

# Final Gender Discrimination Rule for Federal Contractors Issued

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Federal contractor healthcare plans, leave policies, accommodation practices, gender identity protections, and other employment practices to face increased scrutiny.

For the first time in more than 40 years, the **US Department of Labor's Office of Federal Contract Compliance Programs (OFCCP)** has updated its sex discrimination guidelines for federal contractors. OFCCP's final rule, issued on June 14, primarily aligns with existing law interpreting **Title VII of the Civil Rights Act of 1964**, but also goes well beyond existing legal guidance, particularly in connection with sex stereotyping, pay discrimination, pregnancy-related workplace accommodations, leave and fringe benefits, and gender identity. The final rule also establishes suggested "best practices" for contractors, many in these key areas.

## THE RULE'S KEY PROVISIONS

**Sex Stereotyping:** The rule provides that sex discrimination includes adverse treatment of an employee based on gender stereotypes, such as assumptions about caretaking responsibilities or expectations relating to dress and appearance.

**Pay Discrimination:** The rule expands the definition of compensation discrimination to include not only unequal pay for equal work, but also pay differences that result from job segregation or gender-based job classifications, including steering of women into roles based on gender stereotyping, and requires that all "similarly situated" employees be treated equally. The rule sets out a non-exhaustive list of relevant factors to be considered in a pay analysis to determine a "similarly situated" employee. The factors include tasks performed, skills, efforts, levels of responsibility, working conditions, job difficulty, and minimum qualifications. Under the rule's flexible standard, an employee who is comparable on some but not all factors may still be treated as a "similarly situated" employee.

**Pregnancy Discrimination and Accommodation:** Under the rule, sex discrimination includes discrimination against pregnant employees and employees affected by childbirth-related medical conditions. Pregnant employees and employees affected by childbirth or related medical conditions are entitled to workplace accommodations, such as seating, extra bathroom breaks, and light-duty assignments. The rule requires pregnancy accommodations to be equivalent to accommodations granted to other employees who request accommodations due to a disability or occupational injury.

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*Equal Leave and Fringe Benefits:* The rule entitles male and female employees to childcare leave and sick leave on the same terms. Similarly, the rule requires contractors to provide equal benefits and equal contributions for male and female employees participating in any fringe-benefit plan. The increased cost of providing a fringe benefit to members of one sex is not a defense to a contractor's failure to provide equal benefits to members of both sexes.

*Gender Identity and Transgender Protections:* The rule reinforces that sex discrimination includes discrimination based on sexual orientation or gender identity. The rule prohibits adverse treatment of an employee because he or she is in a relationship with a person of the same sex. Similarly, as discussed above, adverse treatment of an employee because the employee does not conform to gender norms or expectations about appearance, attire, and behavior also constitutes prohibited discrimination.

The rule entitles transgender employees to use restrooms, changing rooms, showers, and similar facilities consistent with the gender with which they identify. The rule also prohibits the adverse treatment of employees because they have received, are receiving, or are planning to receive health services related to a gender transition.

## **OFCCP'S BEST PRACTICES**

In addition to the binding provisions discussed above, the rule also contains nonbinding best practices. According to OFCCP, the best practices are meant to ensure that employees feel free from workplace discrimination, and contractors are in compliance with the new rule.

The rule's best practices include the following:

- Banning gender-specific terms for certain positions (e.g., lineman) and using gender-neutral alternatives
- Designating single-user restrooms
- Creating sex-neutral changing rooms or showers
- Providing, as part of broader accommodation 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
- Providing appropriate time off and flexible workplace policies for men and women
- Encouraging men and women to equally engage in care-giving related activities
- Fostering a climate in which women are not assumed to be more likely to provide family care than men
- Ensuring fringe benefits are equally available to both men and women

## **WHAT'S NEXT FOR CONTRACTORS**

The rule is another stride in a trend of increased sex and gender protections for employees. Not

much is likely to change for contractors who are currently in compliance with existing legal requirements. However, the rule presents an opportunity for contractors to ensure legal compliance by reviewing and updating their equal employment opportunity and leave policies and scrutinizing their compensation systems and practices.

In light of the rule's gender identity and transgender provisions, contractors should pay particular attention to their employer-provided insurance policies to identify any exclusion that may violate the rule's protections, such as gender transition-related medical services.

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