix to Part 1604—Questions and Answers on the Pregnancy Discrimination Act, 44 FR 23805 (April 20, 1979), 29 CFR part 1604. EEOC's recently issued guidance echoes this earlier interpretation and discusses recent developments on benefits issues affecting PDA compliance. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues I.C.2-4 (2015), available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed March 25, 2016) (EEOC Pregnancy Guidance).

for pregnancy-related disabilities, and half extended leave to care for a newborn child.[32] In recent years, 13 percent of employees had access to paid family leave, and most employees received some pay during family and medical leave due to paid vacation, sick, or personal leave or temporary disability insurance.[33]

While these changes in policies and practices show a measure of progress, there is no doubt that sex discrimination remains a significant and pervasive problem. Many of the statistics cited above, while improvements to be sure, are far from evincing a workplace free of discrimination. Sex-based occupational segregation, wage disparities, discrimination based on pregnancy or family caregiving responsibilities, sex-based stereotyping, and sexual harassment remain widespread. Had the incidence of sex discrimination decreased, one would expect at least some decrease in the proportion of total annual EEOC charges that allege sex discrimination. But that proportion has remained nearly constant at around 30 percent since at least 1997.[34]

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[32] Wage and Hour Division, U.S. Department of Labor, The 2000 Survey Report ch. 5, Table 5-1. Family and Medical Leave Policies by FMLA Coverage Status, 2000 Survey Report available at http://www.dol.gov/whd/fmla/chapter5.htm (last accessed March 25, 2016).

[33] BLS, National Compensation Survey: Employee Benefits in the United States, March 2015 (September 2015), Table 32. Leave benefits: Access, civilian workers, National Compensation Survey, March 2015, available at http://www.bls.gov/ncs/ebs/benefits/2015/ownership/civilian/table32a.pdf (last accessed February 19, 2016). In addition, in 2012, most employees taking family or medical leave had some access to paid leave: "48% report[ed] receiving full pay and another 17% receive[d] partial pay, usually but not exclusively through regular paid vacation leave, sick leave, or other 'paid time off' hours." Jacob Klerman, Kelly Daley, & Alyssa Pozniak, Family and Medical Leave in 2012: Executive Summary ii, http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Executive-Summary.pdf (last accessed March 27, 2016).

[34] This rate has varied from a low of 28.5 percent in FY 2011 to a high of 31.5 percent in FY 2000. U.S. Equal Employment Opportunity Commission, Enforcement and Litigation Statistics, Charge Statistics: FY 1997 Through FY 2015, available at http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last accessed February 21, 2016) (EEOC Charge Statistics). In FY 2015, the EEOC received 26,396 charges alleging sex discrimination.

One commenter, who nevertheless supports the NPRM, points out that the number of sex discrimination charges filed with the EEOC "decreased by 2000 from 2010 to 2013." It is true that the number of sex discrimination charges filed with the EEOC decreased during this particular time period (by 1342, not by 2000). However, the total

Sex-based Occupational Discrimination

Sex-based occupational sex segregation remains widespread:

> In 2012, nontraditional occupations for women employed only six percent of all women, but 44 percent of all men. The same imbalance holds for occupations that are nontraditional for men; these employ only 5 percent of men, but 40 percent of women. Gender segregation is also substantial in . . . broad sectors where men and women work: three in four workers in education and health services are women, nine in ten workers in the construction industry and seven in ten workers in manufacturing are men.[35]

OFCCP has found unlawful discrimination in the form of sex-based occupational segregation in several compliance evaluations of Federal contractors.[36] For example, OFCCP recently found evidence that a call center steered women into lower-paying positions that assisted customers with cable services rather than higher-paying positions providing customer assistance for Internet services because the latter positions were considered "technical";[37] that a sandwich production plant steered men into dumper/stacker jobs and women into biscuit assembler jobs, despite the fact that the positions required the same qualifications;[38] and that a parking company steered

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number of charges filed decreased during this period (from 99,922 to 88,778), while the percentage of charges alleging sex discrimination increased, from 29.1 percent to 29.5 percent. Moreover, since 1997, the general trend in the raw number of sex discrimination charges filed has been upwards, from 24,728 in FY 1997 to 26,396 charges in FY 2015, with a high of 30,356 charges in FY 2012.

[35] Ariane Hegewisch & Heidi Hartmann, Institute for Women's Policy Research, Occupational Segregation and the Gender Wage Gap: A Job Half Done (2014), available at http://www.iwpr.org/publications/pubs/occupational-segregation-and-the-gender-wage-gap-a-job-half-done (last accessed March 27, 2016) (citations omitted); see also Ariane Hegewisch et al., The Gender Wage Gap by Occupation, Fact Sheet #C350a, The Institute for Women's Policy Research, available at http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-2/at_download/file/(last accessed March 25, 2016) (IWPR Wage Gap by Occupation).

[36] The contractors that OFCCP reviewed did not admit that they engaged in unlawful discrimination.

[37] OFCCP Press Release, "Comcast Corporation settles charges of sex and race discrimination" (April 30, 2015), available at http://www.dol.gov/opa/media/press/ofccp/OFCCP20150844.htm (last accessed March 25, 2016).

[38] OFCCP Press Release, "Hillshire Brands Co.'s Florence, Alabama, production plant settles charges of sex discrimination with US Labor Department" (September 18, 2014), available at http://www.dol.gov/opa/media/press/ofccp/OFCCP20141669.htm (last accessed March 25, 2016).

women into lower-paying cashier jobs and away from higher-paying jobs as valets.[39] The EEOC and at least one court have found discrimination in similar cases as well.[40]

Sex discrimination and other barriers in the construction trades, on the part of both trade unions and employers, remain a particularly intractable problem. Several commenters described many "barriers for women and girls attempting to access [construction careers] and thrive" in them, both on the job and in apprenticeship programs: gender stereotyping; discrimination in hiring, training, and work and overtime assignments; hostile workplace practices and sexual harassment; insufficient training and instruction; and worksites that fail to meet women's basic needs. One commenter, a female worker in a construction union, recounted "discrimination and sexual harassment so bad" at the construction site that she had to quit. In 2014, OFCCP found sex discrimination by a construction contractor in Puerto Rico that involved several of these barriers: denial of regular and overtime work hours to female carpenters comparable to those of their male counterparts, sexual harassment of the women, and failure to provide restroom facilities.[41]

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[39] OFCCP Press Release, "Central Parking System of Louisiana Inc. settles hiring and pay discrimination case with US Department of Labor" (September 4, 2014), available at http://www.dol.gov/opa/media/press/ofccp/OFCCP20140920.htm (last accessed March 25, 2016).

[40] See, e.g., EEOC v. New Prime, Inc., 42 F. Supp. 3d 1201 (W.D. Mo. 2014) (ruling that a trucking company discriminated against female truck driver applicants in violation of title VII by requiring that they be trained by female trainers, of whom there were very few); EEOC Press Release, "Mavis Discount Tire to Pay $2.1 Million to Settle EEOC Class Sex Discrimination Lawsuit" (March 25, 2016), available at http://www.eeoc.gov/eeoc/newsroom/release/3-25-16.cfm (last accessed April 4, 2016) (EEOC alleged that tire retailer refused to hire women as managers, assistant managers, mechanics, and tire technicians); EEOC Press Release, "Merrilville Ultra Foods to Pay $200,000 to Settle EEOC Sex Discrimination Suit" (July 10, 2015), available at http://www.eeoc.gov/eeoc/newsroom/release/7-10-15c.cfm (last accessed April 4, 2016) (EEOC alleged that grocer refused to hire women for night-crew stocking positions); EEOC Press Release, "Unit Drilling to Pay $400,000 to Settle EEOC Systemic Sex Discrimination Suit" (April 22, 2015), available at http://www.eeoc.gov/eeoc/newsroom/release/4-22-15a.cfm (last accessed April 4, 2016) (EEOC alleged that oil drilling company refused to hire women on its oil rigs).

[41] OFCCP Press Release, "Puerto Rico construction contractor settles sexual harassment and discrimination case with US Department of Labor" (April 2, 2014), available at

Likewise, women continue to be underrepresented in higher-level and more senior jobs within occupations. For example, in 2015, women accounted for only 28 percent both of chief executive officers and of general/operations managers.[42]

Wage Disparities

As mentioned above, in 2014, women working full time earned 79 cents on the dollar compared to men, measured on the basis of median annual earnings.[43] While this represents real progress from the 59 cents on the dollar measured in 1970, the size of the gap is still unacceptable, particularly given that the Equal Pay Act was enacted over 50 years ago. In fact, it appears that the narrowing of the pay gap has slowed since the 1980's.[44] At the rate of progress from 1960 to 2011, researchers estimated it would take until 2057 to close the gender pay gap.[45]

The wage gap is also greater for women of color and women with disabilities. When measured by median full-time annual earnings, in 2014 African-American women made approximately 60 cents and Latinas made approximately 55 cents for every dollar earned by a non-Hispanic, white man.[46] In 2014, median annual earnings for women with disabilities were

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http://www.dol.gov/opa/media/press/ofccp/OFCCP20140363.htm (last accessed March 25, 2016).

[42] BLS Labor Force Statistics 2015, supra note 28.

[43] Income and Poverty Report 2014, supra note 30.

[44] From 1980 to 1989, the percentage of women's earnings relative to men's increased from 60.2 percent to 68.7 percent; from 1990 to 1999, the percentage increased from 71.6 percent to just 72.3 percent; and from 2000 to 2009, the percentage increased from 76.9 percent to 78.6 percent. Id. See also Youngjoo Cha & Kim A. Weeden, Overwork and the Slow Convergence in the Gender Gap in Wages, Am. Soc. Rev. 1 (2014), available at http://www.asanet.org/journals/ASR/ChaWeedenJune14ASR.pdf (last accessed March 25, 2016); Francine D. Blau & Lawrence M. Kahn, The U.S. Gender Pay Gap in the 1990s: Slowing Convergence, 60 Indus. & Lab. Rel. Rev. 45 (2006) (Slowing Convergence).

[45] Institute for Women's Policy Research, At Current Pace of Progress, Wage Gap for Women Expected to Close in 2057 (April 2013), available at http://www.iwpr.org/publications/pubs/at-current-pace-of-progress-wage-gap-for-women-expected-to-close-in-2057 (last accessed March 25, 2016).

[46] Calculations from U.S. Census Bureau, Historical Income Tables: People, Table P-38, Full-Time, Year-Round

only 47 percent of median annual earnings for men without disabilities.[47]

Of course, discrimination may not be the cause of the entire gap; these disparities can be explained to some extent by differences in experience, occupation, and industry.[48] However, decades of research show these wage gaps remain even after accounting for factors like the types of work people do and qualifications such as education and experience.[49] Moreover, while some women may work fewer hours or take time out of the workforce because of family responsibilities, research suggests that discrimination and not just choices can lead to women with children earning less;[50] to the extent that the potential explanations such as type of job and

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Workers by Median Earnings and Sex, available at https://www.census.gov/hhes/www/income/data/historical/people/ (last accessed February 22, 2016).

[47] Calculation from U.S. Census Bureau, American Fact Finder, "Median earnings in the past 12 months (in 2014 inflation-adjusted dollars) by disability status by sex for the civilian noninstitutionalized population 16 years and over with earnings, 2014 American Community Survey 1-Year Estimates" available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_B18140&prodType=table (last accessed March 25, 2016).

[48] Equal Pay for Equal Work? New Evidence on the Persistence of the Gender Pay Gap: Hearing Before United States Joint Economic Comm., Majority Staff of the Joint Econ. Comm., 111th Cong., Invest in Women, Invest in America: A Comprehensive Review of Women in the U.S. Economy 78, 81-82 (Comm. Print 2010), available at http://jec.senate.gov/public/?a=Files.Serve&File_id=9118a9ef-0771-4777-9c1f-8232fe70a45c (last accessed March 25, 2016) (statement of Randy Albelda, Professor of Economics and Senior Research Associate, University of Massachusetts–Boston Center for Social Policy) (Equal Pay for Equal Work?).

[49] A 2011 White House report found that while earnings for women and men typically increase with higher levels of education, a male-female pay gap persists at all levels of education for full-time workers (35 or more hours per week), according to 2009 BLS wage data. U.S. Department of Commerce, Economics and Statistics Administration, and Executive Office of the President, Office of Management and Budget, Women in America: Indicators of Social and Economic Well-Being 32 (2011), available at https://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf (last accessed March 25, 2016). As noted above, potentially nondiscriminatory factors can explain some of the gender wage differences; even so, after controlling for differences in skills and job characteristics, women still earn less than men. Equal Pay for Equal Work?, supra note 48, at 80-82. Ultimately, the research literature still finds an unexplained gap exists even after accounting for potential explanations and finds that the narrowing of the pay gap for women has slowed since the 1980s. Joyce P. Jacobsen, The Economics of Gender 44 (2007); Slowing Convergence, supra note 44.

[50] Shelley J. Correll, Stephen Benard, & In Paik, Getting a Job: Is There a Motherhood Penalty? 112 American Journal of Sociology 1297, 1334-1335 (2007), available at http://gender.stanford.edu/sites/default/files/motherhoodpenalty.pdf (last accessed March 25, 2016) (Motherhood Penalty).

length of continuous labor market experience are also influenced by discrimination, the "unexplained" difference may understate the true effect of sex discrimination.[51]

Male-dominated occupations generally pay more than female-dominated occupations at similar skill levels. But even within the same occupation, women earn less than men on average. For example, in 2012, full-time earnings for female auditors and accountants were less than 74 percent of the earnings of their male counterparts.[52] Among the 20 most common occupations for women, the occupation of retail sales faced the largest wage gap; women in this occupation earned only 64 percent of what men earned.[53] Likewise, in the medical profession, women earn less than their male counterparts. On average, male physicians earn 13 percent more than female physicians at the outset of their careers, and as much as 28 percent more eight years later.[54] This gap cannot be explained by practice type, work hours, or other characteristics of physicians' work.[55]

Discrimination Based on Pregnancy or Family Caregiving Responsibilities

Despite enactment of the PDA, women continue to report that they have experienced

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[51] Strengthening the Middle Class: Ensuring Equal Pay for Women: Hearing Before H. Comm. on Educ. and Labor, 110th Cong. (2007), available at http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg34632/html/CHRG-110hhrg34632.htm (last accessed March 25, 2016) (statement of Heather Boushey, Senior Economist, Center for Economic and Policy Research) ("there are many aspects of women's employment patterns and pay that cannot reasonably be attributed to choice").

[52] IWPR Wage Gap by Occupation, supra note 35, at 2.

[53] Id.

[54] Constanca Esteves-Sorenson & Jason Snyder, The Gender Earnings Gap for Physicians and Its Increase over Time 4 (2011), available at http://faculty.som.yale.edu/ConstancaEstevesSorenson/documents/Physician_000.pdf (last accessed March 25, 2016).

[55] Id. A 2008 study on physicians leaving residency programs in New York State also found a $16,819 pay gap between male and female physicians. Anthony T. LoSasso, Michael R. Richards, Chiu-Fang Chou & Susan E. Gerber, The $16,819 Pay Gap For Newly Trained Physicians: The Unexplained Trend Of Men Earning More Than Women, 30 Health Affairs 193 (2011), available at http://content.healthaffairs.org/content/30/2/193.full.pdf+html (last accessed March 25, 2016).

discrimination on account of pregnancy. Between FY 1997 and FY 2011, the number of charges of pregnancy discrimination filed with the EEOC and state and local agencies annually was significant, ranging from a low of 3,977 in 1997 to a high of 6,285 in 2008.[56] The Chair of the EEOC recently testified before a Congressional committee:

> Still today, when women become pregnant, they continue to face harassment, demotions, decreased hours, forced leave, and even job loss. In fact, approximately 70 percent of the thousands of pregnancy discrimination charges EEOC receives each year allege women were fired as a result of their pregnancy.[57]

Low-income workers, in particular, face "extreme hostility to pregnancy."[58]

One commenter provides examples of recent cases to illustrate the prevalence of discrimination against women who are breastfeeding. In one, Donnicia Venters lost her job after she disclosed to her manager that she was breastfeeding and would need a place to pump breast milk.[59] In another, Bobbi Bockoras alleged she was forced to pump breast milk under unsanitary or insufficiently private conditions, harassed, and subjected to retaliation.[60]

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[56] EEOC, Pregnancy Discrimination Charges, EEOC & FEPAs Combined: FY 1997–FY 2011, available at http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm (last accessed March 16, 2017). FY 2011 is the last year for which comparable data are available. For each of the years FY 2012-FY 2015, four percent of the charges filed with the EEOC alleged pregnancy discrimination. OFCCP calculations made from data from EEOC, Pregnancy Discrimination Charges, FY 2010–FY 2015, available at http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy_new.cfm (last accessed March 17, 2016), and EEOC Charge Statistics, supra note 34.

[57] Testimony of EEOC Chair Jenny Yang Before the Senate Committee on Health, Education, Labor and Pensions 4 (May 19, 2015), available at http://www.help.senate.gov/imo/media/doc/Yang.pdf (last accessed March 25, 2016) (Yang Testimony).

[58] Stephanie Bornstein, Center for WorkLife Law, UC Hastings College of the Law, Poor, Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers 2 (2011), available at http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf (last accessed March 27, 2016).

[59] See EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 427 (5th Cir. 2013) (reversing summary judgment for defendant and holding that discrimination on the basis of lactation is sex discrimination under title VII).

[60] See Amended Complaint, Bockoras v. St. Gobain Containers, No. 1:13-cv-0334, Document No. 44 (W.D. Pa. March 6, 2014). The commenter reported that the company denied the allegations, but the case settled.

In addition, some workers affected by pregnancy, childbirth, or related medical conditions face a serious and unmet need for workplace accommodations, which are often vital to their continued employment and, ultimately, to their health and that of their children. OFCCP is aware of a number of situations in which women have been denied accommodations with deleterious health consequences. For example:

> In one instance, a pregnant cashier in New York who was not allowed to drink water during her shift, in contravention of her doctor's recommendation to stay well-hydrated, was rushed to the emergency room after collapsing at work. As the emergency room doctor who treated her explained, because "pregnant women are already at increased risk of fainting (due to high progesterone levels causing blood vessel dilation), dehydration puts them at even further risk of collapse and injury from falling." Another pregnant worker was prohibited from carrying a water bottle while stocking grocery shelves despite her doctor's instructions that she drink water throughout the day to prevent dehydration. She experienced preterm contractions, requiring multiple hospital visits and hydration with IV fluids. . . . [Another] woman, a pregnant retail worker in the Midwest who had developed a painful urinary tract infection, supplied a letter from her doctor to her employer explaining that she needed a short bathroom break more frequently than the store's standard policy. The store refused. She later suffered another urinary tract infection that required her to miss multiple days of work and receive medical treatment.[61]

In one comment submitted on the NPRM, three organizations that provide research, policy, advocacy, or consulting services to promote workplace gender equality and work-life balance for employees state that they "have seen numerous . . . cases where women are pushed out of work simply because they wish to avoid unnecessary risks to their pregnancy" when doctors advise them to avoid exposure to toxic chemicals, dangerous scenarios, or physically

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[61] Brief of Health Care Providers, the National Partnership for Women & Families, and Other Organizations Concerned with Maternal and Infant Health as Amici Curiae in Support of Petitioner in Young v. United Parcel Service, at 9-10, 11 (citations omitted), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/12-1226_pet_amcu_hcp-etal.authcheckdam.pdf (last accessed March 25, 2016). See also Wiseman v. Wal-Mart Stores, Inc., No. 08-1244-EFM, 2009 WL 1617669 (D. Kan. June 9, 2009) (pregnant retail employee with recurring urinary and bladder infections caused by dehydration alleged she was denied permission to carry a water bottle despite doctor's note), available at http://www.gpo.gov/fdsys/pkg/USCOURTS-ksd-6_08-cv-01244/pdf/USCOURTS-ksd-6_08-cv-01244-0.pdf (last accessed March 27, 2016).

strenuous work to prevent problems from occurring in their pregnancies. "Pregnant workers in physically demanding, inflexible, or hazardous jobs are particularly likely to need accommodations at some point during their pregnancies to continue working safely."[62]

Meanwhile, more women today continue to work throughout their pregnancies and therefore are more likely to need accommodations of some sort. Of women who had their first child between 1966 and 1970, 49 percent worked during pregnancy; of those, 39 percent worked into the last month of their pregnancy. For the period from 2006 to 2008, the proportion of pregnant women working increased to 66 percent, and the proportion of those working into the last month of their pregnancy increased to 82 percent.[63]

Several commenters provided evidence of continued discriminatory practices in the provision of family or medical leave. One explained that "[w]orkplaces routinely offer fewer weeks of 'paternity' leave than 'maternity' leave" and that such policies "can be particularly detrimental to LGBT [lesbian, gay, bisexual, and transgender] people, who are more likely to be adoptive parents and, as such, may not be able to access traditional 'maternity' leave frequently reserved for workers who have given birth to a child." Another, a provider of legal services to low-income clients, stated that "[l]ow wage workers are often put on leave before they want or need it" and that such workers, "when not covered by FMLA, . . . are frequently denied leave despite a disparate impact based on gender without business necessity."

Sexual Harassment

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[62] National Women's Law Center & A Better Balance, It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers 5 (2013), available at http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (last accessed March 25, 2016) (Heavy Lift).

[63] U.S. Census Bureau, Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008, at 4, 7 (2011), available at http://www.census.gov/prod/2011pubs/p70-128.pdf (last accessed March 25, 2016) (tables 1 and 3).

The EEOC adopted sexual harassment guidelines in 1980, and the Supreme Court held that sexual harassment is a form of sex discrimination in 1986.[64] Nevertheless, as several commenters report, sexual harassment continues to be a serious problem for women in the workplace and a significant barrier to women's entry into and advancement in many nontraditional occupations, including the construction trades[65] and the computer and information technology industries.[66] In fact, in FY 2015, the EEOC received 6,822 sexual harassment charges — 7.6 percent of the total of 89,385 charges filed.[67] This percentage is hardly different from FY 2010, when the number of sexual harassment charges the EEOC received was 8.0 percent of the total charges filed.[68]

Sex-based Stereotyping

In some ways, the nature of sex discrimination has also changed since OFCCP promulgated the Sex Discrimination Guidelines. Explicit sex segregation, such as facial "male only" hiring policies, has been replaced in many workforces by less overt mechanisms that

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[64] EEOC Guidelines on Discrimination Because of Sex, 29 CFR 1604.11 (1980), available at http://www.gpo.gov/fdsys/pkg/CFR-2014-title29-vol4/xml/CFR-2014-title29-vol4-part1604.xml (last accessed March 25, 2016) (provision on harassment); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). The Court reaffirmed and extended that holding in 1993. Harris v. Forklift Sys., 510 U.S. 17 (1993). Lower courts had held that sexual harassment is a form of sex discrimination since the late 1970s. See, e.g., Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

[65] See National Women's Law Center, Women in Construction: Still Breaking Ground 8 (2014), available at http://nwlc.org/wp-content/uploads/2015/08/final_nwlc_womeninconstruction_report.pdf (last accessed March 17, 2016).

[66] See Women in Tech, Elephant in the Valley (2016), http://elephantinthevalley.com/ (last accessed March 16, 2016) (60% of respondents to survey of women who worked in the technology industry experienced unwanted sexual advances).

[67] EEOC, Enforcement & Litigation Statistics, Sexual Harassment Charges FY 2010 - 2015, available at http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last accessed March 17, 2016); EEOC Charge Statistics, supra note 34.

[68] Id.

nevertheless present real equal opportunity barriers.

One of the most significant barriers is sex-based stereotyping. Decades of social science research have documented the extent to which sex-based stereotypes about the roles of women and men and their respective capabilities in the workplace can influence decisions about hiring, training, promotions, pay raises, and other conditions of employment.[69] As the Supreme Court recognized in 1989, an employer engages in sex discrimination where the likelihood of promotion for female employees depends on whether they fit their managers' preconceived notions of how women should dress and act.[70] Research clearly demonstrates that widely held social attitudes and biases can lead to discriminatory decisions, even where there is no formal sex-based (or race-based) policy or practice in place.[71] One commenter on the NPRM highlights

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[69] See, e.g., Susan Fiske et al., Controlling Other People: The Impact of Power on Stereotyping, 48 Am. Psychol. 621 (1993), available at https://www.researchgate.net/publication/14870029_Controlling_Other_People_The_Impact_of_Power_on_Stereotyping (last accessed March 27, 2016); Anthony Greenwald and Mahzarin Banaji, Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes, 102 Psychol. Rev. 4 (1995); Brian Welle & Madeline Heilman, Formal and Informal Discrimination Against Women at Work, in Managing Social and Ethical Issues in Organizations 23 (Stephen Gilliland, Dirk Douglas Steiner & Daniel Skarlicki eds., 2007); Susan Bruckmüller, Michelle Ryan, Floor Rink, and S. Alexander Haslam, Beyond the Glass Ceiling: The Glass Cliff and Its Lessons for Organizational Policy, 8 Soc. Issues & Pol. Rev. 202 (2014) (describing the role of sex-based stereotypes in the workplace).

[70] Price Waterhouse, 490 U.S. at 235, 250-51. Men, too, can experience adverse effects from sex-based stereotyping.

[71] See, e.g., Kevin Lang & Jee-Yeon K. Lehmann, Racial Discrimination in the Labor Market: Theory and Empirics (NBER Working Paper No. 17450, 2010), available at http://www.nber.org/papers/w17450 (last accessed March 27, 2016); Marianne Bertrand & Sendhil Mullainathan, Are Emily and Brendan More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, 94(4) American Econ. Rev. (2004); Ian Ayres & Peter Siegelman, Race and Gender Discrimination in Bargaining for a New Car, 85(3) Am. Econ. Rev. (1995); Marc Bendick, Charles Jackson & Victor Reinoso, Measuring Employment Discrimination Through Controlled Experiments, 23 Rev. of Black Pol. Econ. 25 (1994).

One commenter expressed concern that this statement, which was made originally in the NPRM, demonstrates an OFCCP enforcement approach contrary to Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). Although the plaintiffs in Wal-Mart raised sex discrimination claims under title VII, the Supreme Court's decision was based on plaintiffs' failure to satisfy procedural requirements under the Federal Rules of Civil Procedure (FRCP) regarding class action lawsuits. Unlike private plaintiffs, who must prevail on class certification motions to bring suit on behalf of others, OFCCP is a governmental agency that is authorized to act in the public's interest to remedy discrimination. It is not subject to the limitations and

a study showing, through both a laboratory experiment and a paired-resume audit, that stereotypes about caregiving responsibilities affect women's employment opportunities significantly. In the experimental study, only 47 percent of mothers were recommended for hire, compared to 84 percent of female non-mothers (i.e., non-mothers were recommended for hire 1.8 times more frequently than mothers); mothers were offered starting salaries $11,000 (7.4 percent) less than those offered to non-mothers; mothers were less likely to be recommended for promotion to management positions; and being a parent lowered the competence ratings for women but not for men. In the audit, non-mothers received 2.1 times as many call-backs as equally qualified mothers.[72] Sex-based stereotyping may have even more severe consequences for transgender, lesbian, gay, and bisexual applicants and employees, many of whom report that they have experienced discrimination in the workplace.[73]

In sum, with the marked increase of women in the labor force, the changes in employment practices, and numerous key legal developments since 1970, many of the provisions in the Guidelines are outdated, inaccurate, or both. At the same time, there are important and current areas of law that the Guidelines fail to address at all. For those reasons, OFCCP is replacing the Guidelines with a new final rule that addresses these changes.

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requirements of class certification under the FRCP. To the extent that the Supreme Court's decision in Wal-Mart addresses title VII principles that apply outside the context of class certification, OFCCP follows those principles in its enforcement of Executive Order 11246.

[72] Motherhood Penalty, supra note 50, at 1316, 1318, 1330.

[73] Injustice at Every Turn, supra note 16; Center for American Progress and Movement Advancement Project, Paying an Unfair Price: The Financial Penalty for Being LGBT in America 18-19 (September 2014; updated November 2014), available at http://www.lgbtmap.org/policy-and-issue-analysis/unfair-price (last accessed March 27, 2016) (discussing studies showing LGBT-based employment discrimination); Brad Sears & Christy Mallory, The Williams Institute, Documented Evidence of Employment Discrimination & Its Effects on LGBT People (2011), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf (last accessed March 27, 2016). Further discussion of discrimination on the basis of sexual orientation and gender identity can be found infra in the passages on paragraph 60-20.2(a) and § 60-20.7.

Overview of the Comments

Prior to issuing an NPRM, OFCCP consulted a small number of individuals from the contractor community, women's groups, and other stakeholders to understand their views on the provisions in the Sex Discrimination Guidelines, specifically which provisions should be removed, updated, or added. There was substantial overlap in opinion among these experts about these matters. In particular, they stated that the second sentence in § 60-20.3(c) of the Guidelines, addressing employer contributions for pensions and other fringe benefits, is an incorrect statement of the law; that the references to State "protective" laws in § 60-20.3(f) of the Guidelines are outmoded; that § 60-20.3(g) of the Guidelines, concerning pregnancy, should be updated to reflect the PDA; and that the reference to the Wage and Hour Administrator in § 60-20.5(c) of the Guidelines should be removed, as the Wage and Hour Administrator no longer enforces the Equal Pay Act.

OFCCP received 553 comments on the NPRM. They include 445 largely identical form-letter comments from 444 individuals expressing general support, apparently as part of an organized comment-writing effort.[74] The 108 remaining comments, representing diverse perspectives, include comments filed by one small business contractor; one construction contractor; two law firms representing contractors; three contractor associations; four associations representing employers (including contractors); one contractor consultant; 23 civil rights, women's, and LGBT organizations; one union; a provider of legal services to low-income individuals; one religious organization; a state credit-union association that has 400 credit-union members; and many individuals.

[74] One of these individuals submitted virtually identical comments twice.

Many additional organizations express their views by signing on to comments filed by other organizations, rather than by separately submitting comments.[75] For example, 70 national, regional, state, and local women's, civil rights, LGBT, and labor organizations and coalitions of such organizations, all co-sign one comment filed by a women's organization. Similarly, three major organizations representing employers join a comment filed by one of them. Altogether, 101 unique organizations file or join comments generally supportive of the rule; 14 unique organizations file or join comments generally opposed to the rule.[76]

The commenters raise a range of issues. Among the common or significant suggestions are those urging OFCCP:

- to add sexual orientation discrimination as a form of sex discrimination;
- to prohibit single-user restrooms from being segregated by sex;
- to clarify application of the BFOQ defense to gender identity discrimination;
- to require contractor-provided health insurance to cover gender-transition-related health care;
- to clarify that contractors' good faith affirmative action efforts after identifying underrepresentation of women in job groups are not inconsistent with the final rule;
- to specify factors that are legitimate for the purposes of setting pay;
- to remove the requirements that contractor-provided health insurance cover contraception and abortion (where the life of the mother would be endangered if

[75] The result is that eight comments are co-signed by multiple organizations.

[76] For this count, OFCCP includes state and regional chapters and affiliates of national organizations individually as commenters, separate from those national organizations.

the fetus were carried to term or medical complications have arisen from an abortion), and further arguing that application of some provisions in the proposed rule to contractors with religious objections are contrary to the Religious Freedom Restoration Act (RFRA);

- to clarify application of Young v. UPS, supra, to the section addressing pregnancy-related accommodations;
- to require reasonable accommodation for pregnancy as a form of affirmative action;
- to clarify the relationship of FMLA leave to any leave that may be required by this rule;
- to add language concerning vicarious liability and negligence involving sexual harassment perpetrated by lower-level supervisors; and
- to add various examples of disparate-treatment or disparate-impact discrimination to the examples in the NPRM.

OFCCP's responses to these comments are discussed in connection with the relevant sections in the Section-by-Section Analysis.

There were also comments associated with the cost and burden of the proposed rule. OFCCP's responses to these comments are discussed in the section on Regulatory Procedures.

OFCCP carefully considered all of the comments in development of this final rule. In response to comments, or in order to clarify and focus the scope of one or more provisions while not increasing the estimated burden, the final rule revises some of the NPRM's provisions.

Overview of the Final Rule

Like the proposed rule, the final rule is organized quite differently than the Guidelines.

One change is that while discussion of the BFOQ defense was repeated in several different sections of the Guidelines, the final rule consolidates this discussion into one section covering BFOQs.

Another major change is the reorganization of § 60-20.2 in the Guidelines, which addressed recruitment and advertisement. Guidelines paragraph 60-20.2(a), which required recruitment of men and women for all jobs unless sex is a BFOQ, is subsumed in § 60-20.2 of the final rule, which states and expands on the general principle of nondiscrimination based on sex and sets forth a number of examples of discriminatory practices. Guidelines paragraph 60-20.2(b) prohibited "[a]dvertisement in newspapers and other media for employment" from "express[ing] a sex preference unless sex is a bona fide occupational qualification for the job." This statement does not have much practical effect, because few job advertisements today express a sex preference. It is therefore omitted from the final rule. Recruitment for individuals of a certain sex for particular jobs, including recruitment by advertisement, is covered in final rule paragraph 60-20.2(b)(10).

A third major change is the reorganization of § 60-20.3 in the Guidelines. Entitled "Job policies and practices," this section addressed a contractor's general obligations to ensure equal opportunity in employment on the basis of sex (Guidelines paragraphs 60-20.3(a), 60-20.3(b), and 60-20.3(c)); examples of discriminatory treatment (Guidelines paragraph 60-20.3(d)); the provision of physical facilities, including bathrooms (Guidelines paragraph 60-20.3(e)); the impact of state protective laws (Guidelines paragraph 60-20.3(f)); leave for childbearing (Guidelines paragraph 60-20.3(g)); and specification of retirement age (Guidelines paragraph 60-20.3(h)). Guidelines paragraph 60-20.3(i) stated that differences in capabilities for job assignments among individuals may be recognized by the employer in making specific

assignments.

As mentioned above, the final rule relocates the general obligation to ensure equal employment opportunity and the examples of discriminatory practices to § 60-20.2. Guidelines paragraph 60-20.3(e), regarding gender-neutral provision of physical facilities, is now addressed in paragraphs 60-20.2(b)(12) and (13) and 60-20.2(c)(2) of the final rule. Guidelines paragraph 60-20.3(f), addressing state protective laws, is not included in the final rule because it is unnecessary and anachronistic. The example at paragraph 60-20.2(b)(8) in the final rule, prohibiting sex-based job classifications, clearly states the underlying principle that absent a job-specific BFOQ, no job is the separate domain of any sex.[77]

Guidelines paragraph 60-20.3(g), regarding leave for childbearing, is now addressed in § 60-20.5 of the final rule on discrimination on the basis of pregnancy, childbirth, or related medical conditions. Guidelines paragraph 60-20.3(h), which prohibited differential treatment between men and women with regard to retirement age, is restated and broadened in the final rule, at paragraph 60-20.2(b)(7); it prohibits the imposition of sex-based differences not only in retirement age but also in "other terms, conditions, or privileges of retirement." Guidelines paragraph 60-20.3(i) stated that the Sex Discrimination Guidelines allowed contractors to recognize differences in capabilities for job assignments in making specific assignments and reiterated that the purpose of the Guidelines was "to insure that such distinctions are not based upon sex." This paragraph is omitted from the final rule because it is unnecessary and because its second sentence is repetitive of § 60-20.1 in the final rule. Implicit in the provisions

[77] One comment discusses the issue of state protective laws. It agrees with OFCCP's view that the provision is unnecessary and anachronistic, because "45 years of history have made clear that [state protective] laws violate Title VII and EO 11246 as amended." See Int'l Union, United Auto., Aerospace & Agric. Implement. Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187 (1991) (holding that possible reproductive health hazards to women of childbearing age did not justify sex-based exclusions from certain jobs).

prohibiting discrimination on the basis of sex is the principle that distinctions for other reasons, such as differences in capabilities, are not prohibited. Distinguishing among employees based on their relevant job skills, for example, does not constitute unlawful discrimination.

Where provisions of the Guidelines are uncontradicted by the final rule but are omitted from it because they are, as a practical matter, outdated, their omission does not mean that they are not still good law. For example, the prohibition of sex-specific advertisements in newspapers and other media in Guidelines paragraph 60-20.2(b) remains a correct statement of the law.

Comments on Language Usage Throughout the Rule

A number of commenters make recommendations about the language that OFCCP should use throughout the rule. Two commenters suggest that the rule should refer to "gender discrimination" instead of "sex discrimination." OFCCP follows Title VII case law in interpreting "sex" discrimination to include gender discrimination.[78] The NPRM used the word "sex" when referring to sex discrimination because "sex" is used in E.O. 11246, and the word "gender" in the phrase "gender identity" because "gender" is used in E.O. 13672. For these reasons, except where quoting or paraphrasing comments or references that use the terms differently, the final rule continues that usage.

Three comments (joined by four commenters) recommend that phrases such as "he or she" and "his or her" be replaced with gender-neutral language such as "they" and "their" in order to recognize that some gender-nonconforming individuals prefer not to be identified with either gender. OFCCP declines to make this change. While it acknowledges that grammatical rules on this point may evolve, OFCCP believes it would be less confusing to a lay reader to use

[78] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) ("In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."); see, e.g., Smith v. City of Salem, 378 F. 3d 566, 572 (6th Cir. 2004).

the more commonly understood formulations "he or she" and "him or her," rather than a singular "they." However, in a number of places in the rule and preamble, OFCCP replaces the singular "he or she" forms of pronouns with the plural "they" forms where it is possible to make all the references in the sentence plural. For instance, the example of sex stereotyping in § 60-20.7(b) now reads: "Adverse treatment of employees or applicants for employment because of their actual or perceived gender identity or transgender status" (emphasis added), rather than "Adverse treatment of an employee or applicant for employment because of his or her actual or perceived gender identity or transgender status." Where "his or her" or similar language does appear, it should be read to encompass people who do not identify as either gender.

Three comments (joined by five commenters) urge OFCCP to use gender-neutral terminology in the various illustrative examples throughout the rule. OFCCP intentionally drafted the examples that are not gender-neutral in this manner, because they are common types of discrimination: e.g. (in the proposed rule), "Denying women with children an employment opportunity that is available to men with children" (paragraph 60-20.2(b)(2)); "Height and/or weight qualifications that are not necessary to the performance of the job and that negatively impact women substantially more than men" (paragraph 60-20.2(c)(1)); "Failure 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" (paragraph 60-20.7(a)(1)); "A contractor must provide job-guaranteed family leave, including any paid leave, for male employees on the same terms that family leave is provided for female employees" (paragraph 60-20.5(c)(2)(ii)). OFCCP declines to change these examples to make them gender-neutral.

One commenter urges OFCCP to replace the terms "pregnant people" and "people of childbearing capacity" used in the NPRM with the terms "pregnant women" and "women of

childbearing capacity." Another commenter commends OFCCP for "recognizing that some persons who have the physiology necessary to have a chance of becoming pregnant do not identify as women." OFCCP declines to make the suggested replacements.

Section-by-Section Analysis

This Section-by-Section Analysis describes each section in the proposed rule and identifies and discusses the significant comments received and any changes made.

Title of the Regulations

Four comments (joined by six commenters) question OFCCP's authority to issue regulations with the force of law. Specifically, these comments argue that Congress did not grant the EEOC authority to promulgate substantive title VII regulations and, further, that because OFCCP's regulations are enforced consistently with title VII, OFCCP cannot promulgate regulations having the force and effect of law. OFCCP did not propose substantive title VII regulations; it proposed regulations interpreting the Executive Order. Throughout the NPRM, OFCCP explained that E.O. 11246 grants the agency authority to promulgate these regulations. In particular, Section 201 of the Executive Order states that "[t]he Secretary [of Labor] shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of Parts II and III of this Order." One stated purpose of E.O. 11246 is to prohibit discrimination against an employee or applicant for employment because of sex.[79] Although the EEOC does not have statutory authority to issue substantive regulations under title VII, OFCCP is clearly granted the authority to issue substantive rules and regulations to implement the nondiscrimination provisions of E.O. 11246. The Federal Property and

[79] See E.O. 11246 sec. 202(1).

Administrative Services Act of 1949 authorizes a broad array of government contracting requirements, including E.O. 11246's nondiscrimination requirements, to achieve that act's goal of economical and efficient procurement.[80] E.O. 11246 has the force and effect of law.[81] Regulations issued pursuant to E.O. 11246 also have the force and effect of law, as they are not plainly inconsistent with the Executive Order and are thus also entitled to deference.[82] OFCCP's decision to promulgate substantive regulations implementing the sex-based nondiscrimination provision is authorized by the Executive Order.

The comments also state that OFCCP's promulgation of these substantive regulations governing discrimination on the basis of sex is an inappropriate departure from its prior Sex Discrimination Guidelines. While the former part 60-20 was titled "Sex Discrimination Guidelines," these too were regulations with the force and effect of law, promulgated under the clear authority of E.O. 11246. OFCCP's decision to rename these regulations does not affect their legal status.

Therefore, OFCCP adopts the proposed change in the title of part 60-20 to "Discrimination on the Basis of Sex," to make clear that its provisions are regulations implementing E.O. 11246 with the full force and effect of law.

Section 60-20.1 Purpose

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[80] See 40 U.S.C. 101 (establishing the act's goal of providing the Federal government "with an economical and efficient system for . . . (1) Procuring and supplying property and nonpersonal services, and performing related functions including contracting . . ."); 40 U.S.C. 121(a) (authorizing the President to "prescribe policies and directives that the President considers necessary to carry out" the act).

[81] See Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164 (4th Cir. 1981); United States v. Miss. Power & Light Co., 638 F.2d 899 (5th Cir. 1981); Legal Aid Soc'y v. Brennan, 608 F.2d 1319 (9th Cir. 1979); Ne. Constr. Co. v. Romney, 485 F.2d 752 (D.C. Cir. 1973); Contractor's Ass'n v. Sec'y of Labor, 442 F.2d 159, 166-71 (3d Cir. 1971); Uniroyal Inc. v. Marshall, 482 F. Supp. 364, 368 (D.D.C. 1979).

[82] Id. See also Beverly Enter. v. Herman, 130 F. Supp. 2d 1, 9 n.4 (D.D.C. 2000).

The NPRM deleted the words "Title and" from the heading of § 60-20.1 in the Guidelines, as well as the second sentence of that section, which gave the reasons for adopting the Guidelines in 1970. The NPRM also clarified that this part is to be read in conjunction with all the provisions in OFCCP's regulations related to implementation of E.O. 11246 by listing them specifically. OFCCP received no comments on these proposed changes, and it adopts them.

The final rule also adds a sentence to § 60-20.1. This new sentence reads: "For instance, under no circumstances will a contractor's good faith efforts to comply with the affirmative action requirements of part 60-2 of this chapter be considered a violation of this part." OFCCP adds this sentence to respond to the concern that five contractors express that the prohibitions of sex discrimination in the NPRM could be read to conflict with contractors' obligations to undertake good faith efforts to expand employment opportunities for women contemplated by part 60-2.

Two commenters recommend that OFCCP add a reference to contractors' duties as part of Joint Training Councils in recruiting, accepting, training, and employing apprentices in the first sentence of § 60-20.1. Joint Training Councils, committees composed of representatives of construction labor unions and construction management, jointly sponsor most registered apprenticeship programs in the construction industry.[83] OFCCP agrees that contractors' nondiscrimination obligations extend to the execution of their duties as part of Joint Training Councils in recruiting, accepting, training, and employing apprentices, and it will interpret the rule accordingly. OFCCP declines, however, to add the suggested language to this section, as it

[83] Center for Construction Research and Training, The Construction Chart Book: The US Construction Industry and Its Workers (Fifth Edition), § 31, available at http://www.cpwr.com/publications/construction-chart-book (last accessed March 27, 2016).

is too specific for a section delineating the overall purpose of a rule.

Section 60-20.2 General Prohibitions

In the proposed rule, paragraph 60-20.2(a) set forth the general prohibition that contractors may not discriminate against any applicant or employee because of sex and stated that the term "sex" includes, but is not limited to, pregnancy, childbirth, or related medical conditions; gender identity; and transgender status. In the final rule, OFCCP adds "sex stereotyping" to this list. One comment requests this addition, on the ground that one of the most important aspects of the rulemaking is to clarify that sex stereotyping is a form of sex discrimination. OFCCP agrees with this reasoning and inserts the term "sex stereotyping" in the second sentence of paragraph 60-20.2(a).

A large number of commenters, including the 70 signers to the comment from a women's organization, as well as a contractor association, support inclusion of "gender identity" and "transgender status" in paragraph 60-20.2(a) as consistent with title VII law.

Two comments, the one from a religious organization and the joint comment from three employer groups mentioned above, do not support identification of gender identity and transgender status discrimination as forms of sex discrimination. The religious organization argues that inclusion of gender identity discrimination as a form of sex discrimination (either directly or as a form of sex-stereotyping discrimination) is inconsistent with title VII law and with Congressional efforts to ban gender identity discrimination in employment. The religious organization also claims that including gender identity discrimination would interfere with religious contractors' rights under RFRA.[84] The joint employer group comment argues that

[84] The religious organization also claims that including gender identity discrimination would interfere with non-transgender employees' "legitimate expectation of privacy in workplace restrooms and locker rooms." This

inclusion of gender identity discrimination as a form of sex discrimination is not settled under title VII law[85] and is inconsistent with E.O. 13672's separate amendment of E.O. 11246 adding gender identity discrimination; it recommends that OFCCP address gender identity discrimination only as part of guidance on the final rule implementing E.O. 13672.

As explained above, OFCCP is not adopting substantive title VII regulations; it is adopting regulations interpreting the Executive Order. OFCCP's inclusion of gender identity and transgender status in the rule is consistent with the agency's prior interpretation of the Executive Order, as articulated in its August 19, 2014 directive, which states that OFCCP "will investigate and seek to remedy instances of sex discrimination that occur because of an employee's gender identity or transgender status."[86]

In addition, OFCCP does not find inclusion of gender identity and transgender status in the rule to be inconsistent with title VII law. As discussed in the preamble to the NPRM, in Macy v. Holder, the EEOC commissioners unanimously concluded that discrimination on the basis of gender identity is, by definition, sex discrimination in violation of title VII, because the discriminatory act is "related to the sex of the victim."[87] The EEOC cited both the text of title

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argument is addressed in connection with proposed paragraph 60-20.2(b)(9), infra.

[85] Specifically, the comment states that while the theory that sex discrimination applies to discrimination based on gender identity (and sexual orientation) may be consistent with EEOC's interpretation of title VII, it is not fully embraced by the Federal judicial system.

[86] OFCCP Directive 2014-02 (August 19, 2014), available at http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html (last accessed March 27, 2016). The purpose of Directive 2014-02 is to clarify that existing agency guidance on discrimination on the basis of sex under E.O. 11246 includes discrimination on the bases of gender identity and transgender status. Further, this directive made clear that OFCCP's interpretation of the Executive Order is consistent with the EEOC's position that, under title VII, discrimination based on gender identity or transgender status is discrimination based on sex.

[87] Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *7 (EEOC) (2012), available at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt (last accessed March 27, 2016), on remand, Department of Justice (DOJ) Final Agency Decision, Agency Complaint No. ATF–2011–00751, DJ No.

VII and the reasoning in Schroer v. Billington[88] for its conclusion. Similarly, it is the position of the U.S. Department of Justice that "[t]he most straightforward reading of Title VII is that discrimination 'because of . . . sex' includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex."[89]

Indeed, a number of Federal appellate and district court decisions establish that disparate treatment of a transgender employee may constitute discrimination because of the individual's non-conformity to sex-based stereotypes.[90] This principle is reflected in § 60-20.7 of the final rule.

OFCCP also does not find inclusion of gender identity and transgender status in the rule to be inconsistent with Congressional efforts to ban gender identity discrimination in employment or with E.O. 13672's separate amendment of E.O. 11246 adding gender identity to

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187–9–149 (July 8, 2013).

[88] Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008).

[89] Memorandum from Attorney General Eric Holder to United States Attorneys and Heads of Department Components (December 15, 2014), available at http://www.justice.gov/file/188671/download (last accessed March 27, 2016).

[90] See, e.g., Smith v. City of Salem, supra note 78, 378 F.3d at 575 ("discrimination against a plaintiff who is a transsexual — and therefore fails to act and/or identify with his or her gender — is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman"); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (termination of a transgender employee on the basis of gender non-conformity is sex discrimination under Equal Protection Clause); see also United States v. Se. Okla. State Univ., No. 5:15-cv-00324, 2015 WL 4606079, *2 (W.D. Okla. July 10, 2015); Finkle v. Howard County, Md., 12 F. Supp. 3d 780 (D. Md. 2014); Hart v. Lew, 973 F. Supp. 2d 561 (D. Md. 2013). This principle — that discrimination against a transgender individual based on non-conformity to sex-based stereotypes is sex discrimination — has also been adopted under the Gender-Motivated Violence Act, Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000), and the Equal Credit Opportunity Act, Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000). Other recent district court cases have held that discrimination on the basis of transgender identity is sex discrimination under the plain language of title VII. See Fabian v. Hosp. of Cent. Conn., 2016 WL 1089178, *14 (D. Conn. Mar. 18, 2016); Doe v. Arizona, 2016 WL 1089743, *2 (D. Ariz. Mar. 21, 2016) (transgender status satisfied the "protected status" element of a gender discrimination claim).

the list of protected categories. Overlapping prohibitions of discrimination are not uncommon. When President Johnson amended E.O. 11246 in 1967 to add sex to the list of prohibited categories, for example, title VII already prohibited sex discrimination in employment by most covered contractors. The fact that gender identity is both a stand-alone protected category and subsumed under the term "sex" simply means that Federal contractor employees and applicants can pursue claims of gender identity discrimination in two ways, and OFCCP can address violations either as sex discrimination or as gender identity discrimination (or both).

Therefore, OFCCP declines to depart from the "most straightforward reading of Title VII" by removing the terms "gender identity" and "transgender status" from paragraph 60-20.2(a). OFCCP also declines to remove any of the references to gender identity discrimination as a form of sex stereotyping from the final rule. Nor does OFCCP accept the suggestion that it address gender identity discrimination only under the final rule implementing Executive Order 13672. If contractors or workers are confused about the two avenues, OFCCP will consider developing additional guidance materials to be posted on its website, as it regularly does.

On the subject of RFRA, the religious organization commenter asks OFCCP to clarify in the final rule that RFRA forbids application of this paragraph, as well as proposed paragraphs 60-20.7(a)(3) (regarding adverse treatment based on failure to conform to sex-role expectations by being in a relationship with a person of the same sex) and 60-20.7(b) (regarding adverse treatment based on gender identity or transgender status), to contractors with religious objections to those provisions.[91]

[91] The religious organization commenter also asks OFCCP to clarify that RFRA forbids application of paragraphs 60-20.5(a) (regarding abortion coverage) and 60-20.5(b)(4) (regarding contraceptive coverage) to contractors with religious objections to those provisions. This comment is addressed separately in the relevant portions of the Section-by-Section Analysis, infra.

OFCCP declines to implement a blanket exemption from these provisions because claims under RFRA are inherently individualized and fact specific. There is no formal process for invoking RFRA specifically as a basis for an exemption from E.O. 11246. Insofar as the application of any requirement under this part would violate RFRA, such application shall not be required.

If a contractor seeks an exemption to E.O. 11246 pursuant to RFRA, OFCCP will consider that request based on the facts of the particular case. OFCCP will do so in consultation with the Solicitor of Labor and the Department of Justice, as necessary. OFCCP will apply all relevant case law to the facts of a given case in considering any invocation of RFRA as a basis for an exemption.

OFCCP also notes that the Supreme Court has recognized that the First Amendment to the Constitution requires a "ministerial exception" from employment discrimination laws, which prohibits the government from interfering with the ability of a religious organization to make employment decisions about its "ministers," a category that includes, but is not limited to, clergy. OFCCP follows this precedent.

Finally, OFCCP notes that EO 11246 contains an exemption that specifically allows religiously affiliated contractors (religious corporations, associations, educational institutions, or societies) to favor individuals of a particular religion when making employment decisions.[92] The regulation implementing that exemption states that the nondiscrimination obligations of E.O. 11246 "shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of

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[92] 41 CFR 60-1.5(a)(5).

individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order." OFCCP has already published guidance regarding the application of the religious exemption in Executive Order 11246 in connection with the recent Executive Order 13672 rulemaking.[93] If, however, a contractor is unsure about whether its employment practices are shielded by this exemption, it can seek guidance from OFCCP.

Ten comments from civil rights, women's, and LGBT organizations, and a credit union, including the comment that 70 organizations signed, urge OFCCP to add sexual orientation discrimination to the list of kinds of sex discrimination in paragraph 60-20.2(a).[94] OFCCP supports this view as a matter of policy. Federal agencies have taken an increasing number of actions to ensure that lesbian, gay, and bisexual individuals are protected from discrimination,[95] and court decisions have repeatedly made clear that individuals and couples deserve equal rights regardless of their sexual orientation.[96] OFCCP further notes that E.O. 13672 amended E.O.

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[93] See OFCCP, Frequently Asked Questions: EO 13672 Final Rule, available at http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q9 (last accessed May 31, 2016).

[94] The commenters similarly urge OFCCP to add discrimination because of sexual orientation to § 60-20.7(b) and § 60-20.8(b), which, like § 60-20.2(a), list forms of sex discrimination.

[95] See, e.g., 80 FR 9989 (February 25, 2015) (DOL amendment of the regulatory definition of spouse under the Family and Medical Leave Act (FMLA) so that eligible employees in legal same-sex marriages are treated the same way for FMLA purposes as employees in opposite-sex marriages); 45 CFR 155.120(c)(1)(ii) and 156.200(e) (HHS regulations barring discrimination on the basis of sexual orientation by Health Insurance Marketplaces and issuers offering qualified health plans); U.S. Citizenship and Immigration Services, Same Sex Marriages, https://www.uscis.gov/family/same-sex-marriages (last accessed May 13, 2016) (treating immigration visa petitions filed on behalf of same-sex spouses in the same manner as those filed on behalf of opposite-sex spouses).

[96] For example, in 1996, the Supreme Court struck down an amendment to the Colorado constitution that prohibited the State government from providing any legal protections to gay, lesbian, and bisexual individuals. Romer v. Evans, 517 U.S. 620 (1996). And, just last year, the Supreme Court ruled in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), that states may not prohibit same-sex couples from marrying and must recognize the validity of same-sex couples' marriages. See also United States v. Windsor, 133 S. Ct. 2675 (2013) (declaring unconstitutional the

11246 to prohibit employment discrimination by contractors based on sexual orientation.

Because E.O. 11246 expressly includes "sexual orientation" in the list of prohibited bases of discrimination, OFCCP finds it unnecessary to add the term "sexual orientation" to paragraph 60-20.2(a).[97] OFCCP further notes that this area of title VII law is still developing. In a recent Federal-sector decision, the EEOC — the lead Federal agency responsible for administering and enforcing title VII — offered a legal analysis and review of the title VII case law and its evolution, concluding that sexual orientation is inherently a "sex-based consideration" and that discrimination on the basis of sexual orientation is therefore prohibited by title VII as one form of sex discrimination.[98] As the EEOC noted in that case, in Oncale v. Sundowner Offshore Services, a unanimous Supreme Court stated that "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[99] More than fifty years after the passage of the Civil Rights Act of 1964, the contours of the law governing sex discrimination in the workplace have changed significantly. Indeed, a number of courts have found that discrimination related to sexual orientation, particularly in the forms of sex stereotyping and same-sex harassment, is a form of

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federal Defense of Marriage Act's definition of "marriage" as only a legal union between a man and a woman); Lawrence v. Texas, 539 U.S. 558 (2003) (declaring unconstitutional a state statute criminalizing consensual same-sex sexual conduct).

[97] Similarly, OFCCP declines to add the term to § 60-20.7(b) or § 60-20.8(b).

[98] Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080, slip op. at 6-7 (July 16, 2015). The EEOC relied on several analyses to reach this conclusion: a plain reading of the term "sex" in the statutory language, an associational analysis of discrimination based on "sex," and the gender stereotype analysis announced in Price Waterhouse.

[99] Id. at 13 (quoting Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) (alteration in original) (internal quotation marks omitted)).

sex discrimination.[100] OFCCP will continue to monitor the developing law on sexual orientation discrimination as sex discrimination under title VII. OFCCP will also consider issuing further guidance on this subject as appropriate.

In the proposed rule, paragraph 60-20.2(b) prohibited contractors from making distinctions based on sex in employment decisions unless sex is a BFOQ reasonably necessary to the normal operation of a contractor's particular business or enterprise. It also provided contractors and workers with a non-exhaustive list of scenarios that would constitute unlawful sex-based discriminatory practices. OFCCP received dozens of comments recommending revisions to the proposed examples from women's rights organizations, contractor and employer associations, consulting firms, law firms, organizations representing LGBT individuals, and individuals. The comments also suggest new examples for OFCCP to include in the final rule. As explained below, in consideration of the comments, OFCCP alters seven of the proposed paragraphs and adds three examples in the final rule.

The first three paragraphs in proposed paragraph 60-20.2(b) state that, unless sex is a BFOQ, it is unlawful disparate treatment (1) to make a distinction between married and unmarried persons that is not applied equally to both sexes; (2) to deny women with children an employment opportunity that is available to men with children; and (3) to fire, or otherwise treat adversely, unmarried women, but not unmarried men, who become parents. A contractor organization comments that these provisions appear to expand title VII and E.O. 11246 to protect against discrimination on the basis of marital or parental status and requests that OFCCP clarify

[100] This recognition is reflected by paragraph 60-20.7(a)(2), which addresses harassment of a man because he is considered effeminate or insufficiently masculine, and paragraph 60-20.7(a)(3), which provides that adverse treatment of an employee or applicant who is in a relationship with a person of the same sex may be a form of sex-stereotyping discrimination, depending on the facts of the case. See cases cited in notes 163-167, infra.

whether these provisions extend protections on these bases. Neither the proposed paragraphs nor their corresponding provisions in the final rule create new protected bases under E.O. 11246. Rather, these examples illustrate situations when treating men and women differently would constitute discriminatory practices. These sex-based discriminatory practices occur in connection with marital or parental status, not because of marital or parental status. OFCCP retains these examples in the final rule, with two minor modifications: paragraph (1) contains the phrase "men and women" instead of "both sexes," and proposed paragraph (3) is renumbered to (4).

One comment suggests changing proposed paragraphs 60-20.2(b)(2) and 60-20.2(b)(3) to be gender-neutral, recommending that OFCCP state that it is an unlawful discriminatory practice to deny "an employment opportunity to any employee with children based on the employee's gender" in paragraph (b)(2) and to fire "unmarried employees who become parents because of the gender of the employees" in paragraph (b)(3). OFCCP declines to make the suggested changes because these gender-specific examples were deliberately drafted to highlight common forms of sex discrimination. The use of gender-specific language in these examples does not override E.O. 11246 or this part to permit discrimination against male applicants or employees.

In light of a comment regarding sex-based disparate treatment in permitting flexible work arrangements, OFCCP adds an example at paragraph 60-20.2(b)(3) of the final rule. The comment recommends that OFCCP add "flexible work arrangements" to § 60-20.6 (on fringe benefits). Employees increasingly see flexible work arrangements, such as flexible or alternative work schedules, as a valuable benefit,[101] and one commenter specifically states that providing

[101] Patricia Schaefer, "Flexible Work Arrangements: Employer Solutions to Common Problems" [no date], available at http://www.businessknowhow.com/manage/flex-work.htm (last accessed March 27, 2016).

time off and flexible workplace policies for men and women can help to combat caregiver stereotyping. Because of these policies' growing importance in the workplace, and the concern that contractors might treat men and women differently when authorizing such arrangements based on sex stereotypes, OFCCP agrees with the commenter that it would be useful to refer to flexible work arrangements in the final rule. Instead of doing so in § 60-20.6, however, OFCCP inserts the example — "treating men and women differently with regard to the availability of flexible work arrangements" — as new paragraph 60-20.2(b)(3) in the final rule.

After considering one comment that requests additional examples to highlight barriers that commonly impact women in a variety of sectors, OFCCP adds two more examples at paragraphs 60-20.2(b)(5) and 60-20.2(b)(6) in the final rule. The comment discusses several discriminatory hiring and promotion practices, including "applying different standards for hiring men and women" and "requiring more experience when promoting women as opposed to men." The commenter also describes several steering practices as examples of discrimination, including "steering or pigeonholing women into feminized sub-sectors of an industry, and keeping women in lower-paying jobs within sectors based on sex stereotyping and other disparate treatment." The final rule's new examples are intended to educate workers and contractors on how sex discrimination arises in today's workforce. In the final rule, subparagraphs (b)(5) and (b)(6) provide "applying different standards in hiring or promoting men and women on the basis of sex" and "steering women into lower-paying or less desirable jobs on the basis of sex" as examples of unlawful sex-based discriminatory practices.

OFCCP makes no substantive changes in the final rule to the examples in proposed paragraphs 60-20.2(b)(4), 60-20.2(b)(5), or 60-20.2(b)(6), although the last of these paragraphs

is reworded from "based upon sex" to "on the basis of sex" for consistency of language in the final rule. Also, OFCCP renumbers those provisions to paragraphs (b)(7), (b)(8), and (b)(9) in the final rule.

Proposed paragraph 60-20.2(b)(7) provided "recruiting or advertising for individuals for certain jobs on the basis of sex, including through use of gender-specific terms for jobs (such as 'lineman')" as an example of an unlawful practice. OFCCP received four comments on this proposed paragraph, three of which criticize OFCCP for making the use of gender-specific job titles an example of disparate treatment because, as one comment puts it, "the requirement to use gender-neutral job titles is inconsistent with the way in which job titles are used by the federal government." Two comments from employer associations recommend clarification of the proposed paragraph, because, as written, it implies that using gender-specific job terms is per se an unlawful sex-based discriminatory practice. One comment points out that the EEOC permits gender-specific job titles in advertisements if they are clearly used as terms of art rather than as means for deterring applicants on the basis of sex. Several comments cite widespread use of certain gender-specific job titles and explain that contractors would incur costs to change their human resources systems and to negotiate new job titles with unions if they could not use certain gender-specific job titles; fully half of the member respondents to one industry association's survey think that there would be an impact if the use of gender-specific job titles were prohibited. One commenter suggests revising the example to make using gender-neutral job terms a best practice.

In response to these comments, OFCCP amends proposed paragraph 60-20.2(b)(7) (renumbered to paragraph 60-20.2(b)(10) in the final rule) by deleting the final clause: "including through use of gender-specific terms for jobs (such as 'lineman')." OFCCP will

follow EEOC's policy guidance on Use of Sex-Referent Language in Employment Opportunity Advertising and Recruitment, which provides that use of sex-referent language in employment opportunity advertisements and other recruitment practices "is suspect but is not a per se violation of Title VII" and that "[w]here sex-referent language is used in conjunction with prominent language that clearly indicates the employer's intent to include applicants or prospective applicants of both sexes, no violation of Title VII will be found."[102] In addition, OFCCP incorporates the use of gender-neutral job terms, where such alternatives exist, as a best practice in an Appendix to the final rule.

In the NPRM, paragraph 60-20.2(b)(8) listed several ways in which women may be denied equal employment opportunity in career advancement, specifically if contractors distinguish on the basis of sex in "apprenticeship or other formal or informal training programs; in other opportunities such as networking, mentoring, sponsorship, individual development plans, rotational assignments, and succession planning programs; or in performance appraisals that may provide the basis of subsequent opportunities." Five commenters suggest adding "on-the-job training" to the list of opportunities mentioned in the proposed paragraph. OFCCP agrees that on-the-job training is an important type of opportunity that should not be omitted. Therefore, in the final rule, OFCCP adds "on-the-job training" to this example (renumbered as

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[102] EEOC Notice No. 915-051, at 2 (April 16, 1990). While this document is not available on EEOC's website, a hard copy of it is available for public viewing in EEOC's library. A copy of this Notice is also available for public viewing in OFCCP's office.

The joint employer group comment also mentions more recent EEOC guidance on this point: an informal discussion letter that the Commission's Office of Legal Counsel issued in 2008 about the Commission's policy regarding the use of gender-specific job titles like "journeyman." The discussion letter stated that use of the term "journeyman" "probably would not implicate federal EEO laws to the extent that it is a term of art designating a particular skill level," but that "[t]he Commission has taken no position on whether 'journeyman' or 'journey level' is appropriate." The EEOC informs OFCCP that this informal discussion letter was not reviewed or voted on by the Commission and as such does not constitute an official opinion of the Commission.

paragraph 60-20.2(b)(11)).

As discussed above in connection with § 60-20.1, five comments from employer associations and a law firm express concern that the examples in proposed paragraphs 60-20.2(b)(7) and (8) are inconsistent with contractors' affirmative action obligations in 41 CFR part 60-2, specifically 41 CFR 60-2.17(c), which requires contractors to correct identified impediments to equal employment opportunity by developing and executing action-oriented programs, attaining established goals and objectives, and using good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results (e.g., targeting outreach or recruitment efforts to women who are underrepresented in the contractor's workforce). One of those comments also points out that the Uniform Guidelines on Employee Selection Procedures (UGESP), 41 CFR part 60-3, state that it may be necessary for contractors to use recruiting procedures designed to attract members of a particular sex. These concerns should be alleviated by § 60-20.1, which provides that the regulations at 41 CFR part 60-20 "are to be read in conjunction with the other regulations implementing Executive Order 11246." Nevertheless, as explained above, OFCCP includes new language in the final rule, in § 60-20.1, stating that under no circumstances will a contractor's good faith efforts to comply with the affirmative action requirements of 41 CFR part 60-2 be considered a violation of 41 CFR part 60-20. Contractors should not interpret 41 CFR part 60-20 as prohibiting them from using targeted efforts to recruit and advance women in order to comply with their affirmative action obligations.

Proposed paragraph 60-20.2(b)(9) stated that making any facilities or employment-related activities available only to members of one sex is an unlawful sex-based discriminatory practice, with the condition that if a contractor provides restrooms or changing facilities, the contractor

must provide separate or single-user restrooms or changing facilities to assure privacy between the sexes. NPRM paragraph 60-20.2(b)(10) stated that a Federal contractor is discriminating based on sex if it denies employees access to the bathroom designated for the gender with which they identify. Comments on these provisions raise several issues.

First, nine comments on paragraph 60-20.2(b)(10) recommend revising the example to include other workplace facilities as well as restrooms, because the legal principle of equality and non-stigmatization underlying the example applies to all types of facilities. The proposed example in paragraph (b)(10) was not intended to limit transgender workers' access to other workplace facilities that are segregated by sex, as OFCCP agrees that the legal protection applies equally to these various types of facilities. Accordingly, OFCCP clarifies paragraph 60-20.2(b)(9) (renumbered paragraph 60-20.2(b)(12)), as well as paragraph 60-20.2(b)(10) (renumbered paragraph 60-20.2(b)(13)), to refer specifically to "restrooms, changing rooms, showers, or similar facilities."

Nine comments urge OFCCP to revise proposed paragraph 60-20.2(b)(9) to prohibit Federal contractors from segregating single-user restrooms based on sex. As a comment from an organization representing LGBT individuals explained, segregating single-user restrooms can negatively affect transgender workers by drawing "unwanted attention and scrutiny to their gender identity and expression, contributing to workplace harassment." In another comment, an employer association notes that gender-neutral restrooms give contractors more flexibility "given the rapidly changing social environment." Although provision of sex-neutral single-user facilities may well contribute to the prevention of discomfort and harassment for transgender employees, the example regarding sex-segregated single-user facilities must be read in conjunction with the final rule's example in 60-20.2(b)(13), which provides that denying

transgender employees access to facilities designated for use by the gender with which they identify constitutes an unlawful sex-based discriminatory practice. Provision of sex-segregated single-user facilities is not sex discrimination as long as transgender employees may use the facilities consistent with their gender identity. OFCCP therefore declines to require that single-user restrooms be sex-neutral. However, recognizing the role that sex-neutral single-user facilities might play in preventing harassment of transgender employees, OFCCP adds to the Appendix a new paragraph that recommends that, as a best practice, contractors designate single-user restrooms, changing rooms, showers, and similar single-user facilities as sex-neutral.

In light of the comments discussed above, the final rule example (renumbered paragraph 60-20.2(b)(12)) is clarified to include "restrooms, changing rooms, showers, or similar facilities." With minor wording changes for clarity and brevity, the final rule also maintains OFCCP's proposal that if a contractor provides restrooms, changing rooms, showers, or similar facilities, the contractor must provide same-sex or single-user facilities.

OFCCP received 13 comments that support the requirement in proposed paragraph 60-20.2(b)(10) that Federal contractors provide employees with access to the bathrooms designated for the gender with which they identify. One comment underscores the effect of denying a transgender employee access to gender-appropriate restrooms: Such a denial "singles out and humiliates transgender workers, invites others to harass them, and places workers in the untenable position of either enduring this humiliation or avoiding restroom use at work altogether, risking serious negative health effects."[103]

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[103] This comment, as well as others, cites Jody L. Herman, Gendered Restrooms and Minority Stress: The Public Regulation and its Impact on Transgender People's Lives, J. PUB. MGMT. & SOC. POL'Y 19:65-80 (2013) (transgender individuals fearing denial of access in workplaces, among other public venues, avoid restroom use and commonly report physical symptoms or medical problems).

Two comments oppose the NPRM paragraph (b)(10) requirement. These two opposition comments argue that the requirement is contrary to title VII — that, indeed, courts have held that the title VII prohibition on sex discrimination does not preclude the reservation of restrooms and locker rooms based on biological sex — and thus is beyond OFCCP's authority. The EEOC, however, recently held that an employer must permit access to restrooms and other facilities consistent with the employee's gender identity.[104] These decisions are consistent with the stated legal positions of the Departments of Justice and Education in the context of sex discrimination under title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) (title IX);[105] with the final rule interpreting the prohibition of sex discrimination under Section 1557 of the Patient Protection and Affordable Care Act (ACA) published by the Department of Health and Human Services;[106] with guidance documents issued by the Office of Personnel Management (OPM) regarding the employment of transgender individuals in the Federal workplace;[107] and with the Department's Occupational Safety and Health Administration's best practices relating to

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[104] Lusardi v. Dep't of Army, EEOC Appeal Doc. 0120133395, 2015 WL 1607756, at *8 (April 1, 2015); Additionally at least one Federal district court has recognized that such a claim is cognizable under title VII. See, e.g., Hart v. Lew, 973 F. Supp. 2d 561, 581-82 (D. Md. 2013) (recognizing a transgender plaintiff's title VII sex discrimination claim based in part on her employer's repeated denial of access to the women's restroom).

[105] U.S. Department of Justice and U.S. Department of Education, Dear Colleague Letter on Transgender Students (May 13, 2016), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf (last accessed May 13, 2016); Brief of the United States as Amicus Curiae Supporting Plaintiff-Appellant, G.G. v. Gloucester Cnty. Sch. Bd., Case No. 15-2056, 2015 WL 6585237 (4th Cir. October 28, 2015). The Fourth Circuit subsequently upheld the Department of Education's interpretation, G.G., 2016 WL 1567467, at *8 (4th Cir. April 19, 2016), and denied the school board's petition for rehearing en banc, G.G., slip op. at 2 (4th Cir. May 31, 2016).

[106] See U.S. Dep't of Health & Hum. Servs., Nondiscrimination in Health Programs and Activities: Final Rule, 81 FR 31376, 31388-31389, 31409 (May18, 2016) (HHS Nondiscrimination Final Rule).

[107] See OPM, Diversity and Inclusion Reference Materials: Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, available at http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ (last accessed March 26, 2016).

restroom access for transgender workers.[108] Most relevant, the proposed requirement is consistent with guidance that OFCCP issued in April 2015 relating to its Executive Order 13672 regulations, which expressly prohibit discrimination on the basis of gender identity.[109]

Further, this requirement is the logical outgrowth of the rulings that discrimination on the basis of gender identity is discrimination on the basis of sex. As one supportive comment explains, "denying employees access to sex-segregated facilities consistent with their gender identity amounts to treating them differently from non-transgender employees based on a perceived inconsistency between their gender identity and sex assigned at birth — in other words, based on being transgender, and therefore based on sex." Although E.O. 11246 does not expressly state that applicants and employees must be allowed to use the restroom that is designated for use by the gender with which they identify, OFCCP must "adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes" of the Executive Order.[110]

One of the comments that opposes the requirement also argues that allowing workers to use facilities according to the gender with which they identify would have an adverse impact on other employees who have a legitimate expectation of privacy in workplace restrooms and locker rooms. To begin with, this comment assumes that non-transgender employees will react to the presence of transgender employees based on the transgender employees' birth-assigned gender,

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[108] See Occupational Safety and Health Administration, U.S. Department of Labor, Publications: Best Practices: A Guide to Restroom Access for Transgender Workers, available at https://www.osha.gov/Publications/OSHA3795.pdf (last accessed March 26, 2016).

[109] See OFCCP, Frequently Asked Questions: EO 13672 Final Rule ("How is restroom access affected by the Final Rule?"), available at http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q35 (last accessed March 25, 2016).

[110] E.O. 11246, sec. 201.

rather than on the gender with which they identify in their daily interactions with co-workers. It also assumes that non-transgender employees' reactions will be based on fear, ignorance, or prejudice about transgender individuals. It is well established that private bias, prejudice, or fear "is not a legitimate basis for retaining the status quo."[111] Non-transgender co-workers' fears, ignorance, or prejudice about transgender individuals can no more be permitted to trump the right of transgender employees to equal workplace treatment than white co-workers' prejudices against sharing restrooms or drinking fountains with black employees would have been permitted to trump black employees' rights after the Executive Order and title VII went into effect 50 years ago.

One industry organization comments that few of its members have policies in place to address restroom access and asks OFCCP to provide more guidance to facilitate successful implementation of the final rule. OFCCP will provide general guidance and technical assistance to contractors as part of the final rule's implementation.

Paragraph 60-20.2(b)(11) in the proposed rule described the unlawful sex-based discriminatory practice of treating an employee adversely because "he or she has undergone, is undergoing, or is planning to undergo sex-reassignment surgery or other processes or procedures designed to facilitate the adoption of a sex or gender other than the individual's designated sex at birth." OFCCP received two comments suggesting that this paragraph's focus on "sex-reassignment surgery" is too narrow. The comments point out that some transgender individuals are unable or do not wish to undergo surgical or other types of medical procedures as part of

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[111] Latta v. Otter, 771 F.3d 456, 470-71 (9th Cir. 2014); see also Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); Lusardi, 2015 WL 1607756, at *9, ("supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment…[a]llowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII intended to overcome").

their gender transition. To clarify that disparate treatment because of an employee's gender transition is sex discrimination under E.O. 11246 regardless of whether the transition involves medical treatment, one comment suggests revising the paragraph as follows (emphasis added to show suggested revision): "Treating an employee or applicant adversely because she or he has adopted a gender identity other than the one designated at birth, or because he or she is undergoing . . ." a gender transition. The suggested language is, however, tantamount to saying "because she or he is transgender" — which is already provided in paragraph 60-20.1(a). For that reason, OFCCP declines to revise this example as suggested.

Another comment suggests replacing the term "sex-reassignment surgery or other processes or procedures" with "transition-related health care" to encompass non-surgical treatment, such as hormone therapy and other medical services, as well as surgical treatment. OFCCP adopts this suggestion with slight modifications, changing the provision in the final rule (now at paragraph 60-20.2(b)(14)) by replacing the clause "because he or she has undergone, is undergoing, or is planning to undergo sex-reassignment surgery or other processes or procedures" with the clause "because he or she has received, is receiving, or is planning to receive transition-related medical services."

As noted supra, OFCCP adds, in an Appendix to the final rule, two examples of best practices to prevent sex-based disparate treatment. Section (1) of the Appendix recommends that contractors avoid the use of gender-specific job titles and use gender-neutral job alternatives where they are available. Section (2) recommends that contractors designate single-user restrooms and similar facilities sex-neutral. Neither of these practices is required.

Proposed paragraph 60-20.2(c) provided that employment policies or practices that have an adverse impact on the basis of sex, and are not job-related and consistent with business

necessity, violate E.O. 11246 and the regulations at 41 CFR part 60-20. It also identified four examples of employment practices that may have an adverse impact on women, referencing case law as the source of those examples. OFCCP received 14 comments on these proposed provisions. In general, 12 of the comments support proposed paragraph 60-20.2(c), with 11 of them offering suggested changes. One comment opposes the proposed paragraph and recommends deleting it altogether; another generally opposes the paragraph with an overarching recommendation to make the examples less gender-specific.

Several supporting comments, highlighting the overlap between proposed paragraph 60-20.2(c) on disparate impact in general and proposed § 60-20.5, recommend that policies or practices that have a disparate impact on the basis of pregnancy — such as the practice of offering "light duty" only to employees with on-the-job injuries, thereby excluding employees affected by pregnancy, childbirth, or related medical conditions — be cross-referenced under paragraph 60-20.2(c). As paragraph 60-20.2(c) states, disparate-impact analysis applies to all "[e]mployment policies or practices," including those that affect pregnancy, childbirth, or related medical conditions, and proposed paragraph 60-20.5, which addresses pregnancy, childbirth, or related medical conditions, includes, in paragraph 20.5(c)(2), an example of the application of disparate-impact analysis to the provision of leave. OFCCP believes it is therefore unnecessary to add an example of a situation in which a contractor's policies or practices have an unjustified disparate impact on pregnancy to proposed paragraph 60-20.2(c). Instead, the final rule revises § 60-20.5 to apply disparate-impact analysis to contractors' failure to accommodate pregnancy. This revision is discussed in connection with § 60-20.5, infra.

One comment recommends that OFCCP revise the example in proposed paragraph 60-20.2(c)(1) by removing the word "minimum" from "[m]inimum height and/or weight

qualifications." OFCCP agrees that the word "minimum" is unnecessary and deletes it from the example in the final rule. The same comment suggests making this example, as well as the example in proposed paragraph 60-20.2(c)(2), gender-neutral. For example, the commenter suggests replacing the phrase "negatively impact women substantially more than men" with "negatively impact one gender more than the other" in proposed paragraph 60-20.2(c)(1). OFCCP declines to make these examples gender-neutral. As noted earlier, these examples are deliberately gender-specific to highlight common types of sex discrimination.

Five comments recommend that OFCCP insert the language "including in Notices of Openings for Registered Apprenticeship Programs," in the example proposed in paragraph 60-20.2(c)(2). The purpose of this insertion would be to clarify that strength requirements for apprenticeship programs may have a disparate impact on women and be unlawful if the requirements actually exceed what is necessary to perform the job. OFCCP recognizes that job opening notices stating selection criteria such as strength requirements may have a chilling effect on women applicants; if the selection criteria have a disparate impact, unless the criteria are job-related and consistent with business necessity, they may violate E.O. 11246 and 41 CFR part 60-20. Because application of this principle to selection procedures for apprenticeship programs is stated clearly in the final rule, at paragraph 60-20.2(c)(4), OFCCP declines to add another reference to apprenticeship programs to paragraph 60-20.2(c)(2).

Two comments also recommend that OFCCP broaden the first phrase in proposed paragraph 60-20.2(c)(2) by making the example less specific to "strength" requirements. One comment suggests use of the phrase "physical requirements"; the other, "physical agility tests," noting that such physical agility tests have served to exclude women from such sectors as construction, industrial work, transportation, and law enforcement and that those tests are

frequently not necessary to the performance of the job in question. In light of these two comments, OFCCP alters this example to include any type of physical requirement that may have a discriminatory impact based on sex. Instead of being limited to strength, the example in the final rule encompasses "[s]trength, agility, or other physical requirements."

One comment disputes whether the example in proposed paragraph 60-20.2(c)(3) is factual or based on a stereotype that women require the use of restrooms more than men. As indicated in the NPRM, the proposed example — on employer policies effectively prohibiting restroom usage — reflects the fact scenario of Johnson v. AK Steel Corp., No. 1:07-cv-291, 2008 WL 2184230 (S.D. Ohio May 23, 2008), in which the court found that the employer's policy requiring employees to urinate off the back of a crane (i.e., not allowing restroom breaks) was evidence of a prima facie case of disparate-impact discrimination against women. Earlier, the Sixth Circuit similarly held that the "failure to furnish adequate and sanitary facilities to female workers who have been shown to suffer identifiable health risks" had a significant disparate impact on women.[112] As mentioned above in the Reasons for Promulgating this New Regulation section of the preamble, in 2014 OFCCP found a construction contractor to have violated the Executive Order when it failed to provide restroom facilities to female carpenters.[113]

To address the issue of whether women require the use of the restroom more than men, OFCCP surveyed medical literature in this area. While there was evidence supporting the

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[112] Lynch v. Freeman, 817 F.2d 380, 388 (6th Cir. 1987). In Lynch, the district court found that the plaintiff introduced "credible medical expert testimony to demonstrate that women are more vulnerable to urinary tract infections than are men" but rejected her disparate-impact case. Id. The appeals court reversed, holding that the plaintiff had made out a prima facie case of disparate-impact discrimination. The court found that "all females were placed at a higher risk of urinary tract infections by using unsanitary portable toilets or by avoiding the use of such toilets and holding their urine" and that men were not exposed to the same risks from using the toilets because of "anatomical differences between the sexes." Id.

[113] See supra note 41 and accompanying text.

position OFCCP took in the NPRM, the overall results were inconclusive. While some courts have recognized that an employer's policies relating to use of sanitary facilities may have a disparate impact against women, OFCCP is sensitive to this commenter's concern that such an example "perpetuates an unproven stereotype." Accordingly, OFCCP deletes this proposed example from the text of the final rule. However, in certain circumstances, consistent with other courts addressing the issue under title VII, disparate-impact claims based on restroom facility access may be cognizable under the Executive Order.

Five comments recommend broadening the example in proposed paragraph 60-20.2(c)(4) by adding "physical tests" and "interviews" as selection criteria that may have an adverse impact on women seeking to gain entrance to an apprenticeship program. As several of these comments note, some apprenticeship programs utilize physical tests and interview scoring methods that disproportionately exclude women. Because the final rule already addresses "physical requirements" that may have an adverse impact on women at paragraph 60-20.2(c)(2), OFCCP declines to add "physical tests" to the example in proposed paragraph (c)(4). However, OFCCP adds "interview, or other selection procedure" to this example in the final rule, at paragraph 60-20.2(c)(3). As a result of expanding the proposed language to include "performance on a written test, interview, or other selection procedure," OFCCP rephrases the remaining text in final rule paragraph (c)(3) from "the validity of the test" to "the validity of the selection procedure consistent with the Uniform Guidelines on Employee Selection Procedures." OFCCP also expands paragraph (c)(3) to encompass "entry into an apprenticeship or training program" (emphasis added) as a disparate-impact corollary to the example at paragraph 60-20.2(b)(11) in the final rule addressing disparate treatment of women in formal and informal training programs.

Some supporting comments also recommend that OFCCP provide more examples of

disparate impact in the contexts of compensation, leave, and the "lack of appropriate physical facilities in the workplace." OFCCP declines to add particular examples of disparate-impact discrimination in these contexts because the final rule contains separate provisions that discuss compensation, leave, physical facilities, and entry into training programs, at paragraphs 60-20.4(d), 60-20.5(c)(2), 60-20.5(d)(3), and 60-20.2(c)(3), respectively. However, OFCCP inserts one new example in the final rule, at paragraph 60-20.2(c)(4), based on one comment's specific suggestion to include an example of disparate impact due to the policy or practice of relying on "short-lists" and "word-of-mouth" or "tap-on-the-shoulder" recruiting.

Finally, one comment opposes proposed paragraph 60-20.2(c) in its entirety, stating that it is unnecessary because the prohibition against disparate impact already exists in 41 CFR 60-2.14(b)(4), 41 CFR 60-1.20(a), and 41 CFR 60-3. 41 CFR part 60-20 is intended to supplement contractors' other obligations in 41 CFR chapter 60. Additionally, in the last four decades, disparate impact analysis has been applied to new circumstances under title VII, and numerous comments commend OFCCP for updating part 60-20 to reflect current law. For these reasons, OFCCP opts to retain proposed paragraph 60-20.2(c).

Section 60-20.3 Sex as a Bona Fide Occupational Qualification

Proposed § 60-20.3, entitled "Sex as a bona fide occupational qualification," consolidates in one provision the various references to the BFOQ defense available to employers in the Sex Discrimination Guidelines. It adopts the BFOQ language set forth in title VII, 42 U.S.C. 2000e–2(e).

After considering the comments it received, OFCCP adopts § 60-20.3 as proposed. One comment, from a contractor association, supports the proposed changes to § 60-20.3 as an approach that simplifies the regulations and makes obligations under 41 CFR part 60-20 easier to

understand.

Four comments recommend that OFCCP explain in plain language that factors other than sex must be business-related and actually account for the discrimination that occurred. OFCCP declines to provide this explanation in § 60-20.3 of the final rule because, as a matter of practice, OFCCP already follows these title VII principles.

Seven comments recommend that language be added to § 60-20.3 to make clear that when sex is a valid BFOQ, transgender employees should be treated in a manner consistent with their gender identity. Commenters cited the Los Angeles County Sheriff's Department (LASD) as an example of an employer applying a sex-based BFOQ in a way that meets its legitimate needs without discriminating against transgender workers: LASD's Transgender Employee Guide states that transgender employees will be "classified and assigned in a manner consistent with their gender identity, not their sex assigned at birth" for sex-segregated job assignments. OFCCP agrees that, where otherwise valid, a sex-based BFOQ may not be applied in a discriminatory manner to transgender workers. Because case law on application of sex discrimination principles, including those relating to the BFOQ exception, to transgender discrimination is developing, OFCCP declines to incorporate a statement about application of the BFOQ exception to transgender workers, but it will continue to follow relevant title VII case law and administrative interpretations.

Finally, one women's rights organization encourages OFCCP to provide additional guidance for contractors in the form of specific examples of valid and invalid BFOQ defenses in proposed § 60-20.3. OFCCP follows title VII principles in assessing a contractor's use of the BFOQ defense — including the EEOC's view that the BFOQ exception should be "interpreted

narrowly"[114] and its explanation that the exception applies "where it is necessary for the purpose of authenticity or genuineness."[115] OFCCP declines to add examples to the final rule.

Section 60-20.4 Discriminatory Compensation

Proposed section 60-20.4 covers sex discrimination in compensation. The section is organized into paragraphs describing various types of discriminatory compensation practices under E.O. 11246. This portion of the Section-by-Section Analysis first addresses comments on the entire section generally, followed by comments specifically addressing each paragraph.

A law firm comments that proposed § 60-20.4 is unnecessary and redundant, because the existing regulation at paragraph 60-2.17(b)(3) requires contractors to evaluate their compensation systems to determine whether there are any sex-, national origin-, or race-based disparities. The commenter asserts that the section does not change contractors' obligations with regard to assessing their compensation systems or the compliance evaluation procedures that OFCCP uses to assess compliance and that it therefore has no purpose. OFCCP concludes that the section should remain in the final rule. The section does not create new obligations for contractors, but it does provide specific examples based in title VII law to help contractors assess their compliance. OFCCP's rulemaking authority is not constrained to issuing regulations that create new obligations for contractors or that necessitate new enforcement mechanisms to assess contractor compliance. Since § 60-20.4 provides more clarity regarding the types of practices that can form the basis of a compensation discrimination violation of E.O. 11246, it should not be eliminated from the final rule.

The joint employer organization comment also argues that proposed section 60-20.4 is

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[114] EEOC Guidelines on Discrimination Because of Sex, supra note 64 (§ 1604.2, provision on BFOQ defense).

[115] Id. at §1604.2(2).

unnecessary, on the ground that proposed paragraph 60-20.2(b) on disparate treatment already generally states that a "contractor may not make any distinction based on sex in recruitment, hiring, firing, promotion, compensation, hours, job assignments, training, benefits, or other terms, conditions, or privileges of employment" (emphasis added). The comment asserts that proposed § 60-20.4 only reiterates that contractors may not discriminate on the basis of sex in compensation. OFCCP disagrees that proposed § 60-20.4 is redundant. Paragraph 60-20.2(b) merely states that contractors may not discriminate on the basis of sex when making employment decisions, including in compensation. Section 60-20.4 elaborates on this basic principle, describing the various types of practices that can result in sex-based pay discrimination under E.O. 11246, in accordance with title VII law. As stated above, this section provides added clarity about contractors' obligations in this area, and OFCCP retains it in the final rule.

Another law firm commenter expresses concern that proposed § 60-20.4 will impact the self-evaluation of compensation systems that contractors are already required to conduct pursuant to the existing regulation at paragraph 60-2.17(b)(3). As noted previously, paragraph 60-2.17(b)(3) requires contractors to evaluate their compensation systems to determine whether there are sex-, race-, or national origin-based disparities. Because the regulation does not specify any particular analysis method that contractors must follow to comply with this regulation, contractors have substantial discretion to decide how to evaluate their compensation systems. Specifically, the commenter cites the statement in the preamble of the NPRM that proposed paragraphs 60-20.4(a), (b), and (c) were intended "to provide more guidance to contractors about the kinds of practices that they should undertake to assess their compliance." The commenter is concerned that this statement might mean that proposed paragraph 60-20.4 will establish new, mandatory assessment techniques for the self-evaluation of compensation and asks that OFCCP

clarify its intent on this issue. OFCCP appreciates the opportunity to clarify that § 60-20.4 does not create any new obligations with regard to the self-evaluation of compensation systems required by paragraph 60-2.17(b)(3). Each contractor may continue to choose the assessment method that best fits with its workforce and compensation practices. To the extent that § 60-20.4 provides guidance regarding various forms of compensation discrimination, it may inform contractors' efforts to identify sex-based disparities in compensation, as well as the policies or practices that are causing them.[116] Fully understanding the source as well as the scope of the problem is important because sex-, race-, and national origin-based disparities found as part of a self-evaluation must be corrected pursuant to paragraph 60-2.17(c).

Many commenters suggest that § 60-20.4 should be revised to clarify that punitive pay secrecy policies that interfere with enforcement of wage discrimination protections violate antidiscrimination law. OFCCP declines to add this prohibition to § 60-20.4, because pay secrecy policies are already addressed in OFCCP's regulations.[117]

Many of the same commenters also suggest that OFCCP should encourage contractors to implement transparent pay practices and clear methodologies for setting pay. As OFCCP recognized in the preamble to the NPRM on prohibiting pay secrecy policies, research shows

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[116] If EEOC's Proposed Revision of the Employer Information Report (EEO-1) is adopted, it may also provide assistance to contractors that have 100 or more employees as they attempt to identify sex-based disparities in compensation and the policies or practices that cause such disparities. See EEOC, Agency Information Collection Activities: Proposed Revision of the Employer Information Report (EEO-1) and Comment Request, 81 FR 5113, 5115 (February 1, 2016) ("EEOC and OFCCP anticipate that the process of reporting pay data may encourage employers to self-monitor and comply voluntarily if they uncover pay inequities."). In any event, contractors remain free to choose the assessment method that best fits with their workforces and compensation practices to accomplish the self-evaluation of compensation systems required by paragraph 60-2.17(b)(3).

[117] See OFCCP, Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 FR 54934 (September 11, 2015).

that workers without access to compensation information are less satisfied and less productive.[118] Greater transparency about compensation and how it is determined can translate into real benefits for employers, including decreased turnover and higher productivity. Additionally, as mentioned above, greater pay transparency may help prevent or resolve sex-based compensation discrimination by allowing workers to become informed and better able to exercise their right to fair pay by filing a complaint. While OFCCP recognizes the potential value of greater pay transparency to contractors and employees, specifically advising employers to develop more transparent pay practices is beyond the scope of the current rulemaking.

Another commenter asserts that OFCCP's approach to pattern-or-practice pay discrimination claims is inconsistent with title VII case law, including Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). This comment is outside the scope of the proposed rule, which makes no changes to OFCCP's approach to pattern-or-practice pay discrimination claims. Moreover, the Supreme Court's decision in Wal-Mart was based on the private plaintiffs' failure to satisfy procedural requirements under the Federal Rules of Civil Procedure (FRCP) regarding class-action lawsuits. Unlike private plaintiffs, who must prevail on class-certification motions to bring suit on behalf of others, OFCCP is a governmental agency that is authorized to act in the public's interest to remedy discrimination. It is not subject to the limitations and requirements of class certification under the FRCP.[119] Nonetheless, to the extent that Wal-Mart addressed

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[118] 79 FR at 55715 (September 17, 2014).

[119] See OFCCP v. Bank of Am., 1997-OFC-16, Order Den. Def.'s Req. to Strike the Pl.'s Expert Report, & for Recons. of Denial of Req. for Issuance of Subpoenas (ALJ November 2, 2011). Cf. Gen. Tel. Co. of the Nw., Inc. v. Equal Emp't Opportunity Comm'n, 446 U.S. 318, 334 n.16 (1980) ("[T]he nature of the EEOC's enforcement action is such that it is not properly characterized as a 'class action' subject to the procedural requirements of Rule 23."); Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council, Inc., 941 F. Supp. 2d 1159, 1166 (N.D. Cal. 2013)

principles of title VII law that apply outside the class-certification context, OFCCP follows those principles in its enforcement of E.O. 11246.

Three comments suggest that the term "equal wages" in the introductory paragraph to proposed § 60-20.4 is misleading and does not accurately state the law under title VII and E.O. 11246. Specifically, the second sentence in proposed § 60-20.4 states that "Contractors may not engage in any employment practice that denies equal wages, benefits, or other forms of compensation . . . ." (emphasis added). All three commenters point out that title VII prohibits discrimination in compensation but does not require employers to provide equal pay for all employees, as is implied by the term "equal wages." One commenter notes that the term "equal wages" may be especially confusing to contractors because it could be interpreted as a reference to the Equal Pay Act, which OFCCP does not enforce. OFCCP agrees that the term "equal wages" may create confusion about the legal framework relevant to sex-based compensation discrimination under E.O. 11246. Accordingly, OFCCP revises the second sentence of § 60-20.4 in the final rule to read as follows: "Contractors may not engage in any employment practice that discriminates in wages, benefits, or any other forms of compensation . . . ." (emphasis added).

Proposed paragraph 60-20.4(a) prohibits contractors from paying "different compensation to similarly situated employees on the basis of sex." It notes that the determination of which employees are similarly situated is case specific and lists the following factors as among those potentially relevant to determining similarity: tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. Lastly, it states that in some cases, employees are similarly situated

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("The principle that has emerged is that where a governmental agency is authorized to act in the public's interest to obtain broad relief . . . and the authorizing statute confers such power without reference to class certification, Rule 23 may not apply.").

where they are comparable on some of these factors, even if they are not similar on others.

One commenter states that proposed paragraph 60-20.4(a) is inconsistent with title VII case law governing whether employees are similarly situated. OFCCP disagrees with this characterization of proposed paragraph 60-20.4(a), which as described above states that the determination of similarly situated employees is case specific and lists several examples of potentially relevant factors. Under the proposed provision, OFCCP treats employees as similarly situated only if they are comparable for purposes of the contractor's pay practices on factors relevant to the compensation issues presented. The proposed provision is therefore consistent with title VII's flexible, fact-specific approach to proof. The commenter also objects to proposed § 60-20.4(a) as contrary to OFCCP's 2006 Systemic Compensation Discrimination Standards. However, as the commenter acknowledges, OFCCP rescinded those standards in February 2013.[120]

Several commenters express concern that the definition of "similarly situated" in proposed paragraph 60-20.4(a) is too broad and allows the agency too much flexibility in determining which employees to compare in a given case. One commenter states that it does not provide specific enough guidance to contractors and that it permits the agency to compare employees "who are assigned to different jobs at different levels, in different units, and at different geographic locations." Another commenter expresses concern about the statement in the last sentence of paragraph 60-20.4(a) that in some cases employees may be similarly situated

[120] See Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination: Notice of Final Rescission, 78 FR 13508 (February 28, 2013) (Notice of Rescission).

if they are comparable on some but not all of the factors listed. The commenter interprets that sentence to mean that OFCCP will compare employees even though they are not similarly situated in all relevant respects, which is not supported by title VII case law.

In response to these comments, OFCCP clarifies the principles underlying the definition of "similarly situated" set out in proposed paragraph 60-20.4(a). The definition used in the final rule is identical to the definition provided in OFCCP's Directive 307, describing procedures for reviewing contractor compensation systems and practices, and the agency's rescission of the compensation guidance documents issued in 2006.[121] The definition is flexible because title VII law does not provide a static list of factors for determining which employees are similarly situated that can be applied in every case. Under the title VII discrimination framework, comparing employees to determine whether discrimination has occurred is highly case specific. When assessing compensation during a compliance evaluation, OFCCP inquires about the compensation systems and practices of the particular contractor under review and tailors its analyses and investigative approach to the facts of the case. This helps ensure that its compensation analyses compare employees who are in fact similarly situated.

Many of the commenters that express concern about the flexibility of the similarly situated standard set out in proposed paragraph 60-20.4(a) also question whether the paragraph indicates that OFCCP will use a "comparable worth" approach when assessing employee compensation—i.e., whether the agency will compare jobs because they have comparable worth even if they do not involve similar duties or working conditions. OFCCP does not conduct comparable worth assessments when reviewing contractors' compensation systems. OFCCP

[121] OFCCP Directive 307 (renumbered on September 16, 2013, as 2013-03), Procedures for Reviewing Contractor Compensation Systems and Practices (February 28, 2013); Notice of Rescission.

enforces the Executive Orders prohibition against compensation discrimination in line with title VII principles.[122] As noted above, this requires a case-by-case assessment of the relevant factors to determine similarly situated employees. Depending on the unique pay systems and policies of a given contractor, this may involve comparing employees in similar, but not necessarily identical, jobs, or employees who are similar in terms of level, function, or other classification relevant to the contractor's workforce. Further, a specific job or position may not be the only relevant consideration, particularly in a systemic case. For example, a bonus pool or commission formula may apply to a group of individuals who hold multiple positions, and in an assessment of pay practices at hire, a key point of comparison may be qualifications at entry. OFCCP adheres to title VII case law on compensation discrimination as it develops and does not endorse or advocate for any particular method for contractors to ensure nondiscrimination in compensation.

Another commenter suggests adding job title, seniority, and education to the list of factors that may be relevant to the determination of which employees are similarly situated. While one or more of these three factors may be relevant to the determination of which employees are similarly situated in a particular case, OFCCP declines to add them to paragraph 60-20.4(a) in the final rule. The list of potentially relevant factors itemized in the third sentence of proposed paragraph 60-20.4(a) is non-exhaustive, due to the highly case-specific nature of the similarly situated inquiry. OFCCP will continue to consider and account for the factors that a particular contractor uses to determine compensation, on a case-by-case basis and in line with title VII principles.

Two organizations representing women in construction suggest that OFCCP add "work

[122] Id.

hours" to the list of factors that may be relevant to a similarly situated determination as a way of addressing the discrimination in the number of hours assigned that women in construction often face. OFCCP declines to add "work hours" to paragraph 60-20.4(a) because the practice of assigning fewer work hours on the basis of sex is independently prohibited by paragraph 60-20.4(c). Paragraph 60-20.4(c) states that "[c]ontractors may not provide or deny earnings opportunities because of sex, for example, by denying women equal opportunity to obtain regular and/or overtime hours." Additionally, identifying work hours as a possible factor for making the similarly situated determination may limit OFCCP's ability to compare women to their male counterparts who work more hours but have similar qualifications.

A number of commenters recommend that OFCCP add examples of pay factors — such as market forces and prior salary — that may be discriminatory. A related comment on proposed paragraph 60-20.4(d) states that the definition of "compensation practice" in that paragraph is unclear and argues that it would be improper for OFCCP to interpret the phrase to include a contractor's determination to pay a particular applicant a higher wage based on market forces (e.g., matching a competitor's offer) and thus to conclude that the practice is discriminatory. As the comments themselves acknowledge, the case law about what factors are legitimate for the purposes of setting pay is unsettled. Thus, OFCCP declines to adopt a per se rule permitting or prohibiting the use of market forces or prior salaries in setting compensation. As with any other compensation practice, OFCCP will review the employer's practice on a case-by-case basis to determine whether there is discriminatory treatment or discriminatory impact based on sex. Each claim of pay discrimination turns on the specific facts of the case.

Paragraph 60-20.4(b) prohibits contractors from granting or denying higher-paying wage rates, salaries, positions, job classifications, work assignments, shifts, development opportunities,

or other opportunities on the basis of sex. It also prohibits contractors from granting or denying training, work assignments, or other opportunities that may lead to advancement to higher-paying positions on the basis of sex.

A women's rights group suggests that the preamble to the final rule should point out that steering on the basis of sex in assigning workers to part-time and full-time jobs could be sex discrimination in violation of this rule. OFCCP agrees that such a practice could violate this part. For example, it would likely constitute discrimination if a contractor steered women into part-time jobs with a lower wage rate than similar full-time jobs assigned to men, based on a sex stereotype that women prefer to work fewer hours than men. Even if the wage rates for similar part-time and full-time jobs are the same or very similar, steering women into part-time jobs could also be discriminatory — not only because women would be assigned fewer hours but also if benefits such as health insurance were granted only to full-time workers or if opportunities for promotion or training were disproportionately or solely available to full-time workers.

Another commenter, a construction contractor, expresses concern that OFCCP may attribute differences in pay to discrimination rather than to legitimate differences in experience or skill. The commenter explains that the construction industry has historically been male dominated. As a result, men in this industry often have higher-paying positions due to their experience, and women tend to apply for and occupy lower-paying administrative positions. The commenter is concerned that OFCCP will not account for such employee characteristics and preferences that are beyond the control of the contractor. OFCCP considers legitimate, nondiscriminatory factors that may explain differences in employee compensation when

conducting its analyses.[123] Relevant factors may include a particular skill or attribute; education; work experience; the position, level, or function; tenure in a position; and performance ratings. OFCCP considers whether a factor accounts for differences in pay on a case-by-case basis, by determining whether the factor is actually used by the contractor to determine compensation and whether the factor has been applied consistently without regard to sex or another protected basis. Whether any particular factor that explains differences in pay is "tainted" by discrimination, or should be included or excluded as a legitimate explanation for sex-based disparities, will depend on case-specific evidence.

Two comments suggest that OFCCP add the term "apprenticeships" to paragraph 60-20.4(b) in order to make clear that sex-based distinctions in granting apprenticeships are prohibited. OFCCP agrees that apprenticeships provide valuable opportunities for workers to learn new skills and advance and that access to apprenticeships is crucial for women in certain industries like construction. Accordingly, OFCCP adds the term "apprenticeships" to the second sentence of paragraph 60-20.4(b) in the final rule.

Proposed paragraph 60-20.4(d) prohibits compensation practices that have an unjustified sex-based disparate impact, stating that contractors are prohibited from implementing compensation practices, including performance systems, that have an adverse impact on the basis of sex and are not shown to be job-related and consistent with business necessity.

One commenter argues that disparate impact cannot be a viable mode of analysis in pay-discrimination cases because Section 703(h) of title VII, 42 U.S.C. 2000e-2(h), forecloses the

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[123] OFCCP, Frequently Asked Questions: OFCCP Procedures for Reviewing Contractor Compensation Systems and Practices ("How will 'factors' that the contractor asserts are relevant to compensation be considered and analyzed by OFCCP?"), available at http://www.dol.gov/ofccp/regs/compliance/faqs/CompGuidance_faq.htm#Q27 (last accessed March 27, 2016).

possibility of a neutral policy's being the basis of a pay discrimination claim. However, Section 703(h), by its terms, provides a defense only where an employer applies different standards of compensation "pursuant to . . . a system which measures earnings by quantity or quality of production or to employees who work in different locations," and where those differences are not the result of intentional discrimination. This provision of title VII is entirely consistent with OFCCP's case-by-case approach in assessing relevant factors that may explain differences in compensation.

The same commenter further questions the characterization of Lewis v. City of Chicago, 560 U.S. 205, 212 (2010), in footnote 71 of the NPRM, which stated that "[t]itle VII places no limit on the types of employment practices that may be challenged under a disparate impact analysis." To clarify, in footnote 71 of the NPRM, OFCCP referred to the Supreme Court's statement in Lewis that title VII does not define "employment practice" for purposes of establishing a disparate-impact claim. However, to prevent confusion, OFCCP does not include footnote 71 of the NPRM in the final rule. Paragraph 60-20.4(d) should be read consistently with established title VII principles.

Another commenter requests clarification of whether paragraph 60-20.4(d) would as a general rule require contractors to validate their performance review systems pursuant to UGESP. The commenter notes that not all performance review systems are tied to annual merit increases, bonuses, or other forms of compensation. The commenter also alludes to the significant financial burden that contractors would face if required to validate performance review systems and points out that this cost was not estimated as part of the burden calculation in the NPRM. As proposed, paragraph 60-20.4(d) did not necessarily require contractors to validate their performance review systems pursuant to UGESP. UGESP applies to tests and

other selection procedures that employers use as bases for employment decisions. Thus, a performance review system that a contractor uses as a basis for promoting, demoting, referring, or retaining employees is subject to UGESP, which may require it to be validated if it has an adverse impact on the basis of sex, race, or national origin. In that respect, proposed paragraph 60-20.4(d) did not require anything beyond what UGESP already requires. To prevent confusion, however, OFCCP revises final rule paragraph 60-20.4(d) to remove the specific reference to performance review systems. In any event, to the extent that a particular performance review system is not a "selection procedure" and, thus, not subject to UGESP, a contractor that uses such a system to make compensation decisions must show that the system is job-related and consistent with business necessity if it has an adverse impact on the basis of sex.

Proposed paragraph 20.4(e) provided that a contractor violates the rule any time it pays wages, benefits, or other compensation that is the result in whole or in part of the application of any discriminatory compensation decision or other practice described in that section. One commenter, arguing that the FPA extends the statute of limitations for compensation discrimination claims but not for other discrete employment actions such as hiring, initial job assignments, and promotion decisions, requests that OFCCP modify the language in paragraph 60-20.4(e) to exclude discrete employment actions like job assignment and promotion. OFCCP declines to do so, for the reasons below.

OFCCP first notes that a substantial majority of its enforcement actions under E.O. 11246 arise out of compliance evaluations, which are governed by 41 CFR 60-1.26. Both Federal and administrative courts have held that § 60-1.26 contains no statute of limitations.[124] Because

[124] See Lawrence Aviation v. Reich, 28 F. Supp. 2d 728, 737 (E.D.N.Y. 1998), aff'd in relevant part, vacated in part, 182 F.3d 900 (2d Cir. 1999); OFCCP v. Georgia-Pacific Corp., 90-OFC-25, Acting Sec'y Final Decision and Order

OFCCP enforcement actions arising from compliance evaluations contain no statute of limitations, the commenter's discussion of the FPA and subsequent case law is not applicable to those compliance evaluations.

OFCCP enforcement actions arising from individual complaint investigations, on the other hand, are governed by 41 CFR 60-1.21, which does contain a 180-day statute of limitations. Accordingly, OFCCP enforces its complaint-based claims under § 60-20.4(e) in accordance with the FPA. The FPA states that "an unlawful employment practice" occurs

> when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[125]

The FPA's purpose

> was to reinstate the law regarding the timeliness of pay compensation claims as it was prior to [Ledbetter v. Goodyear Tire and Rubber Co, Inc., 550 U.S. 618 (2007)], which Congress believed undermined statutory protections against compensation discrimination by unduly restricting the time period in which victims could challenge and recover for discriminatory compensation decisions.[126]

As another court explained,

> Thus, pursuant to the FPA, each paycheck that stems from a discriminatory compensation decision or pay structure is a tainted, independent employment action that commences the administrative statute of limitations.[127]

With regard to the commenter's specific suggestion, OFCCP declines to exclude discrete

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at 10 (December 29, 1990) (180-day limitation contained in 41 CFR 60-1.21 refers to complaints by individual applicants or employees alleging discrimination and is not applicable to compliance evaluations).

[125] 42 U.S.C. 2000e-5(e)(3)(A).

[126] Mikula v. Allegheny Cnty., 583 F.3d 181, 184 (3d Cir. 2009).

[127] Noel v. Boeing Co., 622 F.3d 266, 271 (3d Cir. 2010).

employment actions like job assignment and promotion from paragraph 60-20.4(e). While some courts have refused to revive failure-to-promote and other employment actions by application of the FPA, whether a particular claim can be revived depends on whether it is sufficiently tied to an allegation of discriminatory pay, which turns on a factual inquiry. For example, one Federal court held that a failure to promote was sufficiently tied to the plaintiff's claim of discriminatory compensation practices to permit application of the FPA to toll the statute of limitations.[128] OFCCP will determine whether a particular claim of compensation discrimination satisfies the FPA's standard of "discriminatory compensation decision or other practice" on a case-by-case basis, following title VII law as it develops.

OFCCP does make a revision to paragraph 60-20.4(e). It deletes the last four words of proposed paragraph 60-20.4(e), "described in this section," so that the final rule reads: "A contractor will be in violation of E.O. 11246 and this part any time it pays wages, benefits, or other compensation that is the result in whole or in part of the application of any discriminatory compensation decision or other practice." With this change, the paragraph uses the exact language in the FPA and thus clarifies that OFCCP will follow the FPA standard.

Section 60-20.5 Discrimination on the Basis of Pregnancy, Childbirth, or Related Medical Conditions

The proposed rule revised, reorganized, or removed the provisions of § 60-20.5 in the Guidelines, entitled "Discriminatory wages." It moved paragraph 60-20.5(a) (dealing with discriminatory wage schedules) to § 60-20.4 and moved paragraph 60-20.5(b) (dealing with

[128] Perry v. Clinton, 831 F. Supp. 2d 1, 13 (D.D.C. 2011); see also Daniels v. United Parcel Service, Inc., 797 F. Supp. 2d 1163, 1186 (D. Kan. 2011) (employer's misclassification of employee's job title, resulting in denial of greater pay and benefits, constitutes a claim of a discriminatory compensation decision under the FPA); Coppett v. Tenn. Valley Auth., 2012 WL 3962902, at *9 (N.D. Ala. September 11, 2012) (forcing employee to take leave for retaliatory reasons can be considered part of a discriminatory compensation decision or other practice).

discriminatory job classifications) to § 60-20.2. It deleted paragraph 60-20.5(c) (dealing with coordination with the Wage and Hour Administrator). OFCCP received no comments on these changes, and the final rule incorporates them.

The NPRM introduced a new § 60-20.5, "Discrimination on the basis of pregnancy, childbirth, or related medical conditions." Proposed paragraph 60-20.5(a) incorporated the principles set forth in the PDA that discrimination on the basis of sex includes "because of or on the basis of pregnancy, childbirth, or related medical conditions," and that employers must treat employees and job applicants of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for employment-related purposes as other persons not so affected but similar in their ability or inability to work. Proposed paragraph 60-20.5(a) also incorporated the provision in the PDA that exempts employers from having to pay for health insurance benefits for abortion "except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion," and the further proviso that nothing in that exemption "preclude[s] a contractor from providing abortion benefits or otherwise affect[s] bargaining agreements in regard to abortion." The proposed provision also included a non-exhaustive list of related medical conditions. For the sake of clarity and ease of comprehension, the final rule divides paragraph 60-20.5(a) into two paragraphs, the first paraphrasing the general provisions of the PDA and the second containing the non-exhaustive list of related medical conditions.

Three commenters address the provision in proposed paragraph 60-20.5(a) that exempted employers from having to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion. One commenter simply states that abortion should

not be government-funded.

Another commenter asserts that coverage of abortion insurance benefits is beyond the scope of E.O. 11246. Finally, the religious organization commenter urges OFCCP to remove the proposed provision because, it argues, the requirement that employer-sponsored health plans in some instances include coverage of abortion violates the Weldon amendment[129] and RFRA.

OFCCP notes that nothing in the proposed rule required the federal government to fund abortion. However, OFCCP does not retain the provisions related to abortion in the final rule. OFCCP refers, and will continue to refer, to the EEOC for processing any individual complaints that raise the issue of whether contractors provide health insurance benefits for the abortion exception specified in the PDA. Accordingly, OFCCP removes the language taken from the PDA regarding abortion from paragraph 60-20.5(a) in the final rule. OFCCP therefore need not address the comments regarding the Weldon amendment and RFRA as they pertain to this provision.

Several commenters recommend additions to the list of related medical conditions in proposed paragraph 60-20.5(a) (60-20.5(a)(1) in the final rule). One such recommendation, joined by three commenters, is to add "propensity for pregnancy-related risks that require restrictions, such as avoiding exposure to toxic chemicals." These commenters acknowledge that the need for preventive restrictions may not be "considered a symptom or disorder-related" but argue that preventive restrictions are nonetheless related to pregnancy. OFCCP declines to include this phrase on the list of related medical conditions, for the reason the commenters acknowledge: The "propensity" that may require restrictions is not a human medical condition,

[129] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H, title V, sec. 507(d) (December 18, 2015).

but rather a characteristic of the workplace condition, like toxic chemicals exposure, and thus not appropriate for a list of medical conditions.

The commenters similarly urge OFCCP to add "or other preventative measures" to the phrase "complications requiring bed rest" already on the list. OFCCP declines to do so, for two reasons. First, doing so is unlikely to achieve the result that the commenters seek, which is to ensure that pregnant women who are advised by their doctors to avoid certain work conditions to prevent problems with their pregnancies are permitted light duty or other accommodations; the problem is that it is the work conditions, not any pregnancy complications, that require preventive measures. Second, to the extent that there are pregnancy complications that require other preventive measures, the list of related medical conditions is not exhaustive, and such complications may fairly be categorized as medical conditions related to pregnancy or childbirth.

In addition, the final rule addresses the well-documented need for pregnant persons to receive light duty or other accommodations when they need them to prevent unhealthy pregnancy outcomes directly, through the prohibition of discrimination in the provision of workplace accommodations. The NPRM addressed discrimination in the provision of workplace accommodations in proposed paragraph 60-20.5(b)(5); the final rule includes a new provision, paragraph 60-20.5(c), covering such discrimination, which is discussed infra.

Several commenters urge OFCCP to include complications related to conception, such as treatment for infertility, in the list of related medical conditions in proposed paragraph 60-20.5(a) (60-20.5(a)(2) in the final rule). OFCCP agrees that employment decisions based on complications related to conception, such as treatment for infertility, may constitute sex discrimination when those decisions are sex specific. The commenters cite a title VII appellate opinion in which the court held that an employee who was terminated for taking time off to

undergo in vitro fertilization treatments could have a valid sex discrimination claim because surgical impregnation is intrinsically tied to a woman's childbearing capacity.[130] In title VII appellate decisions addressing the exclusion of infertility from employer-provided health insurance, however, courts have generally held that exclusions of all infertility coverage for all employees is gender neutral and thus not sex discrimination under title VII.[131] Nevertheless, title VII may be implicated by exclusions of particular treatments that apply only to one gender.[132] While OFCCP declines to add complications related to conception to the list of related medical conditions, it will follow these principles in implementing paragraph 60-20.5(a)(2).

Several commenters recommend that OFCCP add carpal tunnel and urinary tract infections to the list of related medical conditions. OFCCP declines to do so. The list in proposed paragraph 60-20.5(a) (paragraph 60-20.5(a)(2) in the final rule) is illustrative rather than exhaustive. When these conditions are related to pregnancy or childbirth, the rule will encompass them.

Proposed paragraph 60-20.5(b) set forth some of the most common applications of the general principle of nondiscrimination on the basis of pregnancy, childbirth, or related medical conditions. The examples included refusing to hire applicants because of pregnancy or childbearing capacity (proposed paragraph (b)(1)); firing employees or requiring them to go on

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[130] Hall v. Nalco Co., 534 F.3d 644, 649 (7th Cir. 2008).

[131] See Saks v. Franklin Covey, Inc., 316 F.3d 337, 347 (2d Cir. 2003) (holding that the exclusion of surgical impregnation procedures was not discriminatory, even though they were performed only on women, because "the need for the procedures may be traced to male, female, or couple infertility with equal frequency," and thus "male and female employees afflicted by infertility are equally disadvantaged by the exclusion of surgical impregnation procedures"); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996) (holding that, "because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral," it was not intentionally discriminatory, id. at 680, and rejecting plaintiff's disparate impact claim because she failed to demonstrate that the exclusion disproportionately harmed women, id. at 681).

[132] EEOC Pregnancy Guidance, supra note 31, at I.A.3.c.

leave because they become pregnant or have a child (proposed paragraph (b)(2)); limiting a pregnant employee's job duties based on pregnancy or requiring a doctor's note in order for the employee to continue employment while pregnant (proposed paragraph (b)(3)); providing employees with health insurance that does not cover hospitalization and other medical costs for pregnancy, childbirth, or related medical conditions, including contraception coverage, to the same extent that such costs are covered for other medical conditions (proposed paragraph (b)(4)); and denying alternative job assignment, modified duties, or other accommodations on the basis of pregnancy, childbirth, or related medical conditions (proposed paragraph (b)(5)).

Fifteen comments request addition of provisions specifically addressing breastfeeding, including a provision stating that the denial of an adequate time and place to express milk is sex discrimination; a requirement of 20-minute breaks for pumping; and examples of discrimination against women who return to work and face adverse action because they breastfeed or seek an accommodation to breastfeed. OFCCP declines to include additional provisions related to breastfeeding. Lactation — which is inclusive of breastfeeding — is listed as a "related medical condition" in paragraph 60-20.5(a)(2) in the final rule. Moreover, the lists of examples of disparate treatment in paragraph 60-20.5(b) and of discriminatory denial of pregnancy-based accommodations in paragraph 60-20.5(c) in the final rule are merely illustrative; the fact that they do not include lactation examples does not mean that adverse treatment associated with lactation is not discriminatory. To the contrary, as lactation is a pregnancy-related medical condition, certain adverse actions against a lactating employee, including denial of an adequate time and place to express milk and some of the other breastfeeding examples that commenters propose, will be considered unlawful sex discrimination under this rule.

In addition, OFCCP does not have the authority to require 20-minute breaks for pumping.

However, section 7 of the Fair Labor Standards Act (FLSA) requires covered employers to provide reasonable break time for an employee to express breast milk for nursing children each time such employee has need to express the milk, for up to one year after the child's birth.[133] The FLSA also requires employers to provide employees a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, that may be used to express breast milk.[134] Most contractors are subject to these requirements.

One commenter suggests that the final rule eliminate the phrase "when doctors' notes are not required for employees who are similarly situated" in proposed paragraph 60-20.5(b)(3). The commenter believed that requiring pregnant women to provide doctors' notes simply to continue working their regular jobs without modification is, by itself, impermissible disparate treatment and a burden on pregnant employees. OFCCP agrees with this point, and it deletes the clause "when doctors' notes are not required for employees who are similarly situated." In addition, OFCCP changes the word "employment" in the clause "in order for a pregnant woman to continue employment" to "working" because it is plainer, and changes the word "woman" to "employee" because some persons who have the physiology necessary to have a chance of becoming pregnant do not identify as women (as discussed supra). Thus, in the final rule, paragraph 60-20.5(b)(3) reads "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."

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[133] 29 U.S.C. 207(r)(1).

[134] Id. DOL's Wage and Hour Division enforces the FLSA. See Wage and Hour Division, U.S. Department of Labor, "Break Time for Nursing Mothers," available at http://www.dol.gov/whd/nursingmothers/ (last accessed March 26, 2016).

OFCCP received three comments regarding the NPRM's inclusion of contraceptive coverage in proposed paragraph 60-20.5(b)(4), which required that employer-provided health insurance cover contraception to the same extent that medical costs are covered for other medical conditions. One comment commends OFCCP's recognition of contraceptive coverage as a medical cost related to pregnancy that employers must provide, to the extent other medical costs are covered for other conditions. A contractor umbrella organization expresses concern that the rule does not include an exception for contractors with religious and moral objections to contraception coverage and requests clarification of the provision's applicability, given RFRA and the Supreme Court ruling in Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __ (2014). The third commenter, a religious organization, also argues that RFRA forbids application of this portion of paragraph 60-20.5(b)(4) to contractors with religious objections to contraception. In addition, the religious organization commenter argues that title VII case law does not support the rule's requirement that contraceptives be covered in employer-provided health insurance, citing In re Union Pacific Railroad Employment Practices Litigation, 479 F.3d 936 (8th Cir. 2007).

Although OFCCP's rule implements the Executive Order, not title VII, OFCCP notes that proposed paragraph 60-20.5(b)(4)'s provision regarding contraceptives is consistent with the EEOC's interpretation of title VII as amended by the PDA. The EEOC has held that an employer's refusal to offer insurance coverage for prescription contraceptives, which are available only for women, is a facially discriminatory policy that violates title VII if the employer offers coverage of other prescription drugs or devices or other types of services used to prevent the occurrence of other medical conditions.[135] However, federal courts addressing this

[135] EEOC Decision on Coverage of Contraception (December 14, 2000), available at http://www.eeoc.gov/policy/docs/decision-contraception.html (last accessed March 27, 2016).

issue have reached different conclusions. As noted by the religious organization commenter, the only circuit court of appeals that has addressed the question disagreed with the EEOC's interpretation.[136] Some district courts in other circuits, however, have adopted the EEOC's approach.[137] Thus, while there is support for the language proposed in the NPRM, OFCCP acknowledges that case law has not yet settled this issue under title VII.

OFCCP further notes that, since these title VII cases were decided, the ACA and its implementing regulations have imposed a requirement that, with limited exceptions, health insurance must cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" at no cost to the insured.[138] Accordingly, the ACA and its implementing regulations guarantee the provision of comprehensive coverage of contraception and related services for most employees. There are numerous and robust ways to enforce this guarantee, including a private right of action under the Employee Retirement Income Security Act of 1974 (ERISA).[139]

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[136] In re Union Pac. R.R. Emp't Practices Litig., 479 F.3d 936, 943 (8th Cir. 2007).

[137] Mauldin v. Wal-Mart Stores, Inc., No. 01-2755, 2002 WL 2022334 (N.D. Ga. August 23, 2002) (certifying a class of female employees alleging that Wal-Mart's lack of coverage for prescription contraception was a violation of Title VII, as amended by the PDA); Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1272 (W.D. Wash. 2001) (holding that, "[i]n light of the fact that prescription contraceptives are used only by women, Bartell's choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory").

[138] U.S. Dep't of Health & Human Servs., Health Res. & Servs. Admin., Women's Preventive Service Guidelines, available at http://www.hrsa.gov/womensguidelines (last accessed May 22, 2016).

[139] 29 U.S.C. 1132(a)(1)(B) (a provision of ERISA authorizing plan participants and beneficiaries to bring civil actions against group health plans and health insurance issuers "to recover benefits due to [them] under the terms of [the] plan, to enforce [their] rights under the terms of the plan, or to clarify [their] rights to future benefits under the terms of the plan"); see also 29 U.S.C. 1132(a)(5) (a provision of ERISA authorizing the Secretary of Labor to take enforcement action against group health plans of employers that violate this and other requirements); 26 U.S.C. 4980D (a provision of the Internal Revenue Code imposing a tax on group health plans that fail to meet this and other requirements); 42 U.S.C. 300gg-22(b) (a provision of the Public Health Service Act authorizing the Secretary of Health and Human Services, in the absence of state enforcement, to impose civil money penalties on health insurance issuers that fail to meet this and other requirements).

Certain types of employers, such as nonprofit religious hospitals, nonprofit religious institutions of higher education, and certain closely held for-profit corporations, that have religious objections to providing contraceptive coverage, are provided with an accommodation so that these employers do not have to contract, arrange, refer, or pay for the coverage, but their employees generally still receive separate payments for contraceptive services from third parties.[140] This final rule does not alter that accommodation in any way.

For these reasons, OFCCP removes the phrase "including contraceptive coverage" from paragraph 60-20.5(b)(4) in the final rule.

One commenter points out that paragraph 60-20.5(b)(5), as well as several places in the NPRM's preamble narrative, refer to "pregnant workers" or "workers who are pregnant," and recommends that, "because there has been considerable confusion regarding the applicability of Title VII to medical conditions beyond pregnancy itself," the language refer instead to "workers who are pregnant or affected by related medical conditions." This change would, the commenter asserts, clarify that the scope of contractors' obligation encompasses addressing conditions related to pregnancy as well as pregnancy itself. Because OFCCP revises paragraph 60-20.5(b)(5) substantially, referring in that section to "employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions," it is not necessary to make the suggested revision in that paragraph. OFCCP reviewed the narrative sections of the preamble and made changes to ensure that the PDA's coverage of pregnancy, childbirth, and related medical conditions is reflected accurately.

The NPRM's proposed paragraph 60-20.5(b)(5) included, as another common example of

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[140] See 45 CFR 147.131.

discrimination based on pregnancy, childbirth, or related medical conditions, the failure to provide reasonable workplace accommodations to employees affected by such conditions when such accommodations are provided to other workers similar in their ability or inability to work. However, since this issue was pending before the U.S. Supreme Court in Young v. UPS when OFCCP published the NPRM, the NPRM stated that OFCCP would reflect the ruling in Young v. UPS in the final rule as necessary.

The Supreme Court decided Young v. UPS on March 25, 2015. Peggy Young, a part-time truck driver for UPS, had alleged that UPS provided light-duty accommodations for truck drivers who were injured on the job, for those who had disabilities within the meaning of the ADA, and for those who lost their Department of Transportation truck driver certifications, but not for those who were affected by pregnancy, childbirth, or related medical conditions. The Court held that if Young could prove that UPS provided more favorable treatment to at least some employees whose situation could not reasonably be distinguished from hers, then these facts would establish a prima facie case of pregnancy discrimination. The Court remanded the case for further proceedings during which UPS would have been permitted to offer a legitimate, nondiscriminatory reason for differences in treatment and Young would have been permitted to attempt to rebut that reason by showing that it was pretextual.[141] In describing the legitimate,

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[141] This litigation has subsequently been settled. In a company statement provided to the media, UPS explained –

> UPS changed its policy because the company recognized that state law, regulatory guidance and the general work environment in the U.S. have evolved. UPS believes it is appropriate to update its workplace policies so that the company can attract and retain the best workforce. The new policy began last January. It strengthens UPS's commitments to treat all workers fairly and supports women in the workplace.
>
> The new UPS policy makes temporary light duty work available to all pregnant employees with medically certified lifting or other physical restrictions. The policy reflects pregnancy-specific laws recently enacted in a number of states where UPS conducts business, and is consistent with new guidance on pregnancy-related accommodations issued by the Equal Employment Opportunity Commission last year.

nondiscriminatory reason, the Court explained that —

> consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ("similar in their ability or inability to work") whom the employer accommodates.[142]

Once the employer offers a legitimate, nondiscriminatory reason that meets this test, it falls to the plaintiff to prove that the employer's proffered reason is pretextual. The Court explained the evidence required on this point as follows:

> We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather — when considered along with the burden imposed — give rise to an inference of intentional discrimination.
>
> The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong — to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.[143]

As the Chair of the EEOC has testified, "[a]s a result of [the Young] decision, many pregnant women who were previously denied accommodations will now be entitled to receive them."[144]

NBC Washington, "UPS Settles with Maryland Woman in Pregnancy Discrimination Case" (October 1, 2015), available at http://www.nbcwashington.com/news/local/UPS-Settles-With-Maryland-Woman-in-Pregnancy-Discrimination-Case-330305251.html (last accessed March 11, 2016).

[142] Young v. UPS, 135 S. Ct. at 1354.

[143] Id. at 1354-55.

[144] Yang Testimony, supra note 57, at 7. The EEOC had issued guidance in 2014 on the topic of pregnancy

The many comments that OFCCP received on paragraph 60-20.5(b)(5) include the comment that 70 national, regional, state, and local women's, civil rights, LGBT, and labor organizations joined, as well as comments that virtually every organization representing contractors submitted. Two comments recommend that OFCCP defer adoption of any part of the rule interpreting Young until the EEOC issues new guidance. The EEOC has now issued revised guidance in response to Young,[145] and the final rule is consistent with that guidance.

Several of the industry groups suggest that OFCCP should remove the provisions about pregnancy accommodations, given the recent Supreme Court ruling in Young v. UPS.[146] On the other hand, the women's, civil rights, LGBT, and labor organizations recommend no change to paragraph 60-20.5(b)(5) in light of Young v. UPS.[147] OFCCP declines to adopt either suggestion but, instead, revises the final rule to reflect the Supreme Court ruling, as described infra.

A few commenters do suggest specific language to reflect or clarify the effect of the

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discrimination, part of which was disapproved by the Young v. UPS decision. The EEOC revised its guidance in June 2015. See EEOC Pregnancy Guidance, supra note 31.

[145] See EEOC Pregnancy Guidance, supra note 31.

[146] The joint comment filed by one employer group, for example, states:

> [In Young v. UPS,] the Court found the [EEOC's] position untenable because it suggested that the PDA confers upon pregnant women "a most-favored-nation status," under which they are automatically entitled to workplace accommodations to the same extent as anyone else who is similarly limited, "irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria." The Court found that such an approach was unsupported by the text of the PDA and otherwise inconsistent with basic disparate treatment law. . . . [T]he EEOC's discredited position, repeated in the Proposed Rule and now rejected by the Supreme Court, is incompatible with Title VII and the weight of federal appeals court authority. . . . To the extent that Young rejects this interpretation of the PDA, OFCCP should delete that corresponding language from the NPRM in its entirety.

[147] The 70-group comment, for example, states:

> The ADAAA's expansive coverage means that employers will accommodate most non-pregnant employees similar in ability to work to pregnant workers with physical limitations; Young makes clear that employers who refuse to also accommodate pregnant workers in this situation likely violate the PDA. As a result, employers will typically be required to provide these accommodations to pregnant workers as well under the standard articulated by the Court in Young. The rule proposed in the NPRM appropriately reflects this result.

Young v. UPS decision. One commenter proposes that paragraph 60-20.5(b)(5) refer to "other employees whose abilities or inabilities to perform their job duties are similarly affected, including but not limited to employees with on-the-job injuries and employees with disabilities including temporary disabilities." As discussed infra, in the final rule OFCCP reorganizes proposed paragraph 60-20.5(b)(5) and refers specifically to employees with on-the-job injuries as an example in new paragraph 60-20.5(c)(2). Another commenter proposes that the final rule clarify that employers may not use accommodation policies that impose a "significant burden" on pregnant workers. As discussed infra, consistent with Young v. UPS, the final rule includes the proposed language in new paragraph 60-20.5(c)(1)(ii).

To reorganize proposed paragraph 60-20.5(b)(5), OFCCP removes paragraph (5) from paragraph 60-20.5(b) and substitutes a new paragraph, 60-20.5(c), "Accommodations." Paragraph 60-20.5(c) is divided into two paragraphs: (1) Disparate treatment and (2) Disparate impact.

Paragraph (1), on disparate treatment, provides that it is a violation of the Executive Order for a contractor to deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions in three circumstances, recited in three paragraphs of 60-20.5(c)(1).

The first circumstance, in paragraph 60-20.5(c)(1)(i), is a corollary of Congress's reversal of the reasoning in Gilbert v. General Electric, 429 U.S. 125 (1976), by the PDA. In Gilbert, GE's temporary disability insurance policy provided coverage for all conditions except those related to pregnancy. The Court upheld that exclusion as being not based on sex but, rather, as a distinction between pregnant persons, who are all women, and nonpregnant persons, who include

women and men. Congress overturned both that decision and its underlying reasoning that distinctions between pregnancy and nonpregnancy are not distinctions based on sex.[148] As Young recognized, "a plaintiff can prove disparate treatment . . . by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic."[149] Thus, an accommodations policy that distinguishes between all pregnant workers on the one hand, and all nonpregnant workers on the other, runs afoul of the PDA. Paragraph 60-20.5(c)(1)(i) states this principle.

The second circumstance, in paragraph 60-20.5(c)(1)(ii), most directly reflects the holding in Young: that it is a violation of title VII for an employer to deny alternative job assignments, modified duties, or other accommodations (including light duty) to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions when (a) the employer provides such accommodations to other employees whose abilities or inabilities to perform their job duties are similarly affected, (b) the denial of accommodations "impose[s] a significant burden" on employees affected by pregnancy, childbirth, or related medical conditions, and (c) the contractor's asserted reasons for denying accommodations to such employees "are not sufficiently strong to justify the burden."[150]

The phrase "or is required by its policy or by other relevant laws to provide" is included to cover the situation where a contractor's policy or a relevant law (such as the ADA and Section 503) would require an alternative job assignment or job modification to be provided to an employee not affected by pregnancy, childbirth, or a related medical condition but who is

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[148] See Young v, UPS, 135 S. Ct. at 1353.

[149] Id. at 1345.

[150] Id. at 1354.

similarly restricted in his or her ability to perform the job, even if no such employees have been accommodated under the policy or law. In such a situation, the existence of the policy or law (e.g., the ADA and Section 503) requiring reasonable accommodation or job modifications for employees with disabilities may affect the analysis required by Young of whether the contractor's failure to provide such accommodations to employees affected by pregnancy, childbirth, or related medical conditions who are similar in their ability or inability to work imposes a "substantial burden" on those employees and whether the contractor's justification for that failure is pretextual.

The third circumstance, in paragraph 60-20.5(c)(1)(iii) — "where intent to discriminate on the basis of pregnancy, childbirth, or related medical conditions is otherwise shown" — covers the situation in which OFCCP finds that a denial of an accommodation for pregnancy, childbirth, or a related medical condition is the result of intentional discrimination established by means other than the kind of evidence outlined in subparagraphs 60-20.5(c)(1)(i) and (ii). An example would be evidence of animus against an employee's working during pregnancy on the part of the supervisor who denied a requested accommodation. As Young recognized, "'[l]iability in a disparate-treatment case depends on whether the protected trait actually motivated the employer's decision.'"[151]

One commenter suggests that OFCCP add references to specific alternative job assignments, modified duties, or other accommodations that may be required under the accommodations paragraph. In particular, the commenter mentions that reducing lifting requirements, offering light-duty assignments, and allowing employees to drink water and pump

[151] Id. at 1345 (quoting Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (alteration in original)).

breast milk are some ways in which contactors can ensure that workers affected by pregnancy, childbirth, or related medical conditions are reasonably accommodated. Although OFCCP agrees that these are examples of possible reasonable accommodations for workers affected by pregnancy-related conditions, OFCCP declines to add these or other specific examples. The term "or other accommodations" encompasses the examples, as well as other accommodations not specified.

Nine commenters urge OFCCP to include a reference to disparate-impact analysis for pregnancy under section 60-20.5, along with a non-exhaustive list of examples. At least one commenter specifically points out that "a policy of only offering 'light duty' to employees with on-the-job injuries, which excludes pregnant employees, may have a disparate impact and thus would be impermissible unless shown to be job-related and consistent with business necessity." The second paragraph of paragraph 60-20.5 in the final rule, 60-20.5(c)(2), addresses disparate impact. It applies basic disparate-impact principles to policies or practices that deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions, stating that contractors that have such policies or practices must ensure that such policies or practices do not have an adverse impact on the basis of sex unless they are shown to be job-related and consistent with business necessity. The final rule provision also includes, as an example of a policy that might have an unjustified disparate impact based on pregnancy, a contractor's policy of offering light duty only to employees with on-the-job injuries.

Many commenters suggest that OFCCP has the authority to address the need to provide reasonable accommodation for pregnancy not as a nondiscrimination measure but as a form of affirmative action aimed at breaking down barriers to women's acceptance and advancement in

the workplace under E.O. 11246. E.O. 11246 requires contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their . . . sex."[152] Under its affirmative action authority, OFCCP could go beyond the nondiscrimination requirements of title VII and, for example, simply require federal contractors to provide light duty, modified job duties or assignments, or other reasonable accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions (as it requires them to develop, adopt, and update affirmative action programs). OFCCP declines to exercise its affirmative action authority in this way at this time. As discussed in the preamble to the NPRM, OFCCP believes that most employers already provide some form of accommodation when requested.[153] Contractor compliance with the clarified nondiscrimination requirements set out in paragraphs 60-20.5(c)(1) and (2) in the final rule should ensure that many other employees will receive necessary accommodations. Moreover, as the EEOC has indicated, a number of pregnancy-related impairments previously excluded from ADA coverage are likely to be considered disabilities under the Americans with Disabilities Amendments Act of 2008 (ADAAA)[154] and will therefore now require accommodations under the ADA.[155] Should this prove not to be true as the case law develops,

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[152] Executive Order 11246, sec. 202(1).

[153] See Eugene Declercq, Carol Sakala, Maureen Corry, Sandra Appelbaum, and Ariel Herrlich, Childbirth Connection, Listening to Mothers III: New Mothers Speak Out, 36 (2013), available at http://www.childbirthconnection.org/article.asp?ck=10394 (last accessed March 27, 2016) (Listening to Mothers).

[154] 122 Stat. 3555, codified at 42 U.S.C. 12102(1)–(2).

[155] According to the EEOC:

> Prior to the enactment of the ADAAA, some courts held that medical conditions related to pregnancy generally were not impairments within the meaning of the ADA, and so could not be disabilities. Although pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as

OFCCP will reconsider its decision not to require pregnancy-related accommodations under its affirmative action authority.

Nevertheless, OFCCP adds a section to the Appendix to the final rule that makes it a best practice for contractors to provide light duty, modified job duties or assignments, or other reasonable accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions. It is a best practice for contractors to provide these reasonable accommodations as part of their broader accommodations policies.

A number of commenters urge OFCCP to provide in the final rule that in the wake of the ADAAA, Section 503 will entitle many pregnant workers for contractors to reasonable accommodation for their temporary, pregnancy-related impairments.[156] Other commenters objected to this idea, on the ground that interpretation of or guidance on Section 503 is beyond the scope of sex discrimination regulations. OFCCP agrees that Section 503 may require contractors to provide reasonable workplace accommodations to workers with pregnancy-related impairments, when those impairments fall within the meaning of "disability." In addition, as noted above, EEOC has clarified that some pregnancy-related impairments are likely to be considered disabilities under the amended ADA. OFCCP declines to interpret Section 503 as it relates to pregnancy accommodations in this rule, as doing so would be outside the rule's scope.

> disabilities under the ADA, as amended. . . .. Moreover, under the amended ADA, it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting [and therefore covered], even though they are only temporary.

EEOC Pregnancy Guidance, supra note 31, at II.A (footnotes omitted).

[156] In Young v. UPS, the Supreme Court "express[ed] no view" about application of the ADAAA to the case because it was filed before the ADA was amended. 135 S. Ct. at 1348.

Nevertheless, contractors should be aware of their obligation to provide reasonable accommodation for pregnancy-related disabilities, unless they can demonstrate that the accommodation would impose an undue hardship on the operation of their businesses.

Proposed paragraph 60-20.5(c) addressed the provision of leave related to pregnancy, childbirth, or related medical conditions. In the final rule, it is renumbered paragraph 60-20.5(d). Proposed paragraph (c)(1) (final rule paragraph (d)(1)) set forth the general Executive Order and title VII principle that neither family nor medical leave may be denied or provided differently on the basis of sex. Proposed paragraph (c)(2)(i) (final rule paragraph (d)(2)(i)) required that employees affected by pregnancy, childbirth, or related medical conditions be granted medical leave, including paid sick leave, on the same basis that such leave is granted to other employees unable to work for other medical reasons. Proposed paragraph (c)(2)(ii) (final rule paragraph (d)(2)(ii)) required that family leave be provided to men on the same terms that it is provided to women.

Proposed paragraph (c)(3) (now (d)(3)) applied disparate impact analysis to contractor leave policies that are inadequate such that they have a disparate impact on members of one sex. This is consistent with the EEOC's Guidelines on Discrimination Because of Sex, 29 CFR 1604.10(c), and Section I.B.2 of its enforcement guidance on pregnancy discrimination. Therefore, failure to provide workers who are temporarily unable to work due to pregnancy, childbirth, or related medical conditions with any parental or medical leave at all, or with insufficient leave, may be unlawful sex discrimination if that failure is found to have an adverse impact on such workers, unless the contractor can demonstrate that the failure to provide leave or sufficient leave is job-related and consistent with business necessity.

Six commenters address NPRM paragraph 60-20.5(c). One commenter proposes that the

final rule require paid leave after childbirth. OFCCP does not have the authority to require paid leave under E.O. 11246. OFCCP does have the authority to require that, if contractors provide paid leave, they must do so on the same basis for women as for men (and vice versa), and for pregnancy as for other similar disabling conditions. See final rule paragraph 60-20.5(d)(2)(i) (requiring contractors to provide job-guaranteed medical leave, including paid sick leave, for employees' pregnancy, childbirth, or related medical conditions on the same terms that medical or sick leave is provided for other medical conditions that are similar in their effect on employees' ability to work); final rule paragraph 60-20.5(d)(2)(ii) (requiring contractors to provide job-guaranteed family leave, including any paid leave, to male employees on the same terms that they provide such family leave to female employees).

One commenter expresses concern that proposed paragraph 20.5(c)(2)(i) (final rule paragraph 20.5(d)(2)(i)) requires contractors to provide more expansive leave rights than are mandated by the FMLA or similar law because, the commenter asserts, the paragraph requires female employees to be eligible for the same amount of leave as other employees unable to work for other medical reasons. Under paragraph 20.5(d)(2)(i), the contractor's provision of medical and sick leave for other medical conditions establishes the terms on which it must provide medical and sick leave for pregnancy, childbirth, and related medical conditions. Thus, if a contractor provides medical or sick leave beyond that required by the FMLA to employees who are unable to work for other medical reasons, then paragraph 20.5(d)(2)(i) requires the contractor to provide leave for pregnancy, childbirth, and related medical conditions on the same terms. The same commenter also asserts that proposed paragraph 60-20.5(c)(3) (final rule paragraph 60-20.5(d)(3)) requires contractors to grant employee leave rights beyond those required by the FMLA and is inconsistent with current law. Paragraph 60-20.5(d)(3) does not categorically

require employers to provide leave rights beyond those required under current federal law. OFCCP will review implementation of contractors' leave practices to make determinations about potential discriminatory conduct on a case-by-case basis.

A women's rights organization requests that proposed paragraph 60-20.5(c)(3) include an explicit reference to the fact that contractors covered by the FMLA are statutorily required to provide eligible employees with up to 12 weeks of unpaid leave a year and must abide by applicable state FMLA laws that provide more expansive coverage. OFCCP declines to do this, as regulations concerning the FMLA are not within its authority. It is important for contractors to remember, however, that the FMLA requires covered employers to provide eligible employees with unpaid, job-protected leave for specified family and medical reasons and that a number of states also have laws that directly address the provision of leave.

One comment, joined by three organizations, suggests that the final rule require that non-birth parents, including adoptive parents, foster parents, and workers standing in loco parentis, be entitled to family leave time equal to the family leave time provided to birth mothers. No sex discrimination principle requires equal treatment of birth mothers, on the one hand, and adoptive parents, foster parents, and workers standing in loco parentis, on the other. OFCCP therefore declines to add text to the final rule regarding non-birth parents' leave, as doing so would be outside the scope of the sex discrimination regulations.

Section 60-20.6 Other Fringe Benefits

The NPRM proposed to remove the Guidelines' § 60-20.6, entitled "Affirmative action," as the requirements related to affirmative action programs are set forth in 41 CFR parts 60-2 and 60-4. OFCCP received no comment on this change, and the final rule incorporates it. The proposed rule substituted a new § 60-20.6, entitled "Other fringe benefits," divided into three

paragraphs. Proposed paragraph 60-20.6(a) stated the general principle that contractors may not discriminate on the basis of sex in the provision of fringe benefits; paragraph (b) defined "fringe benefits" broadly to encompass a variety of such benefits that are now provided by contractors; and paragraph (c) replaced the inaccurate statement found in the Guidelines' paragraph 60-20.3(c) that a contractor will not be considered to have violated the Executive Order if its contributions for fringe benefits are the same for men and women or if the resulting benefits are equal.[157] In the final rule, OFCCP retains the proposed paragraphs for § 60-20.6 with modifications to paragraphs (a) and (b).

OFCCP received four comments on proposed rule § 60-20.6. One commenter urges OFCCP to state explicitly in paragraph 60-20.6(a) that contractors may not condition fringe benefits on the sex of an employee's spouse. OFCCP declines to explicitly include this in the regulatory text, as this expansion was not proposed in the NPRM. OFCCP will follow developing relevant case law in this area in its interpretation of these regulations. Further, OFCCP notes that a claim of discrimination due to a contractor's failure to provide the same fringe benefits to same-sex spouses that it provides to opposite-sex spouses would be actionable under its Executive Order 13672 regulations.

One commenter states that OFCCP's proposed definition of "fringe benefits" in paragraph 60-20.6(b) is "much broader than current regulations/case law" permit. The commenter does not cite specific regulations or cases. OFCCP believes its proposed definition of "fringe benefits" is permissible; however, to ensure consistency with title VII principles, OFCCP adopts the definition of "fringe benefits" that appears in the EEOC's Guidelines on

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[157] See City of Los Angeles v. Manhart, discussed and cited supra in the section Reasons for Promulgating this New Regulation; see also Ariz. Governing Comm. v. Norris, 463 U.S. 1073 (1983).

Discrimination Because of Sex. See 29 CFR 1604.9(a). Accordingly, OFCCP revises paragraph 60-20.6(b) to read: "As used herein, the term 'fringe benefits' includes, but is not limited to, medical, hospital, accident, life insurance, and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment." Deleted from the final rule are the specific examples "dependent care assistance; educational assistance; employee discounts; stock options; lodging; meals; moving expense reimbursements; retirement planning services; and transportation benefits." OFCCP considers these items to be covered as terms, conditions, or privileges of employment.

Another comment suggests that OFCCP add "flexible work arrangements" as an example of fringe benefits. OFCCP declines to do so. Such an addition would be inconsistent with the decision to use a list that is identical to the list in the EEOC regulations. Moreover, as explained earlier in the preamble, OFCCP does add "treating men and women differently with regard to the availability of flexible work arrangements" at paragraph 60-20.2(b)(3) of the final rule, as an additional listed example of disparate treatment.

Two comments — one from an individual and one from a civil rights legal organization — urge OFCCP to revise the section to prohibit contractors from providing health insurance plans that deny insurance coverage for health care related to gender transition (trans-exclusive plans). One comment states that many health insurance policies are facially discriminatory against transgender individuals because they exclude, for example, "any procedure or treatment, including hormone therapy, designed to change [their] physical characteristics from [their] biologically determined sex to those of the opposite sex." The comment suggests that OFCCP add a new paragraph in § 60-20.6, as follows: "It shall be an unlawful employment practice for a contractor to offer health insurance that does not cover care related to gender identity or any

process or procedure designed to facilitate the adoption of a sex or gender other than the beneficiary's designated sex at birth." OFCCP declines to insert this additional language in the final rule because it would be superfluous. Section 60-20.6 forbids discrimination in fringe benefits on the basis of sex. Because the term "fringe benefits" is defined to include medical benefits and the term "sex" is defined to include gender identity, the logical reading of the language proposed in the NPRM, which is adopted into the final rule without change, is that certain trans-exclusive health benefits offerings may constitute unlawful discrimination.[158]

Contractors are generally responsible for ensuring that fringe-benefit schemes, including health insurance plans, offered to their employees do not discriminate on any of the protected bases set forth in E.O. 11246.[159] Contractors thus must ensure that all of the health insurance plans that are offered to their employees provide services to all employees in a manner that does not discriminate on the basis of sex, including gender identity or transgender status. As discussed below, denying or limiting access to benefits may violate E.O. 11246's prohibition on sex discrimination, consistent with OFCCP Directive 2014-02,[160] as well as its prohibition on gender identity discrimination.

Discrimination in benefits on the basis of gender identity or transgender status may arise

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[158] OFCCP notes that OPM issued a Federal Employee Health Benefits (FEHB) Program Carrier Letter on June 23, 2015, stating that, "[e]ffective January 1, 2016, no carrier participating in the Federal Employees Health Benefits Program may have a general exclusion of services, drugs or supplies related to gender transition or 'sex transformations.'" FEHB Program Carrier Letter No. 2015-12, available at http://www.opm.gov/healthcare-insurance/healthcare/carriers/2015/2015-12.pdf (last accessed January 9, 2016) (OPM Carrier Letter 2015-12). The letter cited the "evolving professional consensus that treatment may be medically necessary to address a diagnosis of gender dysphoria."

[159] See, e.g., Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) (applying Title VII). In the alternative, contractors may arrange to provide services to employees independently. See Norris, 463 U.S. at 1089-91 (Marshall, J., concurring op. joined by five justices).

[160] OFCCP Directive 2014-02, Gender Identity and Sex Discrimination, supra note 86.

under a number of different scenarios. First, transgender individuals may be denied coverage for medically appropriate sex-specific health-care services because of their gender identity or because they are enrolled in their health plans as one gender, where the medical care is generally associated with another gender. Consistent with recent guidance jointly issued by the Departments of Labor, Health and Human Services, and the Treasury pursuant to the ACA,[161] as well as the final rule recently published by the Department of Health and Human Services to implement the ACA's nondiscrimination provision,[162] the nondiscrimination requirements of E.O. 11246 obligate contractors to ensure that coverage for health-care services be made available on the same terms for all individuals for whom the services are medically appropriate, regardless of sex assigned at birth, gender identity, or recorded gender. For example, where an individual could benefit medically from treatment for ovarian cancer, a contractor may not deny coverage based on the individual's identification as a transgender male.

Second, some insurance plans have explicit exclusions of coverage for all health services associated with gender dysphoria[163] or gender transition.[164] Such categorical exclusions are

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[161] U.S. Dep'ts of Labor, Health & Hum. Servs. & the Treasury, FAQs about Affordable Care Act Implementation (Part XXVI), Q.5 (May 11, 2015), available at http://www.dol.gov/ebsa/faqs/faq-aca26.html (last accessed March 27, 2016).

[162] 45 CFR § 92.207(b)(3)-(5), HHS Nondiscrimination Final Rule, supra note 106, 81 FR at 31471-31472.

[163] Gender dysphoria "refers to discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)." World Professional Association for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7, 13 International Journal of Transgenderism 165, 168 (2011) (WPATH Standards of Care), available at www.wpath.org/uploaded_files/140/files/IJT SOC, V7.pdf (last accessed January 22, 2016). Not every transgender person has gender dysphoria. Lambda Legal, Know Your Rights, FAQ on Access to Transition-Related Care (no date), available at http://www.lambdalegal.org/know-your-rights/transgender/transition-related-care-faq#q2 (last accessed February 22, 2016).

[164] OFCCP intends to interpret the scope of health services related to gender transition broadly and recognizes that such services may change as standards of medical care continue to evolve. The range of transition-related services,

facially discriminatory because they single out services and treatments for individuals on the basis of their gender identity or transgender status, and would generally violate E.O. 11246's prohibitions on both sex and gender identity discrimination.

In evaluating whether the denial of coverage of a particular service where an individual is seeking the service as part of a gender transition is discriminatory, OFCCP will apply the same basic principles of law as it does with other terms and benefits of employment — inquiring whether there is a legitimate, nondiscriminatory reason for such denial or limitation that is not a pretext for discrimination, for example.[165] Contractors must apply the same generally applicable standards in determining coverage for health-care services to all employees, regardless of their gender identity or transgender status. If a contractor generally provides coverage for a particular treatment or service, e.g., hormone replacement or mental health care, where it is medically necessary, the contractor cannot decline to provide coverage for that same treatment when it is deemed medically necessary[166] for a transgender individual because the treatment is related to his or her gender identity or transgender status. Contractors may deny or limit coverage only if

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which includes treatment for gender dysphoria, is not limited to surgical treatments and may include, but is not limited to, services such as hormone therapy and psychotherapy, which may occur over the lifetime of the individual.

[165] Note that under the EEOC's title VII guidance, the fact that it may cost more to provide benefits to members of a protected group (e.g., to provide health care for women) is not itself a justification for discriminating against that group. EEOC Compliance Manual Chapter 3, Directive No. 915.003, Title VII/EPA Section (October 3, 2000), available at http://www.eeoc.gov/policy/docs/benefits.html (last accessed March 27, 2016).

[166] Numerous medical organizations, including the American Medical Association, have recognized that "[a]n established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with GID [gender identity dysphoria]" and that "[h]ealth experts in GID, including WPATH [World Professional Association for Transgender Health], have rejected the myth that such treatments are 'cosmetic' or 'experimental' and have recognized that these treatments can provide safe and effective treatment for a serious health condition." American Medical Association House of Delegates, Resolution 122 (A-08), Removing Financial Barriers to Care for Transgender Patients 1 (2008), available at http://www.tgender.net/taw/ama_resolutions.pdf (last accessed May 13, 2016).

such denial or limitation is based on the nondiscriminatory application of neutral criteria, for example, where a service is not medically necessary, a qualified provider is unavailable, or inadequate medical documentation has been provided.

In construing the prohibitions on sex and gender identity discrimination as applying in this manner, OFCCP is taking a similar approach to that of several states and the District of Columbia, which have concluded that their statutory or regulatory provisions prohibiting discrimination on the basis of sex and/or gender identity prohibit policy exclusions on the basis of gender identity or transgender status.[167] For example, the Illinois Department of Insurance has interpreted the Illinois Human Rights Act to prohibit (1) policy exclusions of "surgical treatments for gender dysphoria that are provided to non-transgender persons for other medical conditions"; (2) policy exclusions of non-surgical treatments for gender transition, such as hormone therapy, "if that treatment is provided for other medical conditions"; (3) provisions that deny transgender persons coverage or benefits for sex-specific treatment because of their gender identity (e.g., mammograms, ob-gyn visits); and (4) any exclusionary clauses or language that

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[167] See Cal. Dep't of Managed Health Care, Letter No. 12-K, Gender Nondiscrimination Requirements (April 9, 2013), available at https://www.dmhc.ca.gov/Portals/0/LawsAndRegulations/DirectorsLettersAndOpinions/dl12k.pdf (last accessed March 17, 2016); Conn. Insurance Dep't Bulletin IC-34 (December 19, 2013), available at http://www.ct.gov/cid/lib/cid/Bulletin_IC-37_Gender_Identity_Nondiscrimination_Requirements.pdf (last accessed March 17, 2016) (interpreting Conn. Gen. Stat. Ann. § 46a-60); D.C. Dep't of Insurance, Securities and Banking, Bulletin No. 13-IB-01-30/13 (February 27, 2014), available at http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/ProhibitionofDiscriminationBasedonGenderIdentityorExpression-FINAL.pdf (last accessed March 17, 2016) (interpreting D.C. Code § 31-2231.11(c)); Mass. Office of Consumer Affs. & Bus. Reg., Div. of Insurance, Bulletin 2014-03 (June 20, 2014), available at http://www.mass.gov/ocabr/docs/doi/legal-hearings/bulletin-201403.pdf (last accessed March 17, 2016); Or. Dep't of Consumer & Bus. Servs., Or. Ins. Div. Bulletin INS 2012-1, available at http://www.oregon.gov/DCBS/insurance/legal/bulletins/Documents/bulletin2012-01.pdf (last accessed March 17, 2016) (interpreting Oregon Equality Act); Vt. Dep't of Financial Regulation, Division of Insurance, Insurance Bulletin No. 174 (April 22, 2013), available at http://www.dfr.vermont.gov/sites/default/files/Bulletin_174.pdf (last accessed March 17, 2016) (interpreting 8 V.S.A. § 4724); Letter from Mike Kreidler, Washington State Insurance Commissioner (June 25, 2014), available at http://www.insurance.wa.gov/about-oic/newsroom/news/2014/documents/gender-identity-discrimination-letter.pdf (last accessed March 17, 2106) (interpreting RCW 49.60.040). Two additional states, New York and Colorado, have relied on other bases to require insurers to cover transition-related health care.

have the "effect of targeting transgender persons or persons with gender dysphoria" (including "sex change" or "sex transformation" exclusions).[168]

Section 60-20.7 Employment Decisions Made on the Basis of Sex-Based Stereotypes

In the NPRM, OFCCP proposed this new section to provide specific examples of the well-recognized principle that employment decisions made on the basis of sex-based stereotypes about how applicants and employees are expected to look, speak, or act are a form of sex discrimination. The proposed rule preamble cited the Supreme Court's holding in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and several other decisions that consistently applied the principle laid out in that case.[169] In the final rule, OFCCP adopts § 60-20.7 as proposed, with a revision to paragraph (a)(3), the addition of two new examples of prohibited sex-based stereotyping at paragraphs (c) and (d)(1) and with some minor rewording for clarity and to allow for the use of gender-neutral pronouns. The first minor rewording change is to the third sentence at the beginning of § 20.7, so that the Final Rule reads "examples of discrimination based on sex-based stereotyping may include" those listed. The addition of "may" clarifies that whether each of the examples is unlawful discrimination will necessarily depend on an examination of the facts in a given case.

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[168] Ill. Dep't of Insurance, Company Bulletin 2014-10, Healthcare for Transgender Individuals (Jul. 28, 2014), available at http://insurance.illinois.gov/cb/2014/CB2014-10.pdf (interpreting 775 ILCS 5/1-103 (O-1)) (emphases omitted) (last accessed May 3, 2016).

[169] Price Waterhouse, 490 U.S. at 251 (holding that an employer's failure to promote a female senior manager to partner because of the sex-stereotyped perceptions that she was too aggressive and did not "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" was unlawful sex-based employment discrimination); see also, e.g., United States v. Virginia, 518 U.S. 515, 533 (1996) (in making classifications based on sex, state governments "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); Chadwick v. Wellpoint, Inc., 561 F.3d 38 (1st Cir. 2009) (making employment decision based on the belief that women with young children neglect their job responsibilities is unlawful sex discrimination); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009) (harassment based on a man's effeminacy); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, supra note 78; Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

OFCCP received two general comments about the examples in proposed § 60-20.7: one from a civil rights legal organization, stating that the section omits prevalent examples of sex stereotyping that should be addressed, and one from a human resources consulting firm, suggesting the removal of the entire section except the first sentence because "[i]t is impossible to catalogue all the possible gender-based stereotypes that employers and OFCCP compliance officers might potentially encounter." Although the examples are not exhaustive, OFCCP retains the examples provided in § 60-20.7 of the final rule, as they accurately reflect real-life situations of prohibited sex-stereotyping drawn from title VII case law and provide guidance to contractors and workers. In addition, as explained below, in response to comments it received, OFCCP has inserted two further examples, both of which are also based on title VII case law.

Proposed paragraph 60-20.7(a)(1) addressed a type of sex-based employment discrimination central to the Supreme Court's holding in Price Waterhouse, namely, failing to promote a woman, or otherwise subjecting her to adverse employment treatment, based on sex stereotypes about dress and appearance, including wearing jewelry, make-up, or high heels. One comment on this paragraph specifically requests addition of an example in the final rule to show that requiring a person to conform to gender-specific uniform or appearance codes constitutes sex discrimination. The comment offers the example of uniform or appearance codes applied to gender non-conforming employees to illustrate that different uniform options could be made available to employees but that assigning them by sex is not permissible under title VII principles. Another commenter, however, states that courts have held "that Title VII's prohibition of 'sex discrimination' does not . . . preclude reasonable workplace rules requiring different dress and grooming." Without expressing an opinion on the reach of title VII in this context, OFCCP declines to add this example to the final rule, noting that the list of examples

provided in the final rule is not exhaustive. OFCCP will follow title VII principles in enforcing E.O. 11246 with regard to uniform, dress, and appearance requirements.

Proposed paragraph 60-20.7(a)(2) addressed harassment of a man because he is considered effeminate or insufficiently masculine. No comments specifically address proposed paragraph 60-20.7(a)(2), and the final rule adopts the paragraph as proposed, with minor adjustments to language for clarity.

Proposed paragraph 60-20.7(a)(3) set out, as an example of potentially actionable sex stereotyping, "adverse treatment of an employee because he or she does not conform to sex-role expectations by being in a relationship with a person of the same sex." Three comments oppose this proposed example, which they view as prohibiting discrimination on the basis of sexual orientation. The religious organization commenter argues that the inclusion of this example is inconsistent with title VII law and with Congressional efforts to ban sexual orientation discrimination in employment. In addition, the religious organization argues that it would be "incorrect as a matter of law" if the example "intend[s] to say that Title VII protects sexual conduct between persons of the same sex," because "Title VII says nothing about same-sex relationships or conduct." The joint employer organization comment argues that the Federal judicial system has not fully embraced the inclusion of sexual orientation discrimination in title VII and that its inclusion as a form of sex discrimination here is confusing given Executive Order 13672's amendment of E.O. 11246 adding sexual orientation as a protected category. A third commenter echoes the joint employer organization comment.

As noted above in connection with paragraph 60-20.2(a), a large number of commenters, including the 70 signers to the civil rights organization comment, support expanding that paragraph to encompass not only gender identity discrimination but also sexual orientation

discrimination. Thus, these commenters support inclusion of paragraph 60-20.7(a)(3) to protect employees who are in same-sex relationships from sex-stereotyping discrimination on that ground.

Contrary to the suggestions of the commenters that oppose its inclusion, proposed paragraph 60-20.7(a)(3) did not address sexual orientation discrimination per se; rather, it addressed a form of sex stereotyping. Many sex-stereotyping cases are derived in large part from Price Waterhouse, where the Supreme Court held that employers cannot "evaluate employees by assuming or insisting that they match the stereotype associated with their" sex.[170] Over the past two decades, an increasing number of Federal court cases, building on the Price Waterhouse rationale, have found protection under title VII for those asserting discrimination claims related to their sexual orientation.[171] Many Federal-sector EEOC decisions have found the same.[172]

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[170] 490 U.S. 228, 251 (1989).

[171] See, e.g., Prowel, 579 F.3d at 291-92 (harassment of a plaintiff because of his "effeminate traits" and behaviors could constitute sufficient evidence that he "was harassed because he did not conform to [the employer's] vision of how a man should look, speak, and act — rather than harassment based solely on his sexual orientation"); Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001) (coworkers' and supervisors' harassment of a gay male because he did not conform to gender norms created a hostile work environment in violation of Title VII); Hall v. BNSF Ry. Co., No. C13-2160 RSM, 2014 WL 4719007, at *3 (W.D. Wash. September 22, 2014) (plaintiff's allegation that "he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males" stated a sex discrimination claim under title VII); Terveer v. Billington, 34 F. Supp. 3d 100 (D.D.C. 2014) (hostile work environment claim stated when plaintiff's "orientation as homosexual" removed him from the employer's preconceived definition of male); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) ("[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women."). Cf. Videckis v. Pepperdine Univ., No. CV 15-00298 DDP (JCx), 2015 WL 1735191, at *8 (C.D. Cal. April 16, 2015) (harassment and adverse treatment of students because of their sexual orientation may state a claim of sex discrimination under title IX, because it is a form of sex stereotyping; indeed, "discrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination even if such discrimination were not based explicitly on gender stereotypes").

[172] Baldwin v. Dep't of Transp., supra note 98, slip op. at 9-11 (July 16, 2015); Castello v. U.S. Postal Serv., EEOC Request No. 0520110649 (December 20, 2011) (sex-stereotyping evidence entailed offensive comment by manager about female subordinate's relationships with women); Veretto v. U.S. Postal Serv., EEOC Appeal No. 0120110873

Although some Federal circuit courts have rejected the contention that discrimination based on a person's failure to meet the sex stereotype of being heterosexual constitutes sex discrimination under title VII, even those courts recognize the validity of the sex-stereotyping theory in the context of stereotypes involving workplace behavior and appearance, reflecting the types of sex stereotyping found to be actionable in Price Waterhouse.[173] It is in that context that the example in paragraph 60-20.7(a)(3) applies, as made clear by the language of paragraph 60-20.7(a), which introduces the subsequent list as examples of "[a]dverse treatment of an employee or applicant for employment because of that individual's failure to comply with gender norms and expectations for dress, appearance, and/or behavior" (emphasis added). In light of this legal framework, and for consistency with the position taken by the Department of Health and Human Services in its rule implementing Section 1557 of the ACA, paragraph 60-20.7(a)(3) is amended to cover treatment of employees or applicants adversely based on their sexual orientation where

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(July 1, 2011) (complainant stated plausible sex-stereotyping claim alleging harassment because he married a man); Culp v. Dep't of Homeland Sec., EEOC Appeal 0720130012, 2013 WL 2146756 (May 7, 2013) (title VII covers discrimination based on associating with lesbian colleague); Couch v. Dep't of Energy, EEOC Appeal No. 0120131136, 2013 WL 4499198, at *8 (August 13, 2013) (complainant's claim of harassment based on his "perceived sexual orientation"); Complainant v. Dep't of Homeland Sec., EEOC Appeal No. 0120110576, 2014 WL 4407422 (Aug. 20, 2014) ("While Title VII's prohibition of discrimination does not explicitly include sexual orientation as a basis, Title VII prohibits sex discrimination, including sex-stereotyping discrimination and gender discrimination" and "sex discrimination claims may intersect with claims of sexual orientation discrimination.").

[173] See, e.g., Gilbert v. Country Music Ass'n, 432 F. App'x 516, 520 (6th Cir. 2011) (acknowledging the validity of a sex-stereotyping claim "based on gender non-conforming 'behavior observed at work or affecting . . . job performance,' such as . . . 'appearance or mannerisms on the job,'" but rejecting the plaintiff's sex discrimination claim because his "allegations involve discrimination based on sexual orientation, nothing more. He does not make a single allegation that anyone discriminated against him based on his 'appearance or mannerisms' or for his 'gender non-conformity.'") (quoting Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006); Pagan v. Gonzalez, 430 F. App'x 170, 171-72 (3d Cir. 2011) (recognizing that "discrimination based on a failure to conform to gender stereotypes is cognizable" but affirming dismissal of the plaintiff's sex discrimination claim based on "the absence of any evidence to show that the discrimination was based on Pagan's acting in a masculine manner"); Dawson v. Bumble & Bumble, 398 F.3d 211, 221, 222-23 (2d Cir. 2005) (observing that "one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance, but dismissing the plaintiff's sex discrimination claim because she "has produced no substantial evidence from which we may plausibly infer that her alleged failure to conform her appearance to feminine stereotypes resulted in her suffering any adverse employment action").

the evidence establishes that the discrimination is based on gender stereotypes.[174] OFCCP declines to take a position on the intent that can be derived from Congress's inaction on the Employment Non-Discrimination Act (ENDA).[175] Further, OFCCP disagrees with the assertion that inclusion of 60-20.7(a)(3) will render Executive Order 13672 and its implementing regulations unnecessary. The example in 60-20.7(a)(3) is but one example of potentially actionable discrimination on the basis of sex stereotyping; Executive Order 13672 provides explicit protection against all manner of discrimination on the basis of sexual orientation.

Several commenters that support the inclusion of paragraph 60-20.7(a)(3) also suggest changes to it. Three comments suggest changing the proposed paragraph to state explicitly that the prohibition on sex-based stereotyping includes individuals attracted to persons of the same sex. OFCCP declines to alter the paragraph in this way. As written, this paragraph provides

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[174] See, e.g., Deneffe v. SkyWest, Inc., No. 14-cv-00348-MEH, 2015 WL 2265373 (D. Colo. May 11, 2015) (allegations that an employer gave a homosexual pilot a negative reference, among other reasons, because the pilot designated his same-sex partner for flight privileges and traveled with his domestic partner — i.e., did not conform to stereotypes about appropriate behavior for men — stated a cause of action of sex discrimination under title VII); Terveer, 34 F. Supp. at 116 (hostile work environment claim stated when plaintiff's "orientation as homosexual" removed him from the employer's preconceived definition of male); Koren v. Ohio Bell Tel. Co., 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (taking same-sex spouse's last name was a nonconforming behavior that could support a sex discrimination claim under a sex-stereotyping theory); Centola, 183 F. Supp. 2d at 410 ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women."). .

[175] The most recent version of ENDA was introduced in the 113th Congress (2013-2014) as S. 815 and H.R. 1755, and passed the full Senate by a vote of 64-32. The House did not take action on the bill in the 113th Congress. U.S. Library of Congress.gov, available at https://www.congress.gov/bill/113th-congress/senate-bill/815/all-info?resultIndex=10 (Senate bill) (last accessed May 25, 2016); http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=113&session=1&vote=00232 (Senate vote); https://www.congress.gov/bill/113th-congress/house-bill/1755/all-info (House bill) (last accessed March 17, 2016).

In the 114th Congress (2015-2016), identical bills titled the "Equality Act" were introduced in the Senate (S. 1858) and House (H.R. 3185) on July 23, 2015. The bills would, inter alia, amend title VII to add sexual orientation and gender identity to the list of classes protected from employment discrimination. U.S. Library of Congress, Congress.gov, available at https://www.congress.gov/bill/114th-congress/senate-bill/1858, https://www.congress.gov/bill/114th-congress/house-bill/3185 (last accessed March 27, 2016).

only one of many potential examples that could illustrate how the prohibition on sex-based stereotyping may apply to applicants and employees who are attracted to persons of the same sex. OFCCP's decision not to make the suggested change should not, however, be interpreted by Federal contractors to mean that they can treat employees or applicants who are attracted to persons of the same sex adversely as long as they are not in a same-sex relationship. Such adverse treatment may also be actionable as sex stereotyping depending on the facts alleged, and in any event is prohibited expressly by E.O. 11246, as amended by E.O. 13672.

Finally, several commenters request that OFCCP include protections for persons who are "perceived as" being in a same-sex relationship in proposed paragraph 60-20.7(a)(3). OFCCP does not incorporate this into the text of the final rule for the same reasons, set forth above, that it declines to alter the example to refer to individuals "attracted to" persons of the same sex. OFCCP notes that under title VII, many courts have found that individuals who are perceived to be of a protected class are protected, regardless of whether they are in fact members of that class.[176] This interpretation of title VII is consistent with EEOC guidance regarding the protected categories of national origin, race, and religion.[177] This is also consistent with

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[176] Kallabat v. Mich. Bell Tel. Co., No. 12-CV-15470, 2015 BL 194351 (E.D. Mich. June 18, 2015); Arsham v. Mayor & City Council of Baltimore, No. JKB-14-2158, 2015 WL 590490, at *8 (D. Md. February 11, 2015); Boutros v. Avis Rent A Car Sys., No. 10 C 8196, 2013 WL 3834405, at *7 (N.D. Ill. July 24, 2013); Henao v. Wyndham Vacations Resorts, Inc., 927 F. Supp. 2d 978, 986-87 (D. Haw. 2013). Cf. Jones v. UPS Ground Freight, 683 F.3d 1283, 1299-300 (11th Cir. 2012) ("[A] harasser's use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment."); EEOC v. WC&M Enterprises, Inc., 496 F.3d 393, 401-02 (5th Cir. 2007) (quoting with approval the EEOC's national origin discrimination guidelines and holding that "a party is able to establish a discrimination claim based on its own national origin even though the discriminatory acts do not identify the victim's actual country of origin."). However, not all courts recognize "perceived as" claims under Title VII. El v. Max Daetwyler Corp., 2011 WL 1769805, at *5 (W.D.N.C. May 9, 2011) aff'd, 451 F. App'x 257 (4th Cir. 2011) (collecting cases); see also Burrage v. FedEx Freight, Inc., 2012 WL 6732005, at *3 (N.D. Ohio December 28, 2012); Adler v. Evanston Nw. Healthcare Corp., 2008 WL 5272455, at *4 (N.D. Ill. December 16, 2008); Lewis v. N. Gen. Hosp., 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007); Butler v. Potter, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004).

[177] See 29 CFR 1606.1 (national origin); EEOC Compl. Man. § 15-II (2006) (race); EEOC, Employment

paragraph 20.7(b), which as proposed and adopted herein prohibits "[a]dverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status" (emphasis added).

Proposed paragraph 60-20.7(b) provided that the adverse treatment of an employee or applicant because of his or her actual or perceived gender identity or transgender status is an example of prohibited sex-based stereotyping. OFCCP received 13 comments about the use of "gender identity" in this particular paragraph. All but three generally support the example of sex stereotyping; eight suggest adding "sexual orientation" to the example; three oppose use of the example; two suggest the use of gender-neutral pronouns; and one highlights discriminatory experiences that transgender employees and applicants commonly face. As explained earlier in the analysis of paragraph 60-20.2(a), the case law in the area of sexual orientation discrimination is still developing, and E.O. 11246, as amended by Executive Order 13672, already explicitly prohibits sexual orientation discrimination. However, OFCCP retains use of the terms "gender identity" and "transgender status" in the final rule. As was also explained in the earlier discussion about paragraph 60-20.2(a), the inclusion of gender identity and transgender status discrimination as sex discrimination is consistent with OFCCP's interpretation of the Executive Order even prior to this final rule, as reflected in its Directive 2014-02.

Three organizations representing LGBT people (in two separate comments) suggest that OFCCP should consider adding an example or otherwise clarifying that just as contractors may not terminate employees for transitioning on the job, they also may not discriminate against employees for failing to live, dress, and work as their birth-assigned sex, and must accept the

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Discrimination Based on Religion, Ethnicity, or Country of Origin, available at http://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm (last accessed March 27, 2016).

gender identity asserted by employees and applicants without demanding medical or other evidence that they do not request from other employees under similar circumstances. OFCCP agrees with these examples; they are covered by paragraph 60-20.7(b), which states that adverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status is an example of adverse treatment because of their "failure to comply with gender norms and expectations for dress, appearance, and/or behavior," as well as by paragraph 60-20.2(a), which states that such treatment is a form of sex discrimination.[178] Because they are already covered, OFCCP declines to add them again as specific examples in the final rule. As with all of the examples in the final rule, paragraph 60-20.7(b) is non-exhaustive; failure to include a particular discriminatory fact scenario does not preclude protection under E.O. 11246.

A civil rights legal organization recommends that OFCCP include a new example of discrimination based on sex-based stereotyping in the final rule, to prohibit adverse treatment of a woman "because she does not conform to a sex stereotype about women being in a particular job, sector, or industry." As discussed above in the Reasons for Promulgating this New Regulation section of the preamble, OFCCP has found such steering discrimination based on outdated stereotypes in its compliance reviews.[179] OFCCP includes this new example of discrimination based on sex stereotyping in the final rule, at paragraph 60-20.7(c), because it believes that this sort of sex stereotyping was not fairly represented in proposed paragraphs 60-20.7(a), (b), or (c). In light of this new example at paragraph 60-20.7(c), the final rule renumbers

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[178] These examples are consistent with Executive Order 13672's direct prohibition of gender identity discrimination. See OFCCP, Frequently Asked Questions: EO 13672 Final Rule ("May an employer ask a transgender applicant or employee for documentation to prove his or her gender identity?" and "What kinds of documents may an employer require a transitioning applicant or employee to provide about the employee's transition?"), available at http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q32 (last accessed March 27, 2016).

[179] See supra text accompanying notes 36-39.

the caretaker stereotype provision in the final rule as paragraph 60-20.7(d).

Eleven comments on proposed paragraph 60-20.7(c) request that the final rule include a statement that discussing current and future plans about having a family during a job interview process may be considered evidence of caregiver discrimination. OFCCP agrees that contractors' bringing up current and future plans about family caregiving during the interview process may be evidence of sex-stereotyping women as caregivers but declines to include this suggested example because, unlike the other examples in the rule, it addresses evidence for proving sex discrimination based on sex stereotypes regarding appropriate roles in caregiving (as opposed to describing the fact situation that OFCCP would consider an example of such discrimination if proved).

Twelve comments propose adoption of additional examples of caregiver stereotypes, such as employment decisions based on assumptions that women with caregiver responsibilities cannot succeed in fast-paced environments; that women prefer to spend time with family rather than work; that women are less committed to their jobs than full-time employees; that women, as primary caretakers, are less in need of career advancement and salary increases; and that mothers are unwilling to travel or relocate their families for career advancement. Although these proposed examples are not included in the final rule, adverse actions based on caregiver stereotypes that women cannot succeed in fast-paced environments, are unwilling to travel or relocate, or are less committed to their jobs, among other examples, may also constitute discriminatory sex stereotyping. The list of examples included in the final rule is illustrative rather than exhaustive.

Another comment suggests that the final rule include an example of caregiver stereotypes against male employees receiving adverse treatment for caring for their elder parents. The

comment explains that adding an example of discrimination against men as caregivers would highlight the sex-based stereotype that "men, much more so than women, are expected to be fully devoted to their jobs and available to work long and unpredictable hours, unhindered by family responsibilities." As there is no other example involving men and elder care in the rule, OFCCP includes the suggested example as new paragraph (d)(4) in the final rule, to clarify that discrimination based on sex stereotypes can harm men as well as women.

One comment proposes the addition of best practices for employers to prevent caregiver stereotypes. OFCCP agrees that providing more time off and flexible workplace policies for men and women, encouraging men and women equally to engage in caregiving-related activities, and fostering a climate in which women are no longer assumed to be more likely to provide family care than men are best practices to prevent caregiver stereotypes that interfere with employees' and applicants' opportunities based on their sex. Accordingly, OFCCP adds these examples to the Appendix collecting best practices for contractors to consider undertaking.

As discussed supra in the Overview of the Comments section of the preamble, OFCCP adapts the final rule throughout § 60-20.7 by substituting "their" for "his or her" and "they" for "he or she" and adjusting verbs accordingly.

Section 60-20.8 Harassment and Hostile Work Environments

Although the Guidelines did not include a section on harassment, the courts, EEOC, and OFCCP[180] have recognized for many years that harassment on the basis of sex may give rise to a

[180] OFCCP's construction regulations require construction contractors to "[e]nsure and maintain a working environment free of harassment, intimidation, and coercion at all sites." 41 CFR 60-4.3(a) (paragraphs 7(a) and (n) of the required Equal Opportunity Clause for construction contracts). In addition, in chapter 3, § 2H01(d), the FCCM recognizes that "[a]lthough not specifically mentioned in the Guidelines, sexual harassment (as well as harassment on the basis of race, national origin or religion) is a violation of the nondiscrimination provisions of the Executive Order" and directs OFCCP compliance officers to "be alert for any indications of such harassment." It goes on to state that "OFCCP follows Title VII principles when determining whether sexual harassment has

violation of title VII and the Executive Order. In the proposed rule, OFCCP thus included proposed § 60-20.8, which set forth contractor obligations for offering protections to employees from harassment, including hostile work environments. It incorporated provisions of the EEOC's guidelines relating to sexual harassment, broadly defined harassment because of sex under the Executive Order, and suggested best practices for contractors. OFCCP received 34 comments on this section, primarily from individuals, civil rights groups, and law firms representing contractors. All 34 comments support the new section and indicate that OFCCP regulations covering sexual harassment and hostile work environments are long overdue. Thirteen comments offer suggestions on how to strengthen the section in the final rule. The final rule adopts § 60-20.8 as it was proposed, with one modification to paragraph 60-20.8(b).

As proposed, paragraph 60-20.8(a) generally establishes that harassment on the basis of sex is a violation of E.O. 11246 and describes actions and conduct that constitute sexual harassment. As proposed and as adopted in the final rule, this paragraph incorporates the provision of EEOC's Guidelines relating to sexual harassment virtually verbatim.[181] Inclusion of the EEOC language is intended to align the prohibitions of sexually harassing conduct under the Executive Order with the prohibitions under title VII.

Twelve of the comments on paragraph 60-20.8(a) request that OFCCP clarify in the final rule that a contractor may be vicariously liable for harassment perpetrated by lower-level supervisors that have the authority to make tangible employment decisions such as hiring, firing,

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occurred."

[181] See 29 CFR 1604.11(a), supra note 64.

or demoting an employee in light of Vance v. Ball State University.[182] These comments also recommend that OFCCP provide detailed guidelines explaining what constitutes a tangible employment action, providing information about the effective delegation doctrine, and clarifying when an employer is liable for harassment by coworkers and nonemployees. OFCCP declines to expand the section in this way. To do so would require incorporation of principles of tort and agency law into the final rule, which OFCCP believes is not necessary. OFCCP recognizes and follows the principles of employer liability for harassment established by the Supreme Court's title VII decisions in this area.

Proposed paragraph 60-20.8(b) defines "harassment because of sex" under the Executive Order broadly to include "sexual harassment (including sexual harassment based on gender identity), harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but is because of sex (including harassment based on gender identity)." Twelve of the comments on this paragraph urge OFCCP to elaborate on what constitutes harassment based on gender identity by stating that such harassment includes the intentional and repeated use of a former name or pronoun inconsistent with the employee's current gender identity.[183] The EEOC has held that "[i]ntentional misuse of the employee's new name and pronoun . . . may constitute sex based discrimination and/or harassment."[184] OFCCP agrees with the EEOC that unlawful harassment may include the intentional and repeated use of a former name or pronoun inconsistent with an employee's gender identity. OFCCP declines to

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[182] 133 S. Ct. 2434 (2013).

[183] Multiple comments cite a 2008-2009 national survey in which 45 percent of transgender workers reported that they had been referred to by the wrong gender pronoun, repeatedly and on purpose. Injustice at Every Turn, supra note 16.

[184] Jameson v. Donahoe, EEOC Appeal No. 0120130992, 2013 WL 2368729 (EEOC May 21, 2013).

add this language to the final rule, however, because it believes that the principle is fairly subsumed by inclusion of the phrase "sexual harassment based on gender identity" in the parenthetical after the term "sexual harassment" in paragraph 60-20.8(b): "Harassment because of sex includes sexual harassment (including sexual harassment based on gender identity)." Moreover, because the determination of whether the use of pronouns inconsistent with an employee's gender identity constitutes a hostile work environment will be highly fact-specific, a categorical prohibition in regulatory text is inappropriate. OFCCP will continue to follow title VII law as it evolves in this context.

Five of the comments on paragraph 60-20.8(b) recommend that OFCCP add the term "sexual orientation" along with gender identity. OFCCP declines to incorporate the term "sexual orientation" in this paragraph, for the same reasons, explained earlier in the preamble, that it declines to incorporate that term in paragraph 60-20.2(a). OFCCP will continue to monitor the developing law on sexual orientation discrimination as sex discrimination under title VII and will interpret the Executive Order's prohibition of sex discrimination in conformity with title VII principles. In any event, contractor employees and applicants are protected from sexual orientation discrimination independently of the sex discrimination prohibition by Executive Order 13672's addition of the term "sexual orientation" in the list of prohibited bases of discrimination in E.O. 11246.

OFCCP does make one alteration to the text of paragraph (b) in the final rule, striking the second parenthetical phrase, "(including harassment based on gender identity)," and replacing it with "or sex-based stereotypes," so that the third clause of paragraph (b) in the final rule reads that harassment based on sex includes "harassment that is not sexual in nature but that is because of sex or sex-based stereotypes." OFCCP removes the parenthetical phrase because it is

redundant. OFCCP adds "or sex-based stereotypes" as a result of its decision to list sex-based stereotypes explicitly in paragraph 60-20.2(a).

Another comment asks OFCCP to clarify that discrimination against workers who are victims of gender-based harassment or violence, including domestic violence and stalking, amounts to disparate treatment. OFCCP agrees that sex-based harassment may include violence and stalking if the harassment is "sufficiently patterned or pervasive" and directed at employees because of their sex.[185] Because the proposed text of paragraph 60-20.8(b) states that "[h]arassment because of sex includes . . . harassment that is not sexual in nature but that is because of sex," OFCCP believes it is not necessary to mention violence and stalking as specific examples of such but sex-based conduct.

Paragraph 60-20.8(c) in the proposed rule suggested best practices for procedures that contractors may develop and implement "to ensure an environment in which all employees feel safe, welcome, and treated fairly. . .[and] are not harassed because of sex." One comment applauds the inclusion of "best practice" recommendations in paragraph (c). OFCCP received no other comments on paragraph (c) and adopts it in the final rule. The final rule includes an Appendix of best practices, including those in paragraph (c).

Comments Not Associated with Particular Language in the Rule

Four commenters express general concern that affirmative action requirements lead to hiring based on sex and not qualifications. Nothing in the final rule requires contractors to hire any individual who is unqualified, and OFCCP's existing regulations are clear that no such

[185] See EEOC, Notice No. N-915-050, "Policy Guidance on Current Issues of Sexual Harassment" (1990), available at http://www.eeoc.gov/policy/docs/currentissues.html (last accessed March 27, 2016); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985).

requirement exists and that giving a preference to any individual on account of any of the bases protected by the Executive Order, absent a predicate finding of discrimination that must be remedied, is unlawful.[186] Further clarifying this point, the final rule contains an express prohibition of employment decisions based on sex in paragraph 60-20.3(a).

A number of commenters make recommendations about how OFCCP should implement the rule. Many suggest that OFCCP should provide technical assistance and training for contractors, employees, and OFCCP investigators. As it does for any new rule or other significant policy development, OFCCP will provide appropriate technical assistance and training for contractors, employees, and OFCCP investigators for this new rule.

Several commenters suggest that OFCCP focus compliance reviews on contractors "in industries with the widest gaps between the average wages of men and women, or in industries with the highest rate of EEOC charge filings." OFCCP regularly reviews its selection procedures to make them more efficient and effective.

One commenter suggests that OFCCP provide "robust subsidies to small businesses which may find it difficult to abide by these new regulations." OFCCP has neither the authority nor the budget to provide subsidies to businesses. OFCCP does, however, hold many compliance assistance events for contractors, including compliance assistance events targeted to small employers, free of charge, and provides one-on-one technical assistance when resources

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[186] See, e.g., 41 CFR 60-1.4(a), (b) ("The contractor will 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."); 41 CFR 60-2.16(e)(1) ("Quotas are expressly forbidden."); 41 CFR 60-2.16(e)(2) ("Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's … sex…."); 41 CFR 60-2.16(e)(4) ("Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one."); 41 CFR 60-4.3(10) ("[t]he contractor shall not use the goals . . . or affirmative action standards to discriminate against any person because of … sex….").

permit. It is anticipated that these compliance assistance events will also help ensure stakeholders understand the requirements of the final rule.

A few commenters recommend action that is within the purview of other government entities, such as passing the Equal Rights Amendment or removing the Executive Order's religious exemption.[187] OFCCP does not have the authority to undertake these actions.

One commenter proposes that OFCCP require contractors to use panels of interviewers of mixed genders for hiring and to omit gender as a question on job applications in order to eliminate bias by the hiring team. OFCCP declines to adopt these suggestions. The first is too prescriptive and burdensome: mixed-gender interview panels would not be practical in the case of every hire. The second is impossible: eliminating gender from job applications would not eliminate its consideration from hiring, as in the great majority of cases, hiring officials would identify applicants' genders from their appearance or names. Moreover, OFCCP regulations require contractors to maintain records on the sex of their employees,[188] and the equal employment opportunity forms that employers must file annually with the EEOC require reporting of this as well.[189]

Finally, one commenter urges OFCCP to clarify that "make-whole" relief for victims of discrimination must account for increased tax liability due to lump-sum payments of back pay and interest. OFCCP declines to adopt this suggestion for two reasons. First, the issue of the

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[187] E.O. 11246, as amended, sec. 204(c).

[188] 41 CFR 60-3.4A and B.

[189] See, e.g., EEOC, Equal Employment Opportunity Standard Form 100, Rev. January 2006, Employer Information Report EEO-1 Instruction Booklet, available at http://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm (last accessed July 16, 2015) ("Employees must be counted by sex . . . for each of the ten occupational categories and subcategories.").

components of make-whole relief is tangential to the rule. Second, the suggestion is applicable to relief not just for sex discrimination but for all types of discrimination within OFCCP's purview, and thus not appropriate for part 60-20. With respect to determining the elements of make-whole relief, as with other aspects of E.O. 11246 enforcement, OFCCP follows title VII principles, including court and EEOC decisions on the impact of lump-sum recovery payments on class members' tax liability, and thus on whether they have in fact been made whole.

REGULATORY PROCEDURES:

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

OFCCP issues this final rule in conformity with Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify including equity, human dignity, fairness, and distributive impacts.

Under E.O. 12866, OMB must determine whether a regulatory action is significant and therefore subject to its requirements and review by OMB.[190] Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect of $100 million or more, or adversely affects in a material way a sector of the

[190] 58 FR 51735.

economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

This final rule has been designated a "significant regulatory action" although not economically significant, under sec. 3(f) of E.O. 12866. Accordingly, OMB has reviewed this rule. The final rule is not economically significant, as it will not have an annual effect on the economy of $100 million or more.

The Need for the Regulation

OFCCP's longstanding policy is to follow title VII principles when conducting analyses of potential sex discrimination under E.O. 11246. See Notice of Final Rescission, 78 FR 13508 (February 28, 2013). However, the Sex Discrimination Guidelines, substantively unchanged since their initial promulgation in 1970 and re-issuance in 1978, were no longer an accurate depiction of current title VII principles. Congress has amended title VII significantly four times since 1978, the Supreme Court has issued a number of decisions clarifying that practices such as sexual harassment can be unlawful discrimination, and the lower courts and EEOC have applied title VII law in new contexts. Indeed, because OFCCP follows title VII principles in interpreting a contractor's nondiscrimination mandate, OFCCP no longer enforced the Guidelines to the extent that they departed from existing law. Moreover, since the Guidelines were promulgated in 1970, there have been dramatic changes in women's participation in the workforce and in

workplace practices. In light of these changes, this final rule substantially revises the Guidelines so that the part 60-20 regulations accurately set forth a contractor's obligation not to discriminate based on sex in accordance with current title VII principles. (A more detailed discussion of the need for the regulation is contained in Reasons for Promulgating this New Regulation, in the Overview section of the preamble, supra.)

Discussion of Impacts

In this section, OFCCP presents a summary of the costs associated with the new regulatory requirements in part 60-20. The estimated labor cost to contractors is based on the U.S. Department of Labor, Bureau of Labor Statistics (BLS) data in the publication "Employer Costs for Employee Compensation" issued in December 2014, which lists total compensation for Management, Professionals, and Related Occupations as $55.47 per hour.[191]

There are approximately 500,000 contractor companies or firms, employing approximately 65 million employees, registered in the GSA's SAM database.[192] Therefore, OFCCP estimates that 500,000 contractor companies or firms may be affected by the final rule. The SAM number results in an overestimation for several reasons: the system captures firms that do not meet the $10,000 jurisdictional dollar threshold for this rule; it captures inactive contracts, although OFCCP's jurisdiction covers only active contracts; it captures contracts for work performed outside the United States by individuals hired outside the United States, over which OFCCP does not have jurisdiction; and it captures thousands of recipients of Federal

[191] Press Release, Bureau of Labor Statistics, U.S. Department of Labor, Employer Costs for Employee Compensation—December 2015, at 4, available at http://www.bls.gov/news.release/ecec.t01.htm (last accessed March 27, 2016).

[192] See supra note 13.

grants and Federal financial assistance, which are not contractors.[193]

Cost of Regulatory Familiarization

Agencies are required to include in the burden analysis the estimated time it takes for contractors to review and understand the instructions for compliance. See 5 CFR 1320.3(b)(1)(i). In order to minimize this burden, OFCCP will publish compliance assistance materials including, but not limited to, fact sheets and "Frequently Asked Questions." OFCCP will also host webinars for the contractor community that will describe the new requirements and conduct listening sessions to identify any specific challenges contractors believe they face, or may face, when complying with the requirements.

OFCCP received five comments that address the estimate of time needed for a contractor to become familiar with the new regulatory requirements in the final rule. All indicate that the estimate was low. One of the five provides no additional information or alternative calculation. The remaining four provide alternative estimates of the time it would take for contractors to accomplish regulatory familiarization, ranging from 4 to 15 hours. However, none of these commenters provide data or documentation regarding the time contractors spend on regulatory familiarization. For example, one commenter concludes that the time necessary for regulatory familiarization "would be far closer to 4 or more hours" on the basis of anonymous responses to a solicitation of the opinions of individuals who had previously worked as OFCCP attorneys and contracting legal consultants. These individual opinions are difficult to evaluate absent

[193] In addition to these reasons to believe that the SAM data yield an overestimate of the number of entities affected by this rule, there is at least one reason to believe the data yield an underestimate: SAM does not necessarily include all subcontractors. However, this data limitation is offset somewhat because of the overlap among contractors and subcontractors; a firm may be a subcontractor on some activities but have a contract on others and thus in fact be included in the SAM data.

additional information about the facts underlying the evaluations. Another of the four commenters provides an estimate of the cost of regulatory familiarization of approximately $643 (for a midsize company with a staff of three human resources personnel, four operational directors, two vice presidents, and a president) to $1,000 (for a large firm), but does not explain how the commenter arrived at that estimate. In addition, one commenter criticizes OFCCP's estimate because it does not use the hourly wage rate for the BLS category of "Lawyers" for all the hours of regulatory familiarization, even though not all contractors employ lawyers for this purpose.

OFCCP acknowledges that the precise amount of time each company will take to become familiar with the new requirements is difficult to estimate. However, the elements that OFCCP uses in its calculation take into account the fact that many contractors are smaller and may not have the same human resources capabilities as larger contractors. Further, not every contractor company or firm has the same type of staff; for example, many do not have attorneys on staff. The SAM database shows that the majority of contractors in OFCCP's universe are small; for example, approximately 74 percent of contractor companies or firms in the database have 50 or fewer employees, and approximately 58 percent have 10 or fewer employees.

As stated, the Discrimination on the Basis of Sex final rule updates the Guidelines to existing title VII requirements and current legal standards. As such, the final rule clarifies requirements and removes outdated provisions, potentially reducing the burden of contractors trying to understand their obligations and the responsibility of complying with those outdated and in some instances conflicting provisions. Yet, OFCCP recognizes that there may be additional time needed for regulatory familiarization with some concepts contained in the final rule. In particular, OFCCP added 30 minutes to account for the time it takes specifically to

digest the regulatory text, with its numerous examples. Thus, taking into consideration the comments received, the broad spectrum of contractors in OFCCP's universe, and the fact that the final rule brings the requirements into alignment with existing standards, OFCCP increases its estimation for regulatory familiarization by 50 percent, from 60 to 90 minutes.

In determining the labor cost, OFCCP uses data found in Table 2, Civilian workers, by occupational and industry group, of BLS's "Employer Costs for Employee Compensation" publication. This publication is a product of the National Compensation Survey and measures employer costs for wages, salaries, and employee benefits for nonfarm private and state and local government workers. The occupational grouping of "Management, professional and related" includes the Standard Occupational Classifications (SOC) for the major groups from SOC 11 through SOC 29 and includes SOC 23 Legal Occupations.[194] OFCCP believes that this broad category better reflects the staffing at its universe of contractors, including smaller contractors. OFCCP retains the use of wage data for the broad category of "Management, professional and related."

Thus, in determining the cost for contractors to become familiar with the requirements of the final rule, OFCCP estimates that it will take 90 minutes or 1.5 hours for management or a professional at each contractor establishment either to read the compliance assistance materials that OFCCP provides in connection with the final rule or to prepare for and participate in an OFCCP webinar to learn more about the new requirements. Consequently, the estimated burden for rule familiarization is 750,000 hours (500,000 contractor companies x 1.5 hour = 750,000

[194] SOC Major Groups: 11- Management Occupations, 13 – Business and Financial Operations Occupations, 15- Computer and Mathematical Occupations, 17 0 Architecture and Engineering Occupations, 19 – Life, Physical, and Social Science Occupations, 21- Community and Social Science Occupations, 23 – Legal Occupations, 25 – Education, Training, and Library Occupations, 27 – Arts, Design, Entertainment, Sports, and Media Occupations, and 29 – Healthcare Practitioners and Technical Occupations.

hours) and the estimated cost is $41,602,500 (750,000 hours x $55.47/hour = $41,602,500) or $83 per contractor company.

Cost of Provisions

As stated previously, the final rule replaces OFCCP's Sex Discrimination Guidelines with regulations that set forth requirements that Federal contractors and subcontractors and federally assisted construction contractors and subcontractors must meet in fulfilling their obligations under E.O. 11246 to ensure nondiscrimination in employment based on sex. In order to reduce the burden and increase understanding, the final rule includes examples of prohibited employment practices with each of the provisions.

OFCCP received 28 comments related to the burdens and costs of compliance with the proposed rule. Comments on specific sections are discussed below. Generally, 16 of the comments support the proposed rule, commenting that the costs are minimal and the return on investment high and that the rule would reduce confusion and have a positive effect on the community. Four of the 12 comments that oppose the rule comment generally that the rule imposes significant burden with little benefit but provide no additional specific information. Two of the 12 opposing comments assert that the rule imposes additional burden on contractors for data collection, unspecified recordkeeping requirements, development of affirmative action programs, and employee training. Because the final rule does not require any of these activities, no burden is assessed for them. Below is detailed information that addresses the specific cost and burdens of the final rule by section.

The final rule changes the title of the regulation to provide clarity that the provisions in part 60-20 are regulations implementing E.O. 11246. The title change does not incur burden.

Sections 60-20.1–60-20.4

The final rule makes minor edits to § 60-20.1, including deleting a sentence explaining the reason for promulgating this part of the regulation and modifying the sentence notifying the public that part 60-20 is to be read in connection with existing regulations. These minor edits update the regulations and provide clarity. Because the edits do not cause additional action on the part of contractors, no additional burden is associated with this section.

Section 60-20.2, General prohibitions, of the final rule removes the Guidelines section titled "Recruitment and advertisement" and replaces it with a provision that articulates the general prohibition against sex discrimination in employment. The general prohibition against sex discrimination in employment is not a new provision and as such does not require any additional action on the part of contractors.

Commenters express concern that this section of the rule would cause additional burden if it requires contractors to dissolve existing affinity groups for women, adopt "gender neutral" job titles, revise job descriptions, or construct single-user facilities. One comment recommends that OFCCP quantify the cost for Federal contractors to construct single-user, gender-neutral bathrooms.

In adopting its final rule, OFCCP emphasizes that it does not consider contractors' good faith efforts to comply with their affirmative action requirements a violation of the final rule, thus clarifying that there is no need to dissolve affinity groups. The final rule also clarifies that it does not require contractors to avoid the use of gender-specific job titles, although OFCCP considers doing so a best practice. Nor does the final rule require construction of gender-neutral bathrooms. The final rule offers gender-neutral, single-user restrooms as a best practice for contractors to consider, but only requires that contractors allow employees to access sex-segregated workplace facilities that are consistent with their gender identity. Contractors will be

able to do this without change to their existing facilities. OFCCP declines to quantify the cost as recommended by the commenter. As there is no need for contractors to incur any of the burdens that the commenters suggest, OFCCP assesses no burden for this provision.

The final rule replaces the Guidelines § 60-20.3 (Job policies and practices) with a new § 60-20.3, "Sex as a bona fide occupational qualification." In this section, the final rule consolidates, in one provision, the references to the BFOQ defense available to employers, and updates it with the language set forth in title VII. This reorganization makes it easier for Federal contractors to locate and understand the BFOQ defense. This section reorganizes existing information and does not incur additional burden. Thus, OFCCP assesses no burden for this provision.

Section 60-20.4 replaces the Guidelines provision addressing seniority systems with a new section addressing discrimination in compensation practices.[195] The final rule provides clear guidance to covered contractors on their obligation to provide equal opportunity with respect to compensation. It provides guidance on determining similarly situated employees and conforms to existing title VII principles in investigating compensation discrimination. Two commenters assert that this provision would result in additional burden for contractors related to their analyses of compensation and their compensation practices. OFCCP disagrees, as the final rule does not change existing requirements with regard to compensation discrimination, nor does it change the requirement that contractors with affirmative action programs must conduct in-depth analyses of compensation practices. The final rule merely elaborates on the legal principles applicable to compensation discrimination under the Executive Order, in accordance

[195] In the Guidelines, § 60-20.5 addressed discriminatory wages. The final rule § 60-20.4 incorporates that existing requirement and updates it to be consistent with current title VII law.

with title VII law. As such, this section reduces confusion that may have resulted in the analysis of compensation discrimination.

It is true that existing regulations require some contractors to analyze their personnel activity data, including compensation, annually, to determine whether and where impediments to equal employment opportunity exist.[196] The final rule does not create any new requirements or otherwise change the existing regulatory requirement. Therefore, this provision creates no new burden or new benefit (beyond confusion reduction).

Section 60-20.5: Discrimination Based on Pregnancy, Childbirth, or Related Medical Conditions

The final rule addresses discrimination based on pregnancy, childbirth, or related medical conditions in § 60-20.5. Paragraph 60-20.5(a) generally prohibits discrimination based on pregnancy, childbirth, or related medical conditions, including childbearing capacity. This provision clarifies current law that E.O. 11246 prohibits discrimination based on any of these factors and as such does not generate new burden or new benefits (with the exception of reduced confusion).

Final rule paragraph 60-20.5(b) provides a non-exhaustive list of examples of unlawful pregnancy discrimination, including: refusing to hire pregnant applicants; firing an employee or requiring an employee to go on leave because the employee becomes pregnant; limiting a pregnant employee's job duties based on pregnancy 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 related to pregnancy, childbirth, or related medical conditions when such costs are covered for other medical conditions. The clarification

[196] 41 CFR 60-2.17(b)(3).

that the examples in paragraph 60-20.5(b) provide reduces contractors' confusion by harmonizing OFCCP's outdated regulations with current title VII jurisprudence.

Final rule paragraph 60-20.5(c) addresses accommodations for pregnant employees. As described in the Section-by-Section Analysis above, in proposed paragraph 60-20.5(b)(5), the NPRM proposed a fifth common example of discrimination based on pregnancy, childbirth, or related medical conditions: failure to provide reasonable workplace accommodations to employees affected by such conditions when such accommodations are provided to other workers similar in their ability or inability to work. Because the issue of pregnancy accommodations was pending before the U.S. Supreme Court (in Young v. UPS, supra) when OFCCP published the NPRM, OFCCP stated that it would revise the rule to reflect the ruling in Young as necessary. The Supreme Court decided Young v. UPS on March 25, 2015. In light of this decision, OFCCP modifies the final rule. As described supra in the Section-by-Section Analysis, OFCCP removes paragraph (5) from paragraph 60-20.5(b) and substitutes a new paragraph, paragraph 60-20.5(c), titled "Accommodations," that treats the topic that was covered in proposed paragraph 60-20.5(b)(5). This new paragraph 60-20.5(c) is divided into two paragraphs: (1) Disparate treatment and (2) Disparate impact.

Paragraph (1), on disparate treatment, provides that it is a violation of E.O. 11246 for a contractor to deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions in three circumstances:

(i) Where the contractor denies such assignments, modifications, or other accommodations only to employees affected by pregnancy, childbirth, or related medical conditions;

(ii) Where the contractor provides, or is required by its policy or by other relevant laws to provide, such assignments, modifications, or other accommodations to other employees whose abilities or inabilities to perform their job duties are similarly affected, the denial of accommodations imposes a significant burden on employees affected by pregnancy, childbirth, or related medical conditions, and the contractor's asserted reasons for denying accommodations to such employees do not justify that burden; or

(iii) Where intent to discriminate on the basis of pregnancy, childbirth, or related medical conditions is otherwise shown.

OFCCP believes there is no additional burden for contractors to comply with new paragraph 60-20.5(c)(1). That is because this new paragraph reflects current title VII law as interpreted by the Supreme Court in Young. Contractors subject to title VII or to the state antidiscrimination laws that follow title VII precedent are thus already required to comply with this interpretation. In addition, 16 states have laws that require accommodations for pregnant workers,[197] so covered contractors in those states are already required to provide such accommodations and thus comply with this paragraph. However, because the requirement to provide accommodations in certain circumstances may be new for contractors that had not

[197] As of December, 2015, these states included Alaska (Alaska Stat. §39.20.510); California (Cal. Gov't Code § 12945); Connecticut (Conn. Gen. Stat. § 46a-60(a)(7)); Delaware (Del. Code Ann. title 19 § 711); Hawaii (Haw. Code R. § 12-46-107); Illinois (775 Ill. Comp. Stat. 5/2-102(I)); Louisiana (La. Rev. Stat. Ann. § 23:342); Maryland (Md. Code Ann. State Gov't § 20-609); Minnesota (Minn. Stat. § 181.9414); Nebraska (Neb. Rev. Stat. §§ 48-1107.01, 1121); New Jersey (N.J. Stat. Ann. § 10:5-12(s)); New York (N.Y. Exec. Law §§ 292, 296); North Dakota (N.D. Cent. Code § 14-02.4-03(2)); Rhode Island (R.I. Gen. Laws § 28-5-7.4(a)); Texas (Tex. Lab. Code Ann. §§ 21.051, 21.106); and West Virginia (W. Va. Code. R. § 5-11-9(B)). New York City, the District of Columbia, Philadelphia, Providence, and Pittsburgh have such laws as well; their laws apply to employers of fewer than 15 employees. See National Partnership for Women & Families, Reasonable Accommodations for Pregnant Workers: State and Local Laws, December 2015, available at http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf (last accessed March 25, 2016).

previously provided accommodations or light duty, OFCCP provides an estimate of the cost burden associated with final paragraph 60-20.5(c)(1).[198]

OFCCP uses the estimate that it developed in the NPRM for proposed paragraph 60-20.5(b)(5) as a basis for its estimate of the cost of final paragraph 60-20.5(c)(1) for contractors that had not previously provided accommodations or light duty. That proposed paragraph required contractors to provide alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions whenever such accommodations are provided to other workers similar in their ability or inability to work. OFCCP estimated that the total cost of that accommodations requirement would be $9,671,000.[199] To arrive at that figure, OFCCP estimated that approximately 2,046,850 women in the Federal contractor workforce would be pregnant in a year, of whom 21 percent (429,839 women) work in job categories likely to require accommodations that might involve more than a de minimis cost. Because the incidence of medical conditions during pregnancy that require accommodations ranges from 0.5 percent (placenta previa) to 50 percent (back issues), OFCCP estimated that of the women in positions that require physical exertion or standing, half (or 214,920 women) may require some type of an accommodation or light duty. The Listening to Mothers study found that 63 percent, or 135,400, of pregnant women who needed and requested a change in duties, such as less lifting or more sitting, made such a request of their employers, and 91 percent, or 123,214, of those

[198] Because the Supreme Court had not yet clarified title VII law when the NPRM was published, and therefore some contractors had not previously provided accommodations or light duty, OFCCP similarly provided an estimate in the NPRM of the burden associated with proposed paragraph 60-20.5(b)(5) for such contractors.

[199] OFCCP's methodology was described in greater detail in the preamble to the NPRM. 80 FR at 5262–63.

women worked for employers that attempted to address their needs.[200] In addition, OFCCP assumed that of the 37 percent (79,250 women) who did not make a request for accommodation, 91 percent (72,364) would have had their needs addressed had they made such a request. Thus, OFCCP determined that the proposed rule would require covered contractors to accommodate the 9 percent of women whose needs were not addressed or would not have been addressed had they requested accommodation. According to the Job Accommodation Network,[201] the average cost of an accommodation is $500. Therefore, OFCCP estimated that the cost of proposed paragraph 60-20.5(b)(5) would be $9,671,000 ((135,400 - 123,214) + (79,520 – 72,364)) x $500).

However, proposed paragraph 60-20.5(b)(5) was broader – i.e., it covered more circumstances – than revised paragraph 60-20.5(c)(1). The next paragraphs analyze each of the three paragraphs of paragraph 60-20.5(c)(1) in turn to explain how proposed paragraph 60-20.5(b)(5) was broader.

The fact circumstances contemplated in paragraph 60-20.5(c)(1)(i) are those in which contractors do not provide accommodations to workers affected by pregnancy, childbirth, and related medical conditions, but do provide such accommodations to all other workers who are similar in their ability or inability to work. In other words, under this scenario, contractors deny accommodations to workers affected by pregnancy, childbirth, and related medical conditions, and only to those workers. Because proposed paragraph 60-20.5(b)(5) covered every circumstance in which contractors deny accommodations to workers affected by pregnancy,

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[200] Listening to Mothers, supra note 153.

[201] Job Accommodation Network, Workplace Accommodations: Low Cost, High Impact — Annually Updated Research Findings Address the Costs and Benefits of Job Accommodations 4 (2014), available at http://askjan.org/media/downloads/LowCostHighImpact.doc (last accessed March 9, 2016).

childbirth, and related medical conditions, the subparagraph 60-20.5(c)(1)(i) circumstances are a wholly contained subset of the circumstances that proposed paragraph 60-20.5(b)(5) covered.

The circumstances contemplated in paragraph 60-20.5(c)(1)(ii) are similarly a subset of the proposed paragraph 60-20.5(b)(5) circumstances. That is because, pursuant to Young, the new paragraph requires contractors to provide alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions only when the denial of accommodations imposes a significant burden on employees affected by pregnancy, childbirth, or related medical conditions and the contractor's asserted reasons for denying accommodations to such employees do not justify that burden. It is difficult to ascertain precisely how much narrower this set of circumstances is than proposed paragraph 60-20.5(b)(5), because OFCCP does not have sufficient information to estimate how frequently "denial of accommodations [will] impose[ ] a significant burden on employees affected by pregnancy, childbirth, or related medical conditions and the contractor's asserted reasons for denying accommodations to such employees [will] not justify that burden." But by definition, contractors are required to accommodate workers affected by pregnancy, childbirth, and related medical conditions less frequently under paragraph 60-20.5(c)(1)(ii) than they would have been under proposed paragraph 60-20.5(b)(5).

The circumstance contemplated in paragraph 60-20.5(c)(1)(iii) were not explicitly mentioned in proposed paragraph 60-20.5(b)(5). But because they make express a basic tenet of title VII law – that intentional discrimination may be manifest in a variety of ways – they were implicit in the proposed rule. Proposed paragraph 60-20.5(b)(5) therefore subsumed the circumstance in paragraph 60-20.5(c)(1)(iii).

Thus, combining the circumstances that paragraphs (i), (ii), and (iii) of paragraph 60-

20.5(c)(1) together cover, the circumstances that paragraph 60-20.5(c)(1) covers are narrower than those that proposed paragraph 60-20.5(b)(5) covered. Because of the difficulty in estimating how much narrower, however, for purposes of this rulemaking, OFCCP assumes that the maximum cost for contractor compliance with new subparagraph 60-20.5(c)(1) is equal to the $9,671,000 cost that OFCCP estimated for contractor compliance with proposed paragraph 60-20.5(b)(5). This estimate represents the maximum cost because by definition, the cost for paragraph 60-20.5(c)(1) is less than that for proposed paragraph 60-20.5(b)(5).

Many comments support OFCCP's proposal in paragraph 60-20.5(b)(5) that generally required contractors to provide accommodations to pregnant employees. In support, these commenters report that accommodating pregnant employees is good for business and that the costs of accommodating pregnant employees are minimal.

On the other hand, several commenters suggest that OFCCP's estimated cost of accommodations was low or should be a range. One comment cites an alternate study indicating that pregnant women are prescribed some form of bed rest each year, for which additional burden should be assessed. This study functions as an online informational brochure for pregnant women which defines bed rest and its use. OFCCP's estimate of burden assesses the conditions that may require accommodations during pregnancy. While bed rest may be a way to address some of the conditions that OFCCP factored into its assessment, bed rest in itself is not a condition of pregnancy. Therefore, OFCCP declines to modify its assessment to include bed rest.

The same comment recommends that OFCCP assess burden for workers in all job categories, rather than just the categories of craft workers, operatives, laborers, and service workers. When developing its assessment of burden, OFCCP considered the types of

accommodations needed and the types of jobs in the various job categories. The report Listening to Mothers[202] identified four pregnancy-related accommodations that may be required, depending on the jobs involved: more frequent breaks, changes in schedule, changes in duties such as less lifting and more sitting, and other adjustments. Considering the types of jobs in each of the job categories and the primary functions of those jobs, OFCCP determines that the jobs in the craft worker, operatives, laborers, and service worker categories are the most physically demanding and likely to limit workers' ability to take breaks when needed, reduce lifting, and sit. Thus, OFCCP retains its analysis using the job categories of craft workers, operatives, laborers, and service workers.

Finally, the comment questions whether the Job Accommodation Network's estimate for disability accommodations is "likely sufficient to accommodate a pregnant employee" because it covers all types of accommodations. The commenter is correct that the Job Accommodation Network estimate of $500 accounts for all types of accommodations. OFCCP acknowledged in the NPRM that this may be an overestimation and as multiple other commenters stated, the cost of accommodating a pregnant worker is minimal and results in benefits to employers, including reduced workforce turnover, increased employee satisfaction, and productivity.

One of the industry group commenters acknowledges that "the estimate of annual accommodation costs of $9,671,000 appears to be a reasonable foundation," but contends that this estimate is incomplete, and urges OFCCP to undertake further empirical research to assess the accommodation costs more fully. On the other hand, multiple other commenters describe the burden of accommodating pregnancy as either "minimal," or "not burdensome." One contractor

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[202] Listening to Mothers, supra note 153. OFCCP discussed its consideration of this study in the NPRM. 80 FR at 5262.

organization, which surveyed its membership, comments that the "majority of the respondents felt that OFCCP's regulations will not impose additional duty on federal contractors to provide accommodations to pregnant employees, noting that 90 percent of respondents said that there won't be any impact to the organization." In addition, OFCCP's rule merely harmonizes its regulations with the existing requirements of title VII, as defined by the Supreme Court. As stated below, only those Federal contractors with 14 or fewer employees that are in states that do not have laws that prohibit discrimination on this basis will be required to make changes to their policies to come into compliance. Thus, OFCCP believes that its estimate is sufficient and may be an overestimation of burden.

The second paragraph of paragraph 60-20.5 in the final rule, 60-20.5(c)(2), applies disparate-impact principles to policies or practices that deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions. It states that contractors that have such policies or practices must ensure that such policies or practices do not have an adverse impact on the basis of sex unless they are shown to be job-related and consistent with business necessity. The provision also includes, as an example of a policy that might have an unjustified disparate impact based on pregnancy, a contractor's policy of offering light duty only to employees with on-the-job injuries. Like the circumstance in paragraph 60-20.5(c)(1)(iii), this circumstance was not made express in proposed paragraph 60-20.5(b)(5). But as an expression of a basic principle of title VII law, it makes explicit what was implicit in the proposed rule. Thus, it does not add to contractors' existing obligations under title VII and OFCCP assesses no burden for it.

Proposed paragraph 60-20.5(c)(3) stated that it is a best practice for contractors to

provide light duty, modified job duties, or assignments to pregnant employees and applicants. In the final rule, this paragraph appears in the Appendix. Since this paragraph does not require contractors to provide accommodations, nor to take any action, there is no burden associated with it.

Final rule paragraph 60-20.5(d) (proposed paragraph 60-20.5(c)) prohibits discriminatory leave policies based on sex, including pregnancy, childbirth, or other related medical conditions. This paragraph is the same in the final rule as it was in the proposed rule (except for the renumbering). Because it is consistent with title VII, OFCCP assesses no burden for it.

In sum, § 20.5 provides clarification and harmonizes OFCCP's requirements to existing title VII requirements; as such, no new burden or new benefits is created with the final rule. If any burden is created, it is less than $9,671,000, or $19 per contractor.

Section 60-20.6: Other Fringe Benefits

The final rule replaces the current § 60-20.6 (Affirmative action) with a new section titled "Other fringe benefits." Section 60-20.6 clarifies the existing requirement of nondiscrimination in fringe benefits, specifically with regard to application of that principle to contributions to and distributions from pension and retirement funds and to providing health-care benefits. One commenter, the contractor industry liaison group that surveyed its members, found that the majority did not anticipate any impact, as fringe benefits are already offered without regard to sex. On the other hand, one industry commenter states that this section of the proposed regulation "is completely new or so thoroughly revised as to represent essentially new compliance requirements," and urges OFCCP to provide estimates of this section's compliance costs, such as "the costs of establishing and maintaining requisite procedures, operating, records,

and internal compliance assessment systems."[203] Prohibiting discrimination in benefits, including in health-care benefits, is not a new requirement under E.O. 11246. Further, the final rule does not require the establishment of procedures, records or internal compliance assessment systems. Thus, OFCCP declines to estimate the costs that the commenter suggests.

With regard to pension-related costs, both the proposed and final rule reflect the current state of title VII law with regard to pension funds, imposing no additional burden on contractors covered both by E.O. 11246 and by title VII (which, generally, covers employers of 15 or more employees) or by state or local laws that similarly prohibit sex discrimination (many of which have lower coverage thresholds). Indeed, this has been the law since the Supreme Court's Manhart decision in 1978.[204] As to the remaining contractors, those that have fewer than 15 employees as defined by title VII, are not covered by state or local laws, and have at least $10,000 in Federal contracts or subcontracts, as noted in the discussion of this requirement elsewhere in the preamble, OFCCP's publicly available Federal Contract Compliance Manual (FCCM) put them on notice that OFCCP follows current law with regard to providing equal benefits and making equal contributions to pension funds for men and women. Thus, as an existing requirement, this does not generate any new benefits (beyond reduced confusion) or additional burden.

With regard to fringe benefits for same-sex spouses, as explained supra,[205] the text of the final rule does not include a provision to the effect that conditioning fringe benefits on the sex of

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[203] The commenter does acknowledge that there is a "baseline proportion of covered employers who are already in full compliance."

[204] See supra note 157.

[205] See the discussion of "Section 60-20.6 Other Fringe Benefits" in the Section-by-Section Analysis.

an employee's spouse is sex discrimination. The preamble does state that the agency will follow relevant developing case law in this area in its interpretation of these regulations.[206] But even if the agency does interpret these regulations to require contractors to offer to same-sex spouses the same fringe benefits that they offer to opposite-sex spouses, the import of the Supreme Court's ruling in Obergefell v. Hodges, 576 U.S. __(2015), recognizing the legality of same-sex marriage, is that benefits for which spouses are eligible must be provided regardless of the sex of the spouse. In addition, the independent prohibition of discrimination based on sexual orientation contained in E.O. 11246 and its regulations requires contractors to offer same-sex spouses the same fringe benefits that they offer opposite-sex spouses.[207] Thus, OFCCP does not believe that its interpretation of the final rule will affect contractors' behavior with respect to providing fringe benefits to same-sex spouses. For these reasons, OFCCP does not assess any additional cost under this rule for contractors' providing such benefits.

As discussed in the Section-by-Section Analysis, § 60-20.6 also prohibits discrimination in medical benefits on the basis of gender identity or transgender status. The term "fringe benefits" is defined to include medical benefits and the term "sex" is defined to include gender identity. Thus, the effect of the regulatory language ("It shall be an unlawful employment practice for a contractor to discriminate on the basis of sex with regard to fringe benefits") is that contractors may not discriminate on the basis of gender identity with regard to medical benefits. The preamble to this final rule states that "[t]he logical reading of the language proposed in the NPRM, which is adopted into the final rule without change, is that certain trans-exclusive health

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[206] Id.

[207] Id.

benefits offerings may constitute unlawful discrimination,"[208] and goes on to describe the circumstances under which OFCCP may determine that health-benefits offerings constitute discrimination.[209]

Further, discrimination on the basis of gender identity in the provision of fringe benefits already falls within the scope of E.O. 11246 and its existing regulations. Since issuance of its Directive on Gender Identity and Sex Discrimination in August 2014, it has been OFCCP's position that prohibited sex discrimination includes discrimination on the bases of gender identity and transgender status. Moreover, the independent prohibition of discrimination based on gender identity contained in E.O. 11246 and its regulations bans discrimination in rates of pay and other forms of compensation, which include all manner of employee benefits.

OFCCP recognizes that there has been some uncertainty among contractors and other stakeholders who may not have understood this nondiscrimination obligation under existing authorities, given that the agency has received comments and questions from stakeholders. Understanding that some contractors may recognize a need to update their plans in light of the guidance provided in this final rule, OFCCP has decided to provide an evaluation of the cost for contractors to remove unlawful benefits exclusions or otherwise come into compliance with the prohibition on gender identity discrimination in the provision of employment-based health-care benefits.

This prohibition affects only those contractors that currently offer health-benefit plans[210]

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[208] Supra text accompanying note 158.

[209] Supra text accompanying notes 161-166.

[210] Approximately 57 percent of employers offer health-care benefits to employees. Kaiser Family Foundation and Health Research Educational Trust, 2015 Employer Health Benefits Survey, Summary of Findings (September 22, 2015), available at http://kff.org/report-section/ehbs-2015-summary-of-findings/ (Kaiser Health Benefits Survey 2015) (last accessed January 27, 2016). While no research on the provision of employment-based health-care

that exclude transition-related benefits in a discriminatory manner or otherwise discriminate on the basis of gender identity. While OFCCP does not know how many contractors offer health-benefit plans that discriminate on the basis of gender identity, many employers already offer nondiscriminatory plans, and that number is increasing.[211]

To assess the cost for contractors coming into compliance, OFCCP reviewed a 2012-2013 survey of 34 public and private employers,[212] a 2012 assessment by the California Insurance Department of the cost of a proposed regulation prohibiting transition-exclusive health insurance in California and the data on which it relied,[213] and projections of the cost of providing transition-related health-care benefits to the members of the military published in the New England Journal of Medicine,[214] which are described in the text below. Based on this review, OFCCP determines that the cost of adding nondiscriminatory health-care benefits is most likely to be de minimis.

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benefits is specific to contractors, OFCCP is not aware of any reason to believe that the population of contractors is significantly different from the broader employer population with respect to whether they offer employment-based health-care benefits.

[211] The Human Rights Campaign Foundation's 2016 Corporate Equality Index (CEI) reports that the number of businesses that offer transgender-inclusive health coverage has increased from zero in 2002 to 40 percent of Fortune 500 companies and 60 percent of the CEI universe of businesses in 2016. Human Rights Campaign Foundation, Corporate Equality Index 2016 (2015) 4, 16, available at http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/CEI-2016-FullReport.pdf (last accessed January 23, 2016).

[212] Cost and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans, Williams Institute, September 2013 (Williams Institute Study), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Cost-Benefit-of-Trans-Health-Benefits-Sept-2013.pdf (last accessed January 24, 2016).

[213] Economic Impact Assessment, Gender Nondiscrimination in Health Insurance, State of California Department of Insurance, April 13, 2012 (Cal. Ins. Dept. Assessment), available at http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf (last accessed January 24, 2016). The U.S. Department of Health and Human Services relied in part on the California Insurance Department Assessment to "estimate that providing transgender individuals nondiscriminatory insurance coverage and treatment will … have de minimis impact on the overall cost of care and on health insurance premiums." HHS Nondiscrimination Final Rule, supra note 106, at 31457.

[214] A. Belkin, "Caring for Our Transgender Troops — The Negligible Cost of Transition-Related Care," 373 New Eng. J. Medicine 1089 (September 15, 2015) (DOD Study).

This result is due in large part to the rarity of gender dysphoria[215] and gender transition. Inexpensive hormone therapy is the most commonly sought treatment,[216] and it is often already covered by insurance plans as the treatment for diagnoses other than gender dysphoria. Further, only a small percentage of individuals with a need for health services related to gender transition undergo the most expensive treatment, genital surgery, because they do not choose it or meet the physical, diagnostic, and other qualifications for it.[217] Moreover, "surgical treatment …is usually a once-in-a-lifetime event, and many costs are spread over a lifetime, and do not occur in just a single year."[218] Studies of utilization of transgender-nondiscriminatory health-care benefits provided by both private and public employers confirm this data, placing the utilization rate at between 0 and 0.325 per thousand employees per year.[219]

After assessing the experiences of five public employers when they eliminated gender-

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[215] Data from 25 specialty hospital- and university-based clinics around the world serving as gateways for surgical and hormonal sex reassignment reported the prevalence of adults with gender identity disorder at between 0.0065 percent and 0.0173 percent of the population. K. Zucker and A. Lawrence, Epidemiology of Gender Identity Disorder: Recommendations for the Standards of Care of the World Professional Association for Transgender Health, 11 International Journal of Transgenderism 8, 13, 16 (2009), available at http://dx.doi.org/10.1080/15532730902799946 (last accessed February 24, 2016). See also Cal. Ins. Dept. Assessment at 3 (reporting on study based on medical diagnoses of gender identity disorder finding prevalence range as low as 0.0014-0.0047 percent). After these studies were published, the diagnostic term "gender dysphoria" replaced "gender identity disorder." American Psychiatric Association, Gender Dysphoria (2013), available at http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf (last accessed March 3, 2016).

[216] D. Spade, "Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates," 8 Seattle Journal for Social Justice 497, 498 (2010) (Medicaid Policy & Gender-Confirming Healthcare), available at http://digitalcommons.law.seattleu.edu/sjsj/vol8/iss2/4 (last accessed January 22, 2016).

[217] Medicaid Policy & Gender-Confirming Healthcare at 498. The WPATH Standards of Care prescribe a period of at least 12 continuous months of hormone therapy, of the "experience of living in an identity-congruent gender role," or both, before performance of genital surgeries. WPATH Standards of Care at 202.

[218] Cal. Ins. Dept. Assessment, supra note 213, at 8.

[219] Williams Institute Study at 2 (for the figure 0); Cal. Ins. Dept. Assessment at 6, 14 (citing Wilson, A., Transgender-Inclusive Health Benefits: Costs, Data for Cost Calculation (Jamison Green and Associates 2012) (Wilson Cost Study) for the figure 0.325). According to the Williams Institute Study, the figure of 0.325 per thousand that the California Insurance Department cites is not a correct report of the findings of the Wilson Cost Study; the correct figure is 0.22 per thousand. Williams Institute Study at 6 and 22, note 18.

identity discrimination in the provision of health insurance to their employees, the California Insurance Department characterized the impact on costs of a proposed regulation prohibiting such discrimination in health insurance in California as "immaterial" and assigned a value of $0 to such costs in its economic impact assessment.[220] The Insurance Department relied particularly on the experiences of the City and County of San Francisco (San Francisco) and the University of California, neither of which charged any additional premium for health insurance covering transition-related medical costs.[221]

Likewise, a 2013 Williams Institute study of employers that provided nondiscriminatory health-care coverage found that providing transition-related benefits has "zero to very low costs."[222] Of the respondents that provided "information about the cost of adding transition-related coverage to existing health-care plans," 85 percent reported no costs.[223] And of the employers that provided information about actual costs that they incurred as a result of employees' utilizing the transition-related health-care coverage, 67 percent reported no actual costs.[224] Of those that incurred some costs based on benefit utilization, only one, a self-insured

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[220] Cal. Ins. Dept. Assessment, supra note 213, at 5. The five employers were the University of California, the City and County of San Francisco, and the Cities of Berkeley, Portland, and Seattle.

[221] Human Rights Campaign, San Francisco Transgender Benefit: Total Claims Experience and Plan Evolution, By Year (2001-2006) (HRC SF Report), available at http://www.hrc.org/resources/san-francisco-transgender-benefit-total-claims-experience-and-plan-evolutio (last accessed March 27, 2016); Calif. Ins. Dept. Assessment at 6 (San Francisco); Cal. Ins. Dept. Assessment at 7 (University of California). San Francisco did charge an additional amount when it first removed exclusions for transgender-related health care in 2001, but removed the surcharges altogether in 2006, presumably because they were unnecessary as costs were de minimis.

[222] Williams Institute Study, supra note 212, at 2. Although it is a very small and nonrandom sample—with responses from only 34 employers—this is the only publicly available study that includes data on the costs to private employers of providing nondiscriminatory health-care insurance. The employers that responded to the Williams Institute survey ranged in size from fewer than 1,000 employees to 50,000 or more employees; their health-benefits plans included self-insured, fully insured, and managed care/HMO plans. Id. at 7, 8.

[223] Id. at 2.

[224] Id. at 11.

employer with approximately 10,000 employees, provided enough specific information to allow an estimate of the proportion of overall health-insurance costs attributable to the transgender-inclusive benefit; that proportion was 0.004 percent.[225]

The DOD study published in the New England Journal of Medicine provided an estimate of the increase in cost for providing transition-related health-care benefits to the members of the military. This study projected an annual increase of $5.6 million, or 0.012 percent of health-care costs—"little more than a rounding error in the military's $47.8 billion annual health care budget."[226]

OFCCP also considered whether there might be an increase in demand for transition-related health-care services that would affect benefits utilization and therefore cost. Of the available public information about actual utilization and cost adjustments over time, there is a small amount of evidence of an increase in utilization—in one plan that the University of California offered and one offered by one respondent to the Williams Institute Study—but in neither case does the record show that there was an associated increase in cost. Thus, OFCCP does not believe that an increase in demand that is significant enough to affect the cost of nondiscriminatory health-care benefits is likely. The California Insurance Department considered this issue as well, and despite expecting "a possible spike in demand for such [benefits] in the first few years … due to the possible existence of some current unmet demand," it similarly concluded that any increased utilization that might occur over time was likely to be

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[225] Id.

[226] DOD Study at 1090.

so low that any resulting costs remained actuarially immaterial.[227]

Sections 60-20.7–60-20.8

Section 60-20.7, titled "Employment decisions made on the basis of sex-based stereotypes," explains the prohibition against making employment decisions based on sex stereotypes, which the Supreme Court recognized in 1989 as a form of sex discrimination under title VII. This section clarifies that such discrimination includes disparate treatment based on nonconformity to gender norms and expectations. To the three paragraphs in the proposed rule, covering sex stereotypes about dress, appearance, and behavior (paragraph 60-20.7(a)), gender identity (paragraph 60-20.7(b)), and caregiving responsibilities (proposed rule paragraph 60-20.7(c), renumbered in the final rule to paragraph 60-20.7(d)), the final rule adds a fourth, covering sex stereotypes about the jobs, sectors, or industries appropriate for women to work in (final rule paragraph 60-20.7(c)). As such, the final rule reflects the current state of title VII law with regard to sex-based stereotyping, imposing no additional burden on contractors covered both by E.O. 11246 and by title VII or state or local laws that similarly prohibit sex discrimination and have lower coverage thresholds. As to the remaining contractors, those that have fewer than 15 employees as defined by title VII, are not covered by state or local laws, and have at least $10,000 in Federal contracts or subcontracts, as noted in the discussion of this requirement elsewhere in the preamble, OFCCP's publicly available FCCM has put them on notice that OFCCP follows current law with regard to sex-based stereotyping. The FCCM provides that:

[227] Cal. Ins. Dept. Assessment at 9.

> [Compliance Officers (COs] must examine whether contractor policies make prohibited distinctions in conditions of employment based on sex, including the basis of pregnancy, childbirth or related medical conditions, or on the basis of sex-based stereotypes, including those related to actual or perceived caregiver responsibilities. Contractors must not make employment decisions based on stereotypes about how males and females are "supposed" to look or act. Such employment decisions are a form of sex discrimination prohibited by Executive Order 11246, as amended.

FCCM, ch. 2, section 2H00(a).[228] Thus, for these contractors as well, the final rule imposes no additional burden and generates no new benefits for their employees.[229]

Section 60-20.8 of the final rule, titled "Harassment and hostile work environments," explains the circumstances under which sex-based harassment and hostile work environments violate the Executive Order, reflecting principles established in EEOC Guidelines adopted in 1980 and Supreme Court title VII decisions beginning in 1986. This section clarifies that such discrimination includes "sexual harassment (including harassment based on gender identity or

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[228] Another section of the FCCM also covers sex-based stereotyping:

> Sex-Based Stereotyping and Caregiver Discrimination. Differential treatment for an employment-related purpose based on sex-based stereotypes, including those related to actual or perceived caregiving responsibilities, is a violation of Title VII of the Civil Rights Act of 1964. For example, it is prohibited to deny advancement opportunities to similarly situated mothers that are provided to fathers or women without children, based on stereotypes about mothers in the workplace; it is also prohibited to deny to fathers access to family-friendly policies like workplace flexibility that employers provide to mothers, based on stereotypes about fathers' roles in care giving.

FCCM, ch. 2, section 2H01(e).

[229] One commenter asserts that this section, as well, is so "new or . . . thoroughly revised" that cost estimates for it are required. OFCCP disagrees with this assertion. The Supreme Court recognized sex stereotyping as a form of sex discrimination in 1989.

expression), harassment based on pregnancy, childbirth, or related medical conditions," and sex-based harassment that is not sexual in nature but that is because of sex or sex-based stereotypes. In addition, the Appendix includes a section describing best practices that contractors may follow to reduce and eliminate harassment and hostile work environments.

One commenter asserts that there would be burdens for complying with this requirement, explaining that there would be costs for establishing and maintaining procedures, records, and internal compliance assessments. The equal opportunity clause has always prohibited discrimination, including harassment and hostile work environments. The update proposed in the NPRM and finalized with this rule does not create any additional burdens. In fact, the section reflects the current state of title VII law with regard to sex-based harassment and hostile work environments, imposing no additional burden on contractors covered both by E.O. 11246 and by title VII or state or local laws that similarly prohibit sex discrimination and have lower coverage thresholds. As to the remaining contractors, those that have fewer than 15 employees as defined by title VII, are not covered by state or local laws, and have at least $10,000 in Federal contracts or subcontracts, as noted in the discussion of this requirement elsewhere in the preamble, OFCCP's publicly available FCCM has put them on notice that OFCCP follows current law with regard to sex-based harassment and hostile work environments. The FCCM provides that:

> Although not specifically mentioned in the Guidelines, sexual harassment, as well as harassment based on race, color, national origin or religion is a violation of the nondiscrimination provisions of EO 11246. During the onsite review, COs must be alert for any indications of such harassment. OFCCP follows Title VII principles when

determining whether sexual harassment has occurred.

FCCM, Chapter 2, Section 2H01(d). Thus, for these contractors as well, the final rule imposes no additional burden and generates no new benefits for their employees.

Summary: Cost of Provisions

The total cost to contractors of the regulation in the first year is, thus, estimated at a maximum of $51,273,500, or $103 per contractor company. Below, in Table 1, is a summary of the hours and costs.

Table 1: New Requirements			
Section	**Hours**	**Total Cost**	**Per Contractor**
Estimated One-Time Burden			
Regulatory Familiarization	750,000	$41,602,500	$83
Total One-Time Burden	**750,000**	**$41,602,500**	**$83**
Estimated Annual Recurring Cost			
41 CFR 60-20.5: Light duty or accommodation (maximum)	0	$9,671,000	$19
Total Annual Recurring Cost (maximum)	**0**	**$9,671,000**	**$19**
Total Cost (maximum)	**750,000**	**$51,273,500**	**$103**[230]

Summary of Transfer and Benefits

E.O. 13563 recognizes that some rules have benefits that are difficult to quantify or monetize, but are, nevertheless, important, and states that agencies may consider such benefits. In fact, in its comment, one industry organization criticizes OFCCP for not attempting to

[230] The estimated per-contractor one-time burden and the annual recurring cost do not sum to $103 due to rounding.

monetize the benefits of the proposed rule, and urges OFCCP "to assign a monetary value (e.g., increased earnings, improved productivity, recovered denied wages) to the regulatory benefit." The final rule creates equity and fairness benefits, which are explicitly recognized in E.O. 13563. Prohibiting discrimination in employment based on sex can contribute to ensuring that qualified and productive employees, both female and male, receive fair compensation, employment opportunities, and terms and conditions of employment. That effect may generate a transfer of value to employees from employers (if additional wages are paid out of profits) or from taxpayers (if contractor fees increase to pay higher wages to employees). OFCCP designed the final rule to achieve these benefits by:

- Supporting more effective enforcement of the prohibitions against sex-based discrimination in employment;
- Providing clearer guidance and harmonizing existing regulations, improving contractors' and their employees' understanding of the requirements;
- Increasing employees' and applicants' understanding of their rights in the workforce.

Social science research suggests antidiscrimination law can have broad social benefits, not only to those workers who are explicitly able to mobilize their rights and obtain redress, but also to the workforce and the economy as a whole. In general, discrimination is incompatible with an efficient labor market. Discrimination interferes with the ability of workers to find jobs that match their skills and abilities and to obtain wages consistent with a well-functioning marketplace.[231] Discrimination may reflect market failure, where collusion or other anti-

[231] Shelley J. Lundberg & Richard Starz, "Private Discrimination and Social Intervention in Competitive Labor Markets," 73 American Economic Review 340 (1983), available at http://www.jstor.org/stable/pdf/1808117.pdf?acceptTC=true (last accessed June 3, 2015); Dennis J. Aigner & Glen G. Cain, "Statistical Theories of Discrimination in Labor Markets," 30 Industrial and Labor Relations Review 175

egalitarian practices allow majority group members to shift the costs of discrimination to minority group members.[232]

For this reason, effective nondiscrimination enforcement can promote economic efficiency and growth. For example, a number of scholars have documented the benefits of the civil rights movement and the adoption of title VII on the economic prospects of workers and the larger economy.[233] One recent study estimated that improved workforce participation by women and minorities, including through adoption of civil rights laws and changing social norms, accounts for 15-20 percent of aggregate wage growth between 1960 and 2008.[234] Positive impacts of this rule, which only applies to Federal contractors and only affects discrimination based on sex, would necessarily be smaller than the impacts of major society-wide phenomena such as the civil rights movement as a whole.

More specifically, concrete benefits arise from the provisions of the final rule disallowing discrimination based on gender identity and sex stereotyping involving sexual orientation. Research specifically on corporate policies prohibiting employment discrimination on these bases has found that employers – including federal contractors – adopt such policies because they benefit the employers in multiple ways. Of the 41 top 50 federal contractors that had

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(1977), available at http://econ2.econ.iastate.edu/classes/econ321/rosburg/Aigner%20and%20Cain%20-%20Statistical%20Theories%20of%20Discrimination%20in%20Labor%20Markets.pdf (last accessed June 3, 2015).

[232] Kenneth J. Arrow, "What Has Economics to Say about Racial Discrimination?" 12 Journal of Economic Perspectives 91 (1998), available at http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.12.2.91 (last accessed June 3, 2015).

[233] J. Hoult Verkerke, "Free to Search," 105 Harvard Law Review 2080 (1992); James J. Heckman and Brook S. Payner, "Determining the Impact of Federal Anti-Discrimination Policy on the Economic Status of Blacks: A Study of South Carolina," 79 American Economic Review 138 (1989).

[234] Hsieh, C., Hurst, E. Jones, C. I., Klenow, P. J. "The Allocation of Talent and U.S. Economic Growth," NBER Working Paper (2013), available at http://klenow.com/HHJK.pdf (last accessed June 3, 2015).

adopted such nondiscrimination policies or extended health-insurance benefits to their employees' same-sex domestic partners as of 2011, fully 88 percent made public statements to the effect that "policies promoting employee diversity in general are good for their bottom line" or otherwise "linked diversity to corporate success."[235] The most commonly cited specific benefits of workplace policies that benefit LGBT employees were in the areas of improving recruitment and retention of talented employees (and thus improving company competitiveness); promoting innovation through a workforce reflecting diverse perspectives; providing better service to a diverse customer base; and boosting employee morale and thus productivity.[236]

Particularly with regard to nondiscriminatory health-care benefits for transgender individuals, the California Insurance Department reviewed relevant research and concluded that eliminating discrimination will result in lower costs for insurance companies and employers for other treatments that employees whose claims are denied on the basis of their transgender status commonly need.[237] The conditions for which these treatments are needed, and for which the California Insurance Department predicted reduced need if gender nondiscriminatory health-care coverage were available, include complications arising from suicide attempts, mental illness, substance abuse, and HIV.[238] As one transgender man explained,

People who need [treatments for gender transition] but don't have access to them can end

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[235] B. Sears and C. Mallory, Williams Institute, "Economic Motives for Adopting LGBT-Related Workplace Policies" (Williams Institute October 2011) 2, 7, available at http://williamsinstitute.law.ucla.edu/research/workplace/economic-motives-for-adopting-lgbt-related-workplace-policies/ (last accessed February 13, 2016). The federal contractors were the 50 prime contractors with the greatest contract award amounts in FY 2009. Id. at 3.

[236] Id. at 5-6.

[237] Cal. Ins. Dept. Assessment at 9.

[238] Id. at 9-12.

> up costing their companies a lot in terms of being treated for depression and stress-related illnesses. [After undergoing reassignment surgery,] my costs related to migraine treatment and … prescription drugs … dropped dramatically. My healthcare costs went from being well-above average for my plan to well-below average in the first full year after my transition.[239]

The Insurance Department "determined that the benefits of eliminating discrimination far exceed the insignificant costs associated with implementation of the proposed regulation [requiring nondiscriminatory health-care coverage]."[240]

Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 et seq., as amended, requires agencies to prepare regulatory flexibility analyses and make them available for public comment when proposing regulations that will have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such in lieu of preparing an analysis. See 5 U.S.C. 605. As explained in the Regulatory Flexibility Act and Executive Order 13272 section of the NPRM, OFCCP did not expect the proposed rule to have a significant economic impact on a substantial number of small entities. 80 FR at 5266 (January 30, 2015). However, in the interest of transparency and to provide an opportunity for public comment, OFCCP prepared an initial regulatory flexibility analysis (IRFA) rather than certify that the proposed rule was not expected to have a significant economic impact on a substantial number of small entities. In the proposed rule OFCCP specifically requested comments on the initial RFA, including the number of small entities affected by the proposed rule, the compliance

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[239] A. McIlvaine, "A New Benefits Trend," Human Resources Executive Online (October 8, 2012), available at http://www.hreonline.com/HRE/view/story.jhtml?id=533351347 (last accessed March 18, 2016) (quoting Andre Wilson).

[240] Cal. Ins. Dept. Assessment at 9.

cost estimates, and whether alternatives exist that will reduce burden on small entities while still remaining consistent with the objective. While OFCCP received 27 comments that addressed the costs and burdens of the proposed rules, none commented on the initial regulatory flexibility analysis. Thus, as explained below, OFCCP adopts the proposed rule's initial RFA economic analysis for purposes of the final rule and adjusts it to reflect the increased cost of the final rule.

In the NPRM, OFCCP estimated the impact on small entities that are covered contractors of complying with the proposed rule's requirements. In this final rule, OFCCP certifies that this rule will not have a significant economic impact on a substantial number of small entities. In making this certification, OFCCP determines that all small entities subject to E.O. 11246 would be required to comply with all of the provisions of the final rule and that the compliance cost would be approximately $103 per contractor. The compliance requirements are more fully described above in other portions of this preamble. The following discussion analyzes the cost of complying with the final rule.

In estimating the annual economic impact of this rule on the economy, OFCCP determined the compliance cost of the rule and whether the costs would be significant for a substantial number of small contractor firms (i.e., small business firms that enter into contracts with the Federal Government). If the estimated compliance costs for affected small contractor firms are less than three percent of small contractor firms' revenues, OFCCP considered it appropriate to conclude that this rule will not have a significant economic impact on the small contractor firms covered by the final rule. While OFCCP chose three percent as the significance criterion, using this benchmark as an indicator of significant impact may overstate the impact, because the costs associated with prohibiting sex discrimination against employees and job applicants are expected to be mitigated to some degree by the benefits of the rule. As discussed

above in the Summary of Transfers and Benefits section of the preamble, the benefits may include fair compensation, employment opportunities, and terms and conditions of employment, as well as a more efficient labor market and ultimately, improved economic prospects for workers and for the larger economy.

The data sources used in the analysis of small business impact are the Small Business Administration's (SBA) Table of Small Business Size Standards,[241] the Current Population Survey (CPS), and the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB).[242] Because contractors are not limited to specific industries, OFCCP assesses the impact of the rule across the 19 industrial classifications.[243] Because data limitations do not allow OFCCP to determine which of the small firms within these industries are contractors, OFCCP assumes that these small firms are not significantly different from the small contractors that will be directly affected by the rule.

OFCCP takes the following steps to estimate the cost of the rule per small contractor firm as measured by a percentage of the total annual receipts. First, OFCCP uses Census SUSB data that disaggregates industry information by firm size in order to perform a robust analysis of the impact on small contractor firms. OFCCP applies the SBA small business size standards to the

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[241] U.S. Small Business Administration, Office of Advocacy, "Firm Size Data, Statistics of U.S. Businesses, Business Dynamics Statistics, Business Employment Dynamics, and Nonemployer Statistics," available at http://www.sba.gov/advocacy/849/12162#susb (last accessed June 2, 2015).

[242] U.S. Census Bureau, Statistics of U.S. Businesses, "Latest SUSB Annual Data," available at http://www.census.gov/econ/susb/ (last accessed June 2, 2015).

[243] Agriculture, Forestry, Fishing, and Hunting Industry (North American Industry Classification System (NAICS) 11, Mining NAICS 21, Utilities NAICS 22, Construction NAICS 23, Manufacturing, NAICS 31-33, Wholesale Trade NAICS 42, Retail Trade NAICS 44-45, Transportation and Warehousing NAICS 48-49, Information NAICS 51, Finance and Insurance NAICS 52, Real Estate and Rental and Leasing NAICS 53, Professional, Scientific, and Technical Services NAICS 54, Management of Companies and Enterprises NAICS 55, Administrative and Support and Waste Management and Remediation Services NAICS 56, Educational Services NAICS 61, Healthcare and Social Assistance NAICS 62, Arts, Entertainment, and Recreation NAICS 71, Accommodation and Food Services NAICS 72, Other Services NAICS 81.

SUSB data to determine the number of small firms in the affected industries. Then OFCCP uses receipts data from the SUSB to calculate the cost per firm as a percent of total receipts by dividing the estimated annual cost per firm by the average annual receipts per firm. This methodology is applied to each of the industries. The results are presented by industry in the summary tables below (Tables 2 – 20).

Table 2. Agriculture, Forestry, Fishing, and Hunting							
Small Business Size Standard: $0.75 million – $27.5							
	Number of Firms	**Total of**	**Average Number of Employees per Firm[1]**	**Annual per**	**Annual Receipts**	**Average Receipts per Firm [2]**	**Annual per Firm Percent Receipt [3]**
Firms below	4,288	N/	N/A	$103	$215,803,000	$50,327	0.20%
Firms with sales/receipts/revenue $100,000 to	7,985	17,528	2.2	$103	$2,005,870,000	$251,205	0.04%
Firms with sales/receipts/revenue $500,000 to	3,399	15,047	4.4	$103	$2,437,918,000	$717,246	0.01%
Firms with sales/receipts/revenue $1,000,000 to	3,335	27,068	8.1	$103	$5,192,149,000	$1,556,866	0.01%
Firms with sales/receipts/revenue $2,500,000 to	1,213	19,223	15.8	$103	$4,210,314,000	$3,470,993	0.00%
Firms with sales/receipts/revenue $5,000,000 to	351	9,393	26.8	$103	$2,067,573,000	$5,890,521	0.00%
Firms with sales/receipts/revenue $7,500,000-	210	7,143	34.0	$103	$1,736,374,000	$8,268,448	0.00%
Firms with sales/receipts/revenue $10,000,000 to	191	10,526	55.1	$103	$2,198,845,000	$11,512,277	0.00%
Firms with sales/receipts/revenue $15,000,000 to	79	5,883	74.5	$103	$1,226,159,000	$15,521,000	0.00%
Firms with sales/receipts/revenue $20,000,000 to	29	2,399	82.7	$103	$617,304,000	$21,286,345	0.00%
Firms with sales/receipts/revenue $25,000,000 to	29	2,108	72.7	$103	$627,438,000	$21,635,793	0.00%

N/A = not available, not

[1] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average number of employees per firm (2.2) derived by dividing the total number of employees (17,528) by the number of firms

[2] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average receipts per firm ($251,205) was derived dividing the total annual receipts ($2,005,870,000) by the number of firms

[3] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the annual cost per firm as a percent of receipts percent) was derived by dividing the annual cost per firm ($102) by the average receipts per firm

Table 3. Mining Industry							
Small Business Size Standard: 250 – 1,500 employees							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm[1]**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm [2]**	**Annual Cost per Firm as Percent of Receipts [3]**
Firms with 0-4 employees	12,686	20,347	1.6	$103	$9,811,191,000	$773,387	0.01%
Firms with 5-9 employees	3,256	21,571	6.6	$103	$7,696,826,000	$2,363,890	0.00%
Firms with 10-19 employees	2,426	32,884	13.6	$103	$12,472,042,000	$5,140,990	0.00%
Firms with 20-99 employees	2,677	102,569	38.3	$103	$39,167,488,000	$14,631,112	0.00%
Firms with 100-499 employees	735	116,980	159.2	$103	$57,968,047,000	$78,868,091	0.00%
Firms with 500+ employees[4]	369	433,275	1,174.2	$103	$428,416,777,000	$1,161,021,076	0.00%

[1] In the case of mining firms with 0-4 employees, the average number of employees per firm (1.6) was derived by dividing the total number of employees (20,347) by the number of firms (12,686).

[2] In the case of mining firms with 0-4 employees, the average receipts per firm ($773,387) was derived by dividing the total annual receipts ($9,811,191,000) by the number of firms (12,686).

[3] In the case of mining firms with 0-4 employees, the annual cost per firm as a percent of receipts (0.01 percent) was derived by dividing the annual cost per firm ($103) by the average receipts per firm ($773,387).

[4] The small business size standard for several subsectors within the mining industry is 750, 1,000, 1,250, or 1,500 employees; however, data are not disaggregated for firms with more than 500 employees.

Table 4. Utilities Industry							
Small Business Size Standard: 250 – 1,000 employees							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with 0-4 employees	3,072	5,939	1.9	$103	$4,148,617,000	$1,350,461	0.01%
Firms with 5-9 employees	984	6,330	6.4	$103	$2,094,449,000	$2,128,505	0.00%
Firms with 10-19 employees	500	6,670	13.3	$103	$4,464,945,000	$8,929,890	0.00%
Firms with 20-99 employees	904	40,677	45.0	$103	$37,395,431,000	$41,366,627	0.00%
Firms with 100-499 employees	314	52,009	165.6	$103	$50,719,290,000	$161,526,401	0.00%
Firms with 500+ employees[1]	199	529,438	2,660.5	$103	$432,375,983,000	$2,172,743,633	0.00%

[1] The small business size standard for several subsectors within the utilities industry is 750 or 1,000 employees; however, data are not disaggregated for firms with more than 500 employees.

Table 5. Construction Industry							
Small Business Size Standard: $15 million – $36.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	119,538	N/A	N/A	$103	$6,116,019,000	$51,164	0.20%
Firms with sales/receipts/revenue of $100,000 to $499,999	262,870	569,763	2.2	$103	$67,195,728,000	$255,623	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	100,006	466,370	4.7	$103	$70,808,134,000	$708,039	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	85,343	742,370	8.7	$103	$133,337,229,000	$1,562,369	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	35,670	585,723	16.4	$103	$123,598,328,000	$3,465,050	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	12,306	327,911	26.6	$103	$74,430,329,000	$6,048,296	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	6,179	214,777	34.8	$103	$52,933,597,000	$8,566,693	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	6,752	299,412	44.3	$103	$80,939,071,000	$11,987,422	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	3,272	190,075	58.1	$103	$55,527,769,000	$16,970,590	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	2,002	136,366	68.1	$103	$43,498,052,000	$21,727,299	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	1,365	107,700	78.9	$103	$36,048,227,000	$26,408,958	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	909	80,081	88.1	$103	$28,368,318,000	$31,208,271	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	638	64,770	101.5	$103	$22,506,667,000	$35,276,908	0.00%
N/A = not available, not disclosed							

Table 6. Manufacturing Industry							
Small Business Size Standard: 500 – 1,500 employees							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with 0-4 employees	106,932	199,847	1.9	$103	$46,408,019,000	$433,996	0.02%
Firms with 5-9 employees	47,612	317,445	6.7	$103	$52,345,651,000	$1,099,421	0.01%
Firms with 10-19 employees	38,564	526,660	13.7	$103	$94,946,327,000	$2,462,046	0.00%
Firms with 20-99 employees	47,443	1,939,710	40.9	$103	$454,441,177,000	$9,578,677	0.00%
Firms with 100-499 employees	12,186	2,103,243	172.6	$103	$683,068,069,000	$56,053,510	0.00%
Firms with 500+ employees[1]	3,626	6,105,138	1,683.7	$103	$4,399,024,641,000	$1,213,189,366	0.00%
[1] The small business size standard for many subsectors within the manufacturing industry is 750, 1,000, 1,250, or 1,500 employees; however, data are not disaggregated for firms with more than 500 employees.							

Table 7. Wholesale Trade Industry							
Small Business Size Standard: 100 – 250 employees							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with 0-4 employees	180,049	305,056	1.7	$103	$319,323,324,000	$1,773,536	0.01%
Firms with 5-9 employees	53,703	353,848	6.6	$103	$263,541,607,000	$4,907,391	0.00%
Firms with 10-19 employees	36,049	481,671	13.4	$103	$359,184,882,000	$9,963,796	0.00%
Firms with 20-99 employees	34,536	1,276,022	36.9	$103	$1,024,608,963,000	$29,667,853	0.00%
Firms with 100-499 employees	7,737	1,023,919	132.3	$103	$1,085,384,946,000	$140,284,987	0.00%

Table 8. Retail Trade Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	79,415	N/A	N/A	$103	$4,142,505,000	$52,163	0.20%
Firms with sales/receipts/revenue of $100,000 to $499,999	226,195	597,967	2.6	$103	$61,192,802,000	$270,531	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	115,616	539,126	4.7	$103	$82,552,882,000	$714,026	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	115,103	885,466	7.7	$103	$181,435,583,000	$1,576,289	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	53,905	673,056	12.5	$103	$187,480,866,000	$3,477,987	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	19,139	359,417	18.8	$103	$114,151,432,000	$5,964,336	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	9,110	234,666	25.8	$103	$76,658,889,000	$8,414,807	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	9,236	317,056	34.3	$103	$107,103,037,000	$11,596,258	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	4,647	204,846	44.1	$103	$75,536,677,000	$16,254,934	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	3,079	162,942	52.9	$103	$63,579,375,000	$20,649,359	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	2,115	126,196	59.7	$103	$53,042,313,000	$25,079,108	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	1,709	122,481	71.7	$103	$50,891,275,000	$29,778,394	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	1,333	104,722	78.6	$103	$45,330,650,000	$34,006,489	0.00%
N/A = not available, not disclosed							

Table 9. Transportation and Warehousing Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	34,560	N/A	N/A	$103	$1,675,127,000	$48,470	0.21%
Firms with sales/receipts/revenue of $100,000 to $499,999	66,204	164,298	2.5	$103	$16,175,517,000	$244,328	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	23,100	142,743	6.2	$103	$16,279,203,000	$704,727	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	20,675	243,088	11.8	$103	$32,036,433,000	$1,549,525	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,236	207,533	22.5	$103	$31,579,320,000	$3,419,155	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,715	128,002	34.5	$103	$21,532,906,000	$5,796,206	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,991	93,148	46.8	$103	$15,968,571,000	$8,020,377	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,038	122,894	60.3	$103	$21,945,352,000	$10,768,082	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,089	88,025	80.8	$103	$15,508,043,000	$14,240,627	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	706	67,974	96.3	$103	$12,389,543,000	$17,548,928	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	485	56,730	117.0	$103	$10,263,306,000	$21,161,456	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	348	42,232	121.4	$103	$8,074,953,000	$23,203,888	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	273	39,751	145.6	$103	$6,355,335,000	$23,279,615	0.00%
N/A = not available, not disclosed							

Table 10. Information Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	14,555	N/A	N/A	$103	$705,483,000	$48,470	0.21%
Firms with sales/receipts/revenue of $100,000 to $499,999	25,429	67,711	2.7	$103	$6,301,564,000	$247,810	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	9,467	58,475	6.2	$103	$6,705,729,000	$708,327	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	9,098	104,348	11.5	$103	$14,255,220,000	$1,566,852	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,509	93,553	20.7	$103	$15,503,654,000	$3,438,380	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,839	58,853	32.0	$103	$10,822,491,000	$5,884,987	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,063	45,849	43.1	$103	$8,760,095,000	$8,240,917	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,195	67,920	56.8	$103	$13,486,797,000	$11,286,023	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	657	48,544	73.9	$103	$10,520,902,000	$16,013,549	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	464	42,553	91.7	$103	$9,176,577,000	$19,777,106	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	282	31,492	111.7	$103	$6,741,177,000	$23,904,883	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	269	32,228	119.8	$103	$7,476,148,000	$27,792,372	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	167	21,764	130.3	$103	$5,365,464,000	$32,128,527	0.00%

Table 11. Finance and Insurance Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	50,093	N/A	N/A	$103	$2,466,932,000	$49,247	0.21%
Firms with sales/receipts/revenue of $100,000 to $499,999	108,248	259,664	2.4	$103	$27,228,139,000	$251,535	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	30,194	145,543	4.8	$103	$20,834,656,000	$690,026	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	20,617	181,810	8.8	$103	$31,648,935,000	$1,535,089	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	8,743	158,845	18.2	$103	$30,321,167,000	$3,468,051	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,900	108,367	27.8	$103	$23,230,029,000	$5,956,418	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,292	88,271	38.5	$103	$19,151,469,000	$8,355,789	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,594	134,488	51.8	$103	$30,393,812,000	$11,716,967	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,437	95,832	66.7	$103	$23,632,362,000	$16,445,624	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	925	76,347	82.5	$103	$19,240,191,000	$20,800,206	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	632	68,829	108.9	$103	$16,235,520,000	$25,689,114	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	532	60,193	113.1	$103	$15,593,649,000	$29,311,370	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	387	48,800	126.1	$103	$13,302,624,000	$34,373,705	0.00%
N/A = not available, not disclosed							

Table 12. Real Estate and Rental and Leasing Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	69,381	N/A	N/A	$103	$3,496,398,000	$50,394	0.20%
Firms with sales/receipts/revenue of $100,000 to $499,999	115,993	251,175	2.2	$103	$28,401,383,000	$244,854	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	37,145	169,892	4.6	$103	$26,133,483,000	$703,553	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	27,705	239,062	8.6	$103	$42,364,031,000	$1,529,111	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,488	165,022	17.4	$103	$31,946,434,000	$3,367,036	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,047	86,769	28.5	$103	$17,503,088,000	$5,744,368	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,528	58,727	38.4	$103	$11,926,523,000	$7,805,316	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,476	69,231	46.9	$103	$15,748,767,000	$10,669,896	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	789	49,475	62.7	$103	$11,156,616,000	$14,140,198	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	485	33,800	69.7	$103	$8,191,383,000	$16,889,449	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	347	27,443	79.1	$103	$7,110,513,000	$20,491,392	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	260	25,368	97.6	$103	$6,117,119,000	$23,527,381	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	183	17,798	97.3	$103	$4,704,982,000	$25,710,284	0.00%
N/A = not available, not disclosed							

Table 13. Professional, Scientific and Technical Services Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	193,388	N/A	N/A	$103	$9,558,991,000	$49,429	0.21%
Firms with sales/receipts/revenue of $100,000 to $499,999	339,688	750,314	2.2	$103	$82,115,768,000	$241,739	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	99,575	524,326	5.3	$103	$70,218,001,000	$705,177	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	77,769	785,957	10.1	$103	$119,889,375,000	$1,541,609	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	29,032	578,392	19.9	$103	$99,939,437,000	$3,442,389	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	10,314	339,687	32.9	$103	$61,531,502,000	$5,965,823	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	5,300	240,552	45.4	$103	$44,308,266,000	$8,360,050	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	5,195	304,723	58.7	$103	$59,665,120,000	$11,485,105	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,608	211,885	81.2	$103	$41,368,442,000	$15,862,133	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,605	159,832	99.6	$103	$32,088,646,000	$19,992,926	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	1,046	122,102	116.7	$103	$25,225,025,000	$24,115,703	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	752	94,344	125.5	$103	$20,975,584,000	$27,893,064	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	522	81,816	156.7	$103	$16,142,861,000	$30,925,021	0.00%
N/A = not available, not disclosed							

Table 14. Management of Companies and Enterprises Industry							
Small Business Size Standard: $20.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	1,107	7,938	7.2	$103	$33,849,000	$30,577	0.34%
Firms with sales/receipts/revenue of $100,000 to $499,999	1,216	4,631	3.8	$103	$251,252,000	$206,622	0.05%
Firms with sales/receipts/revenue of $500,000 to $999,999	743	5,764	7.8	$103	$285,686,000	$384,503	0.03%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	1,668	17,384	10.4	$103	$783,830,000	$469,922	0.02%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	2,016	26,218	13.0	$103	$1,395,007,000	$691,968	0.01%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,602	26,210	16.4	$103	$1,567,547,000	$978,494	0.01%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,229	22,064	18.0	$103	$1,528,733,000	$1,243,884	0.01%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,969	42,504	21.6	$103	$2,727,035,000	$1,384,985	0.01%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,454	36,455	25.1	$103	$2,687,284,000	$1,848,201	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,114	27,887	25.0	$103	$2,617,195,000	$2,349,367	0.00%

Table 15. Administrative and Support, Waste Management and Remediation Services Industry Small Business Size Standard: $5.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	93,960	126,543	1.3	$103	$4,409,293,000	$46,927	0.22%
Firms with sales/receipts/revenue of $100,000 to $499,999	132,326	477,646	3.6	$103	$32,162,760,000	$243,057	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	40,136	379,760	9.5	$103	$28,185,706,000	$702,255	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	31,696	672,031	21.2	$103	$48,905,893,000	$1,542,967	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	12,452	584,765	47.0	$103	$42,271,882,000	$3,394,787	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,523	373,053	82.5	$103	$26,193,931,000	$5,791,274	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,373	271,117	114.3	$103	$19,082,571,000	$8,041,539	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,522	387,341	153.6	$103	$27,561,427,000	$10,928,401	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,313	270,010	205.6	$103	$18,902,442,000	$14,396,376	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	892	216,790	243.0	$103	$15,644,955,000	$17,539,187	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	601	196,440	326.9	$103	$12,764,154,000	$21,238,193	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	456	164,713	361.2	$103	$10,696,102,000	$23,456,364	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	311	139,531	448.7	$103	$8,205,878,000	$26,385,460	0.00%

Table 16. Educational Services Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	22,232	45,228	2.0	$103	$1,042,922,000	$46,911	0.22%
Firms with sales/receipts/revenue of $100,000 to $499,999	32,128	175,610	5.5	$103	$7,838,923,000	$243,990	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	9,530	123,920	13.0	$103	$6,717,924,000	$704,924	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	8,735	216,317	24.8	$103	$13,846,119,000	$1,585,131	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,716	216,842	46.0	$103	$16,353,734,000	$3,467,713	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,966	142,665	72.6	$103	$11,510,807,000	$5,854,937	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,028	96,347	93.7	$103	$8,493,535,000	$8,262,194	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,113	138,383	124.3	$103	$12,679,800,000	$11,392,453	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	542	87,214	160.9	$103	$8,194,214,000	$15,118,476	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	388	70,422	181.5	$103	$7,566,005,000	$19,500,013	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	255	61,634	241.7	$103	$6,166,517,000	$24,182,420	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	202	57,698	285.6	$103	$5,824,708,000	$28,835,188	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	191	61,907	324.1	$103	$6,200,412,000	$32,462,890	0.00%

Table 17. Health Care and Social Assistance Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	110,259	162,885	1.5	$103	$5,260,895,000	$47,714	0.22%
Firms with sales/receipts/revenue of $100,000 to $499,999	249,219	1,010,642	4.1	$103	$67,642,299,000	$271,417	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	128,577	1,073,376	8.3	$103	$90,967,720,000	$707,496	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	91,324	1,576,609	17.3	$103	$138,206,644,000	$1,513,366	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	28,520	1,156,550	40.6	$103	$98,200,090,000	$3,443,201	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	10,167	729,810	71.8	$103	$60,941,395,000	$5,994,039	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	5,380	556,088	103.4	$103	$45,627,101,000	$8,480,874	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	5,700	785,047	137.7	$103	$67,302,238,000	$11,807,410	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,953	556,945	188.6	$103	$48,758,779,000	$16,511,608	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,642	384,059	233.9	$103	$34,859,152,000	$21,229,691	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	1,139	318,772	279.9	$103	$29,550,252,000	$25,944,032	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	731	244,490	334.5	$103	$22,423,595,000	$30,675,233	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	579	213,048	368.0	$103	$20,384,881,000	$35,207,048	0.00%

Table 18. Arts, Entertainment, and Recreation Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	29,796	43,003	1.4	$103	$1,434,271,000	$48,136	0.21%
Firms with sales/receipts/revenue of $100,000 to $499,999	46,205	177,421	3.8	$103	$11,476,438,000	$248,381	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	16,220	161,111	9.9	$103	$11,394,483,000	$702,496	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	12,675	260,098	20.5	$103	$19,329,326,000	$1,524,996	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,776	205,728	43.1	$103	$16,246,680,000	$3,401,734	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,800	126,508	70.3	$103	$10,478,303,000	$5,821,279	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	854	78,319	91.7	$103	$6,855,951,000	$8,028,046	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	746	94,755	127.0	$103	$8,148,731,000	$10,923,232	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	373	58,407	156.6	$103	$5,452,457,000	$14,617,847	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	239	46,528	194.7	$103	$4,493,765,000	$18,802,364	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	169	36,443	215.6	$103	$3,701,048,000	$21,899,692	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	126	34,942	277.3	$103	$3,075,728,000	$24,410,540	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	83	22,145	266.8	$103	$2,382,282,000	$28,702,193	0.00%

Table 19. Accommodation and Food Services Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	82,318	148,453	1.8	$103	$4,113,239,000	$49,968	0.21%
Firms with sales/receipts/revenue of $100,000 to $499,999	220,222	1,215,171	5.5	$103	$57,675,374,000	$261,897	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	94,121	1,317,249	14.0	$103	$66,152,275,000	$702,843	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	68,299	1,935,085	28.3	$103	$102,096,727,000	$1,494,850	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	18,078	1,031,712	57.1	$103	$59,715,760,000	$3,303,228	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,340	417,047	96.1	$103	$24,803,758,000	$5,715,152	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,946	261,642	134.5	$103	$15,733,566,000	$8,085,080	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,924	369,182	191.9	$103	$21,512,132,000	$11,180,942	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	916	239,396	261.3	$103	$14,017,239,000	$15,302,663	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	573	198,703	346.8	$103	$11,025,439,000	$19,241,604	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	419	168,878	403.1	$103	$9,690,933,000	$23,128,718	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	306	150,087	490.5	$103	$8,385,452,000	$27,403,438	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	216	114,752	531.3	$103	$6,677,701,000	$30,915,282	0.00%

Table 20. Other Services Industry							
Small Business Size Standard: $5.5 million – $38.5 million							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	185,026	299,249	1.6	$103	$9,186,611,000	$49,650	0.21%
Firms with sales/receipts/revenue of $100,000 to $499,999	304,158	1,134,354	3.7	$103	$74,567,484,000	$245,160	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	89,577	725,898	8.1	$103	$62,488,143,000	$697,591	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	56,956	889,426	15.6	$103	$86,073,957,000	$1,511,236	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	16,652	514,285	30.9	$103	$56,387,710,000	$3,386,242	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	5,126	244,934	47.8	$103	$29,769,491,000	$5,807,548	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,355	148,893	63.2	$103	$19,090,059,000	$8,106,182	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,177	167,628	77.0	$103	$23,959,626,000	$11,005,800	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,033	104,192	100.9	$103	$15,023,752,000	$14,543,806	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	612	68,557	112.0	$103	$11,139,647,000	$18,202,038	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	407	53,640	131.8	$103	$8,404,852,000	$20,650,742	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	290	40,754	140.5	$103	$7,311,600,000	$25,212,414	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	210	33,009	157.2	$103	$5,511,004,000	$26,242,876	0.00%

In sum, the increased cost of compliance resulting from the rule is de minimis relative to revenue at small contractor firms no matter their size. All of the industries have an annual cost per firm as a percent of receipts of three percent or less. For instance, the manufacturing industry cost is estimated to range from 0.00 percent for firms with 10 employees or more to 0.02 percent for firms with zero to four employees. Management of companies and enterprises is the industry with the highest relative costs, with a range of 0.00 percent for firms that have average annual receipts of $20 million- $24.99 million to 0.34 percent for firms that have average annual receipts of under $100,000. Therefore, OFCCP determines that in no instance is the effect of the rule greater than three percent of total receipts.

OFCCP then determines the number of small contractor firms actually affected by the

rule. This information is not readily available. The best source for the number of small contractor firms that are affected by this rule is GSA's SAM database, which allows direct estimates of the number of small contractor firms.[244] Based on the most current SAM data available, if OFCCP defines "small" as fewer than 500 employees, then there are 328,552 small contractor firms. If OFCCP defines "small" as firms with less than $35.5 million in revenues, then there are 315,902 small contractor firms. Thus, OFCCP establishes a range of 315,902 - 328,552 as the total universe of small contractor firms that the final rule may affect.

However, this range represents a significant overestimate of the number of small contractor firms that the final rule will in fact affect. First, as described above in the preamble section on "Discussion of Impacts," the SAM database itself probably represents an overestimate, because it includes thousands of recipients of Federal monies that are Federal grantees, not contractors, and thus not subject to E.O. 11246. Second, it includes contractors that have inactive contracts and contracts of $10,000 or less; the final rule affects only those contractors that have active contracts with an annual value in excess of $10,000.[245]

Most important, most if not all of the contractor firms in the universe will not be impacted by the final rule because they already are subject to prohibitions on making employment decisions based on sex. The final rule updates the existing regulations to address discrimination based on pregnancy, harassment, and decisions based on sex-based stereotypes, among other things. These revisions and updates bring OFCCP's regulations at part 60-20 in

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[244] See supra note 13. Federal contractor status cannot be discerned from the SBA firm size data. SBA firm size data can only be used to estimate the number of small firms, not the number of small contractor firms. As described in the text supra, OFCCP uses the SBA data to estimate the impact of the final rule on a "typical" or "average" small firm in each of the 19 industries. OFCCP then assumes that a typical small firm is similar to a small contractor firm. It is based on this analysis that OFCCP believes that this rule will not have a significant economic effect on a substantial number of small businesses.

[245] See supra text accompanying note 193.

line with the current standards of title VII, with applicable state anti-discrimination laws, and with OFCCP's own FCCM and Directives. Thus, small contractor firms should already be in compliance with the requirements of the final rule.

OFCCP has closely reviewed the initial RFA economic analysis it used in the proposed rule and carefully considered all the comments received. Based on this review and consideration and the available data sources, OFCCP concludes that the method used to conduct the initial RFA economic analysis in the proposed rule reasonably estimates the annual effect of the rule. OFCCP accordingly adopts the proposed rule's initial RFA economic analysis for purposes of the final rule, adjusted to reflect the increased cost of the final rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number.

OFCCP has determined that there is no new requirement for information collection associated with this final rule. This final rule clarifies and updates current part 60-20 and removes outdated provisions so that the requirements conform to current sex discrimination law. The information collection requirements contained in the existing E.O. 11246 regulations are currently approved under OMB Control No. 1250-0001 (Construction Recordkeeping and Reporting Requirements) and OMB Control No. 1250-0003 (Recordkeeping and Reporting Requirements – Supply and Service). Consequently, this final rule does not require review by

the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this rule does not include any Federal mandate that may result in excess of $100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

Executive Order 13132 (Federalism)

OFCCP has reviewed this final rule in accordance with E.O. 13132 regarding federalism, and has determined that it does not have "federalism implications." This rule will not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

This rule does not have tribal implications under E.O. 13175 that would require a tribal summary impact statement. The rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the

distribution of power and responsibilities between the Federal government and Indian tribes.

Effects on Families

The undersigned hereby certifies that the final rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999. To the contrary, by better ensuring that working mothers do not suffer sex discrimination in compensation, benefits, or other terms and conditions of employment, and that working fathers do not suffer discrimination on the basis of sex-based stereotypes about caregiver responsibilities, this rule would have a positive effect on the economic well-being of families, especially of families headed by single mothers.

Executive Order 13045 (Protection of Children)

This final rule would have no environmental health risk or safety risk that may disproportionately affect children.

Environmental Impact Assessment

A review of this final rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq.; the regulations of the Council on Environmental Quality, 40 CFR 1500 et seq.; and DOL NEPA procedures, 41 CFR part 11, indicates this rule does not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

Executive Order 13211 (Energy Supply)

This rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 12630 (Constitutionally Protected Property Rights)

This rule is not subject to E.O. 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

Executive Order 12988 (Civil Justice Reform Analysis)

This rule was drafted and reviewed in accordance with E.O. 12988 and will not unduly burden the Federal court system. The rule was: (1) reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 41 CFR Part 60-20

Civil rights, Discrimination in employment, Employment, Equal employment opportunity, Government procurement, Labor, Sex, Women.

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Patricia A. Shiu
Director, Office of Federal Contract Compliance Programs

For the reasons set forth in the preamble, OFCCP revises 41 CFR part 60-20 to read as follows:

PART 60-20 –DISCRIMINATION ON THE BASIS OF SEX

Sec.

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964-1965 Comp., p. 339 as amended by E.O. 11375, 32 FR 14303, 3 CFR 1966-1970 Comp., p. 684; E.O. 12086, 43 FR 46501, 3 CFR 1978 Comp., p. 230; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; and E.O. 13672, 79 FR 42971.

§ 60-20.1 Purpose.

The purpose of this part is to set forth specific requirements that covered Federal Government contractors and subcontractors, including those performing work under federally assisted construction contracts ("contractors"),[1] must meet in fulfilling their obligations under Executive Order 11246, as amended, to ensure nondiscrimination on the basis of sex in employment. These regulations are to be read in conjunction with the other regulations implementing Executive Order 11246, as amended, set forth in parts 60-1, 60-2, 60-3, 60-4, and 60-30 of this chapter. For instance, under no circumstances will a contractor's good faith efforts to comply with the

[1] This part also applies to entities that are "applicants" for Federal assistance involving a construction contract as defined in part 60-1 of this chapter.

affirmative action requirements of part 60-2 of this chapter be considered a violation of this part.

§ 60-20.2 General prohibitions.

(a) In general. It is unlawful for a contractor to discriminate against any employee or applicant for employment because of sex. The term sex includes, but is not limited to, pregnancy, childbirth, or related medical conditions; gender identity; transgender status; and sex stereotyping.

(b) Disparate treatment. Unless sex is a bona fide occupational qualification reasonably necessary to the normal operation of a contractor's particular business or enterprise, the contractor may not make any distinction based on sex in recruitment, hiring, firing, promotion, compensation, hours, job assignments, training, benefits, or other terms, conditions, or privileges of employment. Such unlawful sex-based discriminatory practices include, but are not limited to, the following:

(1) Making a distinction between married and unmarried persons that is not applied equally to men and women;

(2) Denying women with children an employment opportunity that is available to men with children;

(3) Treating men and women differently with regard to the availability of flexible work arrangements;

(4) Firing, or otherwise treating adversely, unmarried women, but not unmarried men, who become parents;

(5) Applying different standards in hiring or promoting men and women on the basis of sex;

(6) Steering women into lower-paying or less desirable jobs on the basis of sex;

(7) Imposing any differences in retirement age or other terms, conditions, or privileges of retirement on the basis of sex;

(8) Restricting job classifications on the basis of sex;

(9) Maintaining seniority lines and lists on the basis of sex;

(10) Recruiting or advertising for individuals for certain jobs on the basis of sex;

(11) Distinguishing on the basis of sex in apprenticeship or other formal or informal training programs; in other opportunities such as on-the-job training, networking, mentoring, sponsorship, individual development plans, rotational assignments, and succession planning programs; or in performance appraisals that may provide the basis of subsequent opportunities;

(12) Making any facilities and employment-related activities available only to members of one sex, except that if the contractor provides restrooms, changing rooms, showers, or similar facilities, the contractor must provide same-sex or single-user facilities;

(13) Denying transgender employees access to the restrooms, changing rooms, showers, or similar facilities designated for use by the gender with which they identify; and

(14) Treating employees or applicants adversely because they have received, are receiving, or are planning to receive transition-related medical services designed to facilitate the adoption of a sex or gender other than the individual's designated sex at birth.

(c) Disparate impact. Employment policies or practices that have an adverse impact on the basis of sex, and are not job-related and consistent with business necessity, violate Executive Order 11246, as amended, and this part. Examples of policies or practices that may violate Executive Order 11246 in terms of their disparate impact on the basis of sex include, but are not limited to:

(1) Height and/or weight qualifications that are not necessary to the performance of the job and that negatively impact women substantially more than men;

(2) Strength, agility, or other physical requirements that exceed the actual requirements necessary to perform the job in question and that negatively impact women substantially more than men;

(3) Conditioning entry into an apprenticeship or training program on performance on a written test, interview, or other selection procedure that has an adverse impact on women where the contractor cannot establish the validity of the selection procedure consistent with the Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60-3; and

(4) Relying on recruitment or promotion methods, such as "word-of-mouth" recruitment or "tap-on-the-shoulder" promotion, that have an adverse impact on women where the contractor cannot establish that they are job-related and consistent with business necessity.

§ 60-20.3 Sex as a bona fide occupational qualification.

Contractors may not hire and employ employees on the basis of sex unless sex is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the contractor's particular business or enterprise.

§ 60-20.4 Discriminatory compensation.

Compensation may not be based on sex. Contractors may not engage in any employment practice that discriminates in wages, benefits, or any other forms of compensation, or denies access to earnings opportunities, because of sex, on either an individual or systemic basis, including, but not limited to, the following:

(a) Contractors may not pay different compensation to similarly situated employees on the basis of sex. For purposes of evaluating compensation differences, the determination of similarly situated employees is case-specific. Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.

(b) Contractors may not grant or deny higher-paying wage rates, salaries, positions, job classifications, work assignments, shifts, development opportunities, or other opportunities on the basis of sex. Contractors may not grant or deny training, apprenticeships, work assignments, or other opportunities that may lead to advancement to higher-paying positions on the basis of sex.

(c) Contractors may not provide or deny earnings opportunities because of sex, for example, by denying women equal opportunity to obtain regular and/or overtime hours, commissions, pay increases, incentive compensation, or any other additions to regular earnings.

(d) Contractors may not implement compensation practices that have an adverse impact on the basis of sex and are not shown to be job-related and consistent with business necessity.

(e) A contractor will be in violation of Executive Order 11246 and this part any time it pays wages, benefits, or other compensation that is the result in whole or in part of the application of any discriminatory compensation decision or other practice.

§ 60-20.5 Discrimination on the basis of pregnancy, childbirth, or related medical conditions.

(a) In general.—(1) Discrimination on the basis of pregnancy, childbirth, or related medical conditions, including childbearing capacity, is a form of unlawful sex discrimination. Contractors must treat people of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, including receipt of benefits under fringe-benefit programs, as other persons not so affected, but similar in their ability or inability to work.

(2) Related medical conditions include, but are not limited to, lactation; disorders directly related to pregnancy, such as preeclampsia (pregnancy-induced high blood pressure), placenta previa, and gestational diabetes; symptoms such as back pain; complications requiring bed rest; and the after-effects of a delivery.

(b) Examples. Examples of unlawful pregnancy discrimination include, but are not limited to:

(1) Refusing to hire pregnant people or people of childbearing capacity, or otherwise subjecting such applicants or employees to adverse employment treatment, because of their pregnancy or childbearing capacity;

(2) Firing female employees or requiring them to go on leave because they become pregnant or have a child;

(3) 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

(4) 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.

(c) Accommodations—(1) Disparate treatment. It is a violation of Executive Order

11246 for a contractor to deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions where:

(i) The contractor denies such assignments, modifications, or other accommodations only to employees affected by pregnancy, childbirth, or related medical conditions;

(ii) The contractor provides, or is required by its policy or by other relevant laws to provide, such assignments, modifications, or other accommodations to other employees whose abilities or inabilities to perform their job duties are similarly affected, and the denial of accommodations imposes a significant burden on employees affected by pregnancy, childbirth, or related medical conditions and the contractor's asserted reasons for denying accommodations to such employees do not justify that burden; or

(iii) Intent to discriminate on the basis of pregnancy, childbirth, or related medical conditions is otherwise shown.

(2) Disparate impact. Contractors that have policies or practices that deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions must ensure that such policies or practices do not have an adverse impact on the basis of sex unless they are shown to be job-related and consistent with business necessity. For example, where a contractor's policy of offering light duty only to employees with on-the-job injuries has an adverse impact on employees affected by pregnancy, childbirth, or related medical conditions, the policy would be impermissible unless shown to be job-related and consistent with business necessity.

(d) Leave—(1) In general. To the extent that a contractor provides family, medical, or

other leave, such leave must not be denied or provided differently on the basis of sex.

(2) Disparate treatment. (i) A contractor must provide job-guaranteed medical leave, including paid sick leave, for employees' pregnancy, childbirth, or related medical conditions on the same terms that medical or sick leave is provided for medical conditions that are similar in their effect on employees' ability to work.

(ii) A contractor must provide job-guaranteed family leave, including any paid leave, for male employees on the same terms that family leave is provided for female employees.

(3) Disparate impact. Contractors that have employment policies or practices under which insufficient or no medical or family leave is available must ensure that such policies or practices do not have an adverse impact on the basis of sex unless they are shown to be job-related and consistent with business necessity.

§ 60-20.6 Other fringe benefits.

(a) It shall be an unlawful employment practice for a contractor to discriminate on the basis of sex with regard to fringe benefits.

(b) As used herein, the term "fringe benefits" includes, but is not limited to, medical, hospital, accident, life insurance, and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(c) The greater cost of providing a fringe benefit to members of one sex is not a defense to a contractor's failure to provide benefits equally to members of both sexes.

§ 60-20.7 Employment decisions made on the basis of sex-based stereotypes.

Contractors must not make employment decisions on the basis of sex-based stereotypes, such as

stereotypes about how males and/or females are expected to look, speak, or act. Such employment decisions are a form of sex discrimination prohibited by Executive Order 11246, as amended. Examples of discrimination based on sex-based stereotyping may include, but are not limited to:

(a) Adverse treatment of an employee or applicant for employment because of that individual's failure to comply with gender norms and expectations for dress, appearance, and/or behavior, such as:

(1) 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;

(2) Harassing a man because he is considered effeminate or insufficiently masculine; or

(3) Treating employees or applicants adversely based on their sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes;

(b) Adverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status;

(c) 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

(d) Adverse treatment of employees or applicants based on sex-based stereotypes about caregiver responsibilities. For example, 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. Other examples of such discriminatory treatment include, but are not limited to:

(1) Adverse treatment of a male employee because he has taken or is planning to take

leave to care for his newborn or recently adopted or foster child based on the sex-stereotyped belief that women and not men should care for children;

(2) Denying opportunities to mothers of children based on the sex-stereotyped belief that women with children should not or will not work long hours, regardless of whether the contractor is acting out of hostility or belief that it is acting in the employee's or her children's best interest;

(3) Evaluating the performance of female employees who have family caregiving responsibilities adversely, based on the sex-based stereotype that women are less capable or skilled than their male counterparts who do not have such responsibilities; and

(4) Adverse treatment of a male employee who is not available to work overtime or on weekends because he cares for his elderly father, based on the sex-based stereotype that men do not have family caregiving responsibilities that affect their availability for work, or that men who are not available for work without constraint are not sufficiently committed, ambitious, or dependable.

§ 60-20.8 Harassment and hostile work environments.

(a) Harassment on the basis of sex is a violation of Executive Order 11246, as amended. Unwelcome sexual advances, requests for sexual favors, offensive remarks about a person's sex, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) Harassment because of sex includes sexual harassment (including sexual harassment based on gender identity or transgender status); harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but that is because of sex or sex-based stereotypes.

Appendix to Part 60-20– Best Practices

Best practices. Although not required by this part, following are best practices for contractors:

(1) Avoiding the use of gender-specific job titles such as "foreman" or "lineman" where gender-neutral alternatives are available;

(2) Designating single-user restrooms, changing rooms, showers, or similar single-user facilities as sex-neutral;

(3) Providing, as part of their broader accommodations policies, light duty, modified job duties or assignments, or other reasonable accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions;

(4) Providing appropriate time off and flexible workplace policies for men and women;

(5) Encouraging men and women equally to engage in caregiving-related activities;

(6) Fostering a climate in which women are not assumed to be more likely to provide family care than men; and

(7) Fostering an environment in which all employees feel safe, welcome, and treated fairly, by developing and implementing procedures to ensure that employees are not harassed

because of sex. Examples of such procedures include:

(a) Communicating to all personnel that harassing conduct will not be tolerated;

(b) Providing anti-harassment training to all personnel; and

(c) Establishing and implementing procedures for handling and resolving complaints about harassment and intimidation based on sex.

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