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April 2, 2015

Debra A. Carr, Director  
Division of Policy and Program Development  
Office of Federal Contract Compliance Programs  
200 Constitution Ave. NW, Room C-3325  
Washington, DC 20210

*Via online submission*

**RE: RIN 1250-AA05 – Discrimination on the Basis of Sex**

Dear Ms. Carr:

On behalf of The Leadership Conference on Civil and Human Rights, we write to express our strong support for the Office of Federal Contract Compliance Program's (OFCCP) proposal to update the Sex Discrimination Guidelines for federal contractors to align the standards with Executive Order 11246 and current law. The Leadership Conference provides a powerful unified voice for the various constituencies of the coalition: persons of color, women, children, individuals with disabilities, gays and lesbians, older Americans, labor unions, major religious groups, civil libertarians, and human rights organizations.

As discussed below, this rule will promote the critically important goal of reducing the instances of sex-based discrimination in the workforce in that it will:

- Benefit low-income women of color who disproportionately work in low-wage and physically-demanding jobs;
- Reduce instances of pay discrimination, narrow the wage gap, and hold employers accountable;
- Clarify employers' obligations to protect against and respond to sex-based harassment;
- Make clear that anti-LGBT bias is a form of unlawful sex-based discrimination;
- Advise employers that they may not use stereotypes about caregiving to deny women access to high-paying jobs or career advancement opportunities;
- Clarify that workplace leave must be provided equally to women and men;
- Help ensure that pregnant workers cannot be pushed out of their jobs or forced to choose between the health of their pregnancy and their paychecks; and
- Meet the needs of employers and employees.

Below, we discuss these points in more detail, as well as identify areas where the proposed rule can be made even stronger.

**The Proposed Rule Will Benefit Low-Income Women of Color who Disproportionately Work in Low-Wage and Physically-Demanding Jobs.** The OFCCP proposal to reduce and prevent sex-based pay discrimination will significantly benefit both white women and women of color who are paid considerably less than white males. While white women are paid 77 cents for every dollar paid to their male counterparts, African-American women make 64 cents for every dollar a white male makes, while Latina women only earn 54 cents for every dollar white males earn<sup>1</sup>. This wage disparity not only hurts women of color, it also harms their families. Women of color are more likely to be the sole provider of household income and live below the poverty line compared to their white counterparts.<sup>2</sup> Sex and race discrimination exacerbates the wage gap that can lead to poverty among low-income women of color.

Minority women constitute a small percentage of the workforce—African-American women make up 5.9 percent, Latinas consist of 6.5 percent, and immigrant women form 7 percent of employed workers<sup>3</sup>. However, low-income women of color are significantly more likely to be employed in service, low-income, and physically-demanding jobs<sup>4</sup>. African-American women make up roughly 29 percent of nurses and home health workers, while immigrant women comprise nearly 45 percent of the maid and housecleaning workforce<sup>5</sup>. Considering women of color are over-represented in low-wage and physically demanding jobs, they are more likely to need accommodations during pregnancy. When these accommodations are neglected or disallowed, it forces African-American and Latina women to choose between their health and income needed to support their growing families. Many women are not in the position to lose their primary source of income; therefore, they continue working in harmful environments that exacerbate the wage gap, sex discrimination, and occupational segregation.

**The Proposed Rule Will Reduce Instances of Pay Discrimination, Narrow the Wage Gap, and Hold Employers Accountable.** OFCCP's proposed §§ 60-20.3 and 60-20.4 include important clarifications of the law to prevent and reduce sex-based pay discrimination and therefore narrow the wage gap between women and men who work full time, year round, which as noted above, still remains at 78 cents on the dollar for non-Hispanic women, 64 cents for African-American women, and only 54 cents for Latina women<sup>6</sup>. OFCCP's proposal to update the definition of "compensation" brings it in line with the current understanding of compensation in other areas of OFCCP's enforcement, which 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. 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

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<sup>1</sup> "Accommodating Pregnancy on the Job: The Stakes for Women of Color and Immigrant Women." National Women's Law Center. May 2014. Retrieved from:  
[http://www.nwlc.org/sites/default/files/pdfs/the\\_stakes\\_for\\_woc\\_final.pdf](http://www.nwlc.org/sites/default/files/pdfs/the_stakes_for_woc_final.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

it easier for employers to self-correct discrimination and for courts to identify it. 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.

There are three ways that the equal pay portion of the proposed rule can be strengthened. First, we recommend explaining in plain language within § 60-20.3, the section addressing sex as a bona fide occupational qualification, that factors other than sex must be business related 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. Lastly, 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.

**The Proposed Rule Will Clarify Employers' Obligations to Protect against and Respond to Sex-Based Harassment.** Women workers—particularly low-income women of color 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 specify that it continues to be 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 all types of harassing behavior that interferes 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 and expectations even clearer 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 current gender identity.

**The Proposed Rule Makes Clear that Anti-LGBT Bias is a Form of Unlawful Sex-Based Discrimination.** The protections proposed in the NPRM for transgender and gender nonconforming workers make unequivocally clear that discrimination against individuals based on gender identity and gender-based stereotypes is sex discrimination in violation of Executive Order 11246 and Title VII. This is an accurate reflection of the state of the law and EEOC guidance. For too many transgender workers, going to work means not knowing whether they will be allowed to simply use the bathroom that aligns with their gender identity. OFCCP's proposed explanation that denying transgender employees access to the bathrooms they need is unlawful sex-based discrimination is critical for these workers and clarifies for employers that transgender workers are entitled to the same comforts at the workplace as non-transgender employees. This provision should be strengthened by extending the example to include all workplace facilities, and by providing that single-user restrooms may not be segregated by sex. Because § 60-20.3 contains an exception for bona fide occupational qualification (BFOQs), it should also clarify that a valid BFOQ must be applied based on an employee's gender identity.

As currently written, § 60.27(a)(3) sets out an example of illegal sex discrimination based on an employee's nonconformity to "sex-role expectations by being in a relationship with a person of the same sex." While we support this provision, we strongly urge OFCCP to clearly recognize the full scope of sex-based discrimination affecting LGBT workers by including "sexual orientation" along with gender identity in § 60-20.2(a), § 60-20.7(b), and § 60-20.8(b). This addition would better align the proposed rule with recent case law and EEOC decisions, and would bring needed clarity for employers and employees.

**The Proposed Rule Advises Employers that They May Not Use Stereotypes about Caregiving to Deny Women Access to High-Paying Jobs or Career Advancement Opportunities.** Sex-based stereotypes remain a serious obstacle to women's entry into and success in the workplace. Outdated assumptions about caregiving and women not being major earners for their families result in occupational segregation and fewer opportunities for women's career advancement. This, in turn, contributes to lower wages and reduced financial security in the short and long term for women. Harmful stereotypes also undermine women's access to higher-paying, nontraditional jobs, and contribute to their overall discrimination in the workplace. By advising federal contractors on their obligations not to discriminate against workers with caregiving responsibilities based on gender stereotypes; not to discriminate based on the assumption that a woman has or will have caregiving responsibilities; and not to distinguish on the basis of sex in apprenticeship or other training or career advancement opportunities, the proposed rule goes a long way toward addressing occupational segregation and the sex-based barriers that keep women from entering higher-paid, traditionally male fields.

We urge OFCCP to adopt more examples illustrative of the problems women face at work based on their position as caretakers. OFCCP should include additional examples of caregiver discrimination under § 60-20.7(c), such as employment decisions based on assumptions that women with caregiving responsibilities cannot succeed in a fast-paced environment, prefer to spend time with family rather than work, or are less committed to their jobs than full-time employees. Second, OFCCP should add that discussing current and future plans about family

during the interview process may be evidence of caregiver discrimination, which would align the rule with requirements under the Americans with Disabilities Act (ADA) not to make disability-related inquiries in the pre-offer stage. Just as the ADA operates to ensure that candidates with disabilities are judged on their qualifications for the job rather than their disabilities, incorporating this language into the proposed rule would likewise ensure that candidates are judged on their merits rather than their caregiving or potential caregiving responsibilities.

**The Proposed Rule Clarifies that Workplace Leave Must be Provided Equally to Women and Men.** By specifying that any paid leave must be provided equally to women and to men, OFCCP not only restates the clear requirement of Title VII and Executive Order 11246 but also makes an important statement that employer policies must not reinforce sex-based stereotypes about family caregiving. This is an important statement of the law that employers should heed because, currently, many employers often provide parental leave unequally. A recent study commissioned by the Department of Labor 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) 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. This amounts to disparate treatment under Title VII and E.O. 11246 and could potentially contribute to disparate impact analysis if women in such workplaces are subject to sex stereotyping as caregivers, suffer compensation discrimination, or are denied workplace opportunities because they have or are expected to take longer or more periods of leave.

**The Proposed Rule Will Help Ensure that Pregnant Workers Cannot Be Pushed Out of Their Jobs or Forced to Choose between the Health of Their Pregnancy and Their Paychecks.** Many women are able to work throughout their pregnancies without any need for changes at work, but some pregnant women require temporary accommodations to protect their health and safety on the job, particularly pregnant workers in physically demanding, inflexible, or hazardous jobs. These are often jobs that pay low wages or jobs traditionally held by men. With women’s income more critical to families than ever before, women cannot afford to choose between the health of their pregnancies and their paychecks. The Institute for Women’s Policy Research found that women of color experienced more difficulty paying for food for their families as compared to their white counterparts, with 31 percent of African-American women and 28 percent of Latina women reporting food insecurity concerns<sup>7</sup>. OFCCP’s proposal to incorporate the language of the Pregnancy Discrimination Act (PDA)—prohibiting

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<sup>7</sup> “Closing the Wage Gap is Crucial for Women of Color and Their Families.” National Women’s Law Center. November 2013. Retrieved from: [http://www.nwlc.org/sites/default/files/pdfs/2013.11.13\\_closing\\_the\\_wage\\_gap\\_is\\_crucial\\_for\\_woc\\_and\\_their\\_families.pdf](http://www.nwlc.org/sites/default/files/pdfs/2013.11.13_closing_the_wage_gap_is_crucial_for_woc_and_their_families.pdf).



discrimination on the basis of pregnancy, childbirth, or related medical conditions as forms of sex-based discrimination, and requiring contractors to treat people of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected, but similar in their ability or inability to work—appropriately recognizes that pregnancy discrimination constitutes sex discrimination, consistent with Title VII and EEOC interpretations. The proposed regulations acknowledge that this rule requires employers to make accommodations for workers with limitations arising out of pregnancy when employers make or are obligated to make accommodations for those similar in ability to work.

Last week, in *Young v. UPS*, the Supreme Court confirmed that, under Title VII, employers may not use accommodations policies that leave pregnant workers out or that impose, in the Court’s words, a “significant burden” upon pregnant workers that outweighs any proffered justification.<sup>8</sup> The Court indicated that employers impose such a significant burden when they “accommodate[] a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers.” The Supreme Court’s interpretation of the PDA in *Young* may helpfully inform OFCCP’s interpretation of Executive Order 11246 and reaffirms the proposed rule’s interpretation.

The 2008 passage of the Americans with Disabilities Act Amendments Acts (ADAAA), and the EEOC’s interpretation of the amendments, informs the analysis required by *Young*. The ADAAA increased protections for workers with disabilities by expanding the law’s coverage to include workers with temporary disabilities, which means that employers will now provide reasonable accommodations for many workers who experience pregnancy related impairments just as they accommodate most non-pregnant employees similar in ability to work to pregnant workers with temporary physical limitations. *Young* makes clear that employers who refuse to accommodate pregnant workers in this situation likely violate the PDA. As a result, employers will typically be required to provide these accommodations to pregnant workers as well under the standard articulated by the Court in *Young*. The rule proposed in the NPRM appropriately reflects this result.

Moreover, 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 related medical conditions, 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 and related conditions, 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

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<sup>8</sup> *Young v. UPS*, No. 12-1226 (Mar. 25, 2015), *slip op.*, at 21.

most other workers who need them, and empowers OFCCP to adopt the standard set out in the NPRM.

We also urge OFCCP to provide additional examples of disparate impact discrimination in the context of pregnancy, rather than addressing it solely in the context of leave, and to note that the examples provided are illustrative rather than exhaustive. The proposed regulations appropriately note that employment policies or practices of providing insufficient or no medical or family leave policies may discriminate on the basis of sex because of the disparate impact that such policies may have on pregnant women. While this is correct, it is important to note that other policies of contractors may also constitute pregnancy discrimination based on their disparate impact. For example, a policy of only offering “light duty” to employees with on-the-job injuries, which excludes pregnant employees, may have a disparate impact and thus would be impermissible unless shown to be job-related and consistent with business necessity.

**The Proposed Rule Meets the Needs of Employers and Employees.** Although the section protecting workers affected by pregnancy, childbirth, and related medical conditions from discrimination and requiring reasonable accommodations is a new provision for the Sex Discrimination Guidelines, its obligations are not new to contractors and so should not be burdensome to implement. The PDA has been the law of the land since 1978, and the EEOC has consistently interpreted it to require employers to treat pregnant workers in the same way they treat non-pregnant workers who are similar in their ability or inability to do work. Moreover, the EEOC provided further guidance as to employers’ accommodation obligations almost a year ago. Additionally, twelve states have laws explicitly requiring accommodations for pregnant workers, as do New York City, the District of Columbia, Philadelphia, Providence, and Pittsburgh. Covered contractors operating in these states can claim no doubt as to whether they were already required to make reasonable accommodations for limitations arising out of pregnancy, childbirth, and related medical conditions.

Accommodating pregnant workers is good for business and not financially burdensome on employers. Employers’ experiences accommodating people with disabilities show that most accommodations for pregnant workers are likely to be low or no cost. Thus, we support OFCCP’s estimation of burdens on employers. Many of the accommodations requested by pregnant workers, such as sitting rather than standing, avoiding heavy lifting, and taking breaks to go to the bathroom, are accommodations employers frequently provide to employees with disabilities. A survey by the Job Accommodation Network, a technical assistance provider to the Department of Labor’s Office of Disability Employment Policy, found that the majority of employers that provided accommodations to employees with disabilities reported that they did not impose any new costs on the employer. Of those employers that reported a cost for accommodations, the majority reported a one-time cost of \$500 or less. Significantly, because accommodations provided to pregnant workers are temporary, the costs associated with these accommodations, if any, are likely to be substantially less than the costs associated with providing accommodations to workers with permanent disabilities.

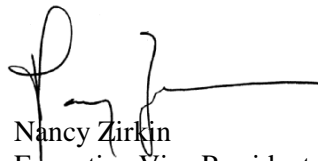
In addition, the experience of employers in accommodating workers with disabilities and in providing voluntary workplace flexibility programs strongly suggests that accommodating pregnancy has benefits for business that outweigh any accommodation costs. Employers that provide accommodations to workers with disabilities and voluntary workplace flexibility programs report a strong return on investment. The data show not only that the direct costs of, for example, altering start and end times, providing break time, honoring lifting restrictions, or redistributing particular physical tasks among members of a workplace team are typically minimal, but also that these practices result in bottom line benefits to employers, which include reduced workforce turnover, increased employee satisfaction and productivity, and savings in workers' compensation and other insurance costs. Making room for pregnancy on the job promises the same benefits.

We urge OFCCP to adopt final regulations on the prohibition against discrimination on the basis of sex swiftly and without any unnecessary delay. The proposed rule, applied to federal contractors and intended to update the outdated sex discrimination guidelines so that it will be perfectly clear that employers cannot discriminate on the basis on sex, will be an effective measure to combat pay discrimination, shrink the wage gap, end occupational segregation and sex-based harassment, provide equal access to career opportunities and equal opportunity for LGBT workers, and prohibit pregnancy discrimination. Thank you for considering our views. If you have any questions about these comments, please contact June Zeitlin, Director of Human Rights Policy at [zeitlin@civilrights.org](mailto:zeitlin@civilrights.org) or 202-263-2852 or Lisa Bornstein, Legal Director and Senior Legal Advisor at [bornstein@civilrights.org](mailto:bornstein@civilrights.org) or 202-263-2856.

Sincerely,



Wade Henderson  
President & CEO



Nancy Zirkin  
Executive Vice President