



September 16, 2019

VIA ELECTRONIC UPLOAD
FEDERAL RULEMAKING PORTAL

Harvey D. Fort
Acting Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW
Room C-3325
Washington, DC 20210

Re: Letter of Comment of The Institute for Workplace Equality on OFCCP's NPRM Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption

Dear Acting Director Fort:

The Institute for Workplace Equality ("IWE" or "The Institute") submits the following Comment in response to the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP" or the "Agency") invitation for comments on its Proposed Rulemaking Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption ("the NPRM" or "the rule").¹

Background on The Institute for Workplace Equality

The Institute, formerly known as The OFCCP Institute, is a national non-profit employer association based in Washington, D.C. The Institute's mission includes the education of federal contractors as to their affirmative action, diversity, and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal and staffing functions representing many of the nation's largest and most sophisticated federal contractors.

The Institute recognizes the responsibility of all employers, including contractors, to create a nondiscriminatory workplace. We applaud and support all efforts to make the workplace free from all forms of discrimination. To that end, we agree that OFCCP has a proper and important role in well-designed and effective enforcement efforts.

¹ Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 *Fed. Register* 41677 (Aug. 15, 2019), available at <https://www.federalregister.gov/documents/2019/08/15/2019-17472/implementing-legal-requirements-regarding-the-equal-opportunity-clauses-religious-exemption>.

Overview of Religious Exemption NPRM

The OFCCP stated in its NPRM that some religious organizations have previously provided feedback to OFCCP that they were reluctant to participate as federal contractors because of uncertainty regarding the scope of the religious exemption contained in Executive Order 11246. As a result, OFCCP is seeking to clarify the scope and application of the exemption. The Institute supports OFCCP's Directive 2018-03, and the recognition of the developments in the law regarding religion-exercising organizations and individuals. However, The Institute respectfully submits that this NPRM is a solution in search of a problem and will in fact create more confusion and burden than clarity for federal contractors.

I. The rulemaking is not necessary

As the OFCCP explains in Executive Summary of the NPRM, the Agency follows Title VII of the Civil Rights Act of 1964² principles with respect to application of its religious exemption. As is also outlined in the Executive Summary,³ federal courts including the US Supreme Court have defined how OFCCP should interpret the religious exemption in Executive Order 11246.⁴ In addition, the recent Supreme Court decisions in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*;⁵ *Trinity Lutheran Church of Columbia, Inc. v. Comer*;⁶ and *Burwell v. Hobby Lobby Stores, Inc.*⁷ have made it clear that not only churches but also employers organized for a religious purpose and which engage in the exercise of religion are covered by Title VII and thus by Executive Order 11246. See OFCCP Directive 2018-03.

The extent to which religious employers can condition employment on acceptance of, or adherence to, religious tenets as long as the practices do not otherwise discriminate based on other protected basis is also outlined in the long-line of Title VII cases, some of which are cited by the Agency in the Executive Summary. As a result, an executive rulemaking to establish the Agency's obligations under the exemption is unnecessary.

II. The proposed rule is inconsistent with Title VII principles

Despite the OFCCP's acknowledgement in the Executive Summary of its NPRM that its interpretation of the religious exemption "springs directly from the Title VII exemption", the Agency's proposed rule fails to do so. Rather, the proposed rule broadens the scope of the religious exemption beyond clearly established Title VII principles. Specifically, while the Agency's proposed definition of "*Religious corporation, association, educational institution, or society*" purports to adopt the test set out in *Spencer v. World Vision, Inc.*,⁸ the NPRM departs from the standard set forth by Judge O'Scannlain by altering or removing critical limiting factors.

² 42 U.S. C. 2000e-1(a) and 2000e-2(e)(2).

³ *Id.*

⁴ Executive Order 11246 of Sept. 24, 1965, 3 CFR, 1964-1965.

⁵ 138 S. Ct. 1719 (2018).

⁶ 137 S. Ct. 2022 (2017).

⁷ 134 S. Ct. 2751 (2014).

⁸ 633 F.3d 723, 724 (9th Cir. 2011) (per curiam).

OFCCP's proposal would weaken certain factors in Judge O'Scannlain's *World Vision* test: "Must be organized for a religious purpose" but "need not be the contractor's only purpose"⁹ and "Must hold itself out to the public as carrying out a religious purpose" – which can be satisfied in a variety of ways including "by affirming a religious purpose in response to inquiries from a member of the public or a government entity."¹⁰

More significantly, OFCCP would completely omit the fourth factor of the *World Vision* test which requires an entity seeking an exemption "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." Indeed, the proposed rule bypasses Judge O'Scannlain's initial and "especially significant" consideration-- that the entity qualifying for the section 2000e-1 exemption be nonprofit.¹¹ This glaring omission would essentially green-light *any* for profit *business* to claim it is a "religious contractor" entitled to "prefer in employment individuals who share their religion" and to "condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor."¹²

The OFCCP contends that this factor was removed as it was difficult to square with other case law interpreting Title VII. However, The Institute believes this limiting factor is consistent with numerous decisions in which courts have considered whether an entity is for-profit or not-for-profit when determining whether it is a religious organization under Title VII.¹³ Moreover, the EEOC has issued guidance making it clear that an organization's for-profit status should be considered in determining whether an organization is covered by the religious exemption.¹⁴ By failing to consider the crucial limiting factors set forth in *World Vision* and other Title VII cases, the proposed rule fails to align with established Title VII principles governing the religious exemption.

Finally, in *World Vision*, Judge O'Scannlain explained that the test he proffered, "also ensures that the section 2000e-1 exemption will remain narrow...help[ing] to ensure that only *bona fide* religious organizations are exempt."¹⁵ The test included in OFCCP's proposed regulation will do just the opposite.

OFCCP should faithfully follow all, rather than selected portions, of Title VII principles. Contrary to OFCCP's conclusion, omitting one of the legal requirements because it may be difficult to apply completely fails to satisfy OFCCP's stated commitment to follow the rule of law and to apply Title VII principles. If OFCCP wants to change the law, it is fully familiar with the processes for Congress to amend Title VII. Alternatively, if non-Title VII standards are to be followed under EO 11246, then the Executive Order should be amended accordingly. The Agency cannot use the NPRM to amend or modify its requirements under EO

⁹ NPRM at 19.

¹⁰ See NPRM at 20. Under the proposed rule, a federal contractor could meet this factor simply by responding to an OFCCP inquiry, whereas *World Vision* always identified itself as a Christian organization, requiring its descriptor statement "on every piece of communication." *World Vision*, 633 F.3d at 738.

¹¹ See *Id.* at 734, "The initial consideration, whether the entity is nonprofit, is especially significant."

¹² NPRM at 8.

¹³ See *LeBoon v. Lancaster Jewish Community Center Association*, 503 F.3d 217, 226 (3rd Cir. 2007); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); *EEOC v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980).

¹⁴ U.S. Equal Emp. Opportunity Comm'n, Questions and Answers: Religious Discrimination in the Workplace.

¹⁵ *World Vision*, 633 F.3d at 735.

11246 or Title VII. Therefore, as proposed, the NPRM fails to meet these fundamental legal standards.

III. The ‘but-for’ standard of causation is not appropriate for evaluating discrimination by religious organizations

The OFCCP proposes in the NPRM to apply a “but-for” standard of causation when evaluating claims of discrimination filed by individuals against religious organizations based on protected characteristics other than religion. The Agency states in the Executive Summary that it will only find a violation of Executive Order 11246 if “it can prove by a preponderance of the evidence that a protected characteristic other than religious was a “but-for” cause of the adverse action,”¹⁶ citing the Supreme Court’s decisions in *University of Texas Sw. Med. Ctr. v. Nassar*¹⁷ and *Gross v. FBL Fin. Servs., Inc.*¹⁸

The Institute believes that it would be inappropriate for OFCCP to adopt the less onerous “but for” standard for evaluating discrimination claims filed by individuals against religious organizations. The Supreme Court has adopted the “but for” standard for retaliation claims under Title VII (*Nassar*) and for ADEA claims (*Gross*); it has not done so for discrimination claims under Title VII.

Again, the proposed rule fails to follow established Title VII principles and is legally unsound.

IV. The proposed rule will confuse federal contractors and their employees

The Institute has submitted to OFCCP two requests requesting clarification and guidance as to how contractors should respond to certain situations given the potentially conflicting requirements in light of federal contractor obligations required by Executive Order 13672, President Trump’s Executive Order Promoting Free Speech and Religious Liberty and the Agency’s Directive 2018-03, copies of which requests are attached. Notwithstanding the Agency’s commitment to respond to opinion letter requests, OFCCP has not responded to either of The Institute’s letters. Moreover, the proposed regulation does not address the concerns raised in the letter. To the contrary, it adds to the confusion.

With the NPRM concluding that the Executive Order’s religious exemption must be construed “in favor of a broad protection of religious exercise,”¹⁹ it is unclear what obligation federal contractors will have towards their employees who claim religious objections to certain working conditions. For example, what if an employee claims that he needs to be accommodated for his religious beliefs when he refuses to work with a woman alone,²⁰ refuses to work with an individual who is gay, lesbian or transgender or refuses to comply with the

¹⁶ NPRM at 30.

¹⁷ 570 U.S. 338, 362-363 (2013).

¹⁸ 557 U. S. 167, 180 (2009).

¹⁹ NPRM at 30.

²⁰ This issue has already surfaced and is the subject of current litigation. See *Torres v. Carter et al.*, Case No. 5:19-cv-327 (W.D.N.C. Aug. 22, 2019).

company's Affirmative Action training. These are just some of the situations that contractors face under the NPRM without clarifying guidance.

Furthermore, The Institute believes the Agency needs to state in the NPRM that the exemption is not applicable for conduct based on an employee's personal beliefs, but is for use by religious organizations. An example of the type of issues that can arise is found in the facts of *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2003) where an employee with a sincerely held religious belief disrupted the workplace with actions that were hostile to employees of the LGBTQ community. The employee refused every effort by the company to reasonably accommodate his beliefs with respect for the LGBT employees, insisting that he must be allowed to continue his attack on their lifestyle. When the company finally fired him, he sued. The court ruled that his termination for this behavior did not violate Title VII. In anticipation that these proposed regulations will raise such questions, we ask OFCCP to state that these changes to the regulations do not have the effect of expanding the rights of individuals to exercise their religious beliefs at non-religious entities, so that the changes do not have the effect thereby of introducing conflict with Executive Order 13672 or other laws enforced by the Agency.

The proposed definitions and especially the broad interpretation of the religious exemption raises many questions for federal contractors which the Agency has yet to answer. The Institute again requests that the Agency provide clarification and guidance on the existing obligations prior to issuing the NPRM. The rule, as proposed, offers no solution and instead is ripe to cause more confusion. Indeed, if the NPRM is finalized as proposed, federal contractors could face the Hobson's choice of determining whether compliance with an OFCCP regulation will result in liability under Title VII. Again, full alignment with Title VII's principles will avoid such an absurd result.

V. This NPRM appears to violate the deregulation requirements of Executive Order 13771

The Trump Administration made clear from its earliest day that one of its primary goals was to deregulate the administrative state. Beginning with President Trump's Executive Order 13771²¹ issued on January 30, 2017, the Trump Administration has focused on reducing regulations in all agencies and in fact required any new regulations to include a 2-for-1 reduction in current regulations.²² In this proposed regulation by OFCCP, the Agency has not provided any evidence as to which existing regulations it is planning to repeal to make room for these new regulations, in satisfaction of the President's directive.

As a result, The Institute submits OFCCP's rulemaking is unauthorized.

²¹ 82 *Fed. Reg.* 9339 (Feb. 3, 2017) available at <https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs>.

²² *Id.*

Conclusion

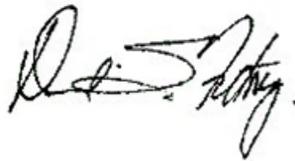
The NPRM does not promote consistency or clarify conflicting case law for confused federal contractors. Instead, OFCCP's proposed rule cherry picks *certain aspects* of a test espoused in a concurring opinion in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011). In so doing, the NPRM departs from Title VII principles and essentially guts Title VII's prohibitions against religious discrimination by adopting an anemic standard that could allow *any* federal contractor to skirt Executive Order 11246's prohibitions against discrimination based on religion. This is unworkable. Title VII's exception for "religious organizations" has been limited to institutions whose "purpose and character are primarily religious."²³ OFCCP has no basis to depart from Title VII.

Thank you in advance for your consideration of The Institute's comments. We are as happy to provide any additional information you may need or to answer any questions you may have.

Respectfully,



David B. Cohen



David S. Fortney



Mickey Silberman

²³ U. S. Equal Emp. Opportunity Comm'n, EEOC Compliance Manual on Religious Discrimination, Section 12 at 16.



October 27, 2017

Via Email to Dowd.Tom@dol.gov

Thomas M. Dowd
Deputy and Acting Director
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW
Washington D.C. 20210

Dear Acting Director Dowd:

On behalf of The Institute for Workplace Equality, we are seeking guidance from the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") on federal contractor's nondiscrimination obligations under the recently issued memoranda addressing religious liberty and the coverage of transgender individuals under Title VII.

On October 6, 2017, the U.S. Department of Justice ("DOJ") issued a memorandum, entitled Implementation of Memorandum on Federal Law Protections for Religious Liberty (the "Religious Liberty Memorandum"), to all component heads and US Attorneys.¹ The Religious Liberty Memorandum has raised many questions for all employers but especially for federal contractors who are subject to the nondiscrimination requirements of Executive Order 11246 that are enforced by OFCCP.² On October 4, 2017, the Attorney General issued a memorandum entitled Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (the "Transgender Memorandum") to all component heads and US Attorneys.³ Again, the changes announced in the Transgender Memorandum pose questions for federal contractors in understanding their compliance obligations relating to transgender individuals in accordance with the nondiscrimination obligations of Executive Order 11246.

¹ *Federal Law Protections for Religious Liberty*, Office of Attorney General, October 6, 2017; <https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination>.

² *Executive Order 11246*--Equal Employment Opportunity, 30 FR 12319, 12935 (1965).

³ *Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, Office of Attorney General, October 4, 2017; <https://www.justice.gov/ag/page/file/1006981/download>.

The Institute for Workplace Equality (“The Institute”), formerly known as The OFCCP Institute, is a national non-profit employer association based in Washington, D.C. The Institute’s mission includes the education of federal contractors as to their affirmative action, diversity and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal and staffing functions representing many of the nation’s largest and most sophisticated federal contractors. Based on discussions with the members of The Institute, we are respectfully requesting further guidance on the following two questions arising as a result of the recent DOJ memoranda.

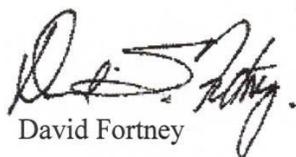
The first question is how the DOJ Transgender Memorandum concluding that transgender individuals are not protected by Title VII affects the obligations of federal contractors who are prohibited under Executive Order 11246 from discriminating against applicants and employees based on sexual orientation or gender identity, including transgender individuals.⁴ Are we correct in understanding that notwithstanding the most recent interpretation of Title VII by DOJ as not covering sexual orientation or gender identity, that federal contractors’ obligations under Executive Order 11246, as amended by Executive Order 13672, remain unchanged? Federal contractors have received questions as a result of the Transgender Memorandum as to whether they are still required not to discriminate against LGBT individuals.

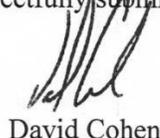
The second question is what obligations do federal contractors have to accommodate employees who claim that they will not work with LGBT individuals based on their religious beliefs. Do federal contractors have a greater or different obligation to accommodate those with religious objections than they did prior to the issuance of the DOJ memoranda?

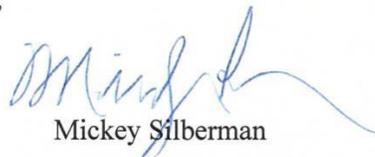
The Institute would strongly recommend that OFCCP provide guidance including updated FAQs to federal contractors addressing the new DOJ memoranda, including how to accommodate those who have a religious objection to working with LGBT individuals.

We would welcome the opportunity to confer with you on these matters or to answer any questions you may have.

Respectfully submitted,


David Fortney


David Cohen


Mickey Silberman

⁴ President Obama added “sexual orientation” and “gender identity” to the protections covered by Executive Order 11246 by Executive Order 13672 on July 21, 2014. [Exec. Order No. 13672](#) of July 21, 2014, 79 FR 42971 (July 23, 2017).



August 22, 2018

Via Email to Leen.Craig@dol.gov

Craig E. Leen
Deputy and Acting Director
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW
Washington D.C. 20210

Dear Acting Director Leen:

On behalf of The Institute for Workplace Equality, we seek guidance from the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") on federal contractors' nondiscrimination obligations under Executive Order 11246 in light of the agency's recently issued Directive 2018-03 addressing religious liberty.¹ The Institute previously submitted a letter to Acting Director Tom Dowd on October 27, 2017 seeking guidance after the Department of Justice issued a memorandum on religious liberty² and a memorandum on transgender coverage under Title VII.³ A copy of that letter is attached. To date, we have not received a response to our October 2017 letter.

The Institute for Workplace Equality ("The Institute") is a national non-profit employer association based in Washington, D.C. The Institute's mission includes the education of federal contractors as to their affirmative action, diversity, and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal, and staffing functions representing many of the nation's largest and most sophisticated federal contractors. Based on discussions with the members of The Institute, we are respectfully requesting further guidance on how Directive 2018-03 impacts federal contractors' obligations under Executive Order 11246.⁴

Some of the questions members have raised include whether federal contractors are obligated to accommodate employees who claim that they will not work with LGBT individuals based on their religious beliefs; whether federal contractors now have a greater or different obligation to accommodate those with religious objections than they did prior to the issuance of Directive

¹ *Executive Order 11246 § 204(c), religious exemption*, Directive 2018-03, Office of Federal Contract Compliance Programs, August 10, 2018; <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-03-ESQA508c.pdf>.

² *Federal Law Protections for Religious Liberty*, Office of Attorney General, October 6, 2017; <https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination>.

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⁴ [Executive Order 11246](#)—Equal Employment Opportunity, 30 FR 12319, 12935 (1965).

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2018-03; and whether employees' reliance on their religious beliefs would be a lawful reason to refuse to work with women or other protected employee groups.

The Institute respectfully requests that OFCCP provide guidance to address these issues, including updated FAQs and/or opinion letters addressing the new Directive and how to accommodate those who have a religious objection to working with individuals otherwise protected by Executive Order 11246. Moreover, providing such guidance would be in furtherance of the recently issued "Bill of Rights" that committed OFCCP to provide access to accurate compliance assistance material, timely responses to compliance assistance questions, and opportunities for contractors to provide meaningful feedback and collaborate.

We would welcome the opportunity to confer with you and your staff on these matters or to answer any questions that you may have.

Respectfully,



David B. Cohen



David S. Fortney



Mickey Silberman

Bcc: B. Kelly
J. Kinderdine



October 27, 2017

Via Email to Dowd.Tom@dol.gov

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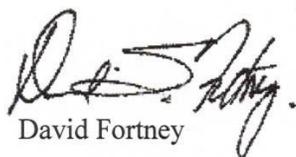
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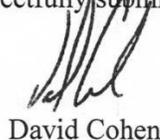
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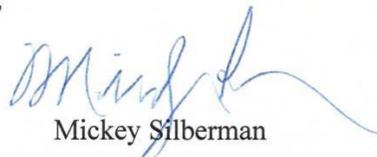
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