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Re: RIN No. 1250–AA05
ACLU Comments in Support of OFCCP's Proposed Regulations Prohibiting Discrimination on the Basis of Sex

Dear Ms. Carr:

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, gender identity, sexual orientation, disability, or national origin.

We write to comment in support of the Office of Federal Contract Compliance Programs' (OFCCP) Notice of Proposed Rulemaking to ensure nondiscrimination in employment on the basis of sex and to take affirmative action to ensure that applicants and employees are treated without regard to their sex. The current guidelines are outdated and we welcome OFCCP's efforts to update and strengthen the guidelines into regulations. Since the guidelines' promulgation in 1970 there have been numerous changes in laws and policies impacting women and LGBT individuals in the workplace. As the NPRM recognizes, the nature of sex discrimination has also changed. Explicit "male only" hiring policies are now rare, but employees continue to face less overt discrimination that nevertheless presents real barriers to equal opportunity, and the persistence of sex-based stereotyping by employers has led to discrimination including discrimination that affects LGBT individuals.

OFCCP's efforts to set forth the current applicable law, including developments and interpretations of existing law, will improve federal contractors' understanding and compliance with nondiscrimination policies, and resolve existing confusion based on outdated guidance. The ACLU applauds these efforts, and provides the following section-by-section recommendations below to further improve the regulations.

The ACLU supports OFCCP's recognition of the need to revise its guidelines and bring them into conformity with current law, including administrative interpretations.

We particularly appreciate the much-needed recognition that "discrimination and not just choices can lead to women with children earning less," and that "widely held social attitudes and biases" persist, inhibiting equal opportunity in the workplace. The discussion appropriately recognizes the ongoing gender wage gap and motherhood penalty, the stubborn persistence of pregnancy discrimination, pervasive sex stereotypes, and the unmet need for workplace accommodations for pregnant workers.

We specifically applaud the proposed rule's recognition that occupational segregation remains widespread. In addition to the sectors mentioned by the rule from which women are excluded, including construction and manufacturing, we note that women are disproportionately excluded, especially from leadership positions, in many fast-growing and lucrative sectors including technology, venture capital, and entertainment.[1] On the other hand, women and particularly women of color find themselves concentrated in sectors that have only recently gained tenuous access to basic wage and other labor protections, including notably home health care workers and other workers in caregiving sectors.[2] The rule should emphasize that sex-based stereotyping and other "less overt mechanisms" keep women's participation low in many sectors.

a. Disparate Treatment and Related Discussion: Section 60-20.2 General Prohibitions

We welcome the proposed rule's explanation of how disparate treatment based on sex operates. The ACLU has engaged in advocacy and litigation on behalf of women who face differential treatment and gender steering based on sex stereotypes in a range of industries and contexts. For example, we represented migrant women seafood processors who were steered into work that paid less and had less work available than their male colleagues.[3] We represented women who were shut out of the job of

[1] *See* CANDIDA BRUSH ET AL., BABSON COLLEGE, WOMEN ENTREPRENEURS 2014: BRIDGING THE GENDER GAP IN VENTURE CAPITAL (Sept. 2014) (reporting decline in proportion of women partners in venture-capital firms from 10% in 1999 to 6% in 2014, while only 2.7% of companies that receive venture capital funding have a woman CEO); Vikas Bajaj, *A Striking Absence of Women*, NY TIMES (Oct. 12, 2013), http://www.nytimes.com/2013/10/13/opinion/sunday/a-striking-absence-of-women.html?_r=0 (noting that nearly half of publicly traded technology companies have no women on their boards, compared with 36% of the largest public companies in the country); MARTHA M. LAUZEN, CENTER FOR THE STUDY OF WOMEN IN TELEVISION AND FILM, SAN DIEGO STATE UNIVERSITY. BOXED IN: EMPLOYMENT OF BEHIND-THE-SCENES AND ON-SCREEN WOMEN IN 2013-14 PRIME TIME TELEVISION (2014); MARTHA M. LAUZEN, CENTER FOR THE STUDY OF WOMEN IN TELEVISION AND FILM, SAN DIEGO STATE UNIVERSITY, THE CELLULOID CEILING: BEHIND-THE-SCENES EMPLOYMENT OF WOMEN ON THE TOP 250 FILMS OF 2014 (2015); STACY L. SMITH ET AL., USC ANNENBERG , GENDER INEQUALITY IN POPULAR FILMS: EXAMINING ON-SCREEN PORTRAYALS AND BEHIND-THE-SCENES EMPLOYMENT PATTERNS IN MOTION PICTURES RELEASED BETWEEN 2007-2013, (2014).

[2] *See, e.g.,* Home Care Association of America et al. v. Weil, No. 15-5018 (brief of Women's Rights, Civil Rights, and Human Rights Organizations and Scholars as *amici curiae* in support of Defendants-Appellants Seeking Reversal, filed D.C. Cir. Feb. 27, 2015).

[3] Consent Decree, Covarrubias v. Capt. Charlie's Seafood, Inc., No. 2:10-CV-10-F (E.D.N.C. Mar. 17, 2010) (litigated jointly by the ACLU, ACLU of North Carolina, and North Carolina Justice Center) *available at* http://www.aclu.org/files/assets/consent_decree_0.pdf. Under a consent decree, their employer agreed to steps to ensure compliance with wage and hour laws as well as anti-discrimination laws, in addition to other remedies such as back pay and costs. The court granted final approval of class action settlement on Nov. 21, 2011, and entered a consent decree in the case on December 22, 2011. A summary of the case is available at http://www.aclu.org/womens-rights/north-carolina-seafood-ompanyimplement-gender-non-discrimination-policy-after-guest.

school custodian, a virtually all-male job category in New York City.[4] And we have been involved in cases in which women were excluded, pushed out, or limited to certain sub-sectors in industries ranging from retail[5] to policing.[6]

Based on our years of experience litigating on behalf of these and other women excluded from occupational sectors and opportunities on the basis of sex, we believe it would be useful for the rule and its accompanying discussion to address additional barriers that constrain women's opportunities in many sectors, including applying different standards for hiring men and women, hiring women only on a token basis in sectors from which women are overwhelmingly excluded, requiring more experience when promoting women as opposed to men, steering or pigeonholing women into feminized sub-sectors of an industry, and keeping women in lower-paying jobs within sectors based on sex stereotyping and other disparate treatment. We support the proposed rule's discussion of gender steering in connection with wage discrimination in its discussion of § 60-20.4 on page 5255, but we believe that a discussion of this *de facto* job segregation is appropriate not only with respect to wage discrimination, but also with respect to the broader disparate treatment of workers based on gender as contemplated by § 60-20.2(b).

b. Need for Recognition in Discussion of Discrimination Upon Return to Work: Section 60—20.5

While providing a much-needed focus on the barriers faced by pregnant workers and the need for workplace accommodations, the "Reasons for Amending the Current Sex Discrimination Guidelines" section omits mention of some manifestations of discrimination commonly faced by new mothers returning to the workplace *after* having babies due to the pregnancy-related condition of lactation. The return to work is frequently a flashpoint for discrimination against new mothers, who may face hostility, sex stereotypes related to their roles as mothers, and failure to accommodate the need to express breast milk at work. For example: When Angela Ames returned from maternity leave, she tried fruitlessly for several hours to find a place to pump breast milk. After being told that she couldn't use the company's lactation room because the company needed three days to processes her "paperwork," she sought help from her department head, who told her "I think it's best that you just go home to be with your babies."[7] Similarly, when Dominicia Venters disclosed to her manager as she was preparing to return to work after her maternity leave that she was breastfeeding and would need a place to pump breast milk, she was told that "they had filled her spot."[8]

As these examples illustrate, discrimination against new mothers, often associated with requests for accommodations related to breastfeeding, reflects precisely the type of stereotypes that the Pregnancy Discrimination Act (PDA) aimed to address—namely, the view that women who become pregnant and have children will (or should) prioritize family over work, that women's proper role is that of homemaker rather than breadwinner, and that being a new mother is incompatible with full workplace participation.

[4] United States v. Brennan, 650 F.3d 65 (2d Cir. 2011). This litigation was initiated by the Department of Justice after it learned that the workforce in question was more than 99% male. The record in the case indicated that women were discouraged from applying for this job, including on the basis of sex stereotypes about women and about what the job required.

[5] *See* Brief for the American Civil Liberties Union and the National Women's Law Center et al.as Amici Curiae Supporting Respondents, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 805231.

[6] *See, e.g.*, Lochren v. County of Suffolk, 344 Fed. Appx. 706, 706-707 (2d Cir. 2009) (describing litigation and trial undertaken on behalf of female police officers).

[7] *See* Ames v. Nationwide Mutual Ins., 760 F.3d 763, 766 (8th Cir. 2014) (holding plaintiff had not been constructively discharged), *cert denied* 135 S.Ct. 947 (Jan. 12, 2015).

[8] *See* EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 427 (5th Cir. 2013) (reversing summary judgment for defendant and holding that discrimination on the basis of lactation is sex discrimination under Title VII). *See also* Bockoras v. St. Gobain Containers, No. 2:13-cv-0334, Docket No. 44 (W.D. PA Mar. 6, 2014) (alleging that plaintiff was forced to pump breast milk under unsanitary conditions, harassed, and retaliated against (the company denied the allegations and the case resulted in a mutually agreed upon settlement)).

This was the view that was for decades codified in laws, court decisions, and employer policies such as forced maternity leave,[9] and it was precisely this view that Congress invalidated by passing the PDA.

We therefore recommend that the discussion section of the final rule be amended to add some recognition of these common obstacles, and of the need for equal treatment for women seeking lactation-related accommodations. As both the EEOC Guidance and the Request for Information on the Break Time for Nursing Mothers provision issued by the Department of Labor in 2011 correctly recognize, employers are obligated to treat requests for accommodations by lactating women the same as they treat similar requests by other employees who are not lactating but who are similar in their ability or inability to work, as failure to do so may violate Title VII.[10] The addition of these issues in the discussion accompanying the final rule will help put contractors on notice that discrimination against new mothers related to requests to accommodation for lactation is a common but frequently overlooked manifestation of prohibited sex discrimination.

c. Sex-Segregated Facilities: Section 60-20.2 General Prohibitions

We also support OFCCP's inclusion of provisions to make clear that discrimination against transgender employees constitutes discrimination on the basis of sex. In particular, the NPRM proposes that contractors must allow transgender employees access to the restrooms used by the gender with which they identify. OFCCP should not limit this important provision to restrooms. As other sections of the NPRM illustrate, contractors often provide sex-segregated facilities other than restrooms, such as changing facilities.[11] OFCCP should clarify that contractors must allow transgender employees access to *all* gender-appropriate sex-segregated facilities, not only restrooms.

d. Discrimination Based on Transition-Related Health Care: Section 60-20.2 General Prohibitions

We support the NPRM's firm prohibition against disparate treatment of employees who have had, or who desire, transition-related health care. However, OFCCP should replace the phrase "sex-reassignment surgery" with more affirmative language, such as "gender confirmation surgery." The former phrase perpetuates misconceptions that all transgender people need or want surgery, and that there is a particular procedure necessary to complete a person's gender transition or "sex reassignment." Conversely, "gender confirmation surgery" can refer to any of the several different surgical procedures that may or may not be

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[9] *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9, 645 (1974) (invalidating a mandatory pregnancy leave rule for teachers on constitutional grounds and noting that the invalid regulations "may have originally been inspired by . . . outmoded taboos" about pregnancy).

[10] *See* Dep't of Labor Wage and Hour Division Reasonable Break Time for Nursing Mothers (Request for Information from the public), 75 Fed. Reg. 80073, 80078 (Dec. 21, 2010) ("If an employer treats employees who take breaks to express breast milk differently than employees who take breaks for other personal reasons, the nursing employee may have a claim for disparate treatment under Title VII of the Civil Rights Act of 1964."); Office of Legal Counsel, Equal Emp't Opportunity Comm'n Notice No. 915.003, Enforcement Guidance, Pregnancy Discrimination and Related Issues (2014), available *at* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [hereinafter Enforcement Guidance on Pregnancy Discrimination] ("Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination... [B]ecause only women lactate, a practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based. For example, it would violate Title VII for an employer to freely permit employees to use break time for personal reasons except to express breast milk."). *See also* Statement of Chair Jenny R. Yang and General Counsel P. David Lopez on the Supreme Court's Ruling in Young v. UPS , *available at* http://www.eeoc.gov/eeoc/litigation/statement_young_v_ups.cfm (including "the application of the Pregnancy Discrimination Act to lactation and breastfeeding" among the aspects of the guidance unaffected by the decision). For further discussion of employers' obligation to accommodate pregnancy and related conditions, *see*, pp 10-11 below.

[11] *See, e.g.*, § 60–20.2(b)(9) (contractors "must provide separate or single-user restrooms or changing facilities" for the sexes).

part of an individual's gender transition. Alternatively, the phrase "sex-reassignment surgery or other processes or procedures" could be replaced with "transition-related health care," which encompasses both gender confirmation surgery as well as non-surgical treatment, including hormone therapy and other medical services that can help align a person's body with their gender identity. We encourage OFCCP to adopt more inclusive language that will better effectuate the purpose of the new prohibition.

e. Treating unmarried female parents differently than unmarried male parents: Section 60-20.2(b)(3)

We support the recognition that differential treatment of unmarried female parents is prohibited. This not only reflects longstanding case law under Title VII,[12] but also ties into a trend, which is currently the focus of some of our litigation, of religiously-affiliated institutions firing women who become pregnant outside of marriage. For example, in *Maudlin v. Inside Out*, we brought suit on behalf of an unmarried worker who alleged that she was fired from her cafeteria job at a day care center after she divulged that she was pregnant.[13] The complaint cited a pattern of hostile treatment toward other unmarried women who became pregnant while working at the organization. Our work in this area emphasizes that no one should be singled out, shamed, or fired from their job for having a baby, regardless of marital status, and further, that an organization's religious affiliation should not give it free rein to ignore laws against sex discrimination.

f. Employment practices that may have an adverse impact on women: Section 60-20.2(c)

We support the recognition that not just selection criteria, but also employment policies or practices such as lack of appropriate physical facilities in the workplace can have a disparate impact on women. We further agree with the elimination of the defenses for failure to offer such facilities of "unreasonable cost or lack of space," through the replacement of current Section 60-20.3(e), to bring the provision in question into compliance with current law. The recognition of potential violations in this area will have a particular impact in sectors from which women have traditionally been excluded, such as construction, industrial work, and transportation. Providing adequate facilities to meet the specific needs of women can help open these sectors up to increased opportunity for equal participation.

We support the recognition that strength requirements that are not necessary for the job can have an unlawful disparate impact. We suggest broadening this discussion to include not only strength requirements but other physical agility tests that have a disparate impact on women and are not necessary to perform the job.[14]

We suggest adding, as a separate numbered item, the use of discriminatory, facially neutral recruiting practices, such as reliance on short-lists and word-of-mouth or tap-on-the-shoulder recruiting and promotion.[15] Such practices, which have the effect of limiting women's participation and advancement,

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[12] *See, e.g.*, Philips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Title VII prohibits employer from hiring men with preschool age children while refusing to hire women with preschool age children).

[13] *See Jennifer Maudlin v. Inside Out*, ACLU (Oct. 22, 2013), https://www.aclu.org/reproductive-freedom-womens-rights/jennifer-maudlin-v-inside-out-inc-et-al.

[14] *Women Police and Physical Agility Tests*, ACLU, https://www.aclu.org/women-police-and-physical-ability-tests (last visited Apr. 7, 2015); ACLU, KNOW YOUR RIGHTS: PHYSICAL AGILITY TESTS FOR POLICE DEPARTMENTS AND SWAT TEAMS, *available at* https://www.aclu.org/sites/default/files/assets/kyr_physicalabilities-rel1.pdf (last visited Apr. 7, 2015).

[15] *See, e.g.*, United States v. Brennan, 650 F.3d at 70, 78 (holding that allegedly discriminatory recruiting practices such as "limited advertising and word-of-mouth referrals" may be prohibited by Title VII if they cause a disparate impact).

affect women in sectors ranging from municipal jobs, as in the *Brennan* case described above, to the entertainment industry[16], to the construction industry.[17]

We further suggest adding a numbered item that makes clear that an example of a policy or practice that may have a disparate impact includes (number) a policy of failing to make reasonable accommodations, including alternative job assignments, modified duties, light duty, or other accommodations to workers affected by pregnancy or pregnancy-related conditions. The language used in this section should mirror the language that we advocate for in Section 60-20.5(b)(5) (see discussion below). OFCCP may wish to reference the Supreme Court's statement that contractors should avoid accommodations policies that "impose a significant burden on pregnant workers," by "accommodate[ing] a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[18] It is important to include this in the disparate impact section of the rule in addition to the section "Discrimination on the Basis of Pregnancy, Childbirth or Related Medical Conditions," to ensure contractors understand their obligations to avoid denying accommodations pursuant to policies that have a disparate impact on workers affected by pregnancy and pregnancy-related conditions. For the same reasons, we suggest cross-referencing this obligation in Section 60-20.5(c)(3) Disparate impact, and making clear that disparate impact violations with respect to pregnancy and pregnancy-related conditions will be found where a contractor maintains a light-duty or other accommodations policy that has a disproportionate impact on people affected by pregnancy and related conditions.

Section 60—20.3 Sex as a Bona Fide Occupational Qualification

We recommend explaining in plain language within § 60-20.3, the section addressing sex as a bona fide occupational qualification, that the BFOQ defense is "written narrowly" in Title VII, and the Supreme Court "has read it narrowly," and that it reaches "only special situations," where sex discrimination is "reasonably necessary to the normal operation of the particular business".[19] The final rule should clarify that a valid BFOQ must be applied based on an employee's gender identity in order to ensure that transgender employees will be eligible for positions open to the gender with which they identify.

Section 60—20.4 Discriminatory Compensation

a. Providing a clear general statement on equal opportunity with respect to wages & other forms of compensation: Section 60—20.4

The ACLU supports OFFCP's inclusion of more comprehensive and updated guidance addressing sex discrimination in wages and other terms of compensation, incorporating the requirements of Executive Order 11246 and implementing regulations, the new Equal Pay report, and the anti-retaliation Executive

[16] DARNELL HUNT & ANA-CRISTINA RAMON, RALP J. BUNCHE CENTER FOR AFRICAN AMERICAN STUDIES AT UCLA, 2015 HOLLLYWOOD DIVERSITY REPORT: FLIPPING THE SCRIPT, 1-2, 54, (Feb. 2015), *available at* http://www.bunchecenter.ucla.edu/wp-content/uploads/2015/02/2015-Hollywood-Diversity-Report-2-25-15.pdf (explaining that "individual stakeholders in the [entertainment] industry (typically white and male) look to surround themselves with other individuals with whom they feel comfortable, … [who] tend to think and look like the former, thereby reproducing an industry culture that routinely devalues the talents of minorities and women") (reporting that women are underrepresented 8 to 1 among film directors and that film studio senior management remains 83% male).

[17] *See* TIMOTHY CASEY, THE WOMEN'S LEGAL DEFENSE AND EDUCATION FUND, STILL EXCLUDED (Mar. 2013), *available at* http://www.legalmomentum.org/sites/default/files/reports/still-excluded.pdf; SUSAN EISENBERG, WE'LL CALL YOU IF WE NEED YOU (1998).

[18] *Young v. United Parcel Serv., Inc.*, No. 12-1226 (Mar. 25, 2015), slip. op. at 21 (U.S. Mar. 25, 2015)..

[19] UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (internal quotation marks omitted)(citing, *inter alia*, Dothard v. Rawlinson, 433 U.S. 321, 332-337 (1977)).

Order 13665. The ACLU has long advocated for these Executive Orders and regulations, and applauds OFCCP's efforts here to integrate them here as part of the sex discrimination regulations.

Despite long recognition of the scope and impact of the wage gap and discrimination at every stage of employment, pay equity problems are persistent, and merit the ongoing commitment of resources for their eradication. Women working full time, year round in 2013 were paid only 78 cents for every dollar paid to their male counterparts. African American women and Latinas suffered from wage gaps even more severe. African American women earn just 64 cents for every dollar earned by white, non-Hispanic men; Latinas' earnings stood at 54 cents for every dollar earned by white men.[20] In 1963, when the Equal Pay Act became law, women were making 59 cents for every dollar earned by men.[21] Thus, in the span of over fifty years, we have erased almost half of the average disparity between men's and women's wages, but the remaining gap is still unacceptable.

Race and ethnicity-based wage inequality is similarly entrenched in the American workplace. In 2013, African Americans employed full-time were paid a median weekly total of $629, and Latino workers received a median salary of only $578 compared to $802 for white workers.[22] In the past 4 years alone, the median weekly salary for white workers saw an increase of more than double that of African Americans.[23] No significant progress has been made in narrowing these wage gaps over the past forty years. In 1975, the median annual pay of African American men equaled 74.3% of that of white men; by 2013, the gap had narrowed less than one percent, to 75.1%.[24] During the same period, wages paid to Latino men as a percentage of those paid to white men actually dropped, from 72.1% in 1975 to 67.2% in 2013.[25]

Renewed efforts to address stagnant pay disparities have never been more important than they are today, as the country emerges from difficult economic conditions. There is now a record 72 million women in the workforce, and these women increasingly are taking on the role of primary and co-breadwinners in their households. In 40% of households with children under the age of 18, mothers are the sole or primary source of income. That figure jumps to 65% of families, when including women who are the primary or co-breadwinners.[26] By 2020, women's participation rate in the workforce is expected to be greater than

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[20] National Women's Law Center calculations from U.S. Census Bureau, Current Population Survey, 2014, *available at* http://www.census.gov/hhes/www/income/.

[21] *E.g., The Wage Gap Over Time*, NAT'L COMM.ON PAY EQUITY (Sept. 2014), http://www.pay-equity.org/info-time.html.

[22] U.S. Department of Labor, Bureau of Labor Statistics, *Median weekly earnings of full-time wage and salary workers by selected characteristics*, Current Population Survey, Table 37 (February 26, 2014), *available at* http://www.bls.gov/cps/cpsaat37.htm.

[23] *Compare Labor Force Statistics from the Current Population Survey*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (Feb. 26, 2014), http://www.bls.gov/cps/cpsaat37.htm, *with* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2010 8 (July 2011) (Table 1 Median usual weekly earnings of full-time wage and salary workers, by selected characteristics, 2010 annual averages), *available at* http://www.bls.gov/cps/cpswom2010.pdf.

[24] *CompareThe Wage Gap, by Gender and* Race, INFOPLEASE (2007), http://www.infoplease.com/ipa/A0882775.html. *with* INSTITUTE FOR WOMEN'S POLICY RESEARCH, FACT SHEET: THE GENDER WAGE GAP BY OCCUPATION 2013 AND BY RACE AND ETHNICITY (April 2014), *available at* http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-and-by-race-and-ethnicity-2013/at_download/file.

[25] *Compare The Wage Gap, by Gender and* Race, INFOPLEASE (2007), http://www.infoplease.com/ipa/A0882775.html. *with* INST. FOR WOMEN'S POLICY RESEARCH, FACT SHEET: THE GENDER WAGE GAP BY OCCUPATION 2013 AND BY RACE AND ETHNICITY (April 2014), *available at* http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-and-by-race-and-ethnicity-2013/at_download/file.

[26] Wendy Wang, et al., *Breadwinner Moms*, PEW RESEARCH CENTER (May 29, 2013), http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/5/#appendix-1-additional-charts.

that of men.[27] Because of the importance of women's earnings to their families, the gender compensation gap is undermining the economic security of a majority of American families.

Race and ethnicity-based disparities likewise affect more and more families as our population demographics shift. Census Bureau figures show that from 2000 to 2013, the percentage of the resident U.S. population that are racial and ethnic minorities grew across the board.[28] As the total population becomes more diverse so does the workforce. As of June 2012, minorities made up 36 percent of the labor force and that number will continue to rise.[29]

Other factors contribute to pay disparities including ongoing occupational segregation and punitive pay secrecy policies. Occupational segregation—the fact that women and men are concentrated in different occupations and different sub-sectors within occupations and even within workplaces—also stands as a barrier to equal pay by keeping women in disproportionately low-paid jobs compared to men. Jobs that are predominantly done by women are often devalued precisely because they are "women's work." In addition, punitive pay secrecy policies and practices also act as a significant obstacle to achieving equal pay. Such policies perpetuate pay discrimination by making it difficult for individuals to learn about unlawful pay disparities and fearful to inquire.

According to a survey by the Institute for Women's Policy Research, more than sixty percent of private sector workers reported that their employer either prohibits or discourages employees from discussing their wages.[30] OFCCP proposed a rule implementing Executive Order 13665 to eliminate pay secrecy policies held by contractors. Additionally, however, to the extent that a pay secrecy policy interferes with enforcement of the proposed Sex Discrimination regulation by keeping workers from discovering pay disparities, it constitutes sex discrimination covered by Executive Order 11246—OFCCP should therefore clarify that these policies conflict with both Executive Orders 13665 and 11246.

In addition for those women who are able to surmount these barriers, and are able to discover pay disparities, and bring their cases to court, some interpretations of the Equal Pay Act make it harder to hold employers accountable for discrimination. For example, despite a Supreme Court ruling to the contrary,[31] employers have continued to argue, and some courts accept, a "market forces" theory to justify pay differentials.[32] This continues even where other courts have cautioned against using a "market forces theory" to justify discrimination.[33] Other courts have authorized employers to pay male employees more than similarly situated female employees based on the higher prior salaries enjoyed by those male

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[27] Crosby Burns, et al., *The State of Diversity in Today's Workforce*, CENTER FOR AMERICAN PROGRESS (July 2012), https://www.americanprogress.org/issues/labor/report/2012/07/12/11938/the-state-of-diversity-in-todays-workforce/.

[28] Latinos went from constituting 12.55% to 17.1% of the population; Native Americans and Alaskan Natives from .95% to 1.2% of the population; African Americans from 12.69% to 13.2%; and Asian Americans from 3.76% to 5.3%. *State & County QuickFacts. Data derived from Population Estimates and American Community Survey*, U.S. CENSUS BUREAU (last updated Mar. 31, 2015), *available at* http://quickfacts.census.gov/qfd/states/00000.html.

[29] Burns, et al., *supra* note 27 at 2.

[30] ARIANE HEGEWISCH, CLAUDIA WILLIAMS & ROBERT DRAGO, INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (2014), *available at* http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file (revealing that 60 percent of male employees and 62 percent of female employees report that their employers either prohibit or discourage the discussion of wages) [hereinafter 2014 IWPR PAY SECRECY REPORT].

[31] In Corning Glass Works v. Brennan, 417 U.S. 188 (1974), the Supreme Court rejected the argument that "market forces" – that is, the value assigned by the market to men's and women's work, or the greater bargaining power that men have historically commanded – can constitute a "factor other than sex," since sex is exactly what those forces have been based upon.

[32] *See* Merillat v. Metal Spinners, Inc., 470 F.3d 685, 697, 697 n.6 (7th Cir. 2006); Tavernier v. Healthcare Management Associates, Inc., No. 0:10-01753-MBS, 2012 WL 1106751, at *11 (D.S.C. Mar. 30, 2012); Greer v. Univ. of South Carolina, 2012 WL 405773, at *8 (D.S.C. Jan. 20, 2012); Schultz v. Department of Workforce Development, 752 F.Supp.2d 1015, 1028 (W.D. Wis. 2010).

[33] *See, e.g.*, Glenn v. Gen. Motors Corp., 841 F.2d 1567 (11th Cir. 1988) (rejecting employer's "market forces" defense to pay discrimination that the plaintiffs previously earned lower salaries prior to promotion).

workers without any analysis as to whether the prior salary itself was inflated because of sex discrimination.[34] Some have abandoned any effort to determine whether the employer's purported "factor other than sex" is related to the qualifications, skills, or experience needed to perform the job.[35] Still other courts have read the "factor other than sex" defense to mean *any* factor—legitimate or not—other than sex.[36] In fact, the Seventh Circuit has gone a step further to presume that a "factor other than sex" "need not be 'related to the requirements of the particular position in question,' nor must it even be business-related."[37]

Wage discrimination not only hurts workers and their families who are living on less money than they have rightfully earned, but it also hurts employers and the nation's overall economy. For example, wage discrimination against women and minorities may restrict employers' pool of the most talented candidates and dilute an appropriate reward structure, leading to less efficient outcomes. In addition, some researchers estimate that the economy would have produced additional income of over $447 billion in 2013 if women alone received equal pay.[38] Therefore, anti-discrimination measures, like prohibitions on punitive pay secrecy policies, data collection under the Equal Pay Report and other civil rights protections, will help promote economic efficiency and growth, as well as fairness and equality.

By providing a clearer general statement on compensation, helping to narrow misinterpretations of the law, and providing examples on the kinds of practices contractors should review and analyses they should undertake to assess their compliance, OFCCP is putting contractors on notice which will allow OFCCP to be better assisted in receiving the necessary information to perform their enforcement related work and reduce compensation disparities.

b. New Definition of Compensation: Section 60—20.4

We support OFCCP's proposal to update the definition of "compensation" to bring it in line with the current understanding of compensation in other areas of OFCCP's enforcement. The revised definition states:

> payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and contributions to retirement.[39]

This new definition is a more inclusive, modern, and accurate reflection of what employees receive in exchange for work than the term "wage schedules" that currently exists in the guidelines. This new definition also assists in implementation of the new anti-retaliation Executive Order, which prohibits government contractors from penalizing or otherwise discriminating against any employee or applicant

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[34] *See, e.g.*, Sparrock v. NYP Holdings, Inc., No. 06 Civ. 1776, 2008 WL 744733, at *16 (S.D.N.Y. Mar. 4, 2008) Covington v. Southern Illinois University, 816 F.2d 317, 322-23 (7th Cir. 1987). *But see*, Glenn v. Gen. Motors Corp., 841 F.2d 1567 (11th Cir. 1988).

[35] *See, e.g.*, Glunt v. GES Exposition Servs., Inc., 123 F. Supp. 2d 847, 859 (D. Md. 2000) (*citing* Mazzella v. RCA Global Commc'ns, Inc., 814 F.2d 653 (2d.Cir. 1987); Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981).

[36] *See, e.g.*, Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989) (describing how the "factor other than sex" defense "embraces an almost limitless number of factors, so long as they do not involve sex").

[37] *Fallon*, 882 F.2d at 1211 (citing Covington v. Southern Illinois University, 816 F.2d 317, 321-22 (7th Cir. 1987)). *See also* Markel v. Bd. of Regents of the Univ. of Wisconsin Sys., 276 F.3d 906, 913 (7th Cir. 2002).

[38] ARIANE HEGEWISCH ET AL., INST, FOR WOMEN'S POLICY RESEARCH SEPARATE AND NOT EQUAL? GENDER SEGREGATION IN THE LABOR MARKET AND THE GENDER WAGE GAP (2010), *available at* http://www.iwpr.org/publications/pubs/separate-and-not-equal-gender-segregation-in-the-labor-market-and-the-gender-wage-gap.

[39] Discrimination on the Basis of Sex, 80 Fed. Reg. 5246, 5255 (proposed Jan. 30, 2015) (to be codified at 41 C.F.R. pt 60-20).

for discussing or inquiring about their compensation. This ensures that the most current requirements are adhered to by contractors and the most up to date laws and regulations are reflected in this new guidance.

c. Guidance on variety of ways pay discrimination may occur: Section 60—20.4 (a)-(c)

For enforcement, OFCCP's proposal to conduct independent compliance reviews so that it may stop pay discrimination even if individual employees have no knowledge of it will ensure that even where employees may stay quiet for fear of retaliation by their employer, the employer will nonetheless be held accountable for pay discrimination. This also aligns with the goal of OFCCP's proposed rule to implement Executive Order 13655 by prohibiting punitive pay secrecy policies in federal contracts.

With respect to voluntary compliance, OFCCP's proposal to include examples of pay discrimination—for example, by contractors limiting career advancement opportunities based on sex—and clarifying the relevant factors in examining "similarly situated" employees, will make it easier for employers to self-correct discrimination and for courts to identify it.

We appreciate the steps OFCCP has taken to broaden the compensation provision, and we provide the following recommendations to further strengthen OFCCP's efforts. First, we recommend explaining that factors other than sex must be job-related and consistent with business necessity and actually account for the discrimination that occurred. Second, in § 60-20.4, the proposed rule should clarify that punitive pay secrecy policies that interfere with enforcement of wage discrimination protections violate antidiscrimination law. Third, OFCCP should also exercise its authority under Executive Order 11246 to encourage employers to take affirmative steps toward achieving equal pay by advising employers on developing more transparent pay practices and clear methodologies for setting pay.

Section 60—20.5 Discrimination on the Basis of Pregnancy, Childbirth, or Related Medical Conditions

a. Incorporation of Pregnancy Discrimination Act: Section 60-20.5(a)

As discussed above, we support the general goals of "clarifying when pregnant workers are entitled to workplace accommodations" to "protect pregnant employees who work for Federal contractors from losing their jobs." As the NPRM appropriately recognizes elsewhere and the proposed rule itself reflects, these critical clarifications apply not only to *pregnant* employees, but also to all employees who are affected by conditions *related to* pregnancy. The revised definition in the proposed rule 60-20.5(a) appropriately clarifies that such conditions "include, but are not limited to lactation; disorders directly related to pregnancy, such as preeclampsia (pregnancy-induced high blood pressure), placenta previa, and gestational diabetes; symptoms such as back pain; complications requiring bed rest; and the after-effects of a delivery."

b. Need for Inclusion of Accommodations for Lactation and other Related Conditions: Section 60—20.5(a)

We are pleased that these common conditions are specifically listed. While there is value in listing each of them, we note that there is a particular need to include lactation explicitly in this list, given that some courts have erroneously held that lactation is *not* covered under Title VII.[40] These courts have erroneously

[40] *See, e.g.*, Martinez v. N.B.C., 49 F. Supp. 2d 305, 309-10 (S.D.N.Y. 1999); Wallace v. Pyro Mining, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991) (*per curiam*); Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1492 (D. Colo. 1997) ("[B]reast-feeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA."); Barrash v. Bowen, 846 F.2d 927, 931-32 (4th Cir. 1988) (opining without citation that the PDA only covered medical conditions that were "incapacitating" and therefore did not cover an employee's request for extended leave in order to breastfeed); *See* Notter v. North Hand Prot., No. 95-1087, 1996 WL 342008, at *5 (4th Cir. June 21, 1996) (unpublished) (rejecting that dictum).

revived the logic of *General Electric Co. v. Gilbert*[41] that pregnancy itself was not covered by Title VII. As the Supreme Court has recognized, in enacting the PDA, Congress repudiated the holding as well as the reasoning of *Gilbert* and adopted the reasoning of the dissent.[42] Indeed, the legislative history indicates that the PDA was intended to prohibit discrimination against women based on "the whole range of matters concerning the childbearing process."[43] Thus, as courts including the Fifth Circuit have begun to recognize, and the EEOC Guidance correctly reflects, conditions that are sex-linked, such as lactation, should be considered covered.[44] Including lactation in the definition in section 60-20.5(a) will therefore promote clarity for employers on their legal obligations under Title VII with respect to discrimination on the basis of lactation.

At the same time as it is essential to explicitly mention lactation, it is critical that the language "include but are not limited to" remain in the regulation in order to make clear that numerous other conditions that may not be explicitly listed (such as treatments related to infertility, the need to attend routine medical examinations, edema, etc.) are not excluded.

Because there has been considerable confusion regarding the applicability of Title VII to medical conditions beyond pregnancy itself, we note that there are several sections of the Notice that should be revised to better clarify the scope of employers' obligations to address conditions related to pregnancy. In several places both the discussion and the proposed rule itself refer to "pregnant workers" or "workers who are pregnant." In these instances, we recommend that the language be further clarified by referring instead to workers who are pregnant *or affected by pregnancy-related conditions*. The harassment section, 60-20.8(b), appropriately references "harassment based on pregnancy, childbirth, or related medical conditions." Other sections of the discussion and the proposed rule itself should be revised to conform to this formulation.[45]

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[41] 429 U.S. 125, (1976).

[42] *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678-679 & n.17 (1983); California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 277 n.6 (1987).

[43] H.R. Rep. No. 948, 95th Cong., 2d Sess. 5 (1978).

[44] *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991) (PDA prohibits discrimination on the basis of ability to become pregnant); EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 430 (5th Cir. 2013) (discrimination on the basis of lactation is covered under Title VII generally and as a "related medical conditions" under the PDA); Falk v. City of Glendale, No. 12-cv-00925-JLK, 2012 WL 2390556, at *4 (D. Colo. June 25, 2012);.Martin v. Canon Bus. Solutions, No. 11-CV-02565-WJM-KMT, 2013 WL 4838913, at *8 & n.4 (D. Colo. Sept. 10, 2013); Enforcement Guidance on Pregnancy Discrimination, *supra*, note 10 ("Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination... [B]ecause only women lactate, a practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based. For example, it would violate Title VII for an employer to freely permit employees to use break time for personal reasons except to express breast milk."); U.S. EEOC, *Statement of Chair Jenny R. Yang and General Counsel P. David Lopez on the Supreme Court's Ruling in Young v. UPS*, *at* http://www.eeoc.gov/eeoc/litigation/statement_young_v_ups.cfm (including "the application of the Pregnancy Discrimination Act to lactation and breastfeeding" among the aspects of the guidance unaffected by the decision). *See also, e.g., Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (holding termination of employee recovering from abortion was covered under PDA), *order clarified*, 543 F.3d 178 (3d Cir. 2008); *Harper v. Thiokol Chem. Corp*., 619 F.2d 489, 492 (5th Cir. 1980) (employer's requirement that employees return to a regular menstrual cycle following the birth of a child violates the PDA and constitutes sex discrimination because it exclusively affects women); *Hall v. Nalco Co.*, 534 F.3d 644, 648-9 (7th Cir. 2008) (termination for taking time off to undergo in vitro fertilization was actionable under the PDA, since "[e]mployees terminated for taking time off to undergo [in vitro fertilization]—just like those terminated for taking time off to give birth or receive other pregnancy related care—will always be women").

[45] Examples where the formulation should be revised include:

- In the proposed rule itself: 60-20.5(b)(5): "to a pregnant employee" should read "to an employee who is pregnant or affected by a related medical condition".
- Pg.5248, second column, para beginning "In addition"— refers to "clarifying when pregnant workers are entitled to workplace accommodations" to "protect pregnant employees who work for Federal contractors from losing their jobs." Both clauses should refer to "*workers who are pregnant or affected by related medical conditions*"

c. Limiting a pregnant employee's job duties based on pregnancy or requiring a doctor's note in order for the employee to continue employment while pregnant: Section 60-20.5(b)(3)

We welcome the recognition that employers may not require doctors' notes of pregnant workers when they do not require them of other workers. We suggest eliminating the phrase "when doctors' notes are not required for employees who are similarly situated." As many scholars have made clear, it is often difficult for pregnant workers to identify any "employees who are similarly situated" – this problem is known as "the similarly situated trap."[46] Beyond that problem, there should be no need for pregnant workers to identify such comparators for this purpose. Employers should not demand doctors' notes for pregnant women to work their regular jobs, period, except insofar as the employer demands that *all* other workers provide periodic doctors' notes or undergo regularly scheduled medical exams. This is an important issue, because requiring pregnant workers to provide doctors' notes just to keep working their regular jobs without modification is impermissible disparate treatment and a burden on pregnant employees.

d. Failure to provide reasonable workplace accommodations to employees: Section 60-20.5(b)(5)

The discussion accompanying this section appropriately addresses the need for contractors to provide reasonable workplace accommodations for pregnant workers who need them. We suggest adding that, frequently, contractors will be obligated to provide such accommodations to workers with pregnancy-related impairments pursuant to their obligations under federal disability law, as explained in the EEOC's recent Guidance cited in footnote 72 of the NPRM. Currently, the NPRM at 5257 and footnote 72 seems to suggest that pregnant employees cannot be covered by the Americans with Disabilities Act and its corollary in the Rehabilitation Act; however, the EEOC has clarified that, in the wake of the 2008 ADA Amendments Act and accompanying regulations, many pregnant workers will be entitled to reasonable workplace accommodations for their temporary, pregnancy-related impairments. To avoid confusion and maintain consistency among the federal agencies' materials, the rule should refer contractors to their obligations to pregnant workers under the disability laws and to the EEOC's discussion thereof.

In addition, we believe that the explanation in the proposed rule itself would be more helpful if it included additional examples of common reasonable accommodations, such as allowing pregnant workers to work with lifting restrictions, permitting the drinking of water, light duty (a common version of modified duty), and the ability to pump breast milk. For consistency and clarity, we also recommend that the rule itself refer to "other employees whose abilities or inabilities to perform their job duties are similarly affected, *including but not limited to employees with on-the-job injuries and employees with disabilities including temporary disabilities*."

- Pg.5251 Third column: "some pregnant workers face a serious and unmet need for workplace accommodations…" should reflect "*workers who are affected by pregnancy and/or related conditions*…"
- Pg.5256, third column: many examples refer to "the pregnant worker"—again, we want to be sure that this is interpreted to apply to workers who are *either* pregnant *or* impacted by pregnancy-related conditions. E.g. "a contractor that permits light-duty assignments who are unable to work their regular assignments due to on-the-job injuries or disabilities must also permit light-duty assignments for employees who are unable to work their regular assignments due to pregnancy" should read "due to pregnancy *or related medical conditions*."
- Pg.5257, columns 2-3: Same comment. "requires that the contractor similarly provide such accommodations to pregnant employees" should read "*to employees affected by pregnancy or related medical conditions*."

[46] Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 33 (2009) (internal quotations omitted).

Last week, the Supreme Court confirmed that, under Title VII, employers may not use accommodations policies that leave pregnant workers out or that impose, in their words, a "significant burden" upon pregnant workers.[47] It is important that OFCCP make clear that the same is true for federal contractors. Contractors may not "accommodate[] a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."

Moreover, in addition to discussing Supreme Court's decision interpreting Title VII and the Pregnancy Discrimination Act, OFCCP's final rule on pregnancy discrimination should make clear that contractors will generally be obligated to make accommodations for limitations arising out of pregnancy. Executive Order 11246's prohibition of sex discrimination explicitly includes an obligation requiring federal contractors and subcontractors to take affirmative action to ensure applicants are employed and treated during employment without regard to sex. Employers have traditionally used pregnancy as an occasion to push women out of work, including by refusing to make accommodation for pregnancy, and this treatment continues. Refusal to accommodate pregnancy can thus enhance and perpetuate occupational segregation. Pursuant to Executive Order 11246, OFCCP should address the need to provide reasonable accommodation for pregnancy not only as a nondiscrimination measure, but as a form of affirmative action aimed at breaking down barriers to women's acceptance and advancement in the workplace. This affirmative obligation complements and reinforces the Supreme Court's recent statements to the effect that employers may not place significant burdens on pregnant workers by excluding them from accommodations offered to most other workers who need them.

e. Leave related to pregnancy, childbirth, or related medical conditions and accompanying discussion: Section 60-20.5(c)

We applaud the clarification that leave may not be denied or provided differently on the basis of sex, including the guarantee of paid sick leave for pregnancy, childbirth, or related medical conditions, and the requirement that job-guaranteed family leave be provided on the same terms for men and women. We further applaud the recognition that insufficient or no medical or family leave may have a disparate impact on the basis of sex and that any leave policies that are shown to have a disparate impact must be shown to be job related and consistent with business necessity. Much research has documented the impact of the lack of adequate paid leave (both sick and parental leave) on low-income workers, and particularly women.[48] Moreover, employers are broadly unaware of the requirements of equal treatment under these policies, and many provide leave on an unequal basis to women and men, even accounting for time needed for recovery from childbirth.[49] A recent study commissioned by DOL found that just over one-third of employers (35.1 percent) offer paid *maternity* leave to most or all employees, whereas one-fifth of employers (20 percent) offer paid *paternity* leave to most or all employees. A separate survey of private employers with 50 or more employees (an employer sample deemed to be covered by the requirements of the Family and Medical Leave Act (FMLA)) found that, on average, employers offer more than the statutorily required 12 weeks of job-guaranteed leave for women after the birth of a child (13.8 weeks) but offer less than the required 12 weeks of job-guaranteed leave for spouses or partners of women following the birth of a child (10.9 weeks). Indeed, even companies that are held up as exemplary in terms of their workplace practices routinely offer fewer weeks of "paternity" leave than "maternity" leave. Application of these principles of basic fairness will greatly improve contractor compliance.

Section 60—20.6 Other Fringe Benefits

[47] *Young v. UPS*, No. 12-1226, slip.op. at 21 (S. Ct. Mar. 25, 2015).
[48] *See, e.g.*, SARAH FASS, NATIONAL CENTER FOR CHILDREN IN POVERTY, PAID LEAVE IN THE STATES: A CRITICAL SUPPORT FOR LOW-WAGE WORKERS AND THEIR FAMILIES (March 2009), *available at* http://www.nccp.org/publications/pdf/text_864.pdf.
[49] *See* BARBARA GAULT ET AL., INST. FOR POLICY RESEARCH, PAID PARENTAL LEAVE IN THE UNITED STATES: WHAT THE DATA TELL US ABOUT ACCESS, USAGE, AND ECONOMIC AND HEALTH BENEFITS 29 (June 2014), *available at* http://www.iwpr.org/publications/pubs/paid-parental-leave-in-the-united-states-what-the-data-tell-us-about-access-usage-and-economic-and-health-benefits.

a. Denial of Fringe Benefits on the Basis of Sex: Section 60-20.6

The NPRM makes explicit that employers may not discriminate on the basis of sex with regard to fringe benefits, such as medical insurance. The ACLU applauds the inclusion of this language, and provides the following recommendation to OFCCP to strengthen this provision in two key ways.

First, the final rule should make explicit that contractors may not condition fringe benefits on the sex of an employee's spouse. For example, a contractor discriminates on the basis of sex by providing fringe benefits to employees' different-sex spouses or domestic partners but not similarly situated same-sex spouses or domestic partners. As the EEOC recently held, such plans discriminate "*because* of sex, since such coverage would be provided if [a female employee] were a woman married to a man" but not if she were married to a woman.[50] Protecting the employees' same-sex spouses and dependents is critical to realizing the promise of nondiscrimination on the basis of sex and sexual orientation.

Second, the final rule should expressly prohibit contractors from providing health insurance plans for their employees that discriminate against transgender people by denying insurance coverage for medically necessary treatment for gender transition. Unfortunately, some health insurers target the transgender population for denial of services that would otherwise be covered for non-transgender people under the same plan. For example, a discriminatory health insurance plan might deny coverage for hormone therapy if used for gender transition but allow coverage for the same therapy if used to treat menopausal symptoms. Such discriminatory exclusions of transition-related health care have no basis in medical science[51] and discriminate because of sex.[52] OFCCP should ensure that the employees of federal contractors receive the health care that is medically appropriate as determined by their doctors, not private insurance companies.

Section 60—20.7 Employment Decisions Made on the Basis of Sex-Based Stereotypes

a. Sex Stereotyping as it relates to steering and exclusion of women from jobs, sectors, and industries, based on sex stereotypes about women and about the jobs in question: Section—20.7(a)

The proposed rule's substantive provision and accompanying discussion on sex stereotyping, including the examples listed in § 60-20.7, are welcome, but omit some prevalent examples of common sex stereotyping that should be addressed. We urge OFCCP to add a discussion of sex stereotyping as it relates to steering and exclusion of women from jobs, sectors, and industries, based on sex stereotypes about women and about the jobs in question. This type of job classification and exclusion based on sex stereotypes extends beyond the discrimination based on caregiving, discussed on page 5259. For example, in a long-running case we litigated concerning school custodians (an overwhelmingly male job), our female clients were told that the job was "a man's work" that women might not be able to "handle,"

[50] Cote v. Wal-Mart Stores East, LP, Final Determination, EEOC Charge No. 523-2014-00916 (Jan. 29, 2015); *see also* Hall v. BNSF Ry. Co., No. C13-2160 RSM, 2014 WL 4719007, at *3(W.D. Wash. Sept. 22, 2014) (denying motion to dismiss Title VII sex discrimination claim against employer who "pays spousal health coverage" only "where a male employee is married to a female spouse and where a female employee is married to a male spouse"); Foray v. Bell Atl., 56 F. Supp. 2d 327, 329-30 (S.D.N.Y. 1999); *cf.* In re Levenson, 560 F.3d 1145, 1147 (9th Cir. 2009) (denial of benefits for same-sex spouse of federal public defender constitutes discrimination on the basis of sex or sexual orientation).

[51] *See, e.g.*, Dep't of Health and Human Services Departmental Appeals Board Decision No. 2576 at 20 (May 30, 2014), *available at* http://www.hhs.gov/dab/decisions/dabdecisions/dab2576.pdf (finding "a consensus among researchers and mainstream medical organizations that transsexual surgery is an effective, safe, and medically necessary treatment for transsexualism").

[52] *See, e.g.*, COMMONWEALTH OF MASSACHUSETTS OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION, DIVISION OF INSURANCE BULLETIN 2014-03 (June 20, 2014), *available at* http://www.mass.gov/ocabr/docs/doi/legal-hearings/bulletin-201403.pdf (relying on state-law prohibitions against sex discrimination to conclude that "denying medically necessary treatment based on an individual's gender identity or gender dysphoria is prohibited sex discrimination under Massachusetts law").

because custodians were expected to know "how to run the boiler and … how to shovel snow…. run a snow plow" and drive a stick shift.[53]

b. Sex Stereotyping as it relates to nonconformity with sex-role expectations: Section—20.7

As the EEOC has recognized consistently,[54] discrimination based on an employee's nonconformity with sex-role expectations by being in a relationship with a person of the same sex is impermissible discrimination based on sex stereotypes. Such stereotypes are equally harmful to employees who are not currently in a relationship with a person of the same sex, but who have been in such a relationship previously or wish to be in one. We encourage OFCCP to strengthen this provision by clarifying that it is unlawful to make employment decisions based on the stereotype that women should only be attracted to men (or that men should only be attracted to women), regardless of whether the employee is currently in a same-sex romantic relationship.

Section 60—20.8 Harassment and Hostile Work Environments

We welcome the proposed rule addressing sexual harassment. Women workers—particularly those in low-wage jobs and in nontraditional fields—and LGBT workers face high rates of sex-based harassment at work, but often do not report it for fear of retaliation. OFCCP's proposal to add § 60-20.8 to address the pervasiveness of sex-based harassment and acknowledge it as a significant barrier to women's entry into nontraditional fields is an important reflection of reality. Because sex-based harassment takes various forms, OFCCP's specification that harassment "because of sex" should be broadly interpreted ensures that the rule will reach the types of harassing behavior that interfere with an individual's ability to feel safe at work. And its proposal to incorporate the Equal Employment Opportunities Commission's (EEOC) Guidelines related to sexual harassment will add much needed clarity for employers regarding their obligations to protect against and respond to sexual harassment in the workplace.

OFCCP should make employers' obligations clear by stating that an employer may be vicariously liable for the harassment perpetrated by lower-level supervisors with the authority to take tangible employment actions (such as hiring, firing, or demoting). This is consistent with Supreme Court precedent and would resolve inconsistencies in courts' interpretations of employer liability for supervisor harassment. OFCCP should likewise explain that an employer is liable for harassment by coworkers if it was negligent in addressing the harassment; that is, if it knew or had reason to know about the harassing conduct and failed to stop it. Lastly, OFCCP should elaborate on what constitutes harassment against individuals based on gender identity or transgender status by stating that it includes intentional and repeated use of a former name or pronouns that are inconsistent with an employee's gender identity.

We also note that discrimination against workers who are the victim of gender-based harassment or violence, including domestic violence and stalking, is disparate treatment and encourage the rule to make this clear as well.

Conclusion

[53] United States v. Brennan, , 650 F. 3d 65 (2nd Cir. 2011)(Dep. of Kim Tatum taken Feb. 11, 2003).

[54] *See, e.g.*, Sayyad v. Johnson, EEOC Doc. 0120110377, 2012 WL 3614539, at *4 (EEOC Aug. 17, 2012) (Title VII prohibits adverse employment actions based on "sex-stereotype that women should only have sexual relationships with men"); Castello v. Donahoe, EEOC Doc. 0520110649, 2011 WL 6960810, at *3 (EEOC Dec. 20, 2011) (Title VII prohibits adverse employment action "motivated by the sexual stereotype that having relationships with men is an essential part of being a woman"); Veretto v. Donahoe, EEOC Doc. 0120110843, 2011 WL 2663401, at *3 (EEOC July 1, 2011) (Title VII prohibits adverse employment action "motivated by the sexual stereotype that marrying a woman is an essential part of being a man").

The ACLU appreciates this opportunity to submit comments on the proposed regulations prohibiting discrimination and contractors' affirmative obligations on the basis of sex. We look forward to our continued work with OFCCP to ensure swift implementation of the regulations.

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