Insights: Alerts

OFCCP Updates Sex Discrimination Guidelines for Federal Contractors and Subcontractors

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On June 14, 2016, the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") announced its final rule updating the agency's guidelines on prohibited sex discrimination in the workplace. The OFCCP enforces Presidential Executive Order 11246 ("E.O. 11246"), which prohibits covered federal contractors and subcontractors from discriminating against employees and applicants because of their race, color, religion, sex, sexual orientation, gender identity, or national origin or because they have discussed, disclosed, or inquired about compensation. The updated guidelines, which apply to federal contractors and subcontractors working on federal contracts totaling $10,000 or more within a 12-month period and not otherwise subject to an exemption, will potentially affect up to 65 million employees across the country.

The updated guidelines reflect a significant departure from the agency's original guidelines on sex discrimination, which were first promulgated in 1970. The updated guidelines incorporate developments in the federal equal employment opportunity statutes and case law relating to pay discrimination, pregnancy discrimination, and sexual harassment over the past four decades. In addition, the updated guidelines reflect emerging recognition of caregiver responsibilities and the needs of transgender employees.

Key changes in the sex discrimination guidelines are summarized below:

Expanded Definitions of Sex Discrimination and Sexual Harassment

The term "sex" has been expanded to include pregnancy, childbirth, or related medical conditions; gender identity; transgender status; and sex stereotyping.

Sexual harassment was not addressed in the 1970 guidelines. The updated guidelines now make it clear that harassment on the basis of sex, including hostile work environment harassment, is a violation of E.O. 11246. "Harassment because of sex" includes sexual harassment (including sexual harassment based on gender identity and transgender status); harassment based on pregnancy, childbirth, or related medical conditions; and harassment that may not be sexual in nature, but is based on sex or sex-based stereotypes.

Protections for Transgender Employees

Transgender employees must be allowed access to restrooms, changing rooms, showers, and similar facilities designated for the gender with which they identify. In addition, employees or applicants may not be treated adversely because they have received, are receiving, or plan to receive, transition-related medical services to adopt a sex or gender other than their designated sex at birth.

Equal Treatment for Employees Affected by Pregnancy, Childbirth, and Related Medical Conditions

Covered employers must treat employees and applicants affected by pregnancy, childbirth, and related medical

conditions the same for all employment-related purposes, including the receipt of benefits under fringe benefit programs, leave, and workplace accommodations, as people who are not affected by such medical conditions, but are similar in their ability or inability to work.

Workplace Protections for Caregivers

Adverse treatment of both male and female employees based on sex-based stereotypes regarding caregiver responsibilities is prohibited. If a covered employer provides job-guaranteed family leave to female employees (including paid leave), the covered employer must provide such leave to male employees on the same terms.

Clarification on Pay Discrimination

The updated guidelines reflect the OFCCP's broad perspective on pay discrimination. Prohibited pay discrimination not only includes paying different compensation to similarly situated employees on the basis of sex, but also granting or denying higher-paying wage rates, salaries, positions, job classifications, work assignments, shifts, development opportunities, and other opportunities on the basis of sex. The updated guidelines also adopt the Lilly Ledbetter Fair Pay Act standard under which every paycheck that is affected by a discriminatory pay decision is considered a separate act of discrimination, thereby creating the opportunity for the OFCCP to find a violation of E.O. 11246 based on discrimination in pay, even though the original discriminatory act causing the pay differential occurred before the employer became a contractor or subcontractor covered by the Executive Order.

Employment Decisions Based on Sex-Based Stereotypes Are Prohibited

Covered employers may not make employment decisions based on sex-based stereotypes, such as stereotypes about how males and females are expected to look, speak, or act. Prohibited discrimination based on sex-based stereotypes may include adverse treatment of an employee or applicant because of the individual's failure to comply with gender norms and expectations for dress, appearance, behavior, sexual orientation, or actual or perceived gender identity or transgender status.

Practical Implications

The updated guidelines, which go into effect on August 16, 2016, reflect the OFCCP's interpretation of what constitutes sex discrimination prohibited by E.O. 11246 and do not themselves have the force of law. They do, however, provide a clearer understanding of what the OFCCP expects from federal contractors and subcontractors in the area of gender equality in the workplace and indicate what the agency will be looking for when investigating sex discrimination complaints. Most of the changes made to the sex discrimination guidelines reflect developments under the sex discrimination provisions of Title VII of the Civil Rights Act of 1964 over the last 46 years and should not come as a surprise to employers covered by Title VII. However, some of the positions taken by the OFCCP in the new guidelines (transgender access to bathrooms and locker rooms, for example) have not yet been tested in the courts.

All federal contractors and subcontractors covered by E.O. 11246 should review their personnel policies, pay practices, and benefit plans to determine whether they are consistent with the new guidelines and should implement changes as appropriate to minimize the risk of sex discrimination complaints under E.O. 11246.

Related People



Susan W. Pangborn
t 404.815.6305
spangborn@ktslaw.com



S. Wesley Butler
t 214.922.7160
wbutler@ktslaw.com



Diane L. Prucino
t 404.815.6479
dprucino@ktslaw.com