



HUMAN
RIGHTS
CAMPAIGN®

April 14, 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

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

Dear Ms. Carr:

On behalf of the Human Rights Campaign's more than 1.5 million members and supporters nationwide, I write in response to the proposed revisions to the Sex Discrimination Guidelines for federal contractors administered by the Office of Federal Contract Compliance Programs (OFCCP). We applaud OFCCP's commitment to updating these critical guidelines and aligning contractor standards with both Executive Order 11,246 and existing law. These revisions will undoubtedly serve as a critical tool for combatting sex-based employment discrimination.

The Proposed Guidelines and LGBT Workers

As we discuss below, we especially appreciate the inclusion of protections on the basis of sex stereotyping and gender identity within the proposed guidelines. Despite recent advances in equality, lesbian, gay, bisexual, and transgender (LGBT) workers across the country still face discrimination on the job simply because of who they are. Currently, 29 states offer no explicit protections from discrimination on the basis of sexual orientation, and 32 states offer no explicit protections on the basis of gender identity. In the absence of uniform, nation-wide protections, many LGBT people who experience discrimination are left with little recourse. The OFCCP revised guidelines not only provide much needed protection for LGBT people working for federal contractors and subcontractors, they also set an important example of fair and effective personnel policies for private employers.

Anti-LGBT Bias is Unlawful Sex Discrimination

As revised, the proposed guidelines clarify that anti-LGBT bias is prohibited as a form of unlawful sex discrimination. We support the prohibition of discrimination against workers on the basis of gender identity or gender-based stereotyping as a form of sex discrimination. This interpretation will provide much needed support for transgender and gender nonconforming workers. In a recent survey, 47% of transgender workers reported experiencing discrimination on the job – in the hiring or promotion process or through termination.¹ This discrimination in employment compounds inequality many LGBT people experience in housing, education, and healthcare – contributing to increased incidence of poverty and homelessness for our community.

This interpretation is consistent with the current status of federal law and EEOC policy pertaining to sex discrimination.² Although the proposed guidelines provide the important clarification that transgender employees must have access to the bathroom facilities consistent with their gender identity, we support further strengthening of this provision to include all workplace facilities, and by providing that single user restrooms not be segregated by sex. Additionally, § 60-20.3 as proposed contains an exception for bona fide occupational qualification (BFOQs). We support further clarification that a valid BFOQ must be applied based on an employee's gender identity. We also recognize that, although the guidelines do provide an example of illegal sex discrimination on the basis of an employee's nonconformity to "sex-role expectations by being in a relationship with a person of the same sex" we support more explicit inclusion of discrimination based on sexual orientation by including "sexual orientation" along with gender identity in § 60-20.2(a), § 60-20.7(b), and § 60-20.8(b).

Obligation to Protect Against and Respond to Sex-Based Harassment

Sex-based harassment on the job is an invidious form of sex discrimination. Women and LGBT workers face high rates of sex-based harassment on the job. Too often, however, workers do not report these incidents due to fear of retaliation or termination. The proposed addition of § 60-20.8 to address sex-based harassment is a meaningful acknowledgement of the pervasiveness of this type of discrimination and the lived experience of so many workers. We urge that OFCCP's specification that harassment "because of sex" be broadly interpreted. Due to the many forms that sex-based harassment can take, a broad interpretation is necessary in order to ensure that the rule will provide real protections for workers. We applaud the proposed incorporation of the EEOC's Guidelines relating to sexual harassment into the guidelines. This will provide employers with increased clarity regarding their obligation to prevent and respond to such harassment in the workplace.

While the proposed additions will serve as helpful tools for workers and their employers, we also acknowledge that the guidelines will be more effective with additional clarification. We urge OFCCP to provide that employers may be held vicariously liable for harassment perpetrated by

¹ Brad Sears & Christy Mallory, The Williams Institute, Documented Evidence of Employment Discrimination & Its Effects on LGBT People, 4 (July 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/SearsMallory-Discrimination-July-20111.pdf>.

² See, e.g. *Jacqueline A. Cote v. Wal-Mart Stores East, LP*; EEOC Charge No. 523-2014-00916.

their employees who have the authority to make employment decisions. This additional clarification would not only provide additional weight to the guidelines, but would also be consistent with Supreme Court precedent involving employer liability for supervisor harassment. We also encourage OFCCP to provide additional guidance as to what harassment on the basis of gender identity or transgender status may look like – for example the intentional and repeated use of a former name or pronouns that are not consistent with a worker’s lived gender identity.

LGBT Workers Suffer from Pay Discrimination and will Benefit from a Narrowed Wage Gap

OFCCP’s proposed §§ 60-20.3 and 60-20.4 include important clarifications to the law, which will serve as a meaningful step towards preventing and reducing sex-based pay discrimination. The wage gap, which remains at 78 cents on the dollar is compounded for lesbian and bisexual female workers. These dual female headed households have the highest incidents of poverty of all types of couples.³ These couples experience an intersection of discrimination based both on sex as well as sexual orientation. The proposed update to the definition of “compensation” brings it in line with the current understanding of compensation in other areas within OFCCP’s prerule. By replacing the current term “wage schedules” that is currently used by the guidelines, the proposed language change modernizes the guidelines – making them a more inclusive and accurate reflection of what employees actually receive in exchange for their work. We also applaud the proposed independent compliance reviews. This will help to smoke out wage discrimination in instances where employees will refrain from reporting discrimination due to fear of retaliation. Such compliance reviews are consistent with the overall goal of OFCCP’s proposed rule to prohibit punitive pay secrecy policies in federal contracts.

Although we appreciate the proposed changes as an important first step, the wage gap portion of the proposed guidelines could be strengthened. We encourage OFCCP to encourage employers to take affirmative steps towards ending the wage gap and encouraging transparency in pay practices across the board.

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We appreciate the opportunity to provide these comments. Please do not hesitate to contact me if I can provide any additional information or clarification.

Sincerely,

Sarah Warbelow
Legal Director

³ Poverty in the Lesbian, Gay, and Bisexual Community, March 2009. Randy Albelda, M.V. Lee Badgett, Alyssa Schneebaum,, Gary J. Gates; The Williams Institute. Available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf>.