



# OFCCP Releases Broad Gender Discrimination Rule

CONTRACTORS TO BE BROUGHT FROM 'MAD MEN' TO MODERN ERA

Insights

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Declaring that it is time to “bring these old guidelines from the 'Mad Men' era to the modern era,” the Office of Federal Contract Compliance Programs (OFCCP) just announced a final rule revising sex discrimination guidelines for federal contractors. It is the first substantive update to the rules since 1970, and will expand contractors’ obligations to ensure equal opportunity in employment based on gender. The effective date for the new rule is rapidly approaching – August 15, 2016 – so you will want to begin the process of ensuring compliance immediately.

## Overview Of New Rule

On June 14, 2016, the U.S. Department of Labor’s OFCCP, which enforces affirmative action compliance requirements, released a final gender discrimination rule impacting federal contractors. The new rule will require contractors to ensure equal opportunity in employment in a number of different ways. First, it will expand the definition of the term “sex” to include pregnancy, childbirth, and related medical conditions; gender identity; transgender status; and sex stereotyping.

It will also prohibit discriminatory treatment and policies or practices that have a disparate effect related to sex, while also addressing fair pay, fringe benefits, and sexual harassment. The rule includes many examples of unlawful discrimination and also includes an appendix listing suggested, but not mandatory, best practices. Explanations and examples include the following:

## Gender Identity

The rule prohibits adverse treatment based on an applicant or employee’s actual or perceived gender identity or transgender status. Under the new rule, contractors must allow employees to use the restroom, changing room, or similar facility designated for use by the gender with which they identify.

## Fair Pay Requirements

Borrowing a standard from Title VII of the Civil Rights Act, the new rule states that contractors may not pay different compensation to similarly situated employees based on their sex. Factors such as tasks performed, skills, efforts, levels of responsibility, working conditions, job difficulty, and minimum qualifications, or other objective factors, may be considered to determine whether employees are similarly situated.

Additionally, compensation, job classifications, work assignments, shifts, and development and other opportunities may not be granted or denied based on sex. Each time a contractor pays a wage or benefit that results from a discriminatory decision, it is in violation of the new rule.

### **Pregnancy, Leave, And Other Accommodations**

The new rule mandates that individuals of childbearing capacity and those affected by pregnancy, childbirth, and related medical conditions must be treated the same as individuals who are not so affected. This rule will apply to all employment-related purposes.

For example, contractors must provide job-guaranteed medical leave, alternate job assignments, modified duties, and other accommodations to employees unable to perform their duties because of pregnancy, childbirth, or related medical conditions on the same terms that contractors provide leave for others with medical conditions that are similar in effect. Contractors must provide job-guaranteed family leave for male employees on the same terms that family leave is provided for female employees.

### **Fringe Benefits**

Under the new rule, it will be unlawful to discriminate on the basis of sex in medical, hospital, accident life insurance, retirement benefits, profit sharing and bonus plans, leave, and other terms and conditions of employment, even if it costs more to provide such benefits to members of one sex.

### **Sex Stereotypes**

Once the new rule takes effect, contractors may not make decisions on the basis of sex-based stereotypes, such as an individual's failure to match expectations of how males and females are expected to look, speak, or act. Steering women into lower-paying or less desirable jobs because of their sex would violate the rule.

Taking adverse action against a woman based on the assumption she will have care-giving responsibilities, or denying family leave to a man to care for a newborn based on an assumption that women should be responsible for childcare, are two additional examples of sex-based stereotyping outlawed under the new rule.

### **Harassment**

The rule clarifies the standards by which harassment claims will be judged. Per the new rule, unlawful harassment will be considered to have occurred when a worker is subject to unwelcome sexual advances, requests for sexual favors, offensive remarks, or verbal or physical conduct that is sexual in nature. Moreover, in order to be considered actionable harassment, submission to the conduct must be a term or condition of employment, an individual's submission or rejection of such conduct must be the basis for employment, or such conduct must unreasonably interfere with work performance or create a hostile work environment.

Sexual harassment includes harassment based on gender, which includes gender identity and transgender status; pregnancy, childbirth, and related medical conditions; and harassment that is

transgender status, pregnancy, childbirth, and related medical conditions, and harassment that is not sexual in nature but instead because of sex or sex-based stereotypes.

### **What Else Do Contractors Need To Know?**

As noted above, the rule will take effect 60 days after it was published in the Federal Register (June 15, 2016), which means the effective date will be August 15, 2016.

If you are unclear about whether this new rule applies to your business, Executive Order 11246 imposes nondiscrimination and affirmative action obligations on entities that hold contracts, subcontracts, or federally-assisted construction contracts in a 12-month period in excess of \$10,000.

If you have any questions about this new rule or how it may affect your business, please contact your Fisher Phillips attorney or any member of our Affirmative Action and Federal Contract Compliance Practice Group.

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*This Legal Alert provides an overview of a specific federal rule. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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