

# PUBLICATION

---

## Federal Contractors Must Comply with OFCCP's Revised Sex Discrimination Guidelines or Face Possible Debarment [Ober|Kaler]

August 10, 2016

**Earlier this year, the OFCCP published a Final Rule revising its Sex Discrimination Guidelines which prohibits discrimination by government contractors on the basis of sex. The new Rule requires federal contractors to proactively identify and eliminate sex-based discriminatory practices, and to take affirmative action to ensure that hiring and employment practices do not adversely affect employees based on sex.**

The Final Rule is set to take effect Monday, August 15, 2016. All federal contractors must be prepared and in compliance with the new Rule by that date. Below is some background on the Final Rule and key provisions that may affect your businesses policies and practices.

### Background

The OFCCP is responsible for enforcing Executive Order 11246 which prohibits federal contractors from engaging in discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin, and it requires federal contractors to take affirmative action to recruit, hire, train, and retain qualified applicants and employees in these same protected categories. With regard specifically to sex and gender, in 1970, the OFCCP published its Sex Discrimination Guidelines. Those guidelines have not been substantively updated since they were first published.

### General Prohibitions Against Sex Discrimination

The Rule generally prohibits discrimination against any applicant or employee based on sex, including discrimination based on pregnancy, childbirth, related medical conditions, gender identity, transgender status, and sex stereotyping. While the Rule incorporates existing federal law prohibiting discrimination based on sex, such as discrimination based on pregnancy and childbirth, into its Guidelines, the Rule also promulgates prohibitions on more advanced areas of sex discrimination.

### New Prohibitions Focused On Gender Identity and Trans-Gender Individuals

As a reflection of the drastic changes in sex discrimination law over the past fifty years, the Rule now prohibits discrimination based on an individual's gender identity or transgender status. As some examples, the Rule prohibits employers from:

- Denying transgender employees access to restrooms and other facilities designated for use by the gender with which they identify.
- Treating employees or applicants adversely because they have receiving, are receiving, or will receive transition-related medical services.
- Discriminating against applicants or employees who identify as neither male nor female.
- Prohibiting applicants or employees from using the restroom of the gender with which they identify.

## First-Ever Prohibitions Against Discrimination Based On Sex-Based Stereotyping

The Rule also represents the first federal law or regulation expressly prohibiting discrimination on the basis of "sex-based stereotypes." Specifically, the Rule prohibits employment decisions based on stereotypes regarding how a particular gender is supposed to look, sound, or act. The Rule generally prohibits employers from treating an employee adversely because of that employee's failure to comply with their gender's norms and expectations.

Additionally, the Rule prohibits employers from making employment decisions based on their employees' caregiver responsibilities. For example, an employer may not fail to offer a female employee overtime hours because it assumes that she has family caretaking responsibilities that would interfere with her ability to work those extra hours. Conversely, an employer may not take adverse action against a male employee is not is available to work overtime hours because he has family caretaking responsibilities.

### Enforcement Efforts

Individuals who believe they have been the subject of discrimination based on sex have the right to file a claim of discrimination or harassment with the OFCCP, and the OFCCP has recently shown more of an interest in investigating such claims. It is also likely that the OFCCP will focus on these new nondiscrimination obligations during compliance audits, looking for opportunities to identify and remedy class-wide violations.

A contractor found to be in violation of the Rule may be liable for "make-whole" and injunctive relief and subject to suspension, cancellation, termination and debarment of its contracts.

Compliance will require an in-depth review of your current policies and practices, as well as training for both employees and supervisors on how to conduct themselves in the workplace under the new Rule. All federal contractors are expected to comply with the new Sex Discrimination Guidelines by August 15, 2016.