

OFCCP Final Rule on Sex Discrimination Requires Federal Government Contractors to Permit Transgender Individuals to Use Bathrooms Consistent with the Gender with which They Identify

By Susan Richards Salen

The bathroom debate has now been decided for federal government contractors. On June 14, 2016, the United States Department of Labor issued updates to the Office of Federal Contract Compliance Program (OFCCP) sex discrimination rule (which rule makes it unlawful for a contractor to discriminate against any employee or applicant because of sex). For the purposes of the Final Rule, sex includes, but is not limited to, pregnancy, childbirth, or related medical conditions, **gender identity**, **transgender status** and **sex stereotyping**. This means that sexual harassment includes harassment based on gender identity and harassment that is not sexual in nature but is because of sex or sex-based stereotypes. The revised regulations take effect on August 15, 2016. The short period of time between the promulgation of the Final Rule and its implementation is justified, in the OFCCP's view, because most contractors have been complying with Title VII as interpreted by recent case law. For example, the *Mia Macy v. Holder* case, in which the Equal Employment Opportunity Commission found that transgender discrimination is sex discrimination, and the *Young v. United Parcel Service* case in which the U.S. Supreme Court found that an employer's failure to provide temporary accommodations to pregnant employees who were unable to perform their job due to pregnancy supports a claim for disparate treatment based upon sex, if similarly situated non-pregnant employees were granted accommodations for temporary conditions which prohibited them from performing their jobs.

Specifically, 29 CFR §§60-20.2(13)-(14) provide the following examples of sex discrimination in the form of disparate treatment based upon a person's transgenderism:

(13) Denying transgender employees access to the restrooms, changing rooms, showers, or similar facilities designated for use by the gender with which they identify; and

(14) Treating employees or applicants adversely because they have received, are receiving, or are planning to receive transition-related medical services designed to facilitate the adoption of a sex or gender other than the individual's designated sex at birth.

In addition, 29 CFR §60-20.7(b) prohibits adverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status. Of course, the Final Rule makes it clear that harassment on the basis of sex extends to harassment based on the person's gender identity or transgender status. 29 CFR §60.20.8(b).

In an Appendix to the Final Rule, the OFCCP suggests that contractors consider designating single-user restrooms, changing rooms, showers, or similar single-user facilities as sex-neutral and anti-harassment training to all personnel, among other recommended practices.

As a reminder, OFCCP regulations apply to any business or organization that (1) holds a single federal contract, subcontract, or federally assisted construction contract or subcontract in excess of \$10,000; (2) holds federal contracts or subcontracts that have a combined total in excess of \$10,000 in any 12-month period; or (3) holds government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

More information can be found at:

https://www.dol.gov/ofccp/SexDiscrimination/sexdiscrimination_faqs.htm.

The entirety of the Final Rule can be found at:

<https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-13806.pdf> or 41 CFR Part 60-20.

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