

FEWER FEDERAL CONTRACTORS WILL QUALIFY FOR RELIGIOUS EXEMPTIONS AS OFCCP RESCINDS 2020 RULE

Insights
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The federal agency that oversees federal contractors and affirmative action programs just announced it would rescind a Trump-era rule that had expanded the scope of long-standing religious exemption principles it had utilized for decades, which means that fewer federal contractors will now qualify for religious exemptions that allow them to avoid other common compliance obligations. The Office of Federal Contract Compliance Programs (OFCCP) announced on March 1 that it was scrapping the 2020 Rule, noting that it now believed that rule went too far and departed from the traditional approach to religious exemption as established by federal law. Importantly, however, this does not mean that federal contractors cannot qualify for religious exemptions. Instead, the effect of this week's announcement is to realign the religious discrimination principles for federal contractors with Title VII's standard approach. What do you need to know about this development – and what should you do?

How Did We Get Here?

In 2002, President Bush amended E.O. 11246 to allow religious organizations to seek an exemption from certain legal standards "to ensure the economical and efficient administration and completion of Government contracts." The amendment allowed certain government contractors or subcontractors that qualify as religious corporations, associations, educational institutions, or societies to be exempt from compliance with the equal opportunity clause of E.O. 11246 with respect to the employment of individuals of a particular religion. However, it did not exempt the

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government contractor or subcontractor from complying with the other E.O. 11246 requirements.

At that time, the final rule's preamble noted that the religious exemption was modeled on Title VII's religious exemption. Under this framework, OFCCP "continued its longstanding policy and practice of applying Title VII principles and case law when analyzing claims of discrimination under Executive Order 11246." This included providing compliance assistance on the interpretation and abiding by relevant religious liberty authorities, including the Religious Freedom Restoration Act (RFRA) and the ministerial exception mandated by the First Amendment.

But in 2020, the Trump-era OFCCP greatly expanded the scope of this exemption. While the 2020 Rule made no changes to the actual text of E.O. 11246's codified religious exemption, it broadened the definitions of the terms "particular religion," "religion," "religious corporation, association, educational institution, or society," and "sincere" – while also specifying that the exemption must be "construed in favor of the broadest protections of religious exercise permitted by the U.S. Constitution and law."

What Happened This Week?

The Biden OFCCP has now scaled back that broad scope. It determined that the 2020 Rule should be rescinded to the extent it departs from applicable legal precedents. The agency also said the broad exemption standards create inconsistencies with the application of Title VII's parallel religious exemption.

OFCCP's announcement that accompanied the rescission said that the agency believes the 2020 Rule also increased uncertainty in the contractor community based on its divergence from the Title VII approach to religious exemptions — approaches that are utilized by courts, the Equal Employment Opportunity Commission (EEOC), the Department of Justice, and OFCCP's past practice. The agency also said it believes the 2020 Rule had weakened discrimination protections for workers.

OFCCP expressed concern that the 2020 Rule's definition of a "particular religion" could authorize a contractor to require, as a condition of employment, the applicant's or employee's "acceptance of or adherence to sincere religious tenets as understood by the employer." The agency found problematic

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the suggestion that qualifying religious organizations might be exempt from the nondiscrimination requirements of Executive Order 11246 where their tenets implicate other protected grounds. Several of the over 760 commentators noted that this could result in contractors' being permitted to discriminate against individuals based on protected classes in favor of a preference for persons of a particular religion. This, of course, is of particular concern to LGBTQ workers, women workers, and those in interracial marriages – who may be met with workplace harassment or discrimination based on religious grounds.

In sum, OFCCP stated it finds the 2020 Rule “unnecessary.” This is especially true in light of comments from religious contractors who confirmed an ability to participate in federal contracting while relying on the Title VII case law approach to religious exemptions incorporated into Executive Order 11246. Essentially, the agency contends “it wasn’t broken, it didn’t need fixing.” Since the creation of the religious exemption in 2002, the agency says it has been applying Title VII case law with appropriate reference to relevant religious authorities without difficulty or confusion.

In any event, the agency noted, very few contractors are actually impacted by the religious exemption rule. OFCCP said that there has only been one contractor to have invoked the religious exemption during a compliance review during the lengthy time the 2020 Rule was in place.

What Should Contractors Do Now?

First, contractors should understand that religious exemptions are still available to employers whose purpose and character are primarily religious. By rescinding the 2020 Rule, OFCCP has simply reaffirmed its reliance on Title VII principles for religious exemptions. Accordingly, contractors should ensure that they adhere to long-standing principles related to religious exemptions.

Religious organizations that had been relying on the 2020 rule to “favor” employees or applicants who had certain religious beliefs should re-evaluate their practices to ensure that their treatment of employees and applicants does not run afoul of Title VII principles and inadvertently discriminate against employees or applicants on the basis of other protected characteristics.

Conclusion

We will continue to monitor developments on this topic. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information direct to your inbox. Please contact your Fisher Phillips attorney, the authors of this insight, or any attorney in our [Affirmative Action and Federal Contract Compliance Practice Group](#) with questions.