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Labor and Employment Alert: OFCCP Updates 'Extremely Outdated' Sex Discrimination Rules for 'The Modern Era'

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For the first time in 46 years, the Office of Federal Contract Compliance Programs (OFCCP), which oversees the affirmative action and equal employment opportunity obligations of federal contractors, has updated its sex discrimination guidelines. According to the OFCCP, **the Final Rule** is intended to “bring these old guidelines from the ‘Mad Men’ era to the modern era, and align them with the realities of today’s workplaces and legal landscape.” While officially effective August 15, 2016, the OFCCP expects that federal contractors are already complying with the obligations outlined in the Final Rule. If not, they should “come into compliance immediately.”

The Final Rule “is intended to state clearly contractor obligations to ensure equal employment opportunity on the basis of sex.” To that end, the Final Rule promotes fair pay practices and prohibits compensation discrimination, discrimination based on pregnancy, sexually hostile work environments, and discrimination based on unlawful sex stereotypes, gender identity, and transgender status.

Fair Pay Requirements

Under the Final Rule, federal contractors are prohibited from paying employees differently because of their sex. This means contractors may not deny opportunities for overtime work, training, better pay, or higher-paying positions because of an employee’s sex. Similarly, the Final Rule prohibits discrimination on the basis of sex with regard to fringe benefits such as medical, hospital, accident, life insurance, and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment. Thus, if a contractor provides family, medical, or other leave (such as paid sick leave), that leave must not be denied or provided differently on the basis of sex. Under the Final Rule (and consistent with the Lily Ledbetter Fair Pay Act), an employee may recover lost wages any time a contractor pays compensation that is the result of discrimination, not only when the decision to discriminate is made.

Pregnancy Accommodations

Contractors must provide workplace accommodations to an employee who needs an accommodation because of pregnancy, childbirth, or related medical conditions when comparable accommodations are provided to other employees, such as those with disabilities or occupational injuries. Examples of accommodations for pregnant employees include extra bathroom breaks and light-duty assignments.

Sex-Based Discrimination and Harassment

Like the EEOC, the OFCCP has adopted the position that sex discrimination includes discrimination based on gender identity and transgender status. Thus, the Final Rule requires contractors to allow employees to use bathrooms, changing rooms, showers, and similar facilities consistent with the gender with which the employees identify. Moreover, an explicit, categorical exclusion of coverage for all care related to gender dysphoria or gender transition is facially discriminatory because it singles out treatments for individuals on the basis of their gender identity or transgender status. Further, contractors may not treat employees or applicants adversely because they fail to comply with expectations about how women and men should dress, look, or act or what kinds of jobs they should do.

Consistent with current law, the Final Rule now prohibits sexual harassment when such conduct unreasonably interferes with an individual's work performance, becomes the basis for employment decisions, or creates a hostile working environment. Sexual harassment includes harassment based on gender identity; harassment based on pregnancy, childbirth, or related medical conditions; and harassment because of sex or sex-based stereotypes.

In addition to prohibiting harassment based on stereotypes, contractors may not treat employees or applicants differently based on the stereotypical assumption that women are more likely to have care giving responsibilities. This means that a contractor may not deny mothers employment based on their presumed childcare responsibilities, nor may it deny fathers flexible workplace arrangements that are available to mothers to care for their children.

Along similar lines, a contractor may not set job or training requirements that are based on sex unless those requirements are a bona fide occupational qualification. Nor may a contractor set requirements, such as height or weight qualifications, that adversely affect applicants because of sex unless the qualifications are job-related and consistent with business necessity.

The Final Rule generally applies to any business that holds (1) a single federal contract, subcontract, or federally assisted construction contract or subcontract more than \$10,000; (2) multiple federal contracts or subcontracts totaling more than \$10,000 in any 12-month period; or (3) 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. Generally, employees need not actually work on a federal contract to be covered; they need only work for a business holding a covered federal contract or subcontract. The Final Rule does not apply to grant recipients or non-construction recipients of federal financial assistance.

Contact your Vorys lawyer if you have questions about a federal contractor's affirmative action and equal employment opportunity obligations.