



December 9, 2021

Tina Williams
Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs
Department of Labor
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

Submitted via regulations.gov

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

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 230 organizations to promote and protect the rights of all persons in the United States, we write to express our support for the proposed rule, "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption" which the Department of Labor ("the Department") Office of Federal Contract Compliance Programs (OFCCP) published in the Federal Register on November 9, 2021. The proposed rule would rescind the final rule titled "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," which took effect on January 8, 2021.

The existing rule was an unwarranted expansion of the scope of the religious exemption in Executive Order 11246 that undermined civil rights protections for millions of working people, making them more vulnerable to unlawful discrimination in the workplace. The proposed rescission is therefore necessary to correct and prevent the harmful effects of the existing rule and to promote equity, fairness, and equal opportunity.

Background

Executive Order 11246 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. In 2002, the George W. Bush administration added a religious exemption to the order, under which a religious organization is permitted to prefer members of its religion in employment but is still prohibited from discriminating in employment on the basis of race, color, sex, sexual orientation, gender identity, or national origin. These organizations could be "a religious corporation, association, educational institution, or society."¹ An exemption like this could allow a religious institution to favor

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¹ Exec. Order No. 11,246, § 204(c), as amended by Exec. Order No. 13,279.

the hiring of members of their own faith in order to carry out religious activities, and still qualify for contract work with the federal government without running afoul of civil rights law.

On its own, this amendment to Executive Order 11246 was highly controversial. It came after Congress repeatedly rejected numerous legislative efforts to allow government-funded entities to use religion to discriminate in an employment setting.² The Leadership Conference opposed these types of measures at the time,³ and in 2014 we joined many of our partners in urging President Obama to rescind the religious exemption altogether.⁴ Religious freedom is among our most cherished civil and human rights — but it should not provide organizations the right to discriminate using taxpayer dollars.

The Trump administration, however, took the religious exemption even further. The existing rule unjustifiably expanded who qualified for an exemption and broadened the scope of the exemption itself, jeopardizing the important workplace protections against discrimination in Executive Order 11246 that cover more than one-fifth of the country’s workforce.

Recission of the Existing Rule is Necessary

The current rule broadened the breadth and scope of the religious exemption in Executive Order 11246, greatly expanding its potential to be used as a license to discriminate.

The rule greatly expanded who qualifies for an exemption by manipulating Title VII case law to devise new definitions to determine whether a contractor is a religious organization. Organizations that only nominally carry out a religious purpose can qualify for the religious exemption. And under the current rule, even “a for-profit employer whose purpose and character are not primarily religious could be eligible for the Title VII religious exemption.”⁵ As we explained in our September 16, 2019 letter in opposition to what is now the existing rule, this interpretation of Title VII is not supported by law.⁶

The existing rule also expanded the scope of what exempted religious organizations can do that would otherwise be prohibited by Executive Order 11246 and made it more difficult for employees to challenge discrimination where religion is used as a pretext for discrimination on another protected basis. The religious exemption in Executive Order 11246 is narrow. It states that its nondiscrimination protections “shall not apply to a” religious entity, “with respect to the employment of individuals of *a particular religion* to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused

² See, e.g., CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001), available at <https://www.congress.gov/bill/107th-congress/house-bill/7>; School Readiness Act of 2003, H.R. 2210, 108th Cong. § 116 (2003) available at <https://www.congress.gov/bill/108th-congress/house-bill/2210>; Workforce Investment Act Amendments of 2003, H.R. 1261, 108th Cong. § 123, available at <https://www.congress.gov/bill/108th-congress/house-bill/2210>.

³ <https://civilrights.org/resource/faith-based-initiatives-testimony-of-wade-henderson/>

⁴ <https://www.au.org/sites/default/files/LGBT%20EO%20sign-on%20letter%20add'l%20signers.pdf>

⁵ Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, 86 Fed. Reg. 62,115, 62,119 (Nov. 9, 2021).

⁶ <https://civilrights.org/resource/ofccp-religious-exemption-nprm-comment/>

from complying with the other requirements contained in this Order.”⁷ The Title VII religious exemption similarly has a religious exemption that allows religious employers to hire coreligionists, but not to discriminate against other protected classes. The existing rule, however, adopted a definition of “particular religion” that expanded the scope of the exemption and would allow federal contractors 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.

The existing rule even suggests that employers could use the Religious Freedom Restoration Act (RFRA) to avoid the prohibition on discrimination against other protected classes.⁸ This put LGBT people, women, nonreligious people, and religious minorities at particular risk of discrimination. The decision to get married, make reproductive health care decisions, or participate in or eschew religious practice in one’s personal life should not be an invitation to discrimination — and certainly not discrimination by an organization that contracts with the federal government.

Under the proposed rule, OFCCP will return to its prior approach of following Title VII case law, which will create clarity for contractors and employees. Rescinding the existing rule will also promote equity and fairness, equal opportunity.

The existing rule put LGBTQ people, women, the nonreligious, and religious minorities at increased risk of facing employment discrimination. A recent study found that 30 percent of LGBT employees and nearly 50 percent of transgender employees report being fired or not hired because of their sexual orientation or gender identity. Over half of those reporting this discrimination also reported that their employer or co-workers did or said something to indicate that the unfair treatment was motivated by religious beliefs.⁹ Similarly, working women continue to experience a wide range of workplace discrimination because of their gender,¹⁰ with some employers even refusing to employ women altogether based on a religious belief that women, or mothers, should not work outside of the home.¹¹ Nonreligious people frequently encounter discrimination in the workplace because of their beliefs. A 2019 survey found that more than one in five (21.7%) participants had negative experiences in employment because of their nonreligious beliefs.¹² The existing rule makes them as well as religious minorities more vulnerable by privileging an employer’s exercise of religion over that of an employee, undermining basic principles of religious freedom.

We commend the Department for issuing this proposed rule and taking this important first step towards restoring critical civil rights protections and curtailing this vehicle for discrimination. 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

⁷ E.O. 11,246 § 204(c) (emphasis added).

⁸ 85 Fed. Reg. at 79,355.

⁹ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>

¹⁰ See e.g., <https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/>; https://nwlc.org/wp-content/uploads/2019/09/FS_BossBill.pdf.

¹¹ See e.g. *Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986).

¹² Somjen Frazer, A. El-Shafei, & Alison Gill, *Reality Check: Being Nonreligious in America*, American Atheists (2020), available at www.secularsurvey.org.

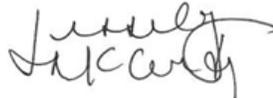


Thank you for your consideration of our views. In addition to comments received in response to this NPRM, we urge the Department to incorporate the record of the existing rule into the record for the proposed rescission. Please contact Gaylynn Burroughs, senior policy counsel, at burroughs@civilrights.org with any questions.

Sincerely,



Wade Henderson
Interim President and CEO



Jesselyn McCurdy
Executive Vice President of Government Affairs