Economic Policy Institute

EPI comments on the Department of Labor's proposed rule regarding the scope and application of the Equal Opportunity Clause's religious exemption

Public Comments • By Margaret Poydock and Celine McNicholas • September 16, 2019

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

Re: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption (RIN 1250-AA09)

Dear Mr. Fort:

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers, and assesses policies with respect to how well they further those goals.

EPI strongly opposes the Department of Labor's proposed rulemaking regarding the scope and application of the religious exemption contained in section 204(c) of Executive Order (EO) 11246. By expanding the scope of religious exemption for organizations who receive federal contracts, the Office of Federal Contract Compliance Programs (OFCCP) has shifted their focus of protecting workers from discrimination to expanding exemptions that allow federally funded employers to discriminate against workers. The proposed rule is an attack on millions of federal contract workers who receive nondiscrimination protections under EO 11246.

The proposed rule undermines the nondiscrimination protections set by EO 11246

Over 50 years ago, President Lyndon B. Johnson signed Executive Order 11246, prohibiting organizations that receive federal construction contracts from discriminating in employment decisions on the basis of sex, race, color, religion, or national origin. The Executive Order is enforced by the Office of Federal Contract Compliance Programs, which exists to "protect workers, promote diversity and enforce the law."[1] In 2002, President George W. Bush amended EO 11246 to allow religious organizations to employ only members of a particular faith, but not allow religious organizations to discriminate in employment on the basis of race, color, sex, or national origin. Later in 2014, President Barack Obama expanded nondiscrimination protections under EO 11246 to include sexual orientation and gender identity, but kept the religious exemption from the Bush administration. The Trump administration's proposed rule regarding the scope and application of EO 11246's religious exemption clause can be broadly applied: Government contractors "that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose" can take advantage of the religious exemption clause under the rule.[2] This would greatly expand who can be considered religiously exempt and even allow for-profit corporations to use the religious exemption. While the proposed rule cannot change or eliminate any of the nondiscrimination protections found in EO 11246, the rule makes it clear that the OFCCP will not enforce these protections sufficiently.

The federal government should not fund employment discrimination

For more than 70 years, the federal government has put forth policies that aim to eradicate employment discrimination by federal contractors. In 1941, President Franklin D. Roosevelt ordered federal agencies to condition defense contracts on an agreement to not discriminate on the basis of race, color, creed, or national origin. Since then, Democratic and Republican presidents have expanded these protections and promoted equal opportunity in the workplace.

President George W. Bush was wrong to add the religious exemption to EO 11246, and the

Trump administration should remove—not expand—the highly controversial exemption.[3] The Constitution bars the government from directly funding or providing aid to private institutions that engage in discrimination.[4] Therefore, if an organization has the opportunity to receive federal funding through a government contract, it should not be allowed to discriminate against qualified job applicants and employees because they cannot meet a religious litmus test.

The proposed rule violates the Establishment Clause

Religious freedom is a core tenet of the Constitution, guaranteeing individuals the right to believe—or not believe—in the religion of their choosing. The First Amendment's Establishment Clause prohibits government actions from favoring one religious group over another and forbids religious exemptions that burden or harm third parties.[5] Therefore, when crafting an exemption, the government "must take adequate account of the burdens" an accommodation places on nonbeneficiaries and ensure it is "measured so that it does not override other significant interests."[6] Not only does the proposed rule extensively broaden the religious exemption in EO 11246, but it also fails to take into account the harm it will have on millions of LGBTQ, women, and nonreligious workers.

The proposed rule will negatively impact millions of workers

By expanding the scope of the religious exemption for federal contractors, the proposed rule subjects countless workers to discrimination in the name of religion. Workers who identify as LGBTQ, women, and nonreligious are at the most risk of facing employment discrimination. Religious exemptions, like the one in this proposed rule, undermine the promise of civil rights protections and erode the security these protections should provide marginalized groups.

The proposed rule would be especially harmful for LGBTQ workers. According to the Harvard T.H. Chan School of Public Health, 20% of LGBTQ adults have experienced discrimination because of their sexual orientation or gender identity when applying for jobs. These rates are even higher among transgender people (48%) and LGBTQ people of color (32%).[7] The significance of EO 11246 should not be undervalued as it provides LGBTQ workers protections they may not have at the state level. As of 2018, only 21 states and the District of Columbia have employment protections on the basis of sexual orientation and gender identity.[8] As a result, the proposed rule would weaken the only existing federal employment protections LGBTQ workers have.

In addition to the LGBTQ community, the proposed rule would negatively impact women workers. While federal law currently prohibits discrimination based on sex—including gender identity, sexual orientation, gender stereotypes, and pregnancy and related medical conditions—the proposed rule would embolden federal contractors to cite

religious beliefs in order to justify discrimination, thus turning the clock back on decades of nondiscrimination law and threatening women's ability to obtain and maintain employment. For example, expanding the religious exemption seems aimed at allowing federal contractors to claim a right to fire a woman who uses birth control or who is pregnant and unmarried.

Finally, the proposed role would be harmful to religious minorities and individuals who identify as nonreligious. The current religious exemption in EO 11246 already allows certain federal contractors to discriminate in hiring on the basis of religion, and the proposed rule would only make the troubling exemption even broader. The U.S. government should not allow federal contractors to fire or refuse to hire a qualified person because they do not regularly attend religious services or are the "wrong" religion.

The Department fails to adequately consider the potential costs of the proposed rule and exaggerates the potential benefits as required under the APA

Under the Administrative Procedure Act, the Department must adequately assess all the potential costs and benefits of a proposed rule. However, OFCCP fails to adequately acknowledge the potential costs of its proposal and exaggerates the proposal's benefits. As described above, it is likely that the proposed rule will encourage contractors to engage in employment discrimination. The Department fails to account for the related economic and noneconomic costs to workers of increased employment discrimination in the form of lost wages and benefits, increased medical expenses and other costs related to the negative mental and physical health consequences of discrimination, and costs associated with looking for work. Further, the Department has long recognized that employment discrimination wastes taxpayer money because it leads to contractors experiencing costly employee turnover and being unable to acquire and retain the best talent. Yet the Department fails to adequately account for those costs. The Department also exaggerates proposed benefits of the rule. The proposed rule would provide less clarity for employers and employees—not more, as the Department claims—because it institutes new vague standards and multifactor tests in place of settled interpretations. The Department also presents no evidence for its claim that the proposed rule will result in an increased number of bona fide competitive bids for federal contracts.

The proposed rule is contradictory to Title VII and makes it harder for employees to challenge discrimination

In the proposed rule, the Department proposes to "apply a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion."[9] The "standard of causation" determines what must be

proven in order to establish that an employer's action was caused by unlawful discrimination. Under current law,[10] OFCCP applies a "motivating-factor" standard of causation, in which an employee can show that an action was discriminatory by proving the action was even partially motivated by a protected characteristic. In the Department's proposed "but-for" standard of causation, an employee can only establish that an action was discriminatory by proving that, but for the protected characteristic, the action would not have happened. It is much more difficult for an employee to win under the "but-for" standard.

The OFCCP previously rejected the "but-for" standard of causation in 2015, in order to be consist with Title VII and the Civil Rights Act of 1991.[11] In the proposed rule, discrimination claims would be evaluated differently under Title VII than under EO 11246. Not only is this inconsistency contrary to OFCCP policy, it is troubling for employers and employees.

Conclusion

We urge the Department to abandon this flawed rulemaking and ensure meaningful workplace protections for millions of federal workers. Expanding the scope of organizations who receive religious exemption shifts the OFCCP's purpose of protecting workers from employment discrimination to encouraging employers to become exempt from discriminatory employment decisions. The proposed rule defies years of existing precedent and would make it even more difficult for workers to challenge discrimination on the basis of religion. If an organization receives federal funding through a government contract, they should not be allowed to discriminate against qualified job applicants and employees because they cannot meet the contractor's religious litmus test. The proposal is an attack on millions of federal contract workers who receive nondiscrimination protections under EO 11246, and it should be withdrawn.

Sincerely,

Margaret Poydock
Policy Associate
Economic Policy Institute

Heidi Shierholz
Senior Economist and Director of Policy
Economic Policy Institute

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1. U.S. Department of Labor, "About the Office of Federal Contract Compliance Programs" (web page), n.d.

2. Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41677–41691 (August 15, 2019).

3. Letter from 98 National Religious and Civil Rights Organizations to President Barack Obama (July 16, 2014), https://www.au.org/sites/default/files/LGBT%20EO%20sign-on%20letter%20add'l%20signers.pdf.

4. E.g., *Norwood v. Harrison*, 413 U.S. 455, 465–466 (1973); *see also Christian Legal Society v. Martinez*, 561 U.S. 661, 682 (2010).

5. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708–710 (1985). *See also Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 706 (1994) ("accommodation is not a principle without limits"); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries"); *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 729 n.37 (2014).

6. *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005).

7. NPR, Robert Wood Johnson Foundation, and Harvard T.H. Chan School of Public Health, *Discrimination in America: Experiences and Views of LGBTQ Americans*, November 21, 2017.

8. Movement Advancement Project (MAP), "Non-Discrimination Laws" (web page), last modified September 12, 2019.

9. Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41677–41691 (August 15, 2019).

10. *See* Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m), amending Title VII to mandate that an "unlawful employment practice is established when the complaining party demonstrates that race, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

11. *See* 80 FR 54934, 54944-46; *see also* RIN 1250-AA09 at fn 10.