

***Third Thursday* – Crowell & Moring’s Labor & Employment Update**

February 19, 2015

The webinar will begin shortly. Please stand by.

Today's Presenters



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OFCCP

2015 Regulatory Initiatives

Today's Discussion

- OFCCP Sex Discrimination Regulations
 - Pay Equity
 - Pregnancy
 - Gender Identity
- OFCCP “Scheduling Letter”

OFCCP Primer

- Authority - Executive Order 11246
- Coverage
- Enforcement
- Remedies

SEX DISCRIMINATION REGULATIONS

Historical Context

- Regulations were adopted over 40 years ago to address sex-based discrimination in contractor policies and practices.
- The regulations are rooted in Title VII of the Civil Rights Act.
- Purpose of Proposed Rules is to update “outdated” guidelines and to reflect changes and developments in sex discrimination law.

Compensation – Section 60-20.4

- Preamble
 - 78 cents on the dollar
 - “While . . . discrimination may not be the cause of the entire pay gap, . . . the size of the gap is still unacceptable”
 - “Steering” and beyond – examples
 - “Case-specific approach to evaluating contractor pay systems” – “special obligation” to avoid discrimination and “monitor their pay practices”
 - Echoes of Directive No. 307

Compensation

- Proposed Rule
 - “Compensation” – definition from prior NPRM and consistent with new Scheduling Letter
 - “Similarly situated” – “tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors”
 - Need not be similar across all factors – more echoes of Directive No. 307 (pay analysis groups)
 - Absence of some factors – performance
 - May not grant or deny training and assignments that may lead to advancement to higher paying jobs

Compensation

- Proposed Rule
 - Performance review systems – if adverse impact, must show job related and consistent with business necessity
 - Not historically a focus of the OFCCP
 - Less impactful alternatives?

Pregnancy – Section 60-20.5

- Preamble
 - The number of pregnancy discrimination charges filed with the EEOC between FY1997 and FY2011 remained consistently significant
 - Research shows that pregnant workers have serious but unmet accommodation needs that are vital to their continued employment and the health of their children.

Pregnancy

- Proposed Rule prohibits discrimination because of or on the basis of pregnancy, childbirth or related medical conditions
 - Some examples of discrimination:
 - Refusing to hire an applicant because of her childbearing capacity
 - Requiring a doctor's note to allow a pregnant woman to continue working
 - Providing employees with healthcare that does not include coverage for pregnancy-related medical costs
 - Denying or providing leave differently on the basis of sex

Pregnancy

- Requires contractor to provide a range of reasonable accommodation for temporary limitations
 - Examples: bathroom and water breaks; light duty, alternative or modified job assignments
- Applies disparate impact analysis to leave policies that have an adverse impact on members of one sex
 - Requires review of policies by Contractors' compliance officers

Pregnancy

- Significance of the Proposed Rule
 - Adopts EEOC Guidance on Pregnancy Discrimination issued in 2014
 - Also adopts EEOC's position in *Young v. UPS*, which is pending before the Supreme Court

Sex Stereotyping – Section 60-20.7

- Preamble
 - “One of the most significant barriers” to “real equal opportunity”
 - *Price Waterhouse v. Hopkins*
 - Social science research: “widely held social attitudes and biases can lead to discriminatory decisions”
 - Even “more severe consequences” for transgender, lesbian, gay and bisexual applicants and employees

Sex Stereotyping

- Preamble
 - Addresses both disparate treatment and disparate impact theory
 - Prohibits stereotyping based on expectations regarding proper roles of men and women in caregiving

Sex Stereotyping

- Proposed Rule
 - Bars making “employment decisions on the basis of sex-based stereotypes, such as
 - How males and/or females are expected to look, speak or act”
 - Adverse treatment based on an individual’s failure to “comply with gender norms and expectations for dress, appearance or behavior”

Sex Stereotyping

- Proposed Rule
 - Outlaws sex-based stereotypes about caregiver responsibilities
 - Making assumptions that women employees will be less reliable or capable than men employees;
 - failing to grant male employees' childcare related leave requests;
 - harassing male primary caregivers

Gender Identity – Section 60.20-2

- Proposed Rule
 - Forbids discrimination against a transgender individual based on non-conformance with sexual stereotypes
 - Makes it unlawful to deny “transgender employees access to the bathrooms used by the gender with which they identify”
 - Outlaws treating an employee or applicant adversely in connection with sex-reassignment surgery

Harassment - Section 60-20.8

- Preamble
 - Harassment “continues to be a serious problem for women in the workplace
 - EEOC regulations adopted “virtually verbatim”
 - A list of suggested best practices that are “key to preventing harassment before it occurs”
 - Incorporation of *Ellerth/Faragher* principles for investigating complaints

Harassment

- Proposed Rule
 - Expands definition to include harassment based on “gender identity”
 - Harassment that is “not sexual in nature but that is because of sex” (including gender identity)

Harassment

- Proposed Rule
 - Lists best practices to “ensure an environment in which all employees feel safe, welcome, and treated fairly”
 - Communications
 - Training
 - Complaint resolution processes

BFOQ – Section 60-20.3

- Proposed Rule
 - Reorganizes prior references to BFOQ and adds a new section
 - Adopts the language from Title VII’s BFOQ Defense
 - An employer may hire employees on the basis of sex in those certain instances where sex “is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”

BFOQ

- Examples of discriminatory practices for which a BFOQ would be needed:
 - Restricting job classifications based on sex
 - Recruiting or advertising jobs for a member of one sex through the use of gender-specific terms
 - Distinguishing on the basis of sex in apprenticeships, formal or informal training programs and networking opportunities

Fringe Benefits – Section 60-20.6

- Preamble
 - Deletion of outdated statements of legal requirements regarding employer-provided insurance policies, etc.
 - Cites *City of Los Angeles v. Manhart*

Fringe Benefits

- Proposed Rule
 - Bars discrimination “on the basis of sex with regard to fringe benefits”
 - Broad definition of the term
 - Rejects the “greater cost of providing coverage” rationale

OFCCP SCHEDULING LETTER

Background

- Scheduling Letter and Itemized Listing initiate compliance review process
- OFCCP initially sought OMB approval for new Scheduling Letter in 2011
- Finally obtained approval in September, 2014
- Significantly changes what must be submitted
- OFCCP now conducting audits using new Scheduling Letter

Compensation

- Individualized compensation data required at outset of audit
- Not just base pay
 - “other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime”
- Data as of the date of the beginning of AAP year

Personnel Activity Data

- Adverse impact data of hires, promotions, terminations by each racial subgroup
 - Exponentially increases possible analyses
- Include applicants with unknown race or sex
 - Highlights any issues with data collection

VEVRAA/Sec 503 Compliance

- Must produce documentation to demonstrate compliance with the revised VEVRAA and Section 503 regulations
 - Results of the evaluation of the effectiveness of outreach and recruitment efforts
 - Documentation of all actions taken to comply with the audit and reporting systems requirements
 - Veteran and disabled applicants and hires analysis
 - Utilization analysis for individuals with disabilities
 - Hiring benchmark analysis for protected veterans

Selected Authorities

- DOL OFCCP Discrimination on the Basis of Sex, proposed 41 CFR Part 60-20, 80 Fed. Reg. 5246 (January 30, 2015)
<http://www.gpo.gov/fdsys/pkg/FR-2015-01-30/pdf/2015-01422.pdf>
- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
- *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978)
- *Young v. UPS*, Case No. 12-1226 (pending before the U.S. Supreme Court)

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