



September 16, 2019

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

Submitted via regulations.gov

RE: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, RIN 1250-AA09

Dear Mr. Fort:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 organizations to promote and protect the rights of all persons in the United States, we write to express our opposition to the Department of Labor ("the Department") Office of Federal Contract Compliance Programs' (OFCCP) proposed rule entitled, "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," RIN 1250-AA09, published in the Federal Register on August 15, 2019. The Leadership Conference calls on the Department of Labor to protect the civil rights and economic security of all working people and withdraw this proposed rule.

The Department did not provide the public with an adequate opportunity to comment on the proposed rule.

The Leadership Conference urges the Department to extend the comment period for a minimum of 60 additional days beyond the current deadline of September 16, 2019.¹ Given the breadth of the proposed rule and its potential legal implications, the 30-day comment period does not provide sufficient time for the public to have a meaningful opportunity to participate in this rulemaking. The proposed rule impacts not just current and prospective federal contractors, but also current employees, applicants, and potentially various federal, state, and local agencies. Those who will be affected by the proposed changes deserve the opportunity to engage in a robust rulemaking process, yet the Department provides no rationale or justification for a 30-day comment window. Failure to provide a meaningful opportunity to comment undermines the purpose of the notice and comment period. A deadline extension would give all stakeholders adequate time to comment on the full range of legal issues presented in the Notice of Proposed Rulemaking (NPRM) and analyze and

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discuss more in-depth the potential impacts and costs of the proposal, including its potential to unlawfully restrict opportunities for working people.

The proposed rule’s expansion of the religious exemption is not supported by law.

The Department’s proposed rule would undermine civil rights protections for millions of working people, making them more vulnerable to unlawful discrimination in the workplace. Although the proposed rule purports only to provide clarity on the scope and application of the religious exemption contained in Executive Order 11246—which prohibits those who do business with the federal government from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin—the rule greatly expands the exemption and thereby threatens the entirety of the Executive Order’s workplace protections.

Under the proposed rule, the religious exemption provided in Executive Order 11246 would be available to organizations and businesses that have not traditionally been considered “religious.” The proposed definition of “religious corporation, association, education institution of society” would permit organizations that only nominally hold themselves out to the public as carrying out a religious purpose to qualify for an exemption allowing them to engage in employment discrimination. This expansive definition is not supported by law.

The Department attempts to justify its broad definition by claiming to adopt the *Spencer v. World Vision* test for determining whether an entity qualifies for a religious exemption, but the definition in the proposed rule departs from the *World Vision* test in significant ways.ⁱⁱ First, the proposed rule would eliminate the *World Vision* requirement that the entity “not engage primarily or substantially in the exchange of goods and services for money beyond nominal amounts”ⁱⁱⁱ and allow for-profit companies to claim a religious exemption.^{iv} The Department, however, does not cite any case where a court extended a religious exemption to Title VII to a for-profit entity.^v Second, although the proposed rule would require that an entity be “organized for a religious purpose,” the rule does not set out a standard for making that determination.^{vi} Even more confusingly, the proposed rule abandons the *World Vision* requirement that the entity must be “engaged primarily in carrying out” the religious purpose for which it was organized.^{vii} Lastly, the proposed rule waters down the *World Vision* requirement that the entity seeking an exemption “holds itself out to the public as an entity for carrying out [a] religious purpose,”^{viii} by allowing a contractor to satisfy this requirement simply “by affirming a religious purpose in response to inquiries from a member of the public or a government entity.”^{ix} Essentially, an employer could make no public showing of a religious purpose, but still potentially qualify for an exemption if, when asked by a government agency like OFCCP, it indicated that it was religious.

The rewriting and misapplication of *World Vision* makes it more likely that the proposed exemption could be abused by contractors who would use it as a pretext for invidious and unlawful discrimination. The Department also proposes a broad interpretation of its proposed rule,^x which could further tip the scales in favor of employers. As a result, this proposed rule

could encourage contractors who are only nominally engaged in a religious purpose to abandon anti-discrimination protections that are critical to protecting the economic security and dignity of millions of working people.

The Department failed to consider how the proposed rule would harm working people, including LGBT people, women, religious minorities, and those who are not religious.

Freedom of religion is a well-protected constitutional right and an important American value, but under no circumstances should religious freedom be used to justify or encourage unlawful discrimination in the public sphere.^{xi} When creating a religious exemption, then, the government must meaningfully consider the impact it would have on non-beneficiaries—in this case, the approximately 20 percent of the U.S. workforce that is employed by a federal contractor.^{xii} Nowhere in this NPRM, however, does the Department even consider the harm this proposed rule would likely have on working people.

In particular, under this proposed rule, working people who identify as LGBTQ or as women would be made increasingly vulnerable to employment discrimination. Already, 37 percent of lesbian and gay people and 47 percent of bisexual people report experiencing discrimination at work because of their sexual orientation,^{xiii} and a 2015 survey found that 30 percent of transgender people faced mistreatment on the job because of their gender identity.^{xiv} This proposed rule would excuse this type of discrimination by a federal contractor who claims a religious exemption. For example, a federal contractor or grantee could assert that a religious exemption allows them to fire a woman who marries her same-sex partner or to fire an employee who they discover is transgender. Similarly, this proposed rule could allow federal contractors to claim a right to fire a woman who uses birth control or has an abortion, a woman who is pregnant and unmarried, or a woman who divorces her spouse.

Religious minorities and those who are nonreligious would also face harm. Executive Order 11246 already allows religious organizations to discriminate in hiring on the basis of religion, but the proposed rule would allow any federal contractor to fire or refuse to hire or promote a qualified person because they do not share an employer's religion or their specific religious beliefs.^{xv} The religious exemption, therefore, could harm people of faith by privileging an employer's exercise of religion over that of an employee. This result ultimately undermines the principle of religious freedom.

The Department failed to adequately consider the proposed rule's costs to working people and taxpayers, as well as to society as a whole.

Since the Department did not consider the potential harm of the proposed rule to employees, it also did not adequately consider the rule's potential costs. Executive Order 13563 requires the Department to meaningfully assess all the potential costs and benefits of a proposed rule and settle on an approach that imposes the least burden on society.^{xvi} Nowhere in the NPRM, however, did OFCCP acknowledge the potential costs of the proposed rule to working people

potentially impacted by the use of the expanded religious exemption, including in the form of lost wages and benefits, costs associated with searching for a job, and costs related to the negative mental and physical impacts of discrimination. The NPRM also does not address increased cost to taxpayers in the form of lost productivity from federal contract workers who experience discrimination on the job, or decreased performance from contractors that do not hire or retain the best talent or that experience employee turnover because of discriminatory employment practices.

No less important is the cost to our society of sanctioning the denigration of those who have been historically marginalized and vulnerable to discrimination. Our hard-won federal nondiscrimination provisions are meant to recognize our equal dignity. Using taxpayer dollars to reward employers who engage in employment discrimination undermines important values like fairness and equality, erodes trust in government institutions and enforcement agencies, like OFCCP, and limits personal freedom, including the ability to make personal decisions about the expression of one's identity.

The proposed rule's standard for challenging discrimination is not supported by Congressional intent or the agency's purpose.

Even as this proposed rule would subject more working people to potentially unlawful employment discrimination, it would make it more difficult for employees to challenge that discrimination. The Department proposes to apply a more stringent "but-for" standard of causation to determine whether a self-described religious organization has based its discriminatory employment decision on religion or on another protected characteristic included in Executive Order 11246, such as race, color, sex, sexual orientation, gender identity, or national origin.^{xvii} The application of a "but-for" standard, however, is inconsistent with Title VII, which applies a "motivating factor" test.^{xviii}

Under a "motivating factor" standard, an employee can show that an employment action was discriminatory by proving that it was partially motivated by a protected characteristic. The Department, however, seeks to allow that discrimination to continue unless an employee can establish that but for the protected characteristic, the discriminatory action would not have happened. Under this proposed rule, then, employment actions that discriminate against a person for being gay or a woman or a racial minority would be acceptable to OFCCP so long as religion was also a reason for the discriminatory employment action. This type of analysis severely undermines nondiscrimination protections and is inconsistent with both Congressional intent and the purpose of OFCCP to "protect workers, promote diversity and enforce the law."

Requiring federal contractors to adhere to our nondiscrimination laws does not require business owners to give up their religious beliefs, but it does require them to protect the constitutional and civil rights of all their employees. The proposed rule, however, has the opposite effect: it undermines the rights of federal contract workers and opens the door to government-sanctioned, taxpayer-funded discrimination. Accordingly, we urge the Department to withdraw the rule.

Thank you for your consideration of our views. Please contact Gaylynn Burroughs, Senior Policy Counsel, at (202) 548-7163 or burroughs@civilrights.org, if you have any questions.

Sincerely,



Vanita Gupta
President & CEO

ⁱ The Leadership Conference, together with 92 civil rights organizations, previously sent a letter to the Department requesting an extension of the deadline. Letter from Civil Rights Groups to Patrick Pizzella, Acting Secretary, U.S. Dep't of Labor and Craig Leen, Director, Office of Federal Contract Compliance Programs (Aug. 28, 2019), <https://civilrights.org/resource/ofccp-nprm-rin-1250-aa09-religious-exemption-letter-from-civil-rights-groups-to-extend-comment-period/>

ⁱⁱ See 84 Fed. Reg. 41677, 41682-84.

ⁱⁱⁱ *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam).

^{iv} 84 Fed. Reg. at 41683-84.

^v OFCCP notes in its NPRM that the religious exemption in Executive Order 11246 should be given a “parallel interpretation” with Title VII. *Id.* at 41678.

^{vii} See *id.* at 41682.

^{vii} *World Vision, supra*, note iii.

^{viii} *Id.*

^{ix} 84 Fed. Reg. at 41683.

^x *Id.* at 41691 (proposed § 60-1.5).

^{xi} Religious exemptions that burden or harm third parties may be unconstitutional under the Establishment Clause. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-10 (1985).

^{xii} U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, History of Executive Order 11246, <https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html> (last visited Sept. 13, 2019).

^{xiii} Human Rights Campaign Foundation, *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide* (2018), <https://www.hrc.org/resources/a-workplace-divided-understanding-the-climate-for-lgbtq-workers-nationwide>.

^{xiv} National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey*, <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

^{xv} 84 Fed. Reg. at 41679 (discussing the proposed definition of “particular religion”).

^{xvi} 3 CFR 13563 (2011).

^{xvii} 84 Fed. Reg. at 41685.

^{xviii} 42 U.S.C. § 2000e-2(m) (“Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”). The Department cites two cases in support of its proposed change, but neither case applied a “but-for” standard of causation to claims analogous to Executive Order 11246.