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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



**EDITOR'S NOTE - PROTEST  
ALLEGATIONS**

Victoria Prussen Spears

**PROTEST ALLEGATIONS: DISCUSSIONS  
WITH OFFERORS - PART I**

Luke Levasseur and Michelle E. Litteken

**THE RISING TIDE OF SUSPENSIONS  
AND DEBARMENTS IN GOVERNMENT  
CONTRACTS - PART II**

Vincent J. Napoleon and Kevin T. Saunders

**POLICING BREACH OF CONTRACT WITH  
FRAUD: FOURTH CIRCUIT ADOPTS  
IMPLIED CERTIFICATION THEORY OF  
LIABILITY UNDER THE FCA**

J. Andrew Howard and Jessica L. Sharron

**FINAL ANTI-HUMAN TRAFFICKING  
FAR AND DFARS RULES CREATE  
SIGNIFICANT NEW SUPPLY CHAIN  
BURDENS AND LIABILITIES FOR  
GOVERNMENT CONTRACTORS**

Robert K. Huffman, Scott M. Heimberg,  
Kimberly A. Ball, and Carroll A. Skehan

**GENDER POLICIES AND PRACTICES  
UNDER THE MICROSCOPE  
FOR FEDERAL GOVERNMENT  
CONTRACTORS**

Colleen P. Lewis and Faith C. Whittaker

**IN THE COURTS**

Steven A. Meyerowitz

**LEGISLATIVE AND REGULATORY  
DEVELOPMENTS**

Steven A. Meyerowitz

**INDUSTRY NEWS**

Victoria Prussen Spears

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<b>Editor's Note—Protest Allegations</b> Victoria Prussen Spears	77
<b>Protest Allegations: Discussions with Offerors—Part I</b> Luke Levasseur and Michelle E. Litteken	79
<b>The Rising Tide of Suspensions and Debarments in Government Contracts—Part II</b> Vincent J. Napoleon and Kevin T. Saunders	86
<b>Policing Breach of Contract with Fraud: Fourth Circuit Adopts Implied Certification Theory of Liability under the FCA</b> J. Andrew Howard and Jessica L. Sharron	92
<b>Final Anti-Human Trafficking FAR and DFARS Rules Create Significant New Supply Chain Burdens and Liabilities for Government Contractors</b> Robert K. Huffman, Scott M. Heimberg, Kimberly A. Ball, and Carroll A. Skehan	97
<b>Gender Policies and Practices under the Microscope for Federal Government Contractors</b> Colleen P. Lewis and Faith C. Whittaker	101
<b>In the Courts</b> Steven A. Meyerowitz	104
<b>Legislative and Regulatory Developments</b> Steven A. Meyerowitz	109
<b>Industry News</b> Victoria Prussen Spears	111

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# Gender Policies and Practices under the Microscope for Federal Government Contractors

*By Colleen P. Lewis and Faith C. Whittaker\**

*In this article, the authors review the U.S. Department of Labor's proposed regulations updating the rules on sex discrimination for federal government contractors.*

The U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") has issued proposed regulations updating the rules on sex discrimination for federal government contractors covered by Executive Order ("EO") 11246.<sup>1</sup>

## **EXECUTIVE ORDER 11246**

EO 11246, as amended, bans discrimination and requires federal contractors and subcontractors to take affirmative action to ensure applicants and employees have equal opportunity for employment without regard to race, color, religion, sex, or national origin. Last August, the OFCCP issued a directive (DIR 2014-02) clarifying that sex-based employment discrimination includes bias based on gender identity and sexual orientation. Following the directive, the Department of Labor published a Final Rule amending the regulations applicable to covered government contractors requiring such contractors to treat applicants and employees without regard to sexual orientation and gender identity. The Final Rule became effective April 8, 2015.<sup>2</sup>

The stated purpose of the proposed regulations is to revise the OFCCP's guidelines regarding sex discrimination to align with other applicable laws, court decisions, and societal changes since they were originally issued in 1970. The proposed regulations address pay discrimination, sexual harassment, failure to provide workplace accommodations for pregnancy, and gender identity and family care-giving discrimination.

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<sup>1</sup> The text of the proposed regulations is available at <http://www.dol.gov/ofccp/SDNPRM/>.

<sup>2</sup> 41 C.F.R. Part 60-1; 60-2; 60-4; 60-50. The Final Rule "reaffirms" the position of the OFCCP that compliance evaluations and complaint investigations conducted by the agency include investigation of whether a company's policies and procedures discriminate against a person because of gender identity or transgender status. *Id.*

The stated focus of the proposed rules is noteworthy.

- Clarify that adverse treatment of an employee based on gender-stereotype assumptions about family caretaking responsibilities is prohibited discrimination.
- Clarify that leave for childcare also must be available for men on the same terms as it is for women.
- Confirm that contractors must provide workplace accommodations, ranging from extra bathroom breaks to light-duty assignments, to women affected by pregnancy, childbirth, and related medical conditions comparable to the accommodations that they provide to other workers similar in their ability or inability to work, such as with disabilities or workplace injuries.
- Clarify that compensation discrimination can result from job segregation or classification on the basis of gender, not just unequal pay for equal work.
- Confirm that contractors must provide equal benefits and equal contributions for male and female employees participating in fringe-benefit plans.
- Address both hostile work environment and quid pro quo sexual harassment, and identify as a best practice that contractors implement procedures to ensure an environment in which all employees are not harassed based on sex.
- Clarify that adverse treatment of employees because they do not conform with gender norms and expectations about appearance, attire, and behavior is unlawful sex discrimination.
- Clarify that discrimination based on an individual's gender identity is unlawful sex discrimination.
- Change the sex discrimination "guidelines" to regulations to make clear that they have the force and effect of the law.

## **THE OFCCP'S POSITION**

The OFCCP's position is that most contractors already comply with the proposed rules by adhering to the same or "similar" standards under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Pregnancy Discrimination Act ("PDA"), and other federal anti-discrimination laws. However, there are a few key differences between the proposed new rules and existing laws and cases. While Title VII does not explicitly prohibit discrimination based on sexual orientation or gender identity, the rules incorporate the Equal Employment

Opportunity Commission (“EEOC”)’s position that Title VII prohibits discrimination against applicants and employees based on their sexual orientation or gender identity.

### **PREGNANT EMPLOYEES**

The proposed rules also incorporate the EEOC’s position that the PDA requires employers to provide reasonable accommodations to pregnant employees including alternative assignments and/or light duty when circumstances so require. The U.S. Supreme Court issued a long awaited decision on whether an employer must provide light duty to pregnant employees on March 25, 2015. In *Young v. United Parcel Service, Inc.*, the Supreme Court reversed and remanded the Fourth Circuit which had affirmed a dismissal of the case against UPS. The Supreme Court rejected the absolute positions advanced by both Young and UPS. Rather, the Supreme Court adopted a “middle ground” leaving the door open where an employer still could attempt to defend a light duty policy by demonstrating that it had a legitimate, non-discriminatory, non-pretextual reason for a policy which does not allow for light duty to pregnant workers. Plainly, in light of the Supreme Court’s decision, and the OFCCP’s stance supported by the EEOC guidance, employers who provide some employees with light duty, but not to pregnant employees with temporary restrictions during their pregnancy, should carefully review their existing policy and evaluate whether any modifications are required.

### **“SIMILARLY-SITUATED”**

With respect to compensation analysis, the OFCCP’s position on “similarly-situated” employees for purposes of comparing equal pay for equal work is noteworthy. The OFCCP’s position, which is explicitly set forth in the proposed regulations, is that to be similarly-situated for purposes of a compensation analysis, workers simply need to be “comparable on some . . . factor, even if they are not similar on others.”

### **CONCLUSION**

According to the OFCCP, the proposed rules would benefit 65 million employees who work for federal contractors by updating the sex discrimination rules. It is clear that contractors will see questions during an OFCCP audit of their affirmative action plans which focus on company accommodations for pregnant workers, as well as company policies and practices addressing gender identity and gender norms. Additionally, contractors will undergo closer scrutiny of their compensation systems.