



April 14, 2015

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

Re: RIN 1250-AA05, Comments in Response to OFCCP's Notice of Proposed Rulemaking
Revising the Existing Sex Discrimination Guidelines for Federal Contractors

Dear Ms. Carr:

The National Partnership for Women & Families appreciates the opportunity to comment on the Department of Labor (DOL) Office of Federal Contract Compliance Programs' (OFCCP) Notice of Proposed Rulemaking (NPRM) to replace the agency's current Sex Discrimination Guidelines with substantially revised sex discrimination regulations. The proposed regulations comprehensively set forth federal contractors' obligations to ensure nondiscrimination in employment on the basis of sex. As an organization that has fought for more than four decades to promote equal employment opportunity and combat sex discrimination, the National Partnership strongly supports updating the guidelines with regulations that align with current law and legal principles. OFCCP should issue final regulations without delay.

OFCCP's proposed sex discrimination regulations represent a significant step forward for women and all workers. The proposed regulations elaborate on covered contractors' duties under Executive Order 11246 as amended by Executive Order 11375 and Executive Order 11478 ("EO 11246 as amended"). EO 11246 as amended prohibits select federal contractors from discriminating in employment decisions on the basis of sex and other protected characteristics. EO 11246 as amended also requires contractors to take affirmative action to ensure that they are providing equal opportunity in all aspects of employment.

The proposed regulations expand on the legal requirements stemming from EO 11246 as amended. OFCCP interprets EO 11246's nondiscrimination obligations in accordance with Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employers from discriminating on basis of race, color, religion, sex and national origin.¹ This means that OFCCP enforces the nondiscrimination obligations by following Title VII and the case law principles that have developed interpreting that statute.² Additionally, because the Equal Employment Opportunity Commission (EEOC) is the key federal agency responsible for

administering and enforcing Title VII, OFCCP generally defers to the EEOC's interpretations of Title VII.

OFCCP plays a vital role in combatting unlawful employment discrimination in the federal contracting workforce. The agency's jurisdiction reaches employers that employ at least 28 million workers, comprising nearly one quarter of the civilian workforce. Identifying and remedying sex discrimination is an important part of OFCCP's mandate. It is consistent with the government's interest in promoting economy and efficiency in contract procurement because it is ultimately less costly to the government and more efficient to contract with employers who are not excluding or discriminating against workers on the basis of sex.

Since the 1970 promulgation of the original sex discrimination guidelines under EO 11246 as amended, women have become an increasingly vital part of the workforce in every sector and position. Women now comprise nearly half the workforce and are primary or sole breadwinners in nearly 40 percent of families with children. Women of color and single women often play an even more pivotal role in their families' economic security. Women play a key role in the national economy as well. According to the White House Council of Economic Advisers, women's labor force participation impacted the rise in the United States' gross domestic product from 1970 to 2007 and women's earnings account for nearly all of the increase in families' income over the past thirty years.³ In short, having women in the labor force – working and earning to their full potential unencumbered by sex discrimination – is good for women, families and the nation.

Yet, as OFCCP has recognized, workers in the United States continue to face sex discrimination. Sex stereotypes, hostile work environments, compensation discrimination, pregnancy discrimination and a lack of family friendly workplace policies cumulatively harm women and all workers by impacting women's economic security, preventing full and fair workplace opportunities, stifling economic opportunities available to families, and harming the stability and growth of our national economy.

Against this backdrop, OFCCP asked in the NPRM whether issuing new regulations is the appropriate course. We believe emphatically that it is. By establishing regulations rather than guidelines, OFCCP makes clear that these updated provisions carry the full force and effect of law. Title VII has been amended four times since the current sex discrimination guidelines were issued in 1970; the Supreme Court has issued several significant decisions clarifying the rights of workers under nondiscrimination laws and outlining the avenues of legal inquiry for evaluating discrimination claims; and EO 11246 itself has been amended. Maintaining the current outdated guidelines, rather than issuing new regulations, would confuse and could ultimately silence workers who have experienced discrimination from lodging complaints. Moreover, it would unnecessarily burden contractors by requiring them to differentiate between outdated guideline provisions and current law; rescinding the guidelines without providing updated regulatory language would impose the same burden and cause the same confusion and uncertainty. Furthermore, although many of the adaptations in the proposed regulations have been made in the Federal Contract Compliance Manual (FCCM), the FCCM also contains outdated provisions and does not offer the clear statements of enforceable law that regulations do.

We commend OFCCP's thoughtful and clear approach in drafting the proposed regulations to account for the developments in the law over the past 45 years, and we appreciate that the analyses of legal scholars, social scientists and stakeholders such as the National Partnership and our allies in the civil rights, women's rights and LGBT rights communities have been incorporated into the agency's justification for the new rule. With OFCCP's objectives in mind, we offer observations and recommendations below to help OFCCP further strengthen the regulations. We urge you to consider our suggestions, incorporate them into a final rule, and promulgate and begin enforcing the final rule without delay. OFCCP's regulations and vigorous enforcement are essential to creating more equitable work environments that provide opportunities for all.

I. The rule's "general prohibitions" section clearly recognizes the many ways in which an individual may be discriminated against "on the basis of sex."

OFCCP's "general prohibitions" section reflects the impact that sex discrimination can have on people of all genders. The "general prohibitions" section, 60-20.2, frames the broad mandate that contractors are prohibited from discriminating against their employees on the basis of the sex and defines "sex" as including but not limited to, pregnancy, childbirth or related medical conditions, gender identity and transgender status.

Whereas the original guidelines were silent as to disparate impact theory of sex discrimination, the proposed rule explicitly and clearly explains the two methods through which discrimination can occur: disparate treatment and disparate impact. Disparate treatment is defined as intentional distinctions on the basis of sex in workplace decisions or outcomes. Disparate impact consists of facially-neutral employment policies and procedures that, when put into practice, have an adverse impact on the basis of sex. This added explanation will assist potential plaintiffs understand how to identify and articulate disparate impact claims. In terms of prevention, contractors may not realize that their "gender-neutral" policies could have a substantial discriminatory impact on protected groups.

The proposed rule references both forms of discrimination throughout and offers illustrations of specific fact patterns that may give rise to claims of disparate treatment, disparate impact or both. Section 60-20.2, in particular, provides helpful examples that illustrate the two ways that invidious discrimination can be evaluated. It explains that contractors are prohibited from treating employees differently on the basis of sex in job postings, job classifications, advancement protocols, seniority systems and retirement benefits. It clearly articulates prohibitions against treating employees differently based on marital and parental status, two aspects of discrimination that research shows is pernicious and detrimental to employees' compensation levels and advancement potential. And, importantly, the regulations acknowledge the challenges faced by transgender and transitioning employees in access to physical facilities, such as bathrooms or changing facilities.

Within the general prohibitions section, OFCCP asks for specific comments on whether its prohibitions on contractors' practices that create sex-based differences in retirement age as well as in "other terms, conditions, or privileges of retirement" are necessary. We believe that it is. Although treating women and men differently in terms of retirement age clearly amounts to disparate treatment, other forms of sex discrimination that impact women

throughout their working lives may result in women living in different conditions or receiving different benefits in retirement. A holistic approach to sex discrimination must account for and address these inequities.

The National Partnership also supports OFCCP's decision to state explicitly the now well-established Title VII principle that men and women must receive equal retirement benefits regardless of cost. Although, as OFCCP itself notes, the FCCM incorporates the Supreme Court holding under Title VII that men and women must receive equal retirement benefits, even if the cost of the benefits is more expensive for one sex,⁴ it is possible that contractors may still be applying the incorrect standard because of the distinction between the FCCM and guidelines language. The language in the proposed rule should eliminate any confusion once and for all.

II. The definition of *bona fide occupational qualification (BFOQ)* in the regulations must provide contractors with clear guidance for using BFOQ as a defense to charges of employment discrimination.

Title VII provides a defense for employers to use to refute charges of sex discrimination in cases where sex is a *bona fide occupational qualification (BFOQ)*. This defense also applies to contractors under EO 11246 as amended and is included in the original guidelines. Section 60-20.3 of the proposed rule imports the Title VII stipulation that the BFOQ defense is only available when an employee's sex is "reasonably necessary to the normal operation of the particular business or enterprise."⁵ However, OFCCP should strengthen this section to state that the qualifications must be business-related and actually account for the discrimination that occurred.

In addition, OFCCP should provide increased guidance for contractors to illustrate permissible versus impermissible uses of the BFOQ defense through examples similar to those provided elsewhere in the regulations. For instance, the EEOC, in its capacity as the enforcer of Title VII against private employers, has clearly stated that BFOQ only applies if an individual's sex prevents her from being able to safely or efficiently perform activities that fall within the "essence" of the employer's business. The EEOC also provides a useful list of situations that would not warrant the application of BFOQ.⁶ OFCCP should include a brief set of examples of the behaviors and policies that would and would not demonstrate that sex is a BFOQ for hiring and employment.

III. The proposed rule thoroughly addresses prohibitions against compensation discrimination and reflects the reality that, more than 50 years after the enactment of the Equal Pay Act and Title VII, women continue to be paid less than men due, in part, to discriminatory pay practices.

Women who work full time and year round are paid on average 78 cents for every dollar paid to men.⁷ This gender pay gap exists across industry, occupation and education level, leading researchers to posit that discrimination is at play in explaining some portion of the gender wage gap.⁸

Addressing compensation discrimination is central to OFCCP's mandate to prohibit sex discrimination and the agency has consistently acknowledged it as such. Beyond the proposed sex discrimination rule itself, the most recent examples of OFCCP's commitment

to this enforcement priority include new proposed regulations regarding the collection of compensation data from contractors and the proposed rule implementing Executive Order 13665, which prohibits pay secrecy policies in the workplace.⁹

Section 60-20.4 of the proposed sex discrimination rule prohibits contractors from determining employee compensation on the basis of sex. The section incorporates clear examples and guidance related both to overt forms of compensation discrimination, such as paying women at lower rates than men for the same or similar work, and more subtle forms of compensation discrimination, such as *de facto* job segregation that steers women into lower-paid work. The section includes several important components that will help contractors understand their obligations. For example, it instructs that employees can be deemed to perform similar work and therefore are entitled to similar compensation if “they are comparable on some [factors relevant to the evaluation of compensation levels], even if they are not similar on others.” In addition, subsections 60-20.4(b) and (c) appropriately acknowledge that different treatment in terms of work assignments, shifts and access to overtime pay can have discriminatory impacts on employee compensation that may amount to unlawful sex discrimination.

Two additions could improve this already-comprehensive section. First, OFCCP should consider including a more explicit discussion of the intersections between differential treatment in compensation and differential treatment on the basis of marital or parental status and/or on sex stereotypes. When employers make assumptions about the constraints that workers with family responsibilities have in terms of hours, shifts or overtime and treat those employees differently than others, this amounts to disparate treatment for caregivers or married persons; this behavior may also be susceptible to a disparate impact claim if the differential treatment results in discriminatory impacts on employees’ wages or benefits. Articulating the different forms of sex discrimination in this section could help employees more easily identify discriminatory behaviors for complaints and employers prevent liability by, among other things, implementing awareness and training programs for managers, supervisors and human resources staff.

In addition, OFCCP should include a discussion about part-time wage rates and include as an example that contractors who steer workers of one sex into part time jobs, and then pay different wage rates for a part-time position than they do for a similar full-time position, may well be engaging in sex discrimination.

IV. The proposed rule provides a comprehensive discussion of the ways in which pregnancy discrimination is sex discrimination.

The proposed regulations incorporate the Pregnancy Discrimination Act of 1978 (PDA), an amendment to Title VII enacted after the 1970 promulgation of the original sex discrimination guidelines. The PDA states, in relevant part, that, “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . .”

Section 60-20.5 provides a robust analysis of contractors' duties under the PDA, a topic which is more timely than ever as women are working later into their pregnancies; are more likely to be in jobs that require employers to make reasonable workplace accommodations so they may continue working while pregnant without jeopardizing their health or the health of their pregnancies; and are more likely to be key breadwinners for their families both before and after childbirth. We especially commend OFCCP's recognition of contraceptive coverage as a medical cost related to pregnancy that employers must provide in their health insurance, to the same extent other medical costs are covered for other conditions.

OFCCP's regulations are of significance to nearly all women and employers. Nearly 85 percent of women will become mothers at some point in their working lives.¹⁰ Among women who had a child during a year-long period in 2012-2013 (the most recent data available), nearly 62 percent were in the labor force.¹¹ When pregnant women are fired or forced to take leave, not only do they and their families lose critical income, but they struggle to re-enter a job market that is especially brutal for the unemployed, mothers and, in particular, pregnant women. For women who are forced out of the workforce because of their pregnancies, the stress associated with job loss can be devastating and it increases the risk of having a premature birth or a baby with low birth weight.¹² Alternatively, when pregnant women are denied reasonable accommodations, many have no choice but to continue in their jobs under unhealthy conditions, risking their own health and the health of their pregnancies.

A. The proposed regulations properly recognize that denying a pregnant woman the same accommodations provided to other workers similar in their ability or inability to work is discrimination on the basis of sex.

In Section 60-20.5(a), OFCCP rightly interprets the second clause of the PDA to mean that workers affected by pregnancy, childbirth, or related medical conditions must be given the same accommodations as workers not so affected but who are similarly restricted in their ability to perform the job. On March 25, 2015, the Supreme Court confirmed the meaning of this clause of the PDA in its decision in *Young v. United Parcel Service, Inc.*¹³ The Court held that when an employer accommodates a large percentage of non-pregnant workers but fails to accommodate workers with limitations due to pregnancy, it places a "significant burden" on pregnant workers, "giv[ing] rise to an inference of intentional discrimination."¹⁴ The Court further explained that an employer cannot rationalize its failure to accommodate pregnant workers on the grounds that its policy similarly fails to accommodate some others if, as UPS did, the employer does accommodate certain employees, such as those with on-the-job injuries or disabilities.

In the proposed regulations, OFCCP makes clear that an employers' obligation to equally accommodate pregnant workers applies whether an employer voluntarily accommodates non-pregnant employees pursuant to the employer's own policy or accommodates non-pregnant employees pursuant to a legal requirement, such as the Americans with Disabilities Act (ADA) or Section 503 of the Rehabilitation Act.

OFCCP should consider including in the justification of the proposed rule a statement that the Americans with Disabilities Act Amendments Act (ADAAA) of 2008 requires employers to provide reasonable accommodations to some pregnant workers. Support for

this proposition is found in EEOC and some federal court interpretations of the ADAAA. The ADAAA changed the law of pregnancy discrimination by clarifying that employers must provide reasonable accommodations for workers with temporary and less severe impairments that impact their daily activities.¹⁵ The EEOC's 2014 pregnancy discrimination guidance discusses that many courts have interpreted the ADAAA to include pregnancy-related impairments within its definition of disability.¹⁶ Read together, the PDA and the ADAAA assure pregnant women with certain physical limitations the right to receive reasonable workplace accommodations.¹⁷

But Title VII and the ADAAA do not cover all pregnant women who might need temporary modifications, such as the ability to carry a water bottle or take more frequent bathroom breaks. Under EO 11246 as amended, OFCCP may apply higher standards to federal contractors than Title VII permits, consistent the EO's requirement that employees be provided equal opportunities and consistent with its affirmative action authority. We urge OFCCP to do so by requiring that contractors must provide reasonable accommodations to women who need them because of known limitations of pregnancy, childbirth and related medical conditions. It should do this to ensure that women are not being disproportionately pushed out of their workplaces or forced to make difficult economic choices based on their sex.

OFCCP's proposed rule is essential to the health and economic security of women and not unduly burdensome for employers, and we therefore submit that any costs employers may absorb, as outlined in the proposed rule, are offset by benefits to women, their families, to the employers themselves, as well as to the government through more effective and efficient contracting. Many women are able to work through their pregnancies without any job or worksite modifications. But for those who need accommodations, their ability to remain on the job has benefits for their companies in terms of retention. It also has benefits for the women themselves, in terms of access to continued wages, health insurance and access to paid or job-protected unpaid leave, which instills greater loyalty and reduces turnover.

B. The proposed rule creates clarity by providing an illustrative list of “related medical conditions” in Section 60-20.5(a), but would benefit from modest adjustments.

We support OFCCP's inclusion of a list of examples of pregnancy-related medical conditions that fall within its pregnancy discrimination protections. The plain language of the PDA explicitly includes prohibitions on discrimination on the basis of “related medical conditions.” The proposed rule anticipates that contractors may not be familiar with the diverse medical conditions that can affect women as a result of their pregnancy and childbirth and includes a helpful list of common examples.

We suggest two additional conditions for inclusion in section 60-20.5(a)'s examples to provide additional clarity regarding the types of “related medical conditions” for which a pregnant woman might seek accommodation: carpal tunnel syndrome and urinary tract infections. Carpal tunnel syndrome often appears during the latter part of pregnancy and during lactation because of fluid retention.¹⁸ Urinary tract infections are among the most common infections during pregnancy and can be associated with other pregnancy

complications.¹⁹ Both can be easily addressed by providing reasonable workplace accommodations.

V. OFCCP’s discussion of workplace leave sets out clear standards for analyzing contractors’ provision of leave and whether such leave (or lack thereof) amounts to unlawful disparate treatment or disparate impact.

We applaud OFCCP for addressing family and medical leave and the relationship between leave and sex discrimination. OFCCP’s regulations make clear that employers ought to provide medical leave that enables women to recover from childbirth, that medical leave must be provided equally to women and to men and, as important, that employers must provide all leave equally to women and to men to allow all workers to manage caregiving responsibilities.

A. The proposed rule correctly requires that paid sick leave be granted to pregnant workers to the same extent such leave is provided to other employees and acknowledges that providing no leave at all or insufficient leave can amount to sex discrimination.

Section 60-20.5(c)(1) and (2) state the well-established rule that denying pregnant women medical leave, including paid sick leave, that is available to other employees is disparate treatment under Title VII.

In addition, OFCCP goes further in section 60-20.5(c)(3), to apply disparate impact theory to a contractor’s practice of providing no leave or insufficient leave. We applaud this approach. Specifically, we support the proposed regulations’ recognition that if a contractor does not provide pregnant workers with parental or medical leave or provides leave that is insufficient for women to recover from childbirth or related medical conditions, the contractor is liable for a disparate impact sex discrimination claim if such a practice has an adverse impact on the basis of sex. This interpretation is consistent with the FCCM and OFCCP’s current enforcement practice, and its inclusion in the regulations appropriately clarifies the rights of employees and obligations of employers.²⁰

B. The proposed rule correctly clarifies that family leave must be provided equally to women and men.

Section 60-20.5(c)(ii) correctly states that job-protected family leave, including paid leave, must be provided to men to the same extent as it is provided to women. This provision of the regulations is consistent with Title VII and EEOC guidance,²¹ and will provide much-needed clarity for employers who routinely provide women and men with unequal amounts of family leave. For example, a recent study commissioned by DOL found that just over one-third of employers (35.1 percent) offer paid *maternity* leave to most or all employees, whereas only one-fifth of employers (20 percent) offer paid *paternity* leave to most or all employees.²² 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.²³ This amounts to disparate treatment under Title VII and EO 11246 as amended and could potentially amount to disparate impact 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 frequent

periods of leave. Ideally this regulation and EEOC's recent pregnancy discrimination guidance can help to transform employers' practices toward offering more equitable leave. Offering paid leave is beneficial for workers and families, but also pays dividends for employers (who are more likely to retain workers when paid leave is available) and the taxpaying public (who see reduced reliance on public assistance and food stamps when women and men have access to paid leave).²⁴

To underscore the legal requirement of providing leave equally, the regulation could also include an explicit reference in section 60-20.5(c) to the fact that contractors covered by the Family and Medical Leave Act (FMLA) are statutorily required to provide eligible female and male employees with up to 12 weeks of unpaid, job protected leave annually for qualifying FMLA reasons and must abide by applicable state FMLA laws that provide more expansive coverage. A survey of private employers covered by the requirements of the FMLA found that, on average, employers offer more than the required 12 weeks of job-guaranteed leave for women after the birth of a child (13.8 weeks) but offer less than that for spouses or partners of women following the birth of a child (10.9 weeks), which is a violation of the FMLA and potentially Title VII.²⁵

VI. The proposed rule provides valuable guidance regarding discrimination based on sex stereotypes.

OFCCP includes a thorough discussion of sex stereotypes under section 60-20.7 that recognizes a range of ways in which sex stereotyping occurs and harms all employees who do not in some way conform to gender or "sex-role" stereotypes. The examples OFCCP provides include caregiving discrimination and discrimination on the basis of gender identity or nonconformity – two important and pernicious examples of sex stereotyping that amount to sex discrimination.

A. The prohibition against discrimination based on caregiving responsibilities is critical for protecting working women and men.

It is well established in Supreme Court cases as far back as *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), that women and men deserve fair and equal employment opportunities regardless of their marital or familial status and that Title VII clearly precludes sex-based stereotypes from entering into an employers' hiring or other employment decisions. Based on that clear history, section 60-20.7(c) correctly articulates that sex-stereotyped assumptions about caregiving responsibilities are not an acceptable basis upon which to make hiring or promotion decisions, to offer or withhold opportunities or to evaluate performance. The regulations make clear that ill-motive need not be a factor in sex stereotyping. They articulate that sex stereotyping can occur both when employers are acting in what they believe to be employees' best interests and when they are acting out of hostility.

Sex-based stereotyping related to caregiving affects women and men. To be sure, working mothers are most negatively affected by this kind of discrimination. Studies have shown that mothers are viewed as being less competent at work and less committed to their jobs.²⁶ In one study by researchers at Cornell University, mothers were 79 percent less likely to be recommended for hire than women without children, were offered an average of \$11,000 less in salary for the same position and were significantly less likely to be

promoted.²⁷ As a result, women in the United States face a well-documented motherhood wage penalty. The motherhood wage penalty can have serious consequences for married and single working mothers in the United States.²⁸ But OFCCP also correctly recognizes that sex stereotyping of men occurs and amounts to sex discrimination when men face adverse treatment for taking on family caregiving.

OFCCP could strengthen section 60-20.7(c) even more by providing a best practices section for employers on preventing caregiving stereotyping, similar to the guidance it offers employers in section 60-20.8(c) on training personnel on sexual harassment. This section should include the recommendation that contractors should combat caregiving stereotyping by providing time off and flexible workplace policies for men and women, encourage women and men equally to engage in caregiving-related activities, if they choose, and reduce future sex stereotyping and potential disparate impact claims by encouraging a climate in which women are no longer assumed to be more likely to provide family care than men.

B. OFCCP’s proposed regulations articulate a clear and much-needed prohibition on adverse employment decisions against LGBT or transgender workers based on sex stereotypes or gender nonconformity.

Sexual orientation and gender identity discrimination is rooted in stereotypes and expectations around gender norms. Discrimination against transgender and gender nonconforming employees in the workplace has been established as sex discrimination in EEOC’s enforcement of Title VII in the federal courts.²⁹

Sections 60-20.7(a) and (b) of the proposed regulations provide several clear examples that illustrate the full range of impermissible sex-based stereotyping. It makes clear that adverse treatment and harassment against employees based on these biases is prohibited, whether an employee dresses or acts counter to ill-conceived gender stereotypes, whether an employee is in a same-sex relationship and therefore defies sex-role expectations, or whether a person is transgender. The proposed regulation’s comprehensive treatment regarding discrimination against LGBT workers should provide helpful guidance to employees about their rights and to employers about their nondiscrimination obligations. OFCCP has an important role to play in educating employers so they can better train their human resources personnel and managers and ensure that their workplaces are free of LGBT bias.

C. The proposed regulations correctly rescind outdated guidance on state protective laws.

Recognition of state protective laws is antithetical to Title VII and to EO 11246 as amended, and OFCCP has correctly chosen to remove any recognition of these laws from the proposed sex discrimination guidelines. State protective laws, which attempt to exclusively protect women in the workplace from hazards or harm, perpetuate sex stereotypes and too easily result in employment discrimination against women.

While there may have been some legal question as to the validity of state protective laws when the sex discrimination guidelines were issued in 1970, 45 years of history have made clear that these laws violate Title VII and EO 11246 as amended. Since *Reed v. Reed*

in 1971, “the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”³⁰ It is unlikely that any state protective laws have been able to withstand the scrutiny of Title VII and remain in force, but we encourage the Department of Labor to launch its own inquiry before determining that state protective laws no longer pose a threat to women’s equal treatment.

VII. The proposed regulations provide a clear statement that contractors may not engage in harassment or perpetuate hostile work environments, and they provide helpful best practices for contractors to ensure safe workplaces.

Section 60-20.8 of the proposed rule includes clear prohibitions against sex-based harassment in the workplace and provides steps employers can take to guard against a hostile work environment. Harassment is an assertion of illegal power, subordinating women in the workplace, excluding women from nontraditional occupations and shaming LGBT workers or compelling them to stay closeted. OFCCP’s attention to this pervasive and pernicious problem is most welcome and much needed.

The rule provides a clear definition of harassment that mirrors Title VII case law. It defines harassment as “unwelcome sexual advances, requests for sexual favors, offensive remarks about a person’s sex, and other verbal or physical conduct of a sexual nature.” After defining the legal elements of harassment, the proposed rule provides a listing of the types of sex-based harassment that amount to sexual harassment, including on the basis of pregnancy, childbirth and gender identity. We urge OFCCP to maintain this helpful list in its final rule.

In addition to defining harassment, the proposed rule goes a step further to provide employers with practical guidance on how to create safe and equitable work environments. Even if such steps are not “required,” as OFCCP indicates in the proposed rule, this “best practice” discussion in section 60-20.8(c) will provide useful guidance for contractors to know the affirmative steps they can take avoid discriminatory practices. As noted above, we urge OFCCP to include a similar “best practice” section in the other sections of the proposed rule to give contractors the same opportunity to proactively establish fair and welcoming work environments.

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We appreciate the opportunity to submit comments on this very important and long-overdue improvement on the outdated 1970 sex discrimination guidelines. We applaud OFCCP’s comprehensive effort and its commitment to eradicating sex discrimination in all forms. We urge OFCCP to thoroughly but swiftly consider the comments submitted and to proceed rapidly to the adoption and implementation of a final rule. We look forward to working with OFCCP on enforcement of these regulations.

If you have any questions regarding this letter, please contact Vicki Shabo, Vice President (vshabo@nationalpartnership.org or 202.238.4832) or Vasu Reddy, Policy Counsel

at the National Partnership for Women & Families (at vreddy@nationalpartnership.org or 202.238.4842).

Sincerely,

National Partnership for Women & Families

1 42 U.S.C. 2000e et seq.

2 U.S. Office of Federal Contract Compliance Programs (2013, July). *Federal Contract Compliance Manual § 2H01*. Retrieved 13 April 2015, from http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf

3 The Council of Economic Advisers. (2014, June). *Nine Facts About American Families and Work*. Executive Office of the President of the United States Publication. Retrieved 27 February 2015, from http://www.whitehouse.gov/sites/default/files/docs/nine_facts_about_family_and_work_real_final.pdf

4 City of Los Angeles v. Manhart, 435 U.S. 702 (1978); Ariz. Governing Comm. v. Norris, 463 U.S. 1073 (1983).

5 42 U.S.C. §2000e-2(e)1.

6 29 C.F.R. 1604.2; U.S. Equal Employment Opportunity Commission. (2013, November 22). *Title VII/Sex/BFOQ/Caregiver*. Retrieved 13 April 2015, from http://www.eeoc.gov/eeoc/foia/letters/2013/title_vii_sex_bfoq_11_22.html; Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

7 U.S. Census Bureau. (2014). *Current Population Survey, Annual Social and Economic (ASEC) Supplement: Table PINC-05: Work Experience in 2013 – People 15 Years Old and Over by Total Money Earnings in 2013, Age, Race, Hispanic Origin, and Sex*. Retrieved 9 April 2015, from http://www.census.gov/hhes/www/cpstables/032014/perinc/pinc05_000.htm (Unpublished calculation based on the median earnings of all men and women who work full time, year-round in 2013.)

8 Corbett, C., & Hill, C. (2012). *Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation*. American Association of University Women Publication. Retrieved 20 March 2015, from <http://www.aauw.org/research/graduating-to-a-pay-gap/> (Concludes that, even after controlling for a number of contributing factors — chosen major, type of job, number of hours worked each week — a 7 percent wage gap persists.) Likewise, a 2009 report from the Government Accountability Office similarly found an average pay gap of 7 percent that could not be explained by occupational or other factors. GAO said its analysis “neither confirms nor refutes the presence of discriminatory practices.” Sherrill, A. (2009, April). *Women’s Pay: Converging Characteristics of Men and Women in the Federal Workforce Help Explain the Narrowing Pay Gap* (p. 2). U.S. Government Accountability Office Publication. Retrieved 30 March 2015, from <http://www.gao.gov/assets/130/122341.pdf>

9 Government Contractors, Requirement to Report Summary Data on Employee Compensation, 79 Fed. Reg. 46562 (August 8, 2014) (to be codified at 41 C.F.R. pt. 60-1); Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 79 Fed. Reg. 55712 (September 17, 2014) (to be codified at 41 C.F.R. pt. 60-1)

10 U.S. Census Bureau. (2015, April). *Fertility of Women in the United States: 2014. Table 6. Completed Fertility for Women age 40 to 50 Years Old – Selected Characteristics: June 2014*. Retrieved 14 April 2015, from <http://www.census.gov/hhes/fertility/data/cps/2014.html> (Unpublished calculation reported percentage of women who had become mothers by age 40 to 44 as of 2014 is 84.7 percent.)

11 U.S. Census Bureau. (2014). *American Community Survey 1 Year Estimates 2013, Table B13012: Women 16 to 50 Years Who Had a Birth in the Past 12 Months by Marital Status and Labor Force Status* (unpublished calculation). Retrieved 28 February 2015, from http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_B13012&prodType=table

12 Brief of Health Care Providers, the National Partnership for Women & Families, and Other Organizations Concerned with Maternal and Infant Health as Amici Curiae in Support of Petitioner (pp. 13-14), *Young v. United Parcel Service*, 707 F.3d 437 (4th Cir. 2013). Retrieved 28 February 2015, from http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/12-1226_pet_amcu_hcp-et-al.authcheckdam.pdf

13 135 S. Ct. 1338 (2015).

14 135 S. Ct. at 1354.

15 42 U.S.C. § 12102; 29 C.F.R. § 1630.2(i) & (j).

16 U.S. Equal Employment Opportunity Commission (2014, July 14). *Enforcement Guidance: Pregnancy Discrimination and Related Issues*. Retrieved 19 March 2015, from http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

17 The *Young v. UPS* Court acknowledged the impact that the ADAAA could have had on facts similar to those in Peggy Young’s case but the Court did not include any legal analysis because the ADAAA was not law at the time of Peggy Young’s placement on unpaid leave. See *Young*, 135 S. Ct. at 1348.

18 Pazzaglia, C., et al. (2005). Multicenter study on carpal tunnel syndrome and pregnancy incidence and natural course. *Asta Neurochirurgica* 92(Supp.), 35-39. Retrieved 19 March 2015, from <http://www.ncbi.nlm.nih.gov/pubmed/15830965>

19 Delzell, J., & LeFevre, M. (2000). Urinary Tract Infections During Pregnancy. *American Family Physician*, 61(3), 713. Retrieved 2 March 2015, from <http://www.aafp.org/afp/2000/0201/p713.html#sec-8>; Foxman, B. (July 2002). Epidemiology of Urinary Tract Infections: Incidence, Morbidity, and Economic Costs. *The American Journal of Medicine*, 113(1), 5-13.

20 U.S. Office of Federal Contract Compliance Programs (2013, July). *Federal Contract Compliance Manual*. Retrieved 28 February 2015, from http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf

21 U.S. Equal Employment Opportunity Commission. (2007, May 23). *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*. Retrieved 30 March 2015, from <http://www.eeoc.gov/policy/docs/caregiving.html#discrmaile>

22 2 Klerman, J., Daley, K., & Pozniak, A. (2012, September 7). *Family and Medical Leave in 2012: Technical Report* (pp. 36-37). Abt Associates Publication. Retrieved 19 March 2015, from <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>

23 Working Mother. (2014). *2014 Working Mother 100 Best Companies*. Retrieved 19 March 2015, from <http://www.workingmother.com/best-company-list/156592>

24 Houser, L., & Vartanian, T. (2012, January). *Pay Matters: The Positive Economic Impact of Paid Family Leave for Families, Businesses and the Public*. Center for Women and Work at Rutgers, the State University of New Jersey Publication. Retrieved 11 April 2015, from http://www.nationalpartnership.org/site/DocServer/Pay_Matters_Positive_Economic_Impacts_of_Paid_Family_L.pdf?docID=9681

25 Matos, K., & Galinsky, E. (2014). *2014 National Study of Employers*. Families and Work Institute, Society for Human Resource Management and When Work Works Publication. Retrieved 28 February 2015, from <http://www.employmentmattersblog.com/files/2014/02/2014NationalStudyOfEmployers.pdf>

26 Correll, S. J., Benard, S., & Paik, I. (2007). Getting a job: Is there a motherhood penalty? *American Journal of Sociology*, 112(5), 1297-1338. Retrieved 1 March 2015, from <http://gender.stanford.edu/sites/default/files/motherhoodpenalty.pdf>

-
- 27 I Correll, S., Benard, S., & Paik, I. (2007, March). Getting a Job: Is There a Motherhood Penalty? *American Journal of Sociology*, (112)5, pp. 1297-1339. Retrieved on 30 March 2015, from <http://gender.stanford.edu/sites/default/files/motherhoodpenalty.pdf>
- 28 Budig, M. J. (2014) *The Fatherhood Bonus and the Motherhood Penalty. Parenthood and the Gender Gap in Pay*. Third Way Publication. Retrieved 11 April 2015, from http://content.thirdway.org/publications/853/NEXT_-_Fatherhood_Motherhood.pdf
- 29 U.S. Equal Employment Opportunity Commission. (n.d.). *Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status*. Retrieved 20 March 2015, from <http://www.eeoc.gov/federal/otherprotections.cfm>
- 30 United States v. Virginia, 518 U.S. 515, 532, 116 S. Ct. 2264, 2275, 135 L. Ed. 2d 735 (1996)