September 16, 2019


Mr. Harvey D. Fort
Acting Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210


Dear Mr. Fort:

On behalf of the American Bar Association (ABA), which is the largest voluntary association of attorneys and legal professionals in the world, I write to express our views regarding the above-referenced proposed rule (the Proposed Rule) by the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP). As explained below, the ABA opposes the Proposed Rule and respectfully urges that it be withdrawn and not be made final.

The ABA is a long-time advocate of the critical need to protect religious freedom, both through protections against government establishment of religion and in support of the free exercise of religion. Moreover, we recognize the right of religious institutions to operate in accord with their religious tenets. In addition, as a champion in the struggle against discrimination, the ABA has been a steadfast advocate of expanding civil rights protections to include LGBTQ and disabled people.

The anti-discrimination protections codified in Executive Order 11246, as amended, prohibit discrimination by federal contractors based on race, color, religion, sex, sexual orientation, gender identity, or national origin. EO 11246 includes an exemption that allows contracting religious organizations to discriminate “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”

The Proposed Rule would expand the current religious exemption in EO 11246 to allow a broader pool of entities to use the exemption, as well as broaden the scope of the exemption itself. Although the Proposed Rule cannot actually change EO 11246—and so workers will remain entitled to the full protections provided therein even if a final rule is adopted—the Proposed Rule
raises real questions regarding the extent to which current leadership of OFCCP will continue to enforce those protections, particularly with respect to the LGBTQ community.

The ABA strongly opposes the Proposed Rule and urges OFCCP not to finalize it for several important reasons:

1. **The Proposed Rule would improperly expand the existing limited religious exemption in Executive Order 11246 to include for-profit corporations and nominally religious entities.**

Executive Order 11246 provides an exemption to the prohibition against employment discrimination for a “contractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities…” This language in EO 11246 closely tracks the religious exemption provision of Title VII of the Civil Rights Act of 1964 (the title of the Civil Rights Act dealing with employment discrimination).

Unfortunately, the Proposed Rule would adopt a broad new definition of the term “religious corporation, association, educational institution, or society” different from that utilized under Title VII that would encompass significantly more contractors than is the case under current law. Per the Congressional Research Service, while the courts have not settled on a uniform definition, they have generally agreed upon several factors relevant to deciding whether an organization qualifies for the exemption. These factors include: (1) the purpose or mission of the organization, (2) the ownership, affiliation, or source of financial support of the organization, (3) requirements placed upon staff and members of the organization (faculty and students if the organization is a school), and (4) the extent of religious practices in or the religious nature of products and services offered by the organization. In contrast, under the Proposed Rule, federal contractors would be able to invoke the exemption so long as they can point to a religious purpose that is a public part of their mission and demonstrate that they engage in religious exercise to further that purpose.

Although OFCCP is correct that the religious exemption in EO 11246 is commonly understood to have the same meaning as in Title VII, it proposes changes without basis in Title VII case law in the name of expanding the religious exemption “to the maximum extent permitted.” The Proposed Rule thereby opens the door even to for-profit corporations and entities that are only nominally religious to discriminate on the basis of religion in their hiring decisions. This is contrary to established case law, sends the wrong message to employers, and may put employers at risk of becoming vulnerable to civil rights lawsuits under federal and state law even as they retain their status as federal contractors.

2. **The Proposed Rule would also widen the scope of the religious exemption, subjecting more workers to employment discrimination on the basis of religion.**

Currently, the religious exemption allows religious organizations to employ only members of a particular faith. However, the exemption does not allow religious organizations to discriminate in employment on the basis of race, color, sex, sexual orientation, gender identity, or national origin.
While the Proposed Rule does not purport to alter these latter prohibitions, it changes the standard for evaluating whether a claim of employment discrimination is based on religion or on another protected category. The Proposed Rule would apply a “but-for” standard of causation rather than the “motivating factor” standard, thereby making it more difficult for employees to challenge discrimination on the grounds that religion has been used as a pretext for discrimination that would otherwise be prohibited – notwithstanding that the Civil Rights Act of 1991 explicitly adopts the “motivating factor” test for determining liability in Title VII cases.

3. The Proposed Rule may be applied in a fashion that allows an employer to obtain or retain federal contracts while violating existing civil rights laws.

Given the ongoing efforts in some quarters to diminish protections for LGBTQ individuals, the ABA is concerned that OFCCP may interpret EO 11246 to allow a federal contractor to refuse to hire or fire based on sexual orientation or religion when the contractor cites a sincere religious reason for doing so. Under Title VII, religious employers enjoy an exemption permitting them to make hiring decisions on the basis of an employee being a member of a particular faith. But such employers are otherwise subject to Title VII’s non-discrimination obligations. Moreover, EO 11246 applies broad non-discrimination provisions to federal contractors, and the Proposed Rule does not alter this obligation. Nevertheless, by incorporating the “but for” test, as described above, the Proposed Rule signals to employers that so long as they can articulate a facially legitimate non-discriminatory basis for an otherwise discriminatory decision, they will be able to retain their federal contracts.

4. The Proposed Rule would misappropriate the Title VII definition of “religion,” intended to protect workers against religious discrimination, to enable companies to discriminate against their employees.

Title VII defines religion broadly to protect both the beliefs and practices of employees, and to require employers to provide religious accommodation. Unfortunately, the Proposed Rule would use this definition of religion to protect employers, not their workers, by granting a wide range of employers who contract with the federal government broad authority to engage in discriminatory practices on the basis of religion against their employees. This goes beyond the existing Title VII and EO 11246 exemptions permitting religious employers to make faith-based employment decisions. For example, in one notable case, an employer was found to have violated Title VII when it required its employees to attend prayer services over their objections. If finalized, the Proposed Rule would appear to protect a for-profit or nominally religious employer’s right to compel its employees to participate in such prayer services or other religious practices of the employer.

5. The Proposed Rule relies on an exaggerated claim that OFCCP cannot inquire into the business of federal contractors when it touches on questions of religion.

The notion that OFCCP cannot even inquire about claims of discrimination by religious employers—even when the discrimination could really be based on race, color, national origin, or sex, including sexual orientation or gender identity—undermines the very structure of the protections of religious freedom that are part of the Constitution and federal and state statutory
schemes. If everything is religious, then nothing is religious. While the government must avoid taking sides on questions of religious doctrine, it is not prohibited from deciding what is and is not “religion” for purposes of deciding when religious freedom protections come into play.

In sum, the ABA is concerned that the Proposed Rule would result in a harmful and unnecessary expansion of the existing religious exemption. We therefore ask that the OFCCP withdraw the Proposed Rule and not finalize it.

Thank you for considering our views on this important issue. If you have any questions regarding the ABA’s position, please contact ABA Governmental Affairs Deputy Director Denise Cardman at (202) 662-1761.

Sincerely,

Judy Perry Martinez
President, American Bar Association