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Office of Federal Contract Compliance Programs

41 CFR Part 60–20

Discrimination on the Basis of Sex; Proposed Rule

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–20

[01 14 15 OFCCP]

RIN 1250–AA05

Discrimination on the Basis of Sex

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Labor's (''DOL'') Office of Federal Contract Compliance Programs (''OFCCP'') is proposing regulations that would set forth requirements that covered Federal Government contractors and subcontractors and federally assisted construction contractors and subcontractors must meet in fulfilling their obligations under Executive Order 11246, as amended, to ensure nondiscrimination in employment on the basis of sex and to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their sex. This proposal would substantially revise the existing Sex Discrimination Guidelines, which have not been substantively updated since 1970, and replace them with regulations that align with current law and legal principles and address their application to current workplace practices and issues. Most of the proposed provisions in this NPRM would clarify well-established case law or applicable requirements from other Federal agencies and therefore would not change existing requirements for entities affected by this rule. The NPRM's approach with respect to pregnancy accommodation is consistent with the interpretation of the Pregnancy Discrimination Act adopted by the Equal Employment Opportunity Commission (EEOC) and by the Government in *Young* v. *United Parcel Serv., Inc.,* 707 F.3d 437 (4th Cir. 2013), *cert. granted* (U.S. No. 12–1226, July 1, 2014).

DATES: To be assured of consideration, comments must be received on or before March 31, 2015.

ADDRESSES: You may submit comments, identified by RIN number 1250–AA05, by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 693–1304 (for comments of six pages or less).
- *Mail:* Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room C–3325, 200 Constitution Avenue NW., Washington, DC 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693–0104 (voice) or (202) 693–1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available for public inspection during normal business hours at Room C–3325, 200 Constitution Avenue NW., Washington, DC 20210, or via the Internet at *http://www.regulations.gov.* Upon request, individuals who require assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice of Proposed Rulemaking (NPRM) will be made available in the following formats: Large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain this NPRM in an alternate format, please contact OFCCP at the telephone numbers or address listed above.

FOR FURTHER INFORMATION CONTACT: 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. Telephone: (202) 693–0104 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

The U.S. Department of Labor's (''DOL'') Office of Federal Contract Compliance Programs (''OFCCP'') is proposing regulations that would set forth requirements that covered [1] Federal Government contractors and subcontractors and federally assisted construction contractors and subcontractors must meet in fulfilling their obligations under Executive Order 11246, as amended, to ensure nondiscrimination in employment on the basis of sex and to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their sex. The OFCCP is charged with enforcing Executive Order 11246, as amended (''Executive Order''), which prohibits covered Federal Government contractors and subcontractors and federally assisted construction contractors and subcontractors (''contractors'') from discriminating in employment on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin.[2] The Executive Order also requires contractors to ensure equal employment opportunity for employees and applicants for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin and to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to the enumerated bases. OFCCP interprets the nondiscrimination provisions of the Executive Order consistent with the principles of title VII of the Civil Rights Act of 1964 (''title VII''),[3] which is enforced, in large part, by the Equal Employment Opportunity Commission (''EEOC''), the agency responsible for coordinating the Federal government's enforcement of all Federal statutes, Executive Orders, regulations, and policies requiring equal employment opportunity.[4]

The Sex Discrimination Guidelines at 41 CFR part 60–20 (''Guidelines'') set forth interpretations and guidelines for implementing the Executive Order's nondiscrimination and affirmative action requirements related to sex. These Guidelines have not been substantively updated since they were

[1] 41 CFR 60–1.5 exempts certain Federal and federally assisted contractors and subcontractors from coverage. That section exempts contracts and subcontracts not exceeding $10,000 (§ 60–1.5(a)(1)); certain contracts and subcontracts for indefinite quantities (§ 60–1.5(a)(2)); work performed outside the United States by employees who were not recruited within the United States (§ 60–1.5(a)(3)); contracts with certain religious entities and educational institutions (§ 60–1.5(a)(5) and (6)); specific contracts and facilities exempted by the Director of the OFCCP when required by ''special circumstances in the national interest'' (§ 60–1.5(b)(1)) or because they are ''separate and distinct from activities . . . related to the performance of the contract or subcontract'' (§ 60–1.5(b)(2); and contracts determined to be essential to the national security (§ 60–1.5(c)).

[2] Executive Order 13672, issued on July 21, 2014, added sexual orientation and gender identity to Executive Order 11246 as prohibited bases of discrimination. It applies to contracts entered into on or after April 8, 2015, the effective date of the implementing regulations promulgated thereunder.

[3] Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2000e–17; U.S. Department of Labor, Office of Federal Contract Compliance Programs, Federal Contract Compliance Manual, ch. 2, § 2H01(c), *available at http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf* (last accessed June 6, 2014) (hereinafter FCCM).

[4] Executive Order 12067, 43 FR 28967, 3 CFR, 1978 Comp., p. 206. The U.S. Department of Justice also enforces portions of title VII, as do state Fair Employment Practice Agencies (FEPA).

first promulgated in 1970,[5] and fail to conform to or reflect current title VII jurisprudence or to address the needs and realities of the modern workplace. Since 1970, there have been historic changes to sex discrimination law, in both statutory and case law, and to contractor policies and practices as a result of the nature and extent of women's participation in the labor force. Because the existing guidelines are so outdated, they may cause some Federal contractors to incur unnecessary legal and/or management expenses to resolve confusion about possibly conflicting obligations; updating the regulations will reduce the costs that such contractors may now incur.

It is long overdue for part 60–20 to be updated. Consequently, OFCCP proposes in this NPRM to revise the Sex Discrimination Guidelines to align the sex discrimination standards under Executive Order 11246 with developments and interpretations of existing title VII principles and OFCCP's corresponding interpretation of the Executive Order.

Statement of Legal Authority

Issued in 1965, and amended several times in the intervening years—including once in 1967, to add sex as a prohibited basis of discrimination, and most recently in 2014, to add sexual orientation and gender identity to the list of protected bases[6]—Executive Order 11246 has two purposes. First, it prohibits covered Federal contractors and subcontractors from discriminating against employees and applicants because of race, color, religion, sex, sexual orientation, gender identity, or national origin. Second, it requires covered Federal contractors and subcontractors to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. The nondiscrimination and affirmative action obligations of Federal contractors and subcontractors cover all aspects of employment.

The requirements of the Executive Order promote the goals of economy and efficiency in Government contracting, and the link between them is well established. *See, e.g,* Executive Order 10925, 26 FR 1977 (March 8, 1961) (nondiscrimination and affirmative employment programs ensure ''the most efficient and effective utilization of all available manpower''). Executive Order 11246 regulations require government contractors to conduct outreach to broaden the qualified applicant pool; to identify and eliminate any discriminatory practices; to apply merit principles; to choose applicants for employment without regard to race, sex, or national origin; and to report their results. *See, e.g.,* 41 CFR 60–2.10, 60–2.11, 60–2.14, 60–2.16, 60–2.17, 60–20.6. The sex discrimination regulations proposed herein outline the sex-discriminatory practices that contractors must identify and eliminate, and clarify how contractors must choose applicants for employment without regard to sex. *See, e.g.,* proposed § 60–20.2 (clarifying that sex discrimination includes discrimination on the bases of pregnancy, childbirth, related medical conditions, gender identity, and transgender status, and that disparate treatment and disparate impact analyses apply to sex discrimination); § 60–20.3 (clarifying application of the *bona fide* occupational qualification (BFOQ) defense to the rule against sex discrimination); § 60–20.4, § 60–20.5, § 60–20.6, and § 60–20.8 (clarifying that discrimination in compensation; discrimination based on pregnancy, childbirth, or related medical conditions; discrimination in other fringe benefits; and sexual harassment, respectively, can be unlawful sex-discriminatory practices); and § 60–20.7(c) (clarifying that contractors must not choose applicants based on sex stereotypes such as ''a sex-based assumption that [a female employee] . . . will have . . . family caretaking responsibilities [that] will interfere with her work performance'').

Each of these requirements ultimately reduces the government's costs and increases the efficiency of its operations by ensuring that all employees and applicants, including women, are fairly considered and that, in its procurement, the government has access to, and ultimately benefits from, the best qualified and most efficient employees. *Cf. Contractors Ass'n of E. Pa.* v. *Sec'y of Labor,* 442 F.2d 159, 170 (3d Cir. 1971) (''[I]t is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen.''). The proposed regulations' requirements to eliminate discrimination and to choose applicants without regard to sex also are consistent with the purposes of Title VII to eliminate discrimination in employment.

The requirements in Executive Order 11246 generally apply to any business or organization that (1) holds a single Federal contract, subcontract, or federally assisted construction contract in excess of $10,000; (2) has Federal contracts or subcontracts that, 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.

Pursuant to Executive Order 11246, receiving a Federal contract comes with a number of responsibilities. Section 202 of this Executive Order requires every covered contractor to agree to comply with all provisions of the Executive Order and the rules, regulations, and relevant orders of the Secretary of Labor. A contractor in violation of Executive Order 11246 may be subject to suit for make-whole and injunctive relief and to having its contracts canceled, terminated, or suspended or to debarment after the opportunity for a hearing.[7]

Major Proposed Revisions

For the reasons stated above, OFCCP proposes to revise the Guidelines at part 60–20 to create new sex discrimination regulations that set forth Federal contractors' obligations under Executive Order 11246, in accordance with existing law and policy. This proposal updates the Guidelines to address current issues in the workplace, and clarifies existing title VII law as it relates to sex discrimination, including developments and interpretations of existing law by the EEOC and OFCCP's corresponding interpretation of the Executive Order. It is intended to state clearly the existing principles applicable to a contractor's obligation to refrain from discrimination in its employment policies and practices because of sex and to ensure equal employment opportunity on the basis of sex.

The proposal removes a number of outdated provisions in the current Guidelines; restates, reorganizes, and clarifies others; and adds new ones that address legal developments that have arisen since 1970. Where current provisions of the Guidelines are uncontradicted by the proposed part 60–20, but are omitted because they are, as a practical matter, outdated, their omission does not mean that they are not still good law. For example, paragraph 60–20.2(b) currently states that ''[a]dvertisement in newspapers

[5] 35 FR 8888, June 9, 1970. The Guidelines were reissued in 1978 without substantive amendment. 43 FR 49258, October 20, 1978.

[6] Executive Order 13672, 79 FR 42971 (July 23, 2014).

[7] Executive Order 11246, § 209(5); 41 CFR 60–1.27.

and other media for employment must not express a sex preference unless sex is a *bona fide* occupational qualification for the job.'' This is a correct statement of the law, but does not have much practical effect, because few job advertisements today express a sex preference.[8] OFCCP seeks comments on whether any of the provisions proposed for deletion continue to be useful.

The proposed amendments to part 60–20 offered herein do not in any way alter a contractor's obligations under all other OFCCP regulations. In particular, a contractor's obligations to ensure equal employment opportunity and to take affirmative action, as set forth in parts 60–1, 60–2, 60–3, and 60–4 of this title, remain in effect. Similarly, inclusion of a provision in part 60–20 does not in any way alter a contractor's obligations to ensure nondiscrimination on the basis of race, color, religion, national origin, sexual orientation, and gender identity, under the Executive Order; on the basis of disability under Section 503 of the Rehabilitation Act of 1973 (''Section 503''); [9] or on the basis of protected veteran status under 38 U.S.C. 4212 of the Vietnam Era Veterans' Readjustment Assistance Act.[10]

Benefits of the Proposed Rule

The proposed rule would benefit both Federal contractors and their employees in several ways. First, by consolidating, updating, and clearly and accurately stating the existing principles of applicable law, including developments and interpretations of existing law by the EEOC and OFCCP's corresponding interpretation of the Executive Order, the proposed rule will facilitate contractor understanding and compliance and thus reduce contractor costs. As discussed above, the existing guidelines are extremely outdated and therefore do not provide sufficient or even accurate guidance to contractors regarding their nondiscrimination obligations. In fact, because OFCCP's interpretations of a contractor's nondiscrimination mandate on the basis of sex follow title VII principles, OFCCP no longer enforces part 60–20 to the extent that it departs from existing law. Maintenance of these outdated and inaccurate guidelines in the regulations may cause Federal contractors to incur unnecessary legal and/or management expenses to resolve confusion about possibly conflicting obligations. Thus, the NPRM will directly reduce the costs that some contractors may now incur when attempting to comply with part 60–20. OFCCP requests comment on the amount of cost savings covered entities may realize because of this rule.

The NPRM would also benefit the employees and job applicants of Federal contractors and subcontractors. In general, by making it easier for Federal contractors to comply with the law, this regulation would increase equality of employment opportunity for the millions of women working for Federal contractor establishments. Sixty-five million employees work for the Federal contractors and other recipients of Federal monies that are included in the General Service Administration's System for Award Management (SAM) database.[11] Based on Bureau of Labor Statistics data showing that 47 percent of the workforce is female,[12] OFCCP estimates that 30.6 million of the employees who work for the Federal contractors and other recipients of Federal monies are women.

More specifically, the NPRM would advance the employment status of female employees of Federal contractors in several ways. First, it would address both *quid pro quo* and hostile-environment sexual harassment. Second, it would clarify that adverse treatment of an employee because of gender-stereotyped assumptions about family caretaking responsibilities is discrimination. It would clarify that childcare leave must be available to fathers on the same terms as they are to mothers. It would also confirm the requirement that contractors provide equal retirement benefits to male and female employees, even if doing so costs more for one sex than the other.

In addition, by clarifying when pregnant workers are entitled to workplace accommodations, this rulemaking will protect pregnant employees who work for Federal contractors from losing their jobs, wages, and health care coverage. OFCCP estimates that 2,046,850 women in the Federal contractor workforce are likely to become pregnant each year. Moreover, by clarifying that discrimination against an individual because of her or his gender identity is unlawful sex discrimination, the NPRM would ensure that contractors are aware of their nondiscrimination obligations with respect to transgender employees and would assure equality of opportunity for transgender employees, the vast majority of whom report that they have experienced discrimination in the workplace.[13]

Finally, the NPRM would benefit public understanding of the law. Removing an ''outmoded'' and ''ineffective'' rule from the Code of Federal Regulations is in the public interest. This public interest is reflected in Section 6 of Executive Order 13563, which requires agencies to engage in retrospective analyses of their rules ''and to modify, streamline, expand, or repeal [such rules] in accordance with what has been learned.''

Costs of the Proposed Rule

A detailed discussion of the costs of the proposed rule is included in the section on Regulatory Procedures, *infra.* In sum, the proposed rule should create relatively minimal administrative and other cost burdens for contractors.

The only new administrative burden the proposed rule would create for contractors would be the one-time cost of regulatory familiarization—the estimated time it takes for contractors to review and understand the instructions for compliance—calculated at just under $26 million, or $52 per contractor company, the first year.

The only other new cost burden this rule would create for contractors would be the cost of pregnancy accommodations, which OFCCP calculates to be under $10 million annually, or $19 per contractor company, per year.[14]

[8] Recruitment for individuals of a certain sex for particular jobs, including recruitment by advertisement, is covered in proposed § 60–20.2(g).

[9] 29 U.S.C. 793.

[10] 38 U.S.C. 4212.

[11] U.S. General Services Administration, System for Award Management, *Legacy CCR Extracts Public (''FOIA'') Data Package,* May 2014, *available at https://www.sam.gov/portal/public/SAM/* (last accessed June 14, 2014).

[12] *Women in the Labor Force: A Databook* 2, BLS Reports, *available at http://www.bls.gov/cps/wlf-databook-2012.pdf* (last accessed Oct. 6, 2014) [hereinafter Women in the Labor Force].

[13] Jaime M. Grant, Lisa M. Mottet, & Justin Tanis, National Center for Transgender Equality & National Gay and Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, (2011), *available at http://transequality.org/PDFs/Executive_Summary.pdf* (last accessed Oct. 3, 2014) [hereinafter Injustice at Every Turn].

[14] OFCCP estimates approximately 2,046,850 women in the Federal contractor workforce would be pregnant in a year, of whom 21 percent work in job categories likely to require accommodations that might involve more than a *de minimis* cost. Because the incidence of medical conditions during pregnancy that require accommodations ranges from 0.5 percent (placenta previa) to 50 percent (back issues), OFCCP estimates that of the women in positions that require physical exertion or standing, half may require some type of an accommodation or light duty. Based on a study finding that the employers of 91 percent of pregnant women who needed and requested a change in duties such as less lifting or more sitting attempted to address their needs, the proposed rule would require covered contractors to accommodate the nine percent of women whose needs were not addressed or would not have been addressed had they requested accommodation. According to the Job Accommodation Network, the average cost of an accommodation is $500. Therefore, OFCCP

Together, these costs amount to under $36 million, or $71 per contractor company, the first year; and under $10 million, or $19 per contractor company, each subsequent year.

Reasons for Amending the Current Sex Discrimination Guidelines, 41 CFR 60–20

The existing statement of the purpose of the current Guidelines demonstrates their outdated nature. As the ''title and purpose'' section of current part 60–20 states, the Guidelines were first adopted because sex discrimination was perceived as presenting ''special problems [of] implementation'' that required ''a definitive treatment beyond the terms of the [executive] order itself.'' 41 CFR 60–20.1. Five sections, covering ''recruitment and advertisement,'' ''job policies and practices,'' ''seniority system,'' ''discriminatory wages,'' and ''affirmative actions,'' currently follow § 60–20.1.

Since the Guidelines were promulgated in 1970, there have been dramatic changes in women's participation in the workforce. Between 1970 and December 2013, women's participation in the labor force grew from 43 percent to 57 percent.[15] This included a marked increase in employment of mothers: The labor force participation of women with children under the age of 18 increased from 47 percent in 1975 to 70 percent in 2013.[16] In 2013, both adults worked at least part time in 59 percent of married-couple families with children under 18, and 73 percent of mothers heading single-parent families with children under 18 worked at least part time.[17]

Since 1970, there have also been extensive changes in the law regarding sex-based employment discrimination and in contractors' policies and practices governing workers. For example:

- Title VII, which generally governs the law of sex-based employment discrimination, has been significantly amended four times: Once in 1972, by the Equal Employment Opportunity Act;[18] once in 1978, by the Pregnancy Discrimination Act (''PDA'');[19] once in 1991, by the Civil Rights Act;[20] and finally in 2009, by the Lilly Ledbetter Act.[21]
- State ''protective laws'' that had explicitly barred women from certain occupations or otherwise restricted their employment conditions on the basis of sex have been repealed or are unenforceable.[22]
- In 1993, the Family and Medical Leave Act (''FMLA'')[23] was enacted, requiring employers of 50 or more employees to provide a minimum of 12 weeks of annual, unpaid, job-guaranteed leave to both male and female employees to recover from their own serious health conditions (including pregnancy, childbirth, or related medical conditions), to care for a newborn or newly adopted or foster child, or to care for a child, spouse, or parent with a serious health condition.
- In 1970 it was not uncommon for employers to require female employees to retire at earlier ages than their male counterparts. However, the Age Discrimination in Employment Act was amended in 1986 to abolish mandatory retirement for all employees with a few exceptions.[24]

Moreover, since 1970 the Supreme Court has determined that numerous practices which were not then widely recognized as discriminatory constitute unlawful sex discrimination under title VII. See *e.g., City of Los Angeles* v. *Manhart,* 435 U.S. 702 (1978) (requiring equal retirement benefits for women and men, despite statistical differences in longevity); *County of Washington* v. *Gunther,* 452 U.S. 161 (1981) (holding that compensation discrimination is not limited to unequal pay for equal work within the meaning of the Equal Pay Act); *Newport News Shipping & Dry Dock Co.* v. *EEOC,* 462 U.S. 669 (1983) (holding that employer discriminated on the basis of sex by excluding pregnancy-related hospitalization coverage for the spouses of male employees while providing complete hospitalization coverage for the spouses of female employees); *Meritor Savings Bank* v. *Vinson,* 477 U.S. 57 (1986) (recognizing cause of action for sexually hostile work environment); *California Federal S. & L. Assn.* v. *Guerra,* 479 U.S. 272 (1987) (upholding California law requiring up to four months leave and reinstatement to pregnant employees and finding law not inconsistent with title VII); *Price Waterhouse* v. *Hopkins,* 490 U.S. 228, 250 (1989) (finding sex discrimination on basis of sex stereotyping); *Oncale* v. *Sundowner Offshore Servs.,* 523 U.S. 75, 78 (1998) (recognizing cause of action for ''same sex'' harassment); *Int'l Union, United Auto., Aerospace and Agr. Implement. Workers of Am.* v. *Johnson Controls, Inc.,* 499 U.S. 187 (1991) (holding that possible reproductive health hazards to women of childbearing age did not justify sex-based exclusions from certain jobs); *Burlington Industries, Inc.* v. *Ellerth,* 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton,* 524 U.S. 775 (1998) (holding employers vicariously liable under title VII for the harassing activity of supervisors who create hostile working conditions for those over whom they have authority); and *Burlington N. & Santa Fe Railway Co.* v. *White,* 548 U.S. 53 (2006) (clarifying broad scope of prohibition of retaliation for filing of charge of sex discrimination).

In response to these legal and economic changes, employment policies and practices have also changed. Contractors rarely adopt or implement explicit rules that prohibit hiring of women for certain jobs; and jobs are no longer advertised in sex-segregated newspaper columns. Women have made major inroads into professions and

estimates that the cost would be $9,671,000 (2,046,850 × 21% × 50% × 9% × $500).

[15] U.S. Census Bureau, *Civilian Population—Employment Status by Sex, Race, and Ethnicity: 1970–2009,* The 2012 Statistical Abstract, *available at http://www.census.gov/compendia/statab/2012/tables/12s0588.pdf* (last accessed Oct. 31, 2014); Bureau of Labor Statistics, U.S. Department of Labor Statistics, *Data Retrieval: Labor Force Statistics (Current Population Survey,* Household Data, Table A–1, Employment status of the civilian population by sex and age, *available at http://www.bls.gov/webapps/legacy/cpsatab1.htm* (last accessed Oct. 3, 2014).

[16] Bureau of Labor Statistics, U.S. Department of Labor, TED: The Economics Daily, Labor force participation rates among mothers,, *available at http://www.bls.gov/opub/ted/2010/ted_20100507_data.htm* (last accessed Oct. 3, 2014) [hereinafter Labor Force Participation: Mothers—2010]; Press Release, Bureau of Labor Statistics, U.S. Department of Labor, Employment Characteristics of Families—2013 (April 25, 2014), *available at http://www.bls.gov/news.release/famee.nr0.htm* (last accessed Nov. 5, 2014) [hereinafter Employment Characteristics of Families—2013].

[17] Employment Characteristics of Families—2013, *supra* note 16.

[18] Equal Employment Opportunity Act of 1972, Public Law 92–261, 86 Stat. 103 (1972).

[19] Amendment to Title VII of the Civil Rights Act of 1964 to Prohibit Sex Discrimination on the Basis of Pregnancy, Public Law 95–555, 995, 92 Stat. 2076 (1978).

[20] Civil Rights Act of 1991, Public Law 102–166, 1745, 105 Stat. 1071 (1991).

[21] Lilly Ledbetter Fair Pay Act of 2009, Public Law 111–2, 123 Stat. 5 (2009).

[22] See, *e.g.,* Conn. Gen. Stat. § 31–18 (*repealed* 1973) (prohibition of employment of women for more than nine hours a day in specified establishments); Mass. Gen. Laws ch. 345 (1911) (*repealed* 1974) (outright prohibition of employment of women before and after childbirth); Ohio Rev. Code Ann. § 4107.43 (*repealed* 1982) (prohibition of employment of women in specific occupations that require the routine lifting of more than 25 pounds); see also *Nashville Gas Co.* v. *Satty,* 434 U.S. 136, 142 (1977) (invalidating public employer requirement that pregnant employees take a leave of absence during which they did not receive sick pay and lost job seniority); *Cleveland Bd. of Educ.* v. *LaFleur,* 414 U.S. 632 (1974) (striking rules requiring leave from after the fifth month of pregnancy until three months after birth); *Somers* v. *Aldine Indep. Sch. Dist.,* 464 F. Supp. 900 (S.D. Tex. 1979) (finding sex discrimination where school district terminated teacher for not complying with requirement that pregnant women take an unpaid leave of absence in their third month or be terminated).

[23] 29 U.S.C. 2601 *et seq.*

[24] 29 U.S.C. 621–634.

occupations traditionally dominated by men. For example, women's representation among doctors tripled, from nearly 12 percent in 1980[25] to 36 percent in 2013.[26] Executive suites are no longer predominantly segregated by sex, with the executive positions all being occupied by men and women functioning as secretaries. Indeed, in many companies, it is hardly surprising for women to be in positions of considerable power and status. Moreover, the female-to-male earnings ratio for women and men working full-time, year-round in all occupations increased from 59 percent in 1970 to 78 percent in 2013.[27]

In addition, employer-provided insurance policies that explicitly provide lower-value or otherwise less comprehensive hospitalization or disability benefits for childbirth than for other medical conditions are unlawful for employers of 15 or more employees.[28] Generous leave and other family-friendly policies are increasingly common. As early as 2000, even employers that were not covered by the FMLA routinely extended leave to their employees for FMLA-covered reasons: Two-thirds of such employers provided leave for an employee's own serious health condition and for pregnancy-related disabilities, and half extended leave to care for a newborn child.[29] Eleven percent of employees have access to paid family leave, and most employees receive some pay during family and medical leave due to paid vacation, sick, or personal leave or temporary disability insurance.[30]

While these changes in policies and practices show a measure of progress, there is no doubt that sex discrimination remains a significant and pervasive problem. Indeed, the percentage of total annual EEOC charges that allege sex discrimination has remained nearly constant at around 30 percent since at least 1997.[31]

Additionally, occupational sex segregation remains widespread:

> In 2012, nontraditional occupations for women employed only six percent of all women, but 44 percent of all men. The same imbalance holds for occupations that are nontraditional for men; these employ only 5 percent of men, but 40 percent of women. Gender segregation is also substantial in terms of the broad sectors where men and women work: Three in four workers in education and health services are women, nine in ten workers in the construction industry and seven in ten workers in manufacturing are men.[32]

Likewise, women continue to be underrepresented in higher level or more senior jobs within occupations. For example, in 2013, women were represented in only 38 percent of all manager positions.[33] Women also accounted for only 27 percent of chief executive officer positions.[34]

As mentioned above, in 2013, women working full time earned 78 cents on the dollar compared with men, measured on the basis of median annual earnings.[35] While this represents real progress, and discrimination may not be the cause of the entire gap, more than fifty years after passage of the Equal Pay Act, the size of the gap is still unacceptable. At the current rate of progress, researchers estimate it will take until 2057 to close the gender pay gap.[36]

The wage gap is also greater for women of color and women with disabilities. When measured by median full-time weekly earnings, in 2013 African-American women made approximately 69 cents and Latinas made approximately 61 cents for every dollar earned by a non-Hispanic, white man.[37] In 2013, median annual earnings for women with disabilities were only 47 percent of median annual earnings for men without disabilities.[38] Moreover, it appears that the narrowing of the pay gap has slowed since the 1990's.[39]

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[25] American Medical Association, *Women in Medicine: An AMA Timeline* 4, *available at https://download.ama-assn.org/resources/doc/wps/x-pub/wimtimeline.pdf* (last accessed May 13, 2014).

[26] Bureau of Labor Statistics, U.S. Department of Labor, *Labor Force Statistics from the Current Population Survey,* Table 11, Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, Household Data Annual Averages, *available at http://www.bls.gov/cps/cpsaat11.htm* (last accessed June 5, 2014) [hereinafter BLS Labor Force Statistics 2013].

[27] U.S. Census Bureau, *Income and Poverty in the United States: 2013,* Current Population Reports 10 (2014), Table A–4, Number and real median earnings of total workers and full-time, year-round workers by sex and female-to-male earnings ratio: 1960–2013, *available at http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf* (last accessed Nov. 2, 2014).

[28] These practices, common before the PDA, were prohibited when that law became effective as to fringe benefits in 1979. As the EEOC explained in guidance on the PDA issued in 1979—

> A woman unable to work for pregnancy-related reasons is entitled to disability benefits or sick leave on the same basis as employees unable to work for other medical reasons. Also, any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions.

Appendix to Part *1604*—Questions and Answers on the Pregnancy Discrimination Act, 44 FR 23805 (Apr. 20, 1979), 29 CFR part 1604. EEOC's recently issued guidance echoes this earlier interpretation and discusses recent developments on benefits issues affecting PDA compliance. U.S. Equal Opportunity Commission, Enforcement Guidance: Pregnancy Discrimination and Related Issues I.C.2–4 (July 14, 2014), *available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm* (last accessed Oct. 3, 2014). OFCCP welcomes comments on the extent to which contractor-provided health insurance plans comply with the PDA.

[29] U.S. Department of Labor, Wage and Hour Division, *The 2000 Survey Report* ch. 5, Table 5–1. Family and Medical Leave Policies by FMLA Coverage Status, 2000 Survey Report *available at http://www.dol.gov/whd/fmla/chapter5.htm#5.1.1* (last accessed May 13, 2014).

[30] Robert Van Giezen, *Paid Leave in Private Industry over the Past 20 Years,* Bureau of Labor Statistics, U.S. Department of Labor, Beyond the Numbers: Pay & Benefits Aug. 2013, *available at http://www.bls.gov/opub/btn/volume-2/paid-leave-in-private-industry-over-the-past-20-years.htm* (last accessed Oct. 3, 2014). In addition, most employees taking family or medical leave had some access to paid leave: ''48% report[ed] receiving full pay and another 17% receive[d] partial pay, usually but not exclusively through regular paid vacation leave, sick leave, or other 'paid time off' hours.'' Jacob Klerman, Kelly Daley, & Alyssa Pozniak, Family and Medical Leave in 2012: Executive Summary ii, *http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Executive-Summary.pdf* (last accessed Oct. 3, 2014).

[31] This rate has varied from a low of 28.5 percent in FY 2011 to a high of 31.5 percent in FY 2000. U.S. Equal Employment Opportunity Commission, *Enforcement and Litigation Statistics,* Charge Statistics: FY 1997 Through FY 2013, *available at http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm* (last accessed Nov. 2, 2014). In FY 2013, the EEOC received 27,687 charges alleging sex discrimination.

[32] Ariane Hegewisch & Heidi Hartmann, Institute for Women's Policy Research, Occupational Segregation and the Gender Wage Gap: A Job Half Done (2014), *available at http://www.iwpr.org/publications/pubs/occupational-segregation-and-the-gender-wage-gap-a-job-half-done* (last accessed Oct. 3, 2014) (citations omitted); see also Ariane Hegewisch et al., The Gender Wage Gap by Occupation, Fact Sheet #C350a, The Institute for Women's Policy Research, *available at http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-2/at_download/file/* (last accessed Oct. 3, 2014) [hereinafter IWPR Wage Gap By Occupation].

[33] BLS Labor Force Statistics 2013, *supra* note 26.

[34] *Id.*

[35] U.S. Census Bureau, *Income and Poverty in the United States: 2013,* Current Population Reports 10 (2014), *available at http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf* (last accessed Nov. 2, 2014).

[36] Institute for Women's Policy Research, *At Current Pace of Progress, Wage Gap for Women Expected to Close in 2057* (April 2013), *available at http://www.iwpr.org/publications/pubs/at-currentpace-of-progress-wage-gap-for-women-expected-toclose-in-2057.*

[37] Bureau of Labor Statistics, U.S. Department of Labor, *Household Data, Annual Averages,* Table 37. ''Median Weekly Earnings of Full-Time Wage and Salary Workers By Selected Characteristics'' *available at http://www.bls.gov/cps/cpsaat37.pdf* (last accessed Oct. 6, 2014).

[38] Calculation from U.S. Census Bureau, American Fact Finder, ''Median earnings in the past 12 months (in 2013 inflation-adjusted dollars) by disability status by sex for the civilian noninstitutionalized population 16 years and over with earnings,'' *available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_B18140&prodType=table* (last accessed Nov. 6, 2014).

[39] From 1980 to 1989, the percentage of women's earnings relative to men's increased from 60.2% to 66.0%; from 1990 to 1999, the percentage increased from 71.6% to just 72.2%. U.S. Census Bureau, *Historical Income Tables: People,* Table P–40: Women's Earnings as a Percentage of Men's Earnings by Race and Hispanic Origin, *available at https://www.census.gov/hhes/www/income/data/historical/people/* (last accessed Nov. 2, 2014). *See*

These disparities can be explained to some extent by differences in experience, occupation, and industry.[40] However, decades of research show these wage gaps remain even after accounting for factors like the type of work people do and qualifications such as education and experience.[41] Moreover, while some women may work fewer hours or take time out of the workforce because of family responsibilities, there is research suggesting that discrimination and not just choices can lead to women with children earning less;[42] to the extent that the potential explanations such as type of job or amount of continuous labor market experience are also influenced by discrimination, the ''unexplained'' difference may understate the true effect of sex discrimination.[43]

Male-dominated occupations generally pay more than female-dominated occupations at similar skill levels. But even within the same occupation, women earn less than men on average. For example, in 2012, full-time women auditors' and accountants' earnings were less than 74 percent of the earnings of their male counterparts.[44] Retail salespersons faced the largest wage gap, among whom women made only 64 percent of what men made.[45] Likewise, in the medical profession, women earn less than their male counterparts. On average, male physicians earn 13 percent more than female physicians at the outset of their careers and as much as 28 percent more eight years later.[46] This gap could not be explained by practice type, work hours, or other characteristics of employees' work situations.[47]

Despite enactment of the PDA, women continue to report that they have experienced discrimination on account of pregnancy. Between FY 1997 and FY 2011, the number of charges of pregnancy discrimination filed with the EEOC and state and local agencies was significant, ranging from a low of 3,977 in 1997 to a high of 6,285 in 2008.[48] A 2011 review of reported ''family responsibility discrimination'' cases (brought by men as well as women) found that low-income workers face ''extreme hostility to pregnancy.''[49]

In addition, some pregnant workers face a serious and unmet need for workplace accommodations, which are vital to their uninterrupted, seamless, and continued employment and, ultimately, to their health and that of their children. OFCCP is aware of a number of situations in which women have been denied accommodations with deleterious health consequences. For example:

In one instance, a pregnant cashier in New York who was not allowed to drink water during her shift, in contravention of her doctor's recommendation to stay well-hydrated, was rushed to the emergency room after collapsing at work. As the emergency room doctor who treated her explained, because ''pregnant women are already at increased risk of fainting (due to high progesterone levels causing blood vessel dilation), dehydration puts them at even further risk of collapse and injury from falling.'' Another pregnant worker was prohibited from carrying a water bottle while stocking grocery shelves despite her doctor's instructions that she drink water throughout the day to prevent dehydration. She experienced preterm contractions, requiring multiple hospital visits and hydration with IV fluids. . . . [Another] woman, a pregnant retail worker in the Midwest who had developed a painful urinary tract infection, supplied a letter from her doctor to her employer explaining that she needed a short bathroom break more frequently than the store's standard policy. The store refused. She later suffered another urinary tract infection that required her to miss multiple days of work and receive medical treatment.[50]

''Pregnant workers in physically demanding, inflexible, or hazardous jobs are particularly likely to need accommodations at some point during their pregnancies to continue working safely.''[51] Meanwhile, more women

also Youngjoo Cha & Kim A Weeden, *Overwork and the Slow Convergence in the Gender Gap in Wages,* Am. Soc. Rev. 1–28 (2014), *available at http://www.asanet.org/journals/ASR/ChaWeeden June14ASR.pdf* (last accessed Nov. 2, 2014); Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990s: Slowing Convergence,* 60 Indus. & Lab. Rel. Rev. 45 (2006) [hereinafter Slowing Convergence].

[40] *Equal Pay for Equal Work? New Evidence on the Persistence of the Gender Pay Gap: Hearing Before United States Joint Economic Comm.,* Majority Staff of the Joint Econ. Comm., 111th Cong., Invest in Women, Invest in America: A Comprehensive Review of Women in the U.S. Economy 80 (Comm. Print 2010), 80, *available at http://jec.senate.gov/public/?a=Files.Serve&File_id=9118a9ef-0771-4777-9c1f-8232fe70a45c* (last accessed Oct. 3, 2014) (statement of Randy Albelda, Professor of Economics and Senior Research Associate, University of Massachusetts-Boston Center for Social Policy).

[41] A March 2011 White House report entitled Women in America: Indicators of Social and Economic Well-Being, found that while earnings for women and men typically increase with higher levels of education, male-female pay gap persists at all levels of education for full-time workers (35 or more hours per week), according to 2009 BLS wage data. Potentially nondiscriminatory factors can explain some of the gender wage differences. See, *e.g.,* June Elliot O'Neill, The Gender Gap in Wages, Circa 2000, Am. Econ. Rev. (May 2003). Even so, after controlling for differences in skills and job characteristics, women still earn less than men. Explaining Trends in the Gender Wage Gap, A Report by the Council of Economic Advisers (June 1998). Ultimately, the research literature still finds an unexplained gap exists even after accounting for potential explanations, and finds that the narrowing of the pay gap for women has slowed since the 1980s. Joyce P. Jacobsen, *The Economics of Gender* 44 (2007); *Slowing Convergence, supra* note 39.

[42] Shelley J. Correll, Stephen Benard, & In Paik, ''Getting a Job: Is There a Motherhood Penalty?'' 112 *American Journal of Sociology* 1297 (2007).

[43] *Strengthening the Middle Class: Ensuring Equal Pay for Women: Hearing Before H. Comm. on Educ. and Labor,* 110th Cong. (2007), available at *http://www.cepr.net/index.php/strengthening-the-middle-class-ensuring-equal-pay-for-women-testimony/* (last accessed Oct. 3, 2014) (statement of Heather Boushey, Senior Economist, Center for Economic and Policy Research).

[44] IWPR Wage Gap by Occupation, *supra* note 32.

[45] *Id.*

[46] Constanca Esteves-Sorenson & Jason Snyder, The Gender Earnings Gap for Physicians and its Increase Over Time 1 (2011), *available at http://faculty.som.yale.edu/ConstancaEstevesSorenson/documents/Physician_000.pdf* (last accessed October 3, 2014).

[47] *Id.* A 2008 study on physicians leaving residency programs in New York State also found a $16,819 pay gap between male and female physicians. Anthony T. LoSasso, Michael R. Richards, Chiu-Fang Chou & Susan E. Gerber, *The $16,819 Pay Gap For Newly Trained Physicians: The Unexplained Trend Of Men Earning More Than Women,* 30 Health Affairs 193 (2011), *available at http://content.healthaffairs.org/content/30/2/193.full.pdf+html* (last accessed May 13, 2014).

[48] U.S. Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges,* EEOC & FEPAs Combined: FY 1997–FY 2011, *available at http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm* (last accessed Nov. 2, 2014); U.S Equal Employment Opportunity Commission, *Charge Statistics: FY 1997 Through FY 2013, available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm* (last accessed Nov. 2, 2014) (hereinafter ''EEOC Charge Statistics: FY 1997–2013''). FY 2011 is the last year for which comparable data are available. For FY 2012 and FY 2013, four percent of the charges filed with the EEOC alleged pregnancy discrimination. OFCCP calculations made from data from U.S Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges,* FY 2010–FY 2013, *available at http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy_new.cfm* (last accessed Nov. 2, 2014) and EEOC Charge Statistics: FY 1997–2013.

[49] Stephanie Bornstein, Center for WorkLife Law, UC Hastings College of the Law, Poor, Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers 2 (2011), *available at http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf* (last accessed Oct. 3, 2014).

[50] *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 in Young* v. *United Parcel Service,* supra, available at *http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/12-1226_pet_amcu_hcp-etal.authcheckdam.pdf,* at 9–10, 11 [citations omitted]. *See also Wiseman* v. *Wal-Mart Stores, Inc.,* No. 08–1244–EFM, 2009 WL 1617669 (D. Kan. June 9, 2009) (pregnant retail employee with recurring urinary and bladder infections caused by dehydration alleged she was denied permission to carry a water bottle despite doctor's note), *available at http://www.gpo.gov/fdsys/pkg/USCOURTS-ksd-6_08-cv-01244/pdf/USCOURTS-ksd-6_08-cv-01244-0.pdf.*

[51] National Women's Law Center & A Better Balance, It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers 5 (2013), *available at http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf* (last accessed Dec. 30, 2014) [hereinafter Heavy Lift].

today continue to work throughout their pregnancies and therefore are more likely to need accommodations of some sort. Of women who had their first child between 1966 and 1970, 49 percent worked during pregnancy; of those, 39 percent worked into their last month. For the period from 2006 to 2008, the proportion working increased to 66 percent, and the proportion of those working into the last month increased to 82 percent.[52]

In some ways, the nature of sex discrimination has also changed since OFCCP promulgated the Sex Discrimination Guidelines. Explicit sex segregation, such as the facial ''male only'' hiring policies that part 60–20 specifically addresses, has been replaced in many workforces by less overt mechanisms that nevertheless present real equal opportunity barriers.

One of the most significant barriers is the role of sex-based stereotyping. Decades of social science research have documented the extent to which sex-based stereotypes about the roles of women and men and their respective capabilities in the workplace can influence decisions about hiring, training, promotions, pay raises, and other conditions of employment.[53] As the Supreme Court recognized in 1989, an employer engages in sex discrimination if its female employees' chances of promotion depend on whether they fit their managers' preconceived notions of how women should dress and act.[54] Research clearly demonstrates that widely held social attitudes and biases can lead to discriminatory decisions, even where there is no formal sex-based (or race-based) policy or practice in place.[55] Sex-based stereotyping may have even more severe consequences for transgender, lesbian, gay, and bisexual applicants and employees, many of whom report that they have experienced discrimination in the workplace.[56]

With the marked increase of women in the labor force, the changes in employment practices, and numerous key legal developments since 1970, the ''special problems . . . [of] implementation'' of the Executive Order's prohibition of sex discrimination referred to in current § 60–20.1 have changed significantly as well. As a result, many of the provisions in the Guidelines are outdated, inaccurate, or both. At the same time, there are important and current areas of law that the Guidelines fail to address at all. For example, while the existing regulations touch upon leave for childbearing, they are completely silent about refusals to hire pregnant women or women of childbearing age, restricted duty during pregnancy, health insurance or other benefits, and other applications of the law prohibiting pregnancy discrimination.

Section-by-Section Analysis

The NPRM recommends a quite different organization of the topics covered in current part 60–20. For example, discussion of the BFOQ defense is repeated in several different sections of the current guidelines; the proposal consolidates this discussion into one section covering BFOQs. In addition, the proposal does not address some topics that are addressed in current part 60–20 but are outdated; includes some topics that are covered by the current guidelines but in revised form to align them with current law; and adds some provisions not contained in the current guidelines to address contemporary problems with implementation.

This Section-by-Section Analysis identifies and discusses all proposed changes in each section. OFCCP welcomes comments on each of the provisions discussed below.

Title of the Regulations

The current title of part 60–20 is ''Sex Discrimination Guidelines.'' OFCCP proposes to change this title to ''Discrimination on the Basis of Sex,'' to make clear that the provisions in part 60–20 are regulations implementing Executive Order 11246 with the full force and effect of law.

Section 60–20.1 Purpose

The NPRM proposes a few minor changes to this section. First, it deletes the words ''Title and'' from the heading of current § 60–20.1, because the proposed section does not set out a title. Second, it deletes the second sentence of current § 60–20.1, which explains the reason that this part was promulgated in 1970, because the reasons for amending this part are contained in the preamble of the NPRM. Finally, the proposal modifies the last sentence of current § 60–20.1, which notifies the public that part 60–20 is ''to be read in connection with existing regulations, set forth in part 60–1 of this chapter.'' For completeness and to prevent any confusion, this change clarifies that contractors are subject to all the relevant parts related to the implementation of Executive Order 11246, by listing them specifically. Therefore, the proposed rule states that part 60–20 is to be read in conjunction with parts 60–1, 60–2, 60–3, 60–4, and 60–30 of this title.

Section 60–20.2 General Prohibitions

OFCCP proposes removing current § 60–20.2 entitled ''Recruitment and advertisement,'' which addresses both the nondiscrimination requirements related to recruiting and advertising and the BFOQ defense. Unlawful practices related to recruitment and advertising contained in current § 60–20.2 are subsumed in a new subparagraph of this section. *See* proposed paragraph 60–20.2(b)(7). The BFOQ defense is now addressed in proposed § 60–20.3.

In place of current § 60–20.2, OFCCP proposes a new section entitled ''General prohibitions.'' Paragraph (a) of this new section articulates the general prohibition against sex discrimination in employment. Paragraph (b) expressly prohibits disparate treatment discrimination; subparagraphs (b)(1) through (b)(10) apply the general prohibition of disparate treatment discrimination to specific practices. Paragraph (c) prohibits discrimination under disparate impact analysis.

The general statement prohibiting sex discrimination in paragraph (a) clarifies that discrimination based on pregnancy,

[52] U.S. Census Bureau, Maternity Leave and Employment Patterns of First-Time Mothers: 1961–2008 4, 7 (2011), *available at http://www.census.gov/prod/2011pubs/p70-128.pdf* (last accessed Nov. 2, 2014) (tables 1 and 3).

[53] *See, e.g.,* Susan Fiske et al., *Controlling Other People: The Impact of Power on Stereotyping,* 48 a.m. Psychol. 621 (1993); Marzarin Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes,* 102 Psychol. Rev. 4 (1995); Brian Welle & Madeline Heilman, *Formal and Informal Discrimination Against Women at Work* in *Managing Social and Ethical Issues in Organizations* 23 (Stephen Gilliland, Dirk Douglas Steiner & Daniel Skarlicki eds., 2007); Susan Bruckmüller et al., *Beyond the Glass Ceiling: The Glass Cliff and Its Lessons for Organizational Policy,* 8 Soc. Issues & Pol. Rev. 202 (2014) (describing the role of sex-based stereotypes in the workplace).

[54] *Price Waterhouse* v. *Hopkins,* 490 U.S. 228 (1989). Men, too, can experience adverse effects from sex-based stereotyping.

[55] *See, e.g.,* Kevin Lang & Jee-Yeon K. Lehmann, *Racial Discrimination in the Labor Market: Theory and Empirics* (NBER Working Paper No. 17450, 2010), *available at http://128.197.153.21/jee/Lang_Lehmann_jel_disc.pdf* (last accessed Oct. 3, 2014); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,* 94(4) American Econ. Rev. (2004); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car,* 85(3) Am. Econ. Rev. (1995); Marc Bendick, Charles Jackson & Victor Reinoso, *Measuring Employment Discrimination Through Controlled Experiments,* 23 Rev. of Black Pol. Econ. 25 (1994).

[56] Injustice at Every Turn, *supra* note 13; Brad Sears & Christy Mallory, The Williams Institute, Documented Evidence of Employment Discrimination & Its Effects on LGBT People (2011), *available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf* (last accessed Nov. 5, 2014). Further discussion of discrimination on the basis of sexual orientation and gender identity can be found *infra* in the passages on § 60–20.2(a) and § 60–20.7.

childbirth, or related medical conditions is a form of sex discrimination. This principle has been the law since Congress enacted the Pregnancy Discrimination Act amendments to title VII in 1978. This form of discrimination is also treated separately in proposed § 60–20.5.

In addition, paragraph (a) clarifies that discrimination based on gender identity or transgender status is also a form of sex discrimination. *See* OFCCP Directive 2014–02, ''Gender Identity and Sex Discrimination'' (August 19, 2014). As Directive 2014–02 explains, ''Under current Title VII case law principles, discrimination based on gender identity or transgender status . . . is discrimination based on sex.'' The Directive relied on the EEOC's decision in *Macy* v. *Holder,* 2012 WL 1435995 (EEOC April 20, 2012), in which the EEOC commissioners unanimously concluded that discrimination because a person is transgender is sex discrimination in violation of title VII, by definition, because the discriminatory act is ''related to the sex of the victim.'' [57] The EEOC cited both the text of title VII and the reasoning in *Schroer* v. *Billington,* 577 F. Supp. 2d 293 (D.D.C. 2008), for its conclusion.[58] See also Memorandum from Attorney General Eric Holder to United States Attorneys and Heads of Department Components (Dec. 15, 2014) (citing EEOC's decision in *Macy* v. *Holder* as support for DOJ's positon that ''[t]he most straightforward reading of Title VII is that discrimination 'because of . . . sex' includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex''). Note that discrimination on the basis of gender identity or transgender status can arise regardless of whether a transgender individual has undergone, is undergoing, or plans to undergo sex-reassignment surgery or other processes or procedures designed to facilitate the adoption of a sex or gender other than the individual's designated sex at birth.

Many of the examples included in this proposed section are presently listed in § 60–20.3, ''Job policies and practices,'' of the current part 60–20. For instance, proposed paragraph 60–20.2(b)(1) identifies making a distinction between married and unmarried persons that is not applied equally to both sexes as an example of a sex-based discriminatory practice, and proposed paragraph 60–20.2(b)(2) provides that denying women with children an employment opportunity that is available to men with children is an unlawful sex-based discriminatory practice. These proposed provisions can be found in current paragraph 60–20.3(d).

Other examples of practices listed in this proposed rule that, absent a BFOQ, would constitute sex-based discriminatory treatment include: Treating unmarried female parents differently than unmarried male parents (proposed paragraph 60–20.2(b)(3)); imposing differences in retirement age or other terms, conditions, or privileges of retirement based on sex (proposed paragraph 60–20.2(b)(4)); restricting job classifications on the basis of sex (proposed paragraph 60–20.2(b)(5)); maintaining seniority lines and lists based on sex (proposed paragraph 60–20.2(b)(6)); recruiting or advertising for members of one sex for a certain job, including through use of gender-specific terms for jobs (proposed paragraph 60–20.2(b)(7)); and distinguishing on the basis of sex in apprenticeship or other formal or informal training programs; in other opportunities such as networking, mentoring, sponsorship, individual development plans, rotational assignments, and succession planning programs; and in performance appraisals that may provide the basis of subsequent opportunities (proposed paragraph 60–20.2(b)(8)). Specific enumeration of these types of programs ensures that the forms of career development and advancement opportunities that contractors currently use are included.

Proposed paragraph 60–20.2(b)(9) states that making any facilities or employment-related activities available only to members of one sex is an example of an unlawful sex-based discriminatory practice, with the condition that if a contractor provides restrooms or changing facilities, the contractor must provide separate or single-user restrooms or changing facilities to assure privacy between the sexes.[59]

This proposed paragraph replaces current § 60–20.3(e), which requires contractors to provide ''appropriate physical facilities'' to both men and women ''unless the employer is able to show that the construction of the facilities would be unreasonable for such reasons as excessive expense or lack of space.'' Under existing law, unreasonable cost is not acceptable as a defense to sex discrimination in employment.[60] Moreover, current § 60–20.3(e) is inconsistent with other OFCCP regulations, which require contractors to provide separate or single-user restrooms and changing facilities to assure privacy between the sexes without exception for cost or lack of space. *See* 41 CFR 60–1.8 (supply and service contractors); 41 CFR 60–4.3(a) 7n (construction contractors).[61]

Proposed paragraph 60–20.2(b)(10) describes another example of sex-based discriminatory practices: Denying transgender employees access to the bathrooms used by the gender with which they identify.

Proposed paragraph 60–20.2(b)(11) addresses discrimination against transgender individuals who have undergone, are undergoing, or plan to undergo sex-reassignment surgery or other processes or procedures designed to facilitate the adoption of a sex or gender other than the individual's designated sex at birth. Disparate treatment for this reason has been classified as both discrimination on the basis of sex-based stereotypes and as discrimination on the basis of sex. *Schroer* v. *Billington, supra,* at 304–08 (D.D.C. 2008) (concluding that an employer's decision to withdraw a job offer from a transgender applicant

[57] *Macy* at *7. Macy also held that discrimination on the basis of transgender status could be unlawful under title VII as sex stereotyping. That form of sex stereotyping is separately addressed in proposed § 20.7.

[58] Consistent with *Macy,* this NPRM defines discrimination on the basis of gender identity as a form of sex discrimination. Gender identity is also a stand-alone protected category (along with sexual orientation) under Executive Order 13672. Executive Order 13672 amends Executive Order 11246 to add sexual orientation and gender identity as protected bases, and applies to contracts entered into or modified on or after April 8, 2015, the effective date of the implementing regulations promulgated thereunder.

[59] This provision aligns with an existing affirmative action requirement applicable to Federal and federally-assisted construction contractors at 41 CFR 60–4.3(a) 7n (''Ensure that all facilities and company activities are nonsegregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.'').

[60] See *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am.* v. *Johnson Controls, Inc.,* 499 U.S. 187, 210–11 (1991), in which the plaintiff challenged defendant's policy prohibiting women of childbearing age from working in jobs involving exposure to lead because of potential health dangers to fetuses that they may be carrying. The Supreme Court held that the cost of eliminating the health dangers cannot be a BFOQ that justifies the exclusion of women workers.

[61] In addition, OSHA regulations require employers to provide employees with toilets, except for ''mobile crews, which must have] ''transportation readily available to nearby toilet facilities.'' 29 CFR 1926.51(c) (OSHA construction sanitation standard); OSHA Standard Interpretation regarding 29 CFR 1926.51(c) (June 7, 2002), *https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24369* (interpreting the provision pertaining to mobile crews as requiring prompt access to toilets that are less than 10 minutes away and recognizing that women may need bathroom facilities more often than men).

constituted both sex-stereotyping discrimination and sex discrimination in violation of title VII). The EEOC has recognized this principle as well. *Macy* v. *Holder, supra.*

Finally, proposed paragraph 60–20.2(c) provides that employment policies or practices that state a claim of disparate impact discrimination violate Executive Order 11246 and the regulations at 41 CFR part 60–20. Proposed paragraph 60–20.2(c) identifies several examples of employment practices that may have an adverse impact on women. Traditionally, disparate impact claims have involved selection criteria that are not necessary to the performance of the job, but which instead reflect stereotypical notions about the skills required for the position in question. *See, e.g., Blake* v. *City of Los Angeles,* 595 F.2d 1367 (9th Cir. 1979) (striking down height requirements by the Los Angeles police department because they were not job related and had a disparate impact on women, who in general are shorter than men); *EEOC* v. *Dial Corp.,* 469 F.3d 735 (8th Cir. 2006) (striking down a strength test used in a sausage factory because the test was more physically demanding than the job in question and had a significant disparate impact on women). This sex discrimination analysis may also apply to policies or practices that are unrelated to selection procedures. For instance, an employer policy requiring crane operators to urinate off the back of the crane instead of using a restroom was held to be a neutral employment policy that was not justified by business necessity and that produced an adverse effect on women, who, the court found, have ''obvious anatomical and biological differences'' that require the use of bathrooms. *Johnson* v. *AK Steel Corp.,* 2008 WL 2184230, *8 (S.D. Oh. May 23, 2008).

Section 60–20.3 Sex as a Bona Fide Occupational Qualification

OFCCP proposes removing current § 60–20.3 entitled ''Job policies and practices,'' which addresses a variety of topics, including a contractor's general obligations to ensure equal opportunity in employment on the basis of sex (paragraphs 60–20.3(a), 60–20.3(b), and 60–20.3(c)); provides examples of discriminatory treatment (paragraph 60–20.3(d)); and sets forth contractor obligations with respect to the provision of physical facilities, including bathrooms (paragraph 60–20.3(e)), the impact of state protective laws (paragraph 60–20.3(f)), leave for childbearing (paragraph 60–20.3(g)), and specification of retirement age (paragraph 60–20.3(h)). Current paragraph 60–20.3(i) clarifies that differences in capabilities for job assignments among individuals may be recognized by the employer in making specific assignments.

As explained earlier in the preamble, OFCCP proposes moving the general obligation to ensure equal employment opportunity and the examples of discriminatory treatment to proposed § 60–20.2. To improve coherence and clarity, OFCCP proposes to move (and revise in some instances) the remaining obligations set forth in paragraphs (e) through (i) to their own separate sections or to incorporate them as illustrations of discriminatory treatment in proposed § 60–20.2.

Specifically, current paragraph 60–20.3(e) regarding provision of physical facilities is now addressed in proposed § 60–20.2. See the discussion earlier in this preamble for information regarding this proposed provision.

Current paragraph 60–20.3(f), which addressed state protective laws, has been removed entirely because it is unnecessary and anachronistic. While in 1970 there may have been some legal question whether state protective laws provided a defense to discriminatory employment policies, in 2014 it is beyond dispute that they do not. See *Int'l Union, United Auto., Aerospace and Agr. Implement. Workers of Am.* v. *Johnson Controls, Inc., supra* (holding that possible reproductive health hazards to women of childbearing age did not justify sex-based exclusions from certain jobs). Proposed paragraph 60–20.2(b)(5), prohibiting sex-based job classifications, clearly states the underlying principle that no job, absent a job-specific BFOQ, is the separate domain of any sex. OFCCP invites comment from stakeholders as to the current scope of state protective laws, whether those that exist are enforced, and what practical effect, if any, they have on contractors.

Current paragraph 60–20.3(g) regarding leave for childbearing is now addressed in its own section: discrimination on the basis of pregnancy, childbirth, or related medical conditions. See the discussion of proposed § 60–20.5 later in this preamble.

Current paragraph 60–20.3(h) prohibits differential treatment between men and women with regard to retirement age. It is restated and broadened, prohibiting the imposition not only of sex-based differences in retirement age but also in ''other terms, conditions, or privileges of retirement,'' in proposed paragraph 60–20.2(b)(4). OFCCP invites comments on whether such differential treatment continues today.

Current paragraph 60–20.3(i) states, in its first sentence, that the Sex Discrimination Guidelines allow contractors to recognize differences in capabilities for job assignments in making specific assignments. The second sentence reiterates that the purpose of the guidelines ''is to insure that such distinctions are not based upon sex.'' This paragraph is omitted from the proposal because it is unnecessary and because its second sentence is repetitive of proposed § 60–20.1. Implicit in the provisions prohibiting discrimination on the basis of sex is the principle that distinctions for other reasons, such as differences in capabilities, are not prohibited.[62] Making distinctions among employees based on their relevant job skills, for example, does not constitute unlawful discrimination.

Proposed § 60–20.3 entitled ''Sex as a *bona fide* occupational qualification'' is new and consolidates in one provision the current references to the BFOQ defense available to employers in paragraphs 60–20.3(b) and 60–20.3(f)(2), and adopts the BFOQ language set forth in title VII, 42 U.S.C. 2000e–2(e).

OFCCP expects that this proposed reorganization will make the regulations more user-friendly and will help facilitate a better understanding of the Executive Order requirements with respect to sex discrimination.

Section 60–20.4 Discriminatory compensation

Current § 60–20.4 relating to seniority systems would be removed because its subject matter—the interaction of seniority systems and sex discrimination—is addressed in proposed § 60–20.2 at paragraph (b)(6).

Proposed § 60–20.4 would replace the current requirements related to discriminatory wages in current § 60–20.5. In general, the existing text focuses on particular kinds of jobs and fact patterns that may have posed significant limitations on equal opportunity in compensation at the time the Guidelines were adopted. However, the continued increase of women into the workforce, their robust participation in a wide variety of occupations and positions, ranging from entry-level to senior management, and the significant representation of women in both the hourly and salaried workforce require a more comprehensive statement

[62] Of course, discrimination based on other reasons that are independently prohibited by law—such as race, religion, color, national origin, disability, sexual orientation, gender identity, and protected veteran status—is prohibited.

addressing sex discrimination in wages and other terms of compensation.

For example, paragraph (a) of current § 60–20.5 provides only a cursory description of sex discrimination in wages and other forms of compensation and fails to give useful guidance to contractors in evaluating their compensation programs for potential sex discrimination. The one clarifying example provided in the Note in current § 60–20.5(a) tracks the Equal Pay Act rather than title VII. OFCCP enforces the Executive Order's nondiscrimination provisions, including the ban on compensation discrimination, consistent with title VII. Courts have concluded that title VII uses a broader and more flexible approach to comparing jobs and defining similarly situated workers than the Equal Pay Act, *see, e.g., Cnty. of Washington* v. *Gunther,* 452 U.S. 161 (1981); *Miranda* v. *B & B Cash Grocery,* 975 F.2d 1518 (11th Cir. 1992). For that reason, the Note has the potential to create unnecessary confusion, and the proposed rule omits it entirely.

Similarly, current paragraph (b) appears to contemplate only workplaces that are completely or explicitly segregated by gender. However, title VII also bars other, more subtle forms of discriminatory compensation that can result from *de facto* job segregation or classification on the basis of sex. For example, a retail chain might disproportionately steer women into lower paying cashier jobs—even though the women are qualified and available for higher paying positions—based on the outdated, stereotypical notion that men, and not women, are the primary wage earners. These forms of discriminatory compensation remain a potential concern that should be, and are, addressed by the proposed regulation.

Current paragraph (c) has been superseded by the transfer of Equal Pay Act jurisdiction to the EEOC and is therefore removed.

The proposed new text in § 60–20.4 provides a clearer general statement of the contractor's obligation to provide equal opportunity with respect to wages and other forms of compensation. The Executive Order and the implementing regulations specifically require contractors to ensure pay equity. Thus, Federal contractors have affirmative duties to maintain data, conduct internal reviews, and monitor pay practices for potential discrimination, as well as comply with the Executive Order's ban on discrimination in the payment of wages, salaries, and other forms of compensation.[63] The section generally restates the agency's case-specific approach to evaluating contractor pay systems and practices for sex discrimination, where the agency tailors the investigative and analytic methods to the facts of the case.[64] This may include conducting multiple regression analyses and applying other formal statistical tests as well as using comparative and circumstantial evidence. As this approach is grounded in well-established principles of title VII law,[65] it also would apply when evaluating contractor pay systems and practices for discrimination based on other protected categories.

Furthermore, OFCCP does not require anecdotal evidence to support a pay violation. Identifying individuals harmed by pay discrimination is particularly difficult.[66] Many workers do not know that they are underpaid.[67] If OFCCP finds evidence of pay discrimination by Federal contractors through its review of data, the agency should not permit that discrimination to continue simply because the contractor had successfully hidden it from its employees. Federal contractors have special obligations to avoid discrimination, monitor their pay practices and submit to reviews to make certain they are in compliance, regardless of whether any individual applicant or employee actually has knowledge of discrimination.

Section 60–20.4 substitutes the general and more modern term ''compensation'' for the outdated term ''wage schedules'' and clarifies that both systemic and individual forms of such discrimination are barred by the Executive Order. Proposed amendments to Section 60–1.3 to implement Executive Order 13655 would define compensation as follows:

> *Compensation* means any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and contributions to retirement.

That same definition would apply to any assessment of compensation discrimination under EO 11246, including when evaluating sex discrimination in compensation under this section.

To provide more guidance to contractors about the kinds of practices they should review and analyses they should undertake to assess their compliance, new paragraphs (a), (b), and (c) specify a variety of ways pay discrimination may occur. For example, proposed paragraph (a) states that contractors may not pay different compensation to similarly situated employees on the basis of sex. Proposed paragraph (b) prohibits contractors from, among other things, granting or denying training, work assignments, or other opportunities that may lead to advancement on the basis of sex, and proposed paragraph (c) states that contractors may not provide or deny earnings opportunities because of sex, for example by denying women equal opportunity to obtain regular and/or overtime hours, commissions, pay increases, incentive compensation, or any other additions to regular earnings.

The revised text in proposed paragraph (a) also addresses the question of determining ''similarly situated'' employees for purposes of analyzing compensation differences. The determination of similarly situated employees is case specific. Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar in other

[63] Section 202 of Executive Order 11246, as amended; 41 CFR 60–1.12; 60–1.4; 60–2.17(b)–(d).

[64] OFCCP's case-by-case investigation procedures implement the title VII principles applicable to enforcing discrimination in any employment practice under Executive Order 11246. The agency provides this very general description of its approach for purposes of clarification and consistency with its other statements of policy in this area.

[65] Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination: Notice of Final Rescission, 78 FR 13508, Feb. 28, 2013 (hereinafter Notice of Rescission).

[66] *Ledbetter* v. *Goodyear Tire & Rubber Co.,* 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting).

[67] On April 8, 2014, President Obama issued Executive Order 13655, which provides that a Federal contractor may not discharge or otherwise discriminate against any employee or applicant because such person has inquired about, discussed, or disclosed the compensation of the person or another employee or applicant. OFCCP published an NPRM on Sept. 17, 2014 to implement this executive order. 79 FR 55712. The comment period closed on Dec. 16, 2014.

[68] In employment discrimination cases, courts generally consider whether the workers being compared are similar in aspects relevant to the case. *See, e.g., McGuinness* v. *Lincoln Hall,* 263 F.3d 49, 53–54 (2d Cir. 2001); *Ercegovich* v. *Goodyear Tire and Rubber Co.,* 154 F.3d 344 (6th Cir. 1998); *McNabola* v. *Chicago Transit Authority,* 10 F.3d 501 (7th Cir. 1993).

factors.[68] For example, when evaluating a job assignment issue, workers are similarly situated when their qualifications are comparable, but they are assigned to jobs at different levels.[69] Employees are similarly situated when they are comparable on factors relevant to the compensation issues presented. Identification of similarly situated employees for purposes of an individual analysis or review of a single specific employment decision may be determined based on different criteria than when conducting a systemic discrimination analysis. In analyzing compensation, title VII permits comparing workers within the same or similar jobs or within specific units or locations, and also permits consideration of pay differences more broadly—for example, across jobs or locations or units—as long as the workers are comparable under the employer's wage or salary system.[70]

New paragraph (d) prohibits contractors from implementing compensation practices, including performance review systems, that discriminate on the basis of sex under the disparate impact analysis of discrimination.[71] New paragraph (e) restates longstanding OFCCP principles regarding the circumstances under which pay discrimination is a continuing violation under the Executive Order.

Section 60–20.5 Discrimination on the Basis of Pregnancy, Childbirth, or Related Medical Conditions

Current § 60–20.5 entitled ''Discriminatory wages'' has been revised and moved to § 60–20.4 as discussed earlier in the preamble.

This proposed section is new; however, it incorporates certain obligations already set forth in the current part 60–20 at paragraph 60–20.3(g) regarding the provision of leave to employees who require time away from work on account of childbearing.

Proposed paragraph (a) of this section incorporates the principle set forth in the Pregnancy Discrimination Act that discrimination on the basis of sex includes ''because of or on the basis of pregnancy, childbirth, or related medical conditions.'' It requires that contractors treat employees and job applicants of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work and defines the term ''related medical conditions.'' Further, it incorporates the provision in the PDA, codified in 42 U.S.C. 2000e(k), that exempts employers from having to pay for health insurance benefits for abortion ''except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion,'' and the further proviso that nothing in that exemption ''preclude[s] a contractor from providing abortion benefits or otherwise affect[s] bargaining agreements in regard to abortion.''

Proposed paragraph (b) sets forth some of the most common applications of the general principle of nondiscrimination on the basis of pregnancy, childbirth, or related medical conditions. These examples include refusing to hire applicants because of pregnancy or childbearing capacity (paragraph (b)(1)); firing employees or requiring them to go on leave because they become pregnant or have a child (paragraph (b)(2)); limiting a pregnant employee's job duties based on pregnancy or requiring a doctor's note in order for the employee to continue employment while pregnant (paragraph (b)(3)); and providing employees with health insurance that does not cover hospitalization and other medical costs for pregnancy, childbirth, or related medical conditions, including contraception coverage, to the same extent that such costs are covered for other medical conditions (paragraph (b)(4)).

Paragraph (b)(5) includes, as another common example of discrimination based on pregnancy, childbirth, or related medical conditions, failure to provide reasonable workplace accommodations to employees affected by such conditions when such accommodations are provided to other workers similar in their ability or inability to work.[72] Without such workplace accommodations, many pregnant workers are forced to go on leave. Unfortunately, insufficient job-protected leave, time-limited temporary disability insurance, and minimal sick leave often fail to cover the entire period of pregnancy-related work limitations. Consequently, some pregnant workers who need reasonable accommodations lose their jobs, wages, and health care coverage.[73]

The range of accommodations to address the temporary limitations of a pregnant worker may include simple things that involve little or no cost, such as permitting more frequent bathroom breaks and allowing the pregnant worker to sit down during a shift.[74] Other temporary limitations, however, may require a temporary light-duty assignment to accommodate lifting or bending restrictions that a pregnant worker may have.

Denying an alternative job assignment, modified duties, or other accommodations to a pregnant employee who is temporarily unable to perform some job duties because of pregnancy, childbirth, or a related medical condition is sex discrimination when such assignments, modifications, or other accommodations are provided, or are required to be provided, by a contractor's policy or other relevant laws, to other employees whose abilities to perform some of their job duties are similarly affected (paragraph (b)(5)). Thus, for example, a contractor that permits light-duty assignments for employees who are unable to work their regular assignments due to on-the-job injuries or disabilities must also permit light-duty assignments for employees who are unable to work their regular assignments due to pregnancy. The approach set forth here with respect to pregnancy accommodation is intended to align OFCCP's regulations implementing Executive Order 11246 with EEOC guidance in this area and with the position taken by the Federal government in *Young* v. *United Parcel Serv., Inc.,* 707 F.3d 437 (4th Cir. 2013), *cert. granted* (U.S. No. 12–1226, July 1, 2014), a case currently before the Supreme Court. Should the Supreme Court rule contrary to our interpretation, OFCCP's final rule will be revised consistent with the ruling.

The EEOC has long interpreted the PDA in this way, stating as early as 1979

[69] *See, e.g., Beckman* v. *CBS,* 192 FRD. 608 (D. Minn. 2000); *Stender* v. *Lucky Stores,* 803 F.Supp. 259 (N.D. Cal. 1992); *OFCCP* v. *St. Regis Corp.* 78–OFC–1, ALJ's Recommended Decision (Dep't. of Labor Dec. 28, 1984).

[70] Notice of Rescission, *supra* note 65, 78 FR at 13511–13513.

[71] *Lewis* v. *City of Chicago,* 560 U.S. 205, 212 (2010) (finding title VII places no limit on the types of employment practices that may be challenged under disparate impact analysis).

[72] This is true even though ''pregnancy itself is not an impairment within the meaning of the [Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.,* as amended], and thus is never on its own a disability.'' EEOC, *Enforcement Guidance: Pregnancy Discrimination and Related Issues, sec. II.A* (July 14, 2014) (footnote omitted), available at *http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm* (last accessed December 12, 2014).

[70] Notice of Rescission, *supra* note 65, 78 FR at 13511–13513.

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[73] Heavy Lift, *supra* note 51, at 1, 4, 6, 8, 9–10, 11, 15, 18.

that ''[a]n employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition *in the same manner as it treats other temporarily disabled employees.''* 29 CFR pt. 1604, App. ¶ 5 (emphasis added). It reaffirmed this position in its 2014 PDA enforcement guidance. EEOC, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* I.C.1.b (July 14, 2014), *http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; see also* 9 CFR pt. 1604, App. ¶ 5 (''[a]n employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition *in the same manner as it treats other temporarily disabled employees.''*) (emphasis added); *id.* (''If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.'').

As the Government has argued in its brief before the Supreme Court in *Young,* nothing in the plain language of the PDA or any EEOC guidance suggests that the underlying reason for the inability to work is relevant; as long as the employees are ''similar in their inability to work,'' those affected by pregnancy, childbirth, or related medical conditions must be provided the same accommodation as those not so affected, regardless of the reasons for the inability to work. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner in *Young* v. *United Parcel Service, Inc.,* No. 12–1226 (U.S.), 2014 WL 4536939, at *16 (''Nothing in the PDA indicates that a pregnant employee faces discrimination . . . only when she receives less favorable treatment than every other employee who is similar in his or her ability or inability to work. The plain text of the statute prohibits treating pregnant employees less favorably (for any 'employment-related purpose[ ]') than 'other persons not so affected but similar in their ability or inability to work.'''') (citation omitted); *id.* at *26 (''Recognizing that petitioner has established a violation of the PDA is consistent with the longstanding position of the EEOC.'').[75] *See also International Union* v. *Johnson Controls, Inc.,* 499 U.S. 187, 204–05 (1991) (''[u]nless pregnant employees differ from others *in their ability or inability to work,* they must be treated the same as other employees *for all employment-related purposes''* (citation and internal quotation marks omitted; emphases added)); *Ensley-Gaines* v. *Runyon,* 100 F.3d 1220 (6th Cir. 1996); *Raciti-Hur* v. *Homan,* No. 98–1218, 1999 U.S. App. LEXIS 9551, 1999 WL 331650 (6th Cir. May 13, 1999) (unpublished); *Latowski* v. *Northwoods Nursing Center,* No. 12–2408, 2013 U.S. App. LEXIS 25738, at *10–*11 (6th Cir. December 23, 2013) (unpublished).[76]

The phrase ''or are required to be provided by a contractor's policy or other relevant laws'' is included to cover the situation where a contractor's policy or a relevant law (such as the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.,* as amended (ADA), and section 503) would require an alternative job assignment or job modification to be provided to an employee not affected by pregnancy, childbirth, or related medical condition but who is similarly restricted in his or her ability to perform the job. In such a situation, the existence of the policy or law (*e.g.,* the ADA and Section 503) requiring reasonable accommodation or job modifications for the one class of employees—employees with disabilities who are not affected by pregnancy, childbirth, or related medical conditions—requires that the contractor similarly provide such accommodations to pregnant employees who are similar in their ability or inability to work. Failure to do so is disparate treatment in violation of Executive Order 11246. The list in § 60–20.5(b) is by no means exhaustive, but rather, contains a few illustrative examples. The relevant provisions of the EEOC's 2014 enforcement guidance on pregnancy discrimination as well as its Guidelines on Discrimination Because of Sex (29 CFR 1604.10) and Questions and Answers on the Pregnancy Discrimination Act (Appendix to part 1604 of 29 CFR) provide additional instruction.

Proposed paragraph (c) addresses the provision of leave related to pregnancy, childbirth, or related medical conditions. Paragraph (c)(1) sets forth the general title VII principle that neither family nor medical leave, including family or medical leave related to pregnancy, childbirth, or related medical conditions, may be denied or provided differently on the basis of sex. Paragraph (c)(2) elaborates on this general principle. Paragraph (c)(2)(a) requires that employees affected by pregnancy, childbirth, or related medical conditions be granted medical leave, including paid sick leave, on the same basis that such leave is granted to other employees unable to work for other medical reasons. An employer may not impose requirements on pregnancy leave not imposed on other employees similar in their ability or inability to work. For example, employers may not impose a shorter maximum amount of pregnancy leave as compared to the maximum time off allowed for other types of medical or short-term disability leave. Paragraph (c)(2)(b) requires that family leave be provided to men on the same terms that it is provided to women.

Consistent with the EEOC's Guidelines on Discrimination Because of Sex, 29 CFR 1604.10(c), and Section I.B.2 of its recent enforcement guidance on pregnancy discrimination, proposed paragraph (c)(3) applies disparate impact analysis to contractor leave policies that are inadequate such that they have a disparate impact on members of one sex. Thus, a contractor that provides workers who are temporarily unable to work due to pregnancy, childbirth, or related medical conditions with no parental or medical leave at all, or with insufficient leave, may be held liable for discrimination based on sex, if such a practice is found to have an adverse impact on such workers, unless the contractor can demonstrate that the failure to provide leave or sufficient leave is job related and consistent with business necessity.

It should be noted that this provision is different from current § 60–20.3(g), which requires contractors to provide maternity leave whether or not their failure to do so has a disparate impact on women. However, OFCCP has not enforced this requirement in § 60–20.3(g) for some time. Instead, as was stated in its previous Federal Contractor Compliance Manual (FCCM), issued in 1988, OFCCP has:

[75] The EEOC further explained its position in *EEOC* v. *Horizon/CMS Healthcare Corp.,* 220 F.3d 1184 (10th Cir. 2000) (decided on other grounds). The EEOC argued in *Horizon* that ''the Charging Parties are most appropriately compared to all temporarily-disabled, non-pregnant employees *whether they sustained their injuries on or off the job.'' Id.* at 1194–1195 (emphasis added).

[76] Other Sixth Circuit opinions appear to suggest a different interpretation of the PDA. *Reeves* v. *Swift Transp. Co.,* 446 F.3d 637 (6th Cir. 2006); *Tysinger* v. *Police Dept.,* 463 F.3d 569 (2006). In addition, other circuits have held that the reason for employees' inability to work does make a difference to the determination whether employees affected by pregnancy, childbirth, or related medical conditions are similarly situated to those not so affected for purposes of receiving accommodations for their inability to work. *Young* v. *United Parcel Serv., Inc.,* 707 F.3d 437 (4th Cir. 2013), *cert. granted* (U.S. No. 12–1226, *July 1, 2014*); *Serednyj* v. *Beverly Healthcare, LLC,* 656 F.3d 540, 548–549 (7th Cir. 2011); *Spivey* v. *Beverly Enters., Inc.,* 196 F.3d 1309, 1312–1313 (11th Cir. 1999); *Urbano* v. *Continental Airlines, Inc.,* 138 F.3d 204, 207–208 (5th Cir.), cert. denied, 525 U.S. 1000 (1998); *Troupe* v. *May Dep't Stores Co.,* 20 F.3d 734, 738 (7th Cir. 1994).

consistent with the PDA, [current] 41 CFR 60–1.4(a), and the EEOC Guidelines on Discrimination Because of Sex, . . . implement[ed] the following policies:

i. . . .

ii. If the contractor's leave policy, or lack thereof, has an adverse impact on employees of one sex and is not justified by business necessity, it violates the Executive Order.[77]

Similarly, the current FCCM requires Compliance Officers to ''examine whether the contractor's leave policy, or lack thereof, has an adverse impact on employees of one sex and is not justified by business necessity.'' Section 2H01(b). Thus, proposed paragraph (c)(3) is consistent both with OFCCP's current and long-standing practice.

OFCCP welcomes comments from stakeholders about current practices and policies regarding workplace accommodations and leave for pregnancy, childbirth, or related medical conditions; for care for newborn or newly adopted or foster children; and for an employee's serious health conditions (other than those related to pregnancy and childbirth).

Section 60–20.6 Other Fringe Benefits

Current § 60–20.6 entitled ''Affirmative action'' has been removed because the requirements related to affirmative action programs are set forth in parts 60–2 and 60–4 of this title.

This proposed section is new and is divided into three paragraphs. Proposed paragraph (a) states the general principle that contractors may not discriminate on the basis of sex in the provision of fringe benefits. Proposed paragraph (b) defines ''fringe benefits'' broadly to encompass a variety of such benefits that are now provided by contractors. In proposed paragraph (c), OFCCP replaces the inaccurate statement found at current § 60–20.3(c) that a contractor will not be considered to have violated the Executive Order if its contributions for fringe benefits are the same for men and women or if the resulting benefits are equal. In 1978, the Supreme Court held that under title VII, an employer must provide equal benefits to men and women, even if doing so costs more for one sex than the other. *City of Los Angeles* v. *Manhart,* 435 U.S. 702 (1978); *see also Ariz. Governing Comm.* v. *Norris,* 463 U.S. 1073 (1983).[78]

Section 60–20.7 Employment Decisions Made on the Basis of Sex-Based Stereotypes

This proposed section is new. It states the well-recognized principle that employment decisions made on the basis of stereotypes about how males and/or females are expected to look, speak, or act are a form of sex-based employment discrimination. As the Supreme Court stated in *Price Waterhouse* v. *Hopkins,* 490 U.S. at 251, ''we are beyond the day when an employer can evaluate employees by assuming or insisting that they match the stereotype associated with their . . . [sex].'' In *Price Waterhouse,* the Court held that an employer's failure to promote a female senior manager to partner because of the sex-stereotyped perceptions that she was too aggressive and did not ''walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry'' was unlawful sex-based employment discrimination.[79] The principle that sex-based stereotyping is a form of sex discrimination has been applied consistently in Supreme Court and lower-court decisions. *See, e.g., Nevada Dep't of Human Res.* v. *Hibbs,* 538 U.S. 721 (2003) (stereotype-based beliefs about the allocation of family duties on which state employers relied in establishing discriminatory leave policies held to be sex discrimination under the Constitution); *Chadwick* v. *Wellpoint, Inc.,* 561 F.3d 38 (1st Cir. 2009) (making employment decision based on the belief that women with young children neglect their job responsibilities is unlawful sex discrimination); *Prowel* v. *Wise Bus. Forms, Inc.,* 579 F.3d 285 (3d Cir. 2009) (harassment based on a man's effeminacy); *Terveer* v. *Billington,* 2014 WL 1280301 (D. DC March 31, 2014) (hostile work environment based on stereotyped beliefs about the appropriateness of same-sex relationships).[80] *Cf. U.S.* v. *Virginia,* 518 U.S. 515, 533 (1996) (in making classifications based on sex, state governments ''must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females'').[81] Specific examples of such stereotyping follow in proposed paragraphs (a) through (c).

Proposed paragraphs 60–20.7(a), (b), and (c) address stereotyping based on an employee's nonconformity with norms about how people with the employee's assigned sex at birth should look, speak, and act. Paragraph (a) sets forth three examples of such stereotyping: in proposed paragraph 60–20.7(a)(1), failure to promote female employee because she did not wear jewelry, make-up, or high heels (*see* Price Waterhouse, supra); in proposed paragraph 60–20.7(a)(2), harassment of a man because he is too effeminate, (*see Prowel* v. *Wise Bus. Forms, Inc., supra*); and in proposed paragraph 60–20.7(a)(3), adverse treatment of an employee because he or she does not conform to sex-role expectations by being in a

[77] U.S. Department of Labor, Office of Federal Contract Compliance Programs Federal Contract Compliance Manual (1988), ch. 3, § 3G01(h)(2) (on file with OFCCP) (hereinafter Previous FCCM). A version of this Manual (dated 1993, but containing the same language) is available at *http://www.docstoc.com/docs/8387063/Federal-Contract (last accessed Oct. 7, 2014).*

[78] Indeed, the FCCM follows current law, providing that ''if the contractor is not providing equal fringe benefits and/or not making equal contributions to insurance plans or pensions for men and women, this may constitute discrimination.'' FCCM, ch. 2, § 2L03. The Previous FCCM also noted the discrepancy between OFCCP's regulations and title VII law, providing (in chapter 3, § 3G01(h)(3)) that because—

OFCCP's policy is to interpret the nondiscrimination provisions of the Executive Order consistent with Title VII principles. . . , if [an OFCCP compliance officer] becomes aware of a situation where a contractor is either not paying equal fringe benefits and/or not making equal contributions to fringe benefits for men and women, the matter should be brought to the attention of RSOL [the Regional Solicitor of Labor].

[79] *Price Waterhouse,* 490 U.S. at 235.

[80] *See also Centola* v. *Potter,* 183 F. Supp. 2d 403 (D. Mass. 2002) (''Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women.''); *Heller* v. *Columbia Edgewater Country Club,* 195 F. Supp. 2d 1212 (D. Or. 2002) (''[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.''). The EEOC has recognized in a long line of federal sector decisions that adverse actions taken on the basis of sex stereotypes related to sexual orientation violate Title VII. *Castello* v. *U.S. Postal Service,* EEOC Request No. 0520110649, 2011 WL 6960810 (Dec. 20, 2011) (sex-stereotyping evidence entailed offensive comment by manager about female subordinate's relationships with women); *Veretto* v. *U.S. Postal Service,* EEOC Appeal No. 0120110873, 2011 WL 2663401 (July 1, 2011) (complainant stated plausible sex-stereotyping claim alleging harassment because he married a man); *Culp* v. *Dep't of Homeland Security,* EEOC Appeal 0720130012, 2013 WL 2146756 (May 7, 2013) (Title VII covers discrimination based on associating with lesbian colleague); *Couch* v. *Dep't of Energy,* EEOC Appeal No. 0120131136, 2013 WL 4499198, at *8 (Aug. 13, 2013) (complainant's claim of harassment based on his ''perceived sexual orientation''); *Complainant* v. *Department of Homeland Security,* EEOC Appeal No. 0120110576, 2014 WL 4407422 (Aug. 20, 2014) (''While Title VII's prohibition of discrimination does not explicitly include sexual orientation as a basis, Title VII prohibits sex discrimination, including sex-stereotyping discrimination and gender discrimination'' and ''sex discrimination claims may intersect with claims of sexual orientation discrimination.'').

[81] The U.S. Court of Appeals for the Seventh Circuit articulated this principle as early as 1971. *Sprogis* v. *United Air Lines, Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971) (''In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women *resulting from sex stereotypes.''*) (emphasis added).

relationship with a person of the same sex (*see Veretto* v. *U.S. Postal Service* and *Castello* v. *U.S. Postal Service, supra* note 80).

Paragraph (b) addresses disparate treatment based on gender identity. As noted above, disparate treatment of a transgender employee may constitute discrimination because of the individual's non-conformity to sex-based stereotypes. *Barnes* v. *City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005) (holding that transgender woman was a member of a protected class based on her failure to conform to sex-based stereotypes and thus her title VII claim was actionable); *Smith* v. *City of Salem,* 378 F.3d 566, 574 (6th Cir. 2004) (''discrimination against a plaintiff who is a transsexual [*sic*]—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman''); *Schroer* v. *Billington, supra,* at 305–06 (D.D.C. 2008) (withdrawal of a job offer from a transgender applicant constituted sex-stereotyping discrimination in violation of title VII). In addition to these appellate cases, ''[t]here has likewise been a steady stream of district court decisions recognizing that discrimination against transsexuals [*sic*] on the basis of sex-based stereotyping constitutes discrimination because of sex.'' *Macy* v. *Holder, supra.* See also *Glenn* v. *Brumby,* 663 F.3d 1312 (11th Cir. 2011) (termination of a transgender employee constituted discrimination on the basis of gender non-conformity and sex-stereotyping discrimination under Equal Protection Clause). *Cf. Oncale* v. *Sundowner Offshore Servs.,* 523 U.S. 75, 78 (1998) (same-sex harassment may be sex discrimination); *Prowel* v. *Wise Bus. Forms,* 579 F.3d 285 (3d Cir. 2009) (harassment of an ''effeminate'' man may be sex discrimination).[82] This principle—that discrimination against a transgender individual is discrimination based on non-conformity to sex-based stereotypes, and thus sex discrimination—has also been adopted under the Gender-Motivated Violence Act,[83] *Schwenk* v. *Hartford,* 204 F.3d 1187, 1201–02 (9th Cir. 2000), and the Equal Credit Opportunity Act,[84] *Rosa* v. *Park W. Bank & Trust Co.,* 214 F.3d 213, 215–16 (1st Cir. 2000).

Paragraph 60–20.7(c) addresses stereotyping based on specific expectations about the proper roles of women and men regarding caregiving. As noted above, the EEOC recognizes that adverse treatment of women stemming from sex-based assumptions about ''childcare responsibilities that will make female employees less dependable than male employees'' violates title VII.[85] Even an employer's perceptions of a caregiver's work performance can, consciously or unconsciously, be affected by sex-based stereotypes that female caregivers are ''less capable and skilled than their childless female counterparts or their male counterparts'' (Caregiving Guidance, II.A.4). Moreover—

> Gender-based stereotypes may also influence how male workers are perceived: ''Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination.'' Stereotypes of men as ''bread winners'' can further lead to the perception that a man who works part time is not a good father, even if he does so to care for his children. Thus, while working women have generally borne the brunt of gender-based stereotyping, unlawful assumptions about working fathers and other male caregivers have sometimes led employers to deny male employees opportunities that have been provided to working women or to subject men who are primary caregivers to harassment or other disparate treatment. For example, some employers have denied male employees' requests for leave for childcare purposes even while granting female employees' requests.

Caregiving Guidance II.C [footnotes omitted].

In its introduction, the Caregiving Guidance also notes that discrimination against caregivers may also fall under the ADA, which prohibits discrimination based on an employee's association with an individual with a disability. The same is true of section 503.

Section 60–20.8 Harassment and Hostile Work Environments

This proposed section is new. It has been well-recognized for many years that harassment on the basis of sex, including the existence of a work environment that is hostile to members of one sex, may give rise to a violation of title VII.[86] Moreover, sexual harassment continues to be a serious problem for women in the workplace[87] and a significant barrier to women's entry into and advancement in many nontraditional occupations, including the construction trades and the computer and information technology industries. Yet, current part 60–20 does not include any references to sexual harassment or hostile work environments. Proposed § 20.8 remedies this omission.[88]

Proposed paragraph 60–20.8(a) incorporates the provision of EEOC's Guidelines relating to sexual harassment virtually verbatim. *See* 29 CFR 1604.11(a). Inclusion of the EEOC language is intended to align the prohibitions of sexually harassing conduct under the Executive Order with the prohibitions under title VII.

Proposed paragraph 60–20.8(b) defines harassment because of sex under the Executive Order broadly to include sexual harassment (including sexual

[82] See also *Statement of Interest of the United States* at 4, Apr. 4, 2014, in *Burnett* v. *City of Philadelphia,* No. 09–4348 (E.D. Pa.) (''Since *Price Waterhouse,* in cases where the defendant's action had been motivated by the plaintiff's failure to conform with sex-based stereotypes, every Federal circuit court of appeals that has addressed the question has recognized that disparate treatment against a transgender plaintiff can be discrimination 'because . . . of sex.' '').

[83] 42 U.S.C. 13981.

[84] 15 U.S.C. 1691.

[85] EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* II.A.3 (last modified Feb. 8, 2011), *http://www.eeoc.gov/policy/docs/caregiving.html* (last accessed Oct. 2, 2014).

[86] U.S. Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 41 CFR 1604.11 (1980) (provision on harassment); *Harris* v. *Forklift Sys.,* 510 U.S. 17 (1993); *Meritor Savings Bank* v. *Vinson,* 477 U.S. 57 (1986); *Barnes* v. *Costle,* 561 F.2d 983 (D.C. Cir. 1977).

[87] In FY 2013, the EEOC received 7,256 sexual harassment charges (out of 93,727). U.S. Equal Employment Opportunity Commission, *Enforcement & Litigation Statistics, Sexual Harassment Charges FY 2010—2013, available at http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm* (last accessed Nov. 2, 2014); U.S. Equal Employment Opportunity Commission, *Enforcement and Litigation Statistics, Charge Statistics: FY 1997 Through FY 2013, available at http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm* (last accessed Nov. 2, 2014). In FY 2011 (the last year for which combined data is available), the EEOC and state and local fair employment practices agencies together received just over 11,300 charges of sexual harassment. The average number of such claims filed per year from FY 2000 through FY 2011 was 13,446. OFCCP calculations from data in U.S. Equal Employment Opportunity Commission, *Enforcement & Litigation Statistics, Sexual Harassment Charges: EEOC & FEPAs Combined: FY 1997—FY 2011, available at http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm* (last accessed Nov. 2, 2014).

[88] The one reference to harassment in OFCCP's current body of regulations implementing Executive Order 11246 is that construction contractors are required to ''[e]nsure and maintain a working environment free of harassment, intimidation, and coercion at all sites.'' 41 CFR 60–4.3(a) (subsections 7(a) and (n) of the required Equal Opportunity Clause for construction contracts).

In addition, in chapter 3, § 2H01(d), the FCCM recognizes that ''[a]lthough not specifically mentioned in the Guidelines, sexual harassment (as well as harassment on the basis of race, national origin or religion) is a violation of the nondiscrimination provisions of the Executive Order'' and directs OFCCP compliance officers to ''be alert for any indications of such harassment.'' It goes on to state that ''OFCCP follows Title VII principles when determining whether sexual harassment has occurred.''

harassment based on gender identity), harassment based on pregnancy, childbirth, or related medical conditions, and harassment that is not sexual in nature but is because of sex (including harassment based on gender identity). This aligns the meaning of ''because of sex'' for purposes of sexual harassment with its meaning under current title VII and Executive Order law. *See* proposed § 60–20.2, which includes discrimination on the bases of pregnancy, childbirth, or related medical conditions and gender identity discrimination as types of sex discrimination.

Proposed paragraph 60–20.8(c) suggests as best practices procedures that contractors may develop and implement ''to ensure an environment in which all employees feel safe, welcomed, and treated fairly . . . [and] are not harassed because of sex.'' The suggested procedures are: Broad dissemination of the message ''that harassing conduct will not be tolerated'' (paragraph 60–20.8(c)(1)); anti-harassment training (paragraph 60–20.8(c)(2)); and procedures for handling and resolving complaints ''about harassment and intimidation based on sex'' (paragraph 60–20.8(c)(3)). Contractors are not required to use such procedures and will not be found in violation of this part for not using such procedures. We note, however, that using such procedures may assist contractors in meeting their obligations with respect to harassment and hostile work environments. Procedures such as these are key to preventing harassment before it occurs.

In addition, a contractor can avoid or reduce liability for certain sexually harassing acts committed by its supervisors if it can show that it has taken reasonable care to prevent and correct harassment.[89] The activities listed in paragraph 60–20.8(c) are the kinds of activities that would help a contractor in making that showing. For example, taking reasonable care ''generally requires establish[ing], disseminat[ing], and enforcing an anti-harassment policy and complaint procedure.'' [90] The law does not require such activities, but it does encourage employers to engage in them.

Regulatory Procedures

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity).

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This proposed rule has been designated a ''significant regulatory action'' although not economically significant, under § 3(f) of Executive Order 12866. The NPRM is not economically significant, as it will not have an annual effect on the economy of $100 million or more. The Office of Management and Budget has reviewed the NPRM.

The Need for the Regulation

OFCCP's longstanding policy is to follow title VII principles when conducting analyses of potential sex discrimination under Executive Order 11246. *See* Notice of Final Rescission, 78 FR 13508, February 28, 2013. However, the existing Sex Discrimination Guidelines, unchanged since their initial promulgation in 1970 and re-issuance in 1978, are no longer an accurate depiction of current title VII principles. Title VII has been significantly amended four times since that time, and the Supreme Court has issued several decisions clarifying that practices such as sexual harassment can be unlawful discrimination. In light of these changes, this proposed rule revises the current Guidelines, and replaces them with new sex discrimination regulations that accurately set forth a contractor's obligation not to discriminate on the basis of sex in accordance with current title VII principles. (A more detailed discussion of the need for the regulation is contained in Reasons for Amending the Current Sex Discrimination Guidelines, *supra*.)

Discussion of Impacts

In this section, OFCCP presents a summary of the costs associated with the new requirements in part 60–20. Comments are welcome on every aspect of the cost and burden calculations including but not limited to the amount of time contractors would spend on complying with the proposals in this NPRM, including those related to accommodations for light duty. The estimated labor cost to contractors and subcontractors is based on U.S. Department of Labor, Bureau of Labor Statistics (BLS) data in the publication ''Employer Costs for Employee Compensation'' issued in December 2013, which lists total compensation for Management, Professionals, and Related Occupations as $51.58 per hour.[91]

There are approximately 500,000 contractor firms, employing approximately 65 million employees, registered in the SAM. Therefore, OFCCP estimates that 500,000 contractor companies or firms may be affected by the proposed new provisions.[92] The SAM number results in an overestimation for several reasons: the system captures firms that do not meet the $10,000 jurisdictional dollar threshold for this proposed rule; it captures inactive contracts, although OFCCP's jurisdiction covers only active contracts; and it captures thousands of recipients of Federal grants and Federal financial assistance, which are not contractors.[93]

[89] The Supreme Court established this affirmative defense in *Burlington Industries, Inc.* v. *Ellerth,* 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton,* 524 U.S. 775 (1998). See also U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (July 18, 1999), *available at http://www.eeoc.gov/policy/docs/harassment.html* (last accessed Oct. 7, 2014) [hereinafter EEOC Guidance on Vicarious Liability for Unlawful Harassment].

[90] EEOC Guidance on Vicarious Liability for Unlawful Harassment, *supra* note 89, § V(C).

[91] Press Release, Bureau of Labor Statistics, U.S. Department of Labor, Employer Costs for Employee Compensation—December 2013, at 4, *available at http://www.bls.gov/news.release/pdf/ecec.pdf* (last accessed Oct. 6, 2014).

[92] U.S. General Services Administration, System for Award Management, *Legacy CCR Extracts Public (''FOIA'') Data Package,* May 2014, *available at https://www.sam.gov/portal/public/SAM/*(last accessed June 14, 2014).

[93] In addition to these reasons to believe that the SAM data yield an overestimate of the number of entities affected by this rule, there is at least one reason to believe the data yield an underestimate: SAM does not necessarily include all subcontractors. But this data limitation is offset somewhat because of the overlap among contractors and subcontractors; a firm may be a subcontractor on some activities but have a contract on others and thus in fact be included in the SAM data.

Cost of Regulatory Familiarization

Agencies are required to include in the burden analysis the estimated time it takes for contractors to review and understand the instructions for compliance. *See* 5 CFR 1320.3(b)(1)(i). In order to minimize this burden, OFCCP will publish compliance assistance materials including, but not limited to, fact sheets and ''Frequently Asked Questions.'' OFCCP will also host webinars for the contractor community that will describe the new requirements and conduct listening sessions to identify any specific challenges contractors believe they face, or may face, when complying with the requirements.

Based on its experience with Federal contractors' compliance with the laws OFCCP enforces, OFCCP believes that human resources or personnel managers at each contractor establishment or firm will become responsible for understanding or becoming familiar with the new requirements. Therefore, OFCCP estimates that it will take 60 minutes or 1 hour for a management professional at each contractor establishment to either read the compliance assistance materials provided by OFCCP or participate in an OFCCP webinar to learn more about the new requirements. Consequently, the estimated burden for rule familiarization is 500,000 hours (500,000 contractor companies × 1 hour = 500,000 hours). Based on data from the Bureau of Labor Statistics, which lists total compensation for the Management, Professional, and Related Occupations group at $51.58,[94] we calculate the total estimated cost as $25,790,000 (500,000 hours × $51.58/hour = $25,790,000) or $52 per contractor company.

Cost of Proposed Provisions

The NPRM proposes revising the current Sex Discrimination Guidelines to replace them with regulations that set forth requirements that Federal contractors and subcontractors and federally assisted construction contractors and subcontractors must meet in fulfilling their obligations under Executive Order 11246, as amended, to ensure nondiscrimination in employment on the basis of sex. In order to reduce the burden and increase understanding, the NPRM includes examples of prohibited employment practices with each of the provisions.

The NPRM proposes changing the title of the regulation to provide clarity that the provisions in part 60–20 are regulations implementing Executive Order 11246. The title change does not incur burden.

The NPRM proposes minor edits to § 60–20.1, including deleting a sentence explaining the reason for promulgating this part of the regulation, and modifying the sentence notifying the public that part 60–20 is to be read in connection with existing regulations. These minor edits update the regulations and provide clarity. Because the edits do not cause additional action on the part of contractors, no additional burden is associated with this section.

Section 60–20.2, General Prohibitions, of the NPRM proposes removing the current section ''Recruitment and advertisement'' section and replacing it with a section that articulates the general prohibition against sex discrimination in employment. The general prohibition against sex discrimination in employment is not a new provision and as such does not require any additional action on the part of Federal contractors, subcontractors, or federally assisted construction contractors or subcontractors. Thus no burden is assessed for this provision.

The NPRM proposes replacing the current § 60–20.3 (Job policies and practices) with ''Sex as a *bona fide* occupational qualification.'' In this section, the NPRM proposes to consolidate in one provision the current references to the BFOQ defense available to employers and update the language set forth in title VII. This reorganization is intended to make it easier for Federal contractors, subcontractors, and federally assisted construction contractors and subcontractors to locate and understand the BFOQ defense. This section reorganizes existing information and does not incur additional burden. Thus no burden is assessed for this provision.

Section 60–20.4 proposes to replace the current provision addressing seniority systems with a section addressing discrimination in compensation practices. The proposed section provides clear guidance to covered contractors on their obligation to provide equal opportunity with respect to compensation. It provides guidance on determining similarly situated employees and confirms that OFCCP follows title VII principles in investigating compensation discrimination. The provisions do not create new requirements; rather, they clarify existing provisions regarding compensation discrimination, thus reducing confusion that may have resulted in the analysis of compensation discrimination.[95] Therefore no new burden or new benefit (beyond confusion reduction) is created by this provision.

The NPRM proposes to address discrimination on the basis of pregnancy, childbirth, or related medical conditions in Section 60–20.5.

Subsection 60–20.5(a) prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions, including childbearing capacity. This clarifies current law that discrimination based on any of these factors is prohibited under Executive Order 11246 and as such does not generate new burden or new benefits (with the exception of reduced confusion).

Subsection 60–20.5(b) provides a non-exhaustive list of examples of unlawful pregnancy discrimination, including refusing to hire pregnant applicants; firing an employee or requiring an employee to go on leave because the employee becomes pregnant; limiting a pregnant employee's job duties based on pregnancy or requiring a doctor's note in order for a pregnant employee to continue employment; providing employees with health insurance that does not cover hospitalization and other medical costs related to pregnancy, childbirth, or related medical conditions when hospitalization is provided for other medical conditions; and denying an alternative job assignment, modified duties or other accommodations to a pregnant employee when such accommodations are provided or are required to be provided by a contractor's policy or by other relevant laws to other employees whose abilities or inabilities to work are similar. The clarification, including the examples provided in subsection 60–20.5(b), reduces contractors' confusion by harmonizing OFCCP's outdated regulations with current title VII jurisprudence. Although OFCCP believes that Federal contractors are already required to provide accommodations and light duty under title VII, because some courts disagree with this interpretation, *see supra* note 76 and accompanying text, it estimates that there will be some burden associated with this provision for contractors that did not provide accommodations or light duty in the past.

To determine the burden of this accommodations provision, OFCCP first estimated the number of workers who may need an accommodation or light

[94] See *supra* note 91 and accompanying text.

[95] The existing § 60–20.5 addressed discriminatory wages. The proposed § 60–20.4 incorporates that existing requirement and updates it to be consistent with current title VII law.

duty during pregnancy. No specific data sets detail the characteristics of Federal contractor and subcontractor workers relating to pregnancy. Thus OFCCP relied on the data sets available for the general population and general labor force. OFCCP believes that the characteristics of the general labor force are similar to the Federal contractor workforce.

In estimating the burden associated with the accommodations provision, OFCCP determined that there are approximately 65 million employees who work for the Federal contractors and other recipients of Federal monies that are included in the SAM database. Because the data does not indicate gender demographics, OFCCP used data from the Bureau of Labor Statistics that indicates that 47 percent of the workforce is female.[96] According to National Center for Health Statistics (NCHS) data, there were 6,127,000 pregnancies among women ages 18 to 44 in the United States in 2009 among the general population.[97] When compared to data from the U.S. Census for the same time period, that number of pregnancies reflects a pregnancy rate of approximately 10.9 percent.[98]

OFCCP further refined this rate to reflect pregnancies of working women. NCHS's pregnancy rate did not distinguish between working and non-working women. Thus OFCCP turned to data from the U.S. Census. U.S. Census American Fact Finder does not report on pregnancy, but does report on births. Census data also shows whether the mother was in the labor force. As this is the best data available, OFCCP used the ratio of births among working and non-working mothers to determine the pregnancy rate of women in the workforce. Thus, OFCCP determined that the pregnancy rate for women in the workforce is approximately 61 percent of the rate for women in the general population, translating to a pregnancy rate of 6.7 percent of women in the Federal contractor workforce.[99] Based on the above, OFCCP estimates approximately 2,046,850 women (four women per SAM contractor firm) in the Federal contractor workforce would be pregnant in a year.[100]

Not every pregnant employee in the Federal contractor workforce will require an accommodation that might involve more than a *de minimis* cost. Many will have no medical condition associated with their pregnancies that require such accommodation. Even for those who do have such conditions, the positions that require such accommodation generally involve physical exertion or standing; such positions are likely to be found in the job categories of craft workers, operatives, laborers, and service workers. Based on data from the Employer Information Report EEO–1, OFCCP estimates that 21 percent of women in the Federal contractor workforce are in such job categories. Thus, of the 2,046,850 women who may be pregnant, 429,839 are in positions in the job categories likely to require accommodations that might involve more than a *de minimis* cost.

Reports from NIH show that the incidence of medical conditions during pregnancy that require accommodations ranges from 0.5 percent (placenta previa) to 50 percent (back issues).[101] Thus, OFCCP estimates that of the approximately 429,839 women in positions that require physical exertion or standing, half or 214,920 may require some type of an accommodation or light duty.

The types of accommodations needed during pregnancy also vary. They range from time off for medical appointments and more frequent breaks to stools for sitting and assistance with heavy lifting.[102] Reports from the W.K. Kellogg Foundation on women's child bearing experiences and the National Women's Law Center on accommodating pregnant workers show that the costs associated with accommodating pregnant workers are minimal and generally involve schedule adjustments or modified work duties.[103] One study found that when faced with a pregnancy-related need for accommodation, between 62 percent and 74 percent of pregnant women asked their employer to address their needs. The study further found that between 87 percent and 95 percent of the pregnant women who requested an adjustment to their work schedule or job duties worked for employers that attempted to address those requests. The study specifically found that 63 percent of pregnant women who needed a change in duties such as less lifting or more sitting asked their employers to address that need, and 91 percent of those women worked for employers that attempted to address their needs.[104] Based on this study, OFCCP believes that most employers do provide some form of accommodation when requested.

To determine the cost of accommodation or light duty imposed by the proposed rule, OFCCP considered the types of light duty or accommodations needed. Generally, providing light duty or accommodation for pregnancy involves adjusting work schedules or allowing more frequent breaks. OFCCP believes that these accommodations would incur little to no additional cost.

Additional accommodations may involve either modifications to work environments (providing a stool for sitting rather than standing) or to job duties—for example, lifting restrictions. In making such an accommodation, Federal contractors have discretion regarding how they would make such modifications. For example, a contractor may provide an employee with an existing stool, or a contractor may have other employees assist when heavy lifting is required. To determine the cost of such accommodations, OFCCP referred to the Job Accommodation Network (JAN). JAN reports that the average cost of accommodation is $500.[105]

As stated above, 63 percent of pregnant women who needed a change in duties related to less lifting or more

[96] Women in the Labor Force, *supra* note 12, at 2.

[97] Centers for Disease Control and Prevention, National Center for Health Statistics, NCHS Data Brief No. 136: *Pregnancy Rates for U.S. Women Continue to* Drop 2 (2013) *available at http://www.cdc.gov/nchs/data/databriefs/db136.pdf* (last accessed Oct. 6, 2014).

[98] This may be an overestimation of the number of pregnant workers because there is limited data available regarding the age of employees of federal contractors.

[99] U.S. Census Bureau, *American Fact Finder,* Women 16 to 50 Years Who Had a Birth in the Past 12 Months by Marital Status and Labor Force Status, 2009 to 2011 American Community Survey 3-Year Estimates, *available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_3YR_B13012&prodType=table* (last accessed Aug. 1, 2014). The data table reports birth rates for women in labor force at 5.1 percent, compared to women not in the labor force at 8.4 percent. Comparing the two rates (5.1 percent to 8.1 percent), the birth rate of women in the labor force was 61 percent that of women not in the labor force. Therefore, multiplying the pregnancy rate among women of working age, 10.9 percent, by 61 percent results in a 6.7 percent pregnancy rate.

[100] *Id.*

[101] S. Malmqvist et.al., *Prevalence of low back and pelvic pain during pregnancy* (Abstract), J. Manipulative Physiological Therapy, National Center for Biotechnology Information (2012), *available at http://www.ncbi.nlm.nih.gov/pubmed/22632586,* (last accessed Oct. 6, 2014).

[102] *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Meeting of the U.S. Equal Emp. Opportunity Comm'n* 8 (Feb. 15, 2012) (statement of Dr. Stephen Benard, Professor of Sociology, Indiana University), *available at http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm (last accessed Oct. 6, 2014).*

[103] Heavy Lift, supra note 51, at 12.

[104] Eugene Declerq et al., W.K. Kellogg Foundation, Listening to Mothers III: New Mothers Speak Out, 36, (2013).

[105] Beth Loy, Job Accommodation Network, *Workplace Accommodations: Low Cost, High Impact, available at http://askjan.org/media/lowcosthighimpact.html* (last updated Sept. 1, 2014) (last accessed Oct. 6, 2014).

sitting requested such an accommodation from their employers. Thus, OFCCP estimates that 135,400 women (214,920 × 0.63) would have made such a request, and 91 percent, or 123,214 of those requests (135,400 × 0.91) would have been addressed. In addition, OFCCP assumes that of the 37 percent (79,520 women) who did not make such a request, had they made the request, the needs of 91 percent of them (72,364 women) would also have been addressed.[106] Thus, this proposed rule would require covered contractors to accommodate the nine percent of women whose needs were not addressed. Therefore, OFCCP estimates that the cost, accounting for those pregnant women who made requests and those additional women who could make requests, would be $9,671,000 ((135,400 − 123,214) + (79,520 − 72,364) × $500). Accounting for women's requests that could be made but may not be made is likely an overestimation of the cost of this accommodation. In addition, OFCCP believes that this cost estimate may also be an overestimate because contractors with 15 or more employees are covered by a similar requirement found in title VII and 36 states have requirements that apply to employers with fewer than 15 employees.[107] Although OFCCP seeks comments on all aspects of its calculation of burden and costs, the agency specifically seeks comments on the burden associated with providing accommodations to pregnant workers.

The NPRM proposes replacing the current § 60–20.6 (Affirmative action) with a new section titled ''Other fringe benefits.'' The current section on affirmative action is unnecessary because the requirements related to affirmative action programs are set forth in parts 60–2 and 60–4. In the new § 60–20.6, the NPRM proposes to clarify the existing requirement of nondiscrimination in fringe benefits, specifically with regard to application of that principle to contributions to and distributions from pension and retirement funds. The proposed section reflects the current state of title VII law with regard to pension funds, imposing no additional burden on contractors covered both by Executive Order 11246, as amended, and by title VII (which, generally, covers employers of 15 or more employees) or by state or local laws that similarly prohibit sex discrimination (many of which have lower coverage thresholds [108]). As to the remaining contractors—those that have fewer than 15 employees as defined by title VII, are not covered by state or local laws, and have at least $10,000 in Federal contracts or subcontracts—as noted in the discussion of this requirement elsewhere in the preamble, OFCCP's publicly available FCCM has put them on notice that OFCCP follows current law with regard to providing equal benefits and making equal contributions to pensions funds for men and women. Thus, as an existing requirement, this does not generate any new benefits (beyond reduced confusion) or additional burden.

The NPRM proposes a new section, § 60–20.7, titled ''Employment decisions made on the basis of sex-based stereotypes.'' This section explains the prohibition against making employment decisions on the basis of sex-based stereotypes, which the Supreme Court recognized in 1989 as a form of sex discrimination under title VII. This section clarifies that such discrimination includes disparate treatment based on nonconformity to stereotypical expectations about gender identity, gender expression, and sexual orientation and stereotyping based on specific expectations about the proper roles of women and men regarding caregiving. The proposed section reflects the current state of title VII law with regard to sex-based stereotyping, imposing no additional burden on contractors covered both by Executive Order 11246, as amended, and by title VII or by state or local laws that similarly prohibit sex discrimination, many of which have lower coverage thresholds.[109] As to the remaining contractors—those that have fewer than 15 employees as defined by title VII, are not covered by state or local laws, and have at least $10,000 in Federal contracts or subcontracts—as noted in the discussion of this requirement elsewhere in the preamble, OFCCP's publicly available FCCM has put them on notice that OFCCP follows current law with regard to sex-based stereotyping. The FCCM provides that:

> COs must examine whether contractor policies make prohibited distinctions in conditions of employment based on sex, including the basis of pregnancy, childbirth or related medical conditions, or on the basis of sex-based stereotypes, including those related to actual or perceived caregiver responsibilities. Contractors must not make employment decisions based on stereotypes about how males and females are ''supposed'' to look or act. Such employment decisions are a form of sex discrimination prohibited by Executive Order 11246, as amended.

FCCM, ch. 2, section 2H00(a).[110] Thus, for these contractors as well, the proposed section imposes no additional burden and generates no new benefits for their employees.

The NPRM proposes a new section, § 60–20.8, titled ''Harassment and hostile work environments.'' This section explains the circumstances under which sex-based harassment and hostile work environments violate the Executive Order, reflecting principles established in Supreme Court title VII decisions beginning in 1986. This section clarifies that such discrimination includes ''sexual harassment (including harassment based on gender identity or expression), harassment based on pregnancy, childbirth, or related medical conditions,'' and sex-based harassment that is not sexual in nature but that is because of sex or where one sex is targeted for the harassment. The proposed section describes best practices that contractors may follow to reduce and eliminate harassment and hostile work environments but explicitly states that such practices are ''not required by this part.''

The proposed section reflects the current state of title VII law with regard to sex-based harassment and hostile work environments, imposing no additional burden on contractors covered both by Executive Order 11246, as amended, and by title VII or by state or local laws that similarly prohibit sex

[106] OFCCP arrived at 79,250 by multiplying the 214,920 women by 37 percent.

[107] State laws covering employers with one employee: Alaska, Colorado, Hawaii, Maine, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont, and Wisconsin; state laws covering employers with two employees: Wyoming; state laws covering employers with three employees: Connecticut; state laws covering employers with four employees: Delaware, Iowa, Kansas, New Mexico, New York, Ohio, Pennsylvania, and Rhode Island; state laws covering employers with five employees: California and Idaho; state laws covering employers with six employees: Indiana, Massachusetts, Missouri, New Hampshire, and Virginia; state laws covering employers with eight or more employees: Kentucky, Tennessee, and Washington; state laws covering employers with nine or more employees: Arkansas; state laws covering employers with 12 or more employees: West Virginia. In addition, the District of Columbia and Puerto Rico's laws cover employers with one employee.

[108] See note 99, *supra.*

[109] See note 99, *supra.*

[110] Another section of the FCCM also covers sex-based stereotyping:

> *Sex-Based Stereotyping and Caregiver Discrimination.* Differential treatment for an employment-related purpose based on sex-based stereotypes, including those related to actual or perceived caregiving responsibilities, is a violation of Title VII of the Civil Rights Act of 1964. For example, it is prohibited to deny advancement opportunities to similarly situated mothers that are provided to fathers or women without children, based on stereotypes about mothers in the workplace; it is also prohibited to deny to fathers access to family-friendly policies like workplace flexibility that employers provide to mothers, based on stereotypes about fathers' roles in care giving.

FCCM, ch. 2, section 2H01(e).

discrimination (many of which have lower coverage thresholds [111]). As to the remaining contractors—those that have fewer than 15 employees as defined by title VII, are not covered by state or local laws, and have at least $10,000 in Federal contracts or subcontracts—as noted in the discussion of this requirement elsewhere in the preamble, OFCCP's publicly available FCCM has put them on notice that OFCCP follows current law with regard to sex-based harassment and hostile work environments. The FCCM provides that:

> Although not specifically mentioned in the *Guidelines,* sexual harassment, as well as harassment based on race, color, national origin or religion is a violation of the nondiscrimination provisions of EO 11246. During the onsite review, COs must be alert for any indications of such harassment. OFCCP follows Title VII principles when determining whether sexual harassment has occurred.

FCCM, Chapter 2, Section 2H01(d). Thus, for these contractors as well, the proposed section imposes no additional burden and generates no new benefits for their employees.

The total first year cost of the regulation is estimated at $35,461,000 or $71 per contractor company. Below, in Table 1, is a summary of the hours and costs:

TABLE 1—CONTRACTOR PROPOSED NEW REQUIREMENTS

Section	Burden hours	Costs
Estimated One-Time Burden:		
Regulatory Familiarization	500,000	$25,790,000
Total One-Time Burden	500,000	25,790,000
Estimated Recurring Burden:		
41 CFR 60–20.5: Light duty or accommodation	0	9,671,000
Total Annual Recurring Burden	0	9,671,000
Total Burden	500,000	35,461,000

Summary of Transfer and Benefits

If the proposed rule decreases sex-based compensation discrimination, that effect may generate a transfer of value to employees from employers (if additional wages are paid out of profits) or taxpayers (if contractor fees increase to pay higher wages to employees). Contractors may also transfer any costs of providing pregnancy accommodations to employees, by not increasing wages or reducing other benefits (to the extent not prohibited by the Davis-Bacon and Service Contract Acts). However, OFCCP does not currently have sufficient information to reliably estimate the potential transfer payments resulting from this proposed rule, and it requests public comment on data and methods to do so.

Analysis of Rulemaking Alternatives

OFCCP considered a range of regulatory alternatives that would enable the agency to encourage voluntary compliance and effectively enforce the prohibition against sex discrimination. In addition to the approach proposed in the NPRM, OFCCP considered two alternative approaches. First, OFCCP considered maintaining the current guidelines with no changes. Second, OFCCP considered rescinding the existing guidelines without proposing new regulations. Each of these alternatives is discussed in further detail below. OFCCP seeks comments from stakeholders on the proposal in the NPRM, as well as each alternative, including OFCCP's assessment of the costs and benefits.

Alternative 1: Maintaining the Current Guidelines

OFCCP considered maintaining the Sex Discrimination Guidelines with no changes. This alternative would impose no new costs and achieve no new benefits. However, as discussed above, the existing guidelines are extremely outdated and therefore do not provide sufficient or even accurate guidance to contractors regarding their nondiscrimination obligations. Thus, retaining the existing guidelines would have the negative effect of continuing to impose compliance costs on compliant contractors. It is true that, as discussed elsewhere in this preamble, the FCCM provides updated guidance in the areas of maternity leave, sex-based stereotyping, sexual harassment, and pensions. But even in these areas, the provisions of the Guidelines conflict with the FCCM and thus potentially sow confusion among the contractor community.

As mentioned above, current § 60–20.3(c) provides that a contractor will not be considered to have violated the Executive Order if its contributions for fringe benefits are the same for men and women or if the resulting benefits are equal. But in 1978, the Supreme Court held that under title VII, an employer must provide equal retirement benefits to men and women even if the contributions necessary to do so cost more for one sex than the other. While the FCCM recognizes this Supreme Court development, it is possible that contractors, especially new contractors confronted for the first time with the conflict between the outdated provisions in the Guidelines, on the one hand, and current title VII principles and the FCCM, on the other, may still be incurring legal fees or the cost of human resource professionals' time to reconcile this conflict. Moreover, maintaining the Sex Discrimination Guidelines with no changes would be inconsistent with Section 6 of Executive Order 13563, which requires agencies to engage in retrospective analyses of ''rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.''

Alternative 2: Rescinding but Not Replacing the Current Guidelines

OFCCP considered rescinding the Sex Discrimination Guidelines but not proposing regulations to replace them. This alternative would have the benefit of removing from the Code of Federal Regulations provisions that are inconsistent with current title VII principles, such as the fringe benefit provision discussed above. Contractors would no longer need to expend resources to reconcile conflicts between the Sex Discrimination Guidelines and the current requirements of title VII law. However, this alternative would create a vacuum of guidance for contractors, requiring them to expend resources for a different reason—for example, to pay for lawyers' or human resource

[111] See note 99, *supra.*

professionals' time to provide guidance regarding their nondiscrimination obligations. That *ad hoc* approach would reduce consistency across contractors' practices and could increase the incidence of unintended noncompliance, potentially harming job applicants and employees.

Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the business organizations and governmental jurisdictions subject to regulation.'' Public Law 96–354. To achieve that principle, the Act requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis (IRFA) and to develop alternatives whenever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The Act requires the consideration for the impact of a proposed regulation on a wide-range of small entities including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposal or final rule would have a significant economic impact on a substantial number of small entities.[112] If the determination is that it would, then the agency must prepare a regulatory flexibility analysis as described in the RFA.[113]

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination and the reasoning should be clear.

OFCCP is publishing this initial regulatory flexibility analysis to aid stakeholders in understanding the small entity impacts of the proposed rule and to obtain additional information on the small entity impacts. OFCCP invites interested persons to submit comments on the following estimates, including the number of small entities affected by the NPRM, the compliance cost estimates, and whether alternatives exist that will reduce burden on small entities while still remaining consistent with the objective of the proposed rule.

Why OFCCP is Considering Action: OFCCP is publishing this proposed rule in order to align its existing regulations related to sex discrimination with current law and address their application to current workplace practices and issues.

Objectives of and Legal Basis for Rule: This proposed rule will provide guidance on how to comply with the nondiscrimination requirements of Executive Order 11246, as amended.

Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping: As explained in this proposed rule, the Sex Discrimination Guidelines at 41 CFR part 60–20 set forth interpretations and guidelines for implementing Executive Order 11246's nondiscrimination and affirmative action requirements related to sex. The guidelines have not been updated in more than 40 years. This NPRM is intended to update the requirements to reflect current statutory and case law. The requirements in Executive Order 11246 generally apply to any business or organization that (1) holds a single Federal contract, subcontract, or federally assisted construction contract in excess of $10,000; (2) has Federal contracts or subcontracts that, 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.

This NPRM contains several provisions that could be considered to impose compliance requirements on contractors. Generally, contractors are prohibited from making employment decisions based upon gender, including decisions regarding compensation and fringe benefits. The NPRM updates the existing regulations to address, *inter alia,* discrimination on the basis of pregnancy, harassment, and employment decisions made on the basis of sex-based stereotypes. These revisions and updates are intended to bring OFCCP's regulations at part 60–20 in line with the current standards of title VII and thus reduce potential confusion among contractors, applicants and employees regarding which requirement applies to a particular situation.

All small entities subject to Executive Order 11246 would be required to comply with all of the provisions of the NPRM. Such compliance requirements are more fully described above in other portions of this preamble. The following section analyzes the cost of complying with proposed requirements in the NPRM.

Calculating Impact of the Proposed Rule on Small Business Firms: OFCCP must determine the compliance cost of this proposed rule on small contractor firms, and whether these costs will be significant for a substantial number of small contractor firms (*i.e.,* small business firms that enter into contracts with the Federal Government). If the estimated compliance costs for affected small contractor firms are less than three percent of small contractor firms' revenues, OFCCP considers it appropriate to conclude that this proposed rule will not have a significant economic impact on the small contractor firms covered by Executive Order 11246. While OFCCP has chosen three percent as our significance criterion, using this benchmark as an indicator of significant impact may overstate the significance of such an impact, since the costs associated with prohibiting sex discrimination against employees and job applicants are expected to be mitigated to some degree by the benefits of the proposed rule. The benefits are discussed more fully in the preamble of this NPRM.

The data sources used in the analysis of small business impact are the Small Business Administration's (SBA) Table of Small Business Size Standards,[114] the Current Population Survey (CPS), and the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB).[115] Since Federal contractors are not limited to specific industries, OFCCP assessed the impact of this NPRM across the 19 industrial classifications.[116] Because data limitations do not allow OFCCP to determine which of the small firms within these industries are Federal contractors, OFCCP assumes that these

[112] See 5 U.S.C. 603.

[113] *Id.*

[114] U.S. Small Business Administration, *Firm Size Data,* Statistics of U.S. Businesses, *available at http://www.sba.gov/advocacy/849/12162#susb* (last visited June 9, 2014).

[115] U.S. Census Bureau, *Statistics of U.S. Businesses:* Latest SUSB Annual Data, *available at http://www.census.gov/econ/susb/* (last accessed June 9, 2014).

[116] Agriculture, Forestry, Fishing, and Hunting Industry (North American Industry Classification System (NAICS) 11, Mining NAICS 21, Utilities NAICS 22, Construction NAICS 23, Manufacturing, NAICS 31–33, Wholesale Trade NAICS 42, Retail Trade NAICS 44–45, Transportation and Warehousing NAICS 48–49, Information NAICS 51, Finance and Insurance NAICS 52, Real Estate and Rental and Leasing NAICS 53, Professional, Scientific, and Technical Services NAICS 54, Management of Companies and Enterprises NAICS 55, Administrative and Support and Waste Management and Remediation Services NAICS 56, Educational Services NAICS 61, Healthcare and Social Assistance NAICS 62, Arts, Entertainment, and Recreation NAICS 71, Accommodation and Food Services NAICS 72, Other Services NAICS 81.

small firms are not significantly different from the small Federal contractors that will be directly affected by the proposed rule.

OFCCP used the following steps to estimate the cost of the proposed rule per small contractor firm as measured by a percentage of the total annual receipts. First, OFCCP used Census SUSB data that disaggregates industry information by firm size in order to perform a robust analysis of the impact on small contractor firms. OFCCP applied the SBA small business size standards to the SUSB data to determine the number of small firms in the affected industries. Then OFCCP used receipts data from the SUSB to calculate the cost per firm as a percent of total receipts by dividing the estimated annual cost per firm by the average annual receipts per firm. This methodology was applied to each of the industries, and the results by industry are presented in the summary tables below (see Tables 2–20).

In sum, the increased cost of compliance resulting from the proposed rule is *de minimis* relative to revenue at small contractor firms, no matter their size. All of the industries had an annual cost per firm as a percent of receipts of far less than three percent. For instance, the manufacturing industry cost is estimated to range from 0.00 percent for firms that have average annual receipts of approximately $985 million to 0.02 percent for firms that have average annual receipts of under $500,000. Management of companies and enterprises is the industry with the highest relative costs, with a range of 0.00 percent for firms that have average annual receipts of approximately $2 million to 0.30 percent for firms that have average annual receipts of under $24,000. Therefore, in no instance is the effect of the NPRM greater than three percent of total receipts, and in fact does not exceed 0.3 percent.

Although OFCCP estimates the compliance costs are less than three percent of the average revenue per small contractor firm for each of the 19 industries, OFCCP seeks data and feedback from small firms on the factors and assumptions used in this analysis, such as the data sources, small business industries, NAICS codes and size standards, and the annual costs per firm as a percent of receipts. OFCCP seeks information about which data sources should be used to estimate the number of Federal small subcontractors. OFCCP also seeks information about the potential compliance cost estimates, such as any differences in compliance costs for small businesses as compared to larger businesses and any compliance costs that may not have been included in this analysis.

Estimating the Number of Small Businesses Affected by the Rulemaking: OFCCP now sets forth its estimate of the number of small contractor firms actually affected by the proposed rule. This information is not readily available. The best source for the number of small contractor firms that are affected by this proposed rule is GSA's SAM. OFCCP used SAM data to estimate the number of affected small contractor firms since SAM data allow us to directly estimate the number of small contractor firms. Federal contractor status cannot be discerned from the SBA firm size data. It can only be used to estimate the number of small firms, not the number of small contractor firms. OFCCP used the SBA data to estimate the impact of the proposed regulation on a ''typical'' or ''average'' small firm in each of the 19 industries. OFCCP then assumed that a typical small firm is similar to a small contractor firm. OFCCP believes that this NPRM will not have a significant economic effect on a substantial number of small businesses.

Based on the most current SAM data available, if OFCCP defined ''small'' as fewer than 500 employees, then there are 328,552 small contractor firms. If OFCCP defined ''small'' as firms with less than $35.5 million in revenues, then there are 315,902 small contractor firms. Thus, OFCCP established a range of 315,902 to 328,552 as the total number of small contractor firms. Of course, not all of these contractor firms will be impacted by the proposed rule; only those contractor firms that have active contracts of more than $10,000 and are not otherwise covered by title VII or similar state or local anti-discrimination laws will be impacted. Thus this range is an overestimate of the number of firms affected by the proposed rule. As the proposed regulation applies to contractors covered by Executive Order 11246, OFCCP estimates that the range of small firms impacted is from 315,902 to 328,552.

Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Rule: As discussed in the preamble above, OFCCP recognizes that title VII, like the Executive Order, prohibits employers from discriminating against employees and job applicants on the basis of sex. Thus some overlap exists between the two laws.[117] In fact, OFCCP is proposing in this NPRM to eliminate conflict with title VII and current case law.

Alternatives to the Proposed Rule: As described above, OFCCP considered two alternatives. These alternatives would not be an effective or efficient way to enforce Executive Order 11246, as amended.

Differing Compliance and Reporting Requirements for Small Entities: This NPRM provides for no differing compliance requirements for small entities. In its implementation of Executive Order 11246, as amended, OFCCP does provide different reporting requirements for small entities—for example, contractor companies with fewer than 50 employees are not required to submit an EEO–1 Report or develop affirmative action programs. *See* 41 CFR 1.7, 1.40, and 2.1. In addition, the record retention period for smaller contractors is reduced. *See* 41 CFR 60–1.12.

Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities: This NPRM was drafted to state clearly the compliance requirements for all contractors subject to Executive Order 11246, as amended. The proposed rule does not contain any new reporting or recordkeeping requirements. The compliance provisions apply generally to all businesses covered by Executive Order 11246, as amended; no rational basis exists for creating an exemption from compliance requirements for small businesses. OFCCP makes available a variety of resources to employers for understanding their obligations and achieving compliance.

Use of Performance Rather Than Design Standards: This NPRM was written to provide clear guidelines to ensure compliance with the Executive Order requirements. Under the proposed rule, contractors may achieve compliance through a variety of means. OFCCP makes available a variety of resources to contractors for understanding their obligations and achieving compliance.

Exemption from Coverage of the Rule for Small Entities: Executive Order 11246, as amended, establishes its own exemption requirements; therefore, OFCCP has no authority to exempt small businesses from the requirements of the Executive Order.

[117] Unlike title VII, Executive Order 11246 contains the additional requirement that Federal contractors engage in affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their sex, as well as their race, color, religion, sexual orientation, gender identity, or national origin.

Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

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Table 2: Cost per small firm in the agriculture, forestry, fishing, and hunting industry.

Agriculture, Forestry, Fishing, and Hunting Industry							
Small Business Size Standard: $0.75 million – $27.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm[1]	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm[2]	Annual Cost per Firm as Percent of Receipts[3]
Firms with sales/receipts/revenue below $100,000	5,086	N/A	N/A	$71	$247,056,000	$48,576	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	8,939	21,523	2.4	$71	$2,231,355,000	$249,620	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	3,670	19,631	5.3	$71	$2,620,344,000	$713,990	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	3,230	30,944	9.6	$71	$4,975,078,000	$1,540,272	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	1,117	20,049	17.9	$71	$3,811,000,000	$3,411,817	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	289	8,997	31.1	$71	$1,730,128,000	$5,986,602	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	165	7,588	46.0	$71	$1,340,763,000	$8,125,836	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	112	6,130	54.7	$71	$1,288,588,000	$11,505,250	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	55	4,042	73.5	$71	$874,841,000	$15,906,200	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	44	5,325	121.0	$71	$858,761,000	$19,517,295	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	26	2,800	107.7	$71	$595,387,000	$22,899,500	0.00%

N/A = not available, not disclosed

[1] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average number of employees per firm (2.4) was derived by dividing the total number of employees (21,523) by the number of firms (8,939).

[2] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average receipts per firm ($249,620) was derived by dividing the total annual receipts ($2,231,355,000) by the number of firms (8,939).

[3] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the annual cost per firm as a percent of receipts (0.03 percent) was derived by dividing the annual cost per firm ($71) by the average receipts per firm ($249,620).

Table 3: Cost per small firm in the mining industry.

Mining Industry							
Small Business Size Standard: 500 employees							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm[1]	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm[2]	Annual Cost per Firm as Percent of Receipts[3]
Firms with 0-4 employees	11,223	17,874	1.6	$71	$6,809,517,000	$606,747	0.01%
Firms with 5-9 employees	3,186	21,314	6.7	$71	$6,304,810,000	$1,978,911	0.00%
Firms with 10-19 employees	2,451	33,344	13.6	$71	$9,092,457,000	$3,709,693	0.00%
Firms with 20-99 employees	2,775	107,447	38.7	$71	$32,035,288,000	$11,544,248	0.00%
Firms with 100-499 employees	690	102,299	148.3	$71	$38,463,690,000	$55,744,478	0.00%

[1] In the case of mining firms with 0-4 employees, the average number of employees per firm (1.6) was derived by dividing the total number of employees (17,874) by the number of firms (11,223).

[2] In the case of mining firms with 0-4 employees, the average receipts per firm ($606,747) was derived by dividing the total annual receipts ($6,809,517,000) by the number of firms (11,223).

[3] In the case of mining firms with 0-4 employees, the annual cost per firm as a percent of receipts (0.01 percent) was derived by dividing the annual cost per firm ($71) by the average receipts per firm ($606,747).

Table 4: Cost per small Firm in the utilities industry.

Utilities Industry							
Small Business Size Standard: 250 – 1,000 employees							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	3,212	6,181	1.9	$71	$7,238,519,000	$2,253,586	0.00%
Firms with 5-9 employees	1,020	6,546	6.4	$71	$4,373,888,000	$4,288,125	0.00%
Firms with 10-19 employees	513	6,722	13.1	$71	$5,657,251,000	$11,027,780	0.00%
Firms with 20-99 employees	870	38,602	44.4	$71	$27,513,924,000	$31,625,200	0.00%
Firms with 100-499 employees	309	52,294	169.2	$71	$53,091,123,000	$171,815,932	0.00%
Firms with 500+ employees[1]	199	512,412	2,574.9	$71	$475,894,489,000	$2,391,429,593	0.00%
[1] The small business size standard for several subsectors within the utilities industry is 750 or 1,000 employees; however, data are not disaggregated for firms with more than 500 employees.							

Table 5: Cost per small firm in the construction industry.

Construction Industry							
Small Business Size Standard: $15 million – $36.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	151,986	N/A	N/A	$71	$7,636,718,000	$50,246	0.14%
Firms with sales/receipts/revenue of $100,000 to $499,999	316,475	776,806	2.5	$71	$81,110,428,000	$256,293	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	124,214	642,823	5.2	$71	$88,028,843,000	$708,687	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	110,546	1,049,670	9.5	$71	$173,054,634,000	$1,565,454	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	47,962	864,701	18.0	$71	$167,758,626,000	$3,497,740	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	16,992	492,370	29.0	$71	$102,502,053,000	$6,032,371	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	7,801	308,512	39.5	$71	$66,977,650,000	$8,585,777	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	8,259	427,159	51.7	$71	$99,174,146,000	$12,008,009	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	4,354	289,441	66.5	$71	$73,881,089,000	$16,968,555	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	2,611	209,081	80.1	$71	$56,928,754,000	$21,803,429	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	1,621	150,754	93.0	$71	$43,119,720,000	$26,600,691	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	1,171	121,928	104.1	$71	$36,848,837,000	$31,467,837	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	831	94,903	114.2	$71	$30,307,198,000	$36,470,756	0.00%
N/A = not available, not disclosed							

Table 6: Cost per small firm in the manufacturing industry.

Manufacturing Industry							
Small Business Size Standard: 500 – 1,500 employees							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	114,635	213,123	1.9	$71	$46,236,636,000	$403,338	0.02%
Firms with 5-9 employees	53,500	358,110	6.7	$71	$53,036,608,000	$991,338	0.01%
Firms with 10-19 employees	44,939	612,113	13.6	$71	$97,897,887,000	$2,178,462	0.00%
Firms with 20-99 employees	55,603	2,288,585	41.2	$71	$440,739,564,000	$7,926,543	0.00%
Firms with 100-499 employees	13,945	2,445,779	175.4	$71	$634,737,830,000	$45,517,234	0.00%
Firms with 500+ employees[1]	4,079	7,402,462	1,814.8	$71	$4,019,587,050,000	$985,434,432	0.00%

[1] The small business size standard for many subsectors within the manufacturing industry is 750, 1,000, or 1,500 employees; however, data are not disaggregated for firms with more than 500 employees.

Table 7: Cost per small firm in the wholesale trade industry.

Wholesale Trade Industry							
Small Business Size Standard: 100 employees							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	190,153	325,412	1.7	$71	$297,267,502,000	$1,563,307	0.00%
Firms with 5-9 employees	57,366	377,841	6.6	$71	$249,842,292,000	$4,355,233	0.00%
Firms with 10-19 employees	39,354	525,216	13.3	$71	$325,243,478,000	$8,264,560	0.00%
Firms with 20-99 employees	36,783	1,365,914	37.1	$71	$899,443,843,000	$24,452,705	0.00%

Table 8: Cost per small firm in the retail trade industry.

Retail Trade Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	98,659	N/A	N/A	$71	$5,008,702,000	$50,768	0.14%
Firms with sales/receipts/revenue of $100,000 to $499,999	251,705	727,585	2.9	$71	$67,380,242,000	$267,695	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	122,575	634,006	5.2	$71	$87,491,736,000	$713,781	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	120,985	1,019,672	8.4	$71	$190,373,341,000	$1,573,528	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	55,634	774,581	13.9	$71	$193,186,239,000	$3,472,449	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	19,594	418,263	21.3	$71	$117,223,823,000	$5,982,639	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	9,582	272,697	28.5	$71	$80,790,141,000	$8,431,449	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	9,824	366,889	37.3	$71	$115,236,313,000	$11,730,081	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	5,310	256,826	48.4	$71	$86,999,536,000	$16,384,093	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	3,498	201,289	57.5	$71	$72,964,681,000	$20,858,971	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	2,438	167,596	68.7	$71	$61,987,531,000	$25,425,566	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	1,835	144,987	79.0	$71	$55,162,317,000	$30,061,208	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	1,491	122,188	82.0	$71	$50,711,404,000	$34,011,673	0.00%
N/A = not available, not disclosed							

Table 9: Cost per small firm in the transportation and warehousing industry.

Transportation and Warehousing Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	40,510	N/A	N/A	$71	$1,939,749,000	$47,883	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	67,987	181,924	2.7	$71	$16,284,066,000	$239,517	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	22,377	151,019	6.7	$71	$15,756,895,000	$704,156	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	20,915	271,012	13.0	$71	$32,305,484,000	$1,544,608	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,183	223,156	24.3	$71	$31,359,227,000	$3,414,922	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,550	136,436	38.4	$71	$20,463,648,000	$5,764,408	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,800	91,408	50.8	$71	$14,261,554,000	$7,923,086	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,840	123,966	67.4	$71	$19,933,921,000	$10,833,653	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	988	85,367	86.4	$71	$14,057,603,000	$14,228,343	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	621	68,836	110.8	$71	$11,060,118,000	$17,810,174	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	429	51,989	121.2	$71	$8,257,805,000	$19,248,963	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	311	45,274	145.6	$71	$7,184,425,000	$23,101,045	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	235	32,922	140.1	$71	$5,902,588,000	$25,117,396	0.00%
N/A = not available, not disclosed							

Table 10: Cost per small firm in the information industry.

Information Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	15,960	N/A	N/A	$71	$767,642,000	$48,098	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	27,678	80,336	2.9	$71	$6,876,130,000	$248,433	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	10,311	67,954	6.6	$71	$7,260,927,000	$704,192	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	9,808	120,499	12.3	$71	$15,248,992,000	$1,554,750	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,508	100,331	22.3	$71	$15,472,313,000	$3,432,190	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,837	65,601	35.7	$71	$10,856,893,000	$5,910,121	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,018	46,846	46.0	$71	$8,447,070,000	$8,297,711	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,092	68,058	62.3	$71	$12,300,328,000	$11,264,037	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	601	49,812	82.9	$71	$9,293,544,000	$15,463,468	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	389	37,522	96.5	$71	$7,616,666,000	$19,580,118	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	270	30,523	113.0	$71	$6,512,265,000	$24,119,500	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	175	25,649	146.6	$71	$4,971,718,000	$28,409,817	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	136	21,553	158.5	$71	$4,082,897,000	$30,021,301	0.00%
N/A = not available, not disclosed							

Table 11: Cost per small firm in the finance and insurance industry.

Finance and Insurance Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	61,548	N/A	N/A	$71	$2,931,522,000	$47,630	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	118,169	308,539	2.6	$71	$29,379,598,000	$248,624	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	33,703	177,822	5.3	$71	$23,302,679,000	$691,413	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	23,023	222,822	9.7	$71	$35,135,972,000	$1,526,125	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,728	185,783	19.1	$71	$33,574,070,000	$3,451,282	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,108	118,100	28.7	$71	$24,483,200,000	$5,959,883	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,405	90,442	37.6	$71	$20,088,983,000	$8,353,007	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,820	148,252	52.6	$71	$33,267,079,000	$11,796,837	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,564	106,896	68.3	$71	$25,663,650,000	$16,408,983	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,028	87,611	85.2	$71	$21,843,640,000	$21,248,677	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	685	65,621	95.8	$71	$17,478,694,000	$25,516,342	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	515	58,481	113.6	$71	$15,619,023,000	$30,328,200	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	418	51,263	122.6	$71	$14,150,222,000	$33,852,206	0.00%
N/A = not available, not disclosed							

Table 12: Cost per small firm in the real estate and rental and leasing industry.

Real Estate and Rental and Leasing Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	86,219	N/A	N/A	$71	$4,165,673,000	$48,315	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	124,930	299,041	2.4	$71	$30,501,166,000	$244,146	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	39,747	191,958	4.8	$71	$27,836,936,000	$700,353	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	29,717	269,366	9.1	$71	$45,164,417,000	$1,519,818	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	10,013	181,600	18.1	$71	$33,652,743,000	$3,360,905	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,288	95,418	29.0	$71	$18,788,566,000	$5,714,284	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,553	62,482	40.2	$71	$12,221,244,000	$7,869,442	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,518	81,675	53.8	$71	$16,329,830,000	$10,757,464	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	771	48,442	62.8	$71	$11,037,708,000	$14,316,093	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	464	36,318	78.3	$71	$8,012,159,000	$17,267,584	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	365	32,555	89.2	$71	$7,621,190,000	$20,879,973	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	228	25,638	112.4	$71	$5,610,499,000	$24,607,452	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	161	17,743	110.2	$71	$4,144,542,000	$25,742,497	0.00%
N/A = not available, not disclosed							

Table 13: Cost per small firm in the professional, scientific, and technical services industry.

Professional, Scientific and Technical Services Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	207,967	N/A	N/A	$71	$9,968,674,000	$47,934	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	339,834	814,116	2.4	$71	$82,241,004,000	$242,003	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	102,144	584,473	5.7	$71	$71,850,790,000	$703,426	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	78,520	870,369	11.1	$71	$120,442,007,000	$1,533,902	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	28,337	631,182	22.3	$71	$97,339,397,000	$3,435,064	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	9,714	355,210	36.6	$71	$57,721,674,000	$5,942,112	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	4,863	245,206	50.4	$71	$40,592,738,000	$8,347,263	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	4,658	313,530	67.3	$71	$53,578,044,000	$11,502,371	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,338	211,940	90.7	$71	$36,728,134,000	$15,709,210	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,381	147,737	107.0	$71	$27,448,191,000	$19,875,591	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	954	122,039	127.9	$71	$22,622,723,000	$23,713,546	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	603	91,258	151.3	$71	$15,961,413,000	$26,470,005	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	511	83,414	163.2	$71	$15,941,272,000	$31,196,227	0.00%
N/A = not available, not disclosed							

Table 14: Cost per small firm in the management of companies and enterprises industry.

Management of Companies and Enterprises Industry							
Small Business Size Standard: $20.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	1,895	11,318	6.0	$71	$44,606,000	$23,539	0.30%
Firms with sales/receipts/revenue of $100,000 to $499,999	1,387	4,529	3.3	$71	$293,971,000	$211,947	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	964	5,082	5.3	$71	$373,917,000	$387,881	0.02%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	2,039	18,829	9.2	$71	$1,087,692,000	$533,444	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	2,242	26,723	11.9	$71	$1,698,014,000	$757,366	0.01%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,717	28,312	16.5	$71	$1,855,703,000	$1,080,782	0.01%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,258	22,469	17.9	$71	$1,711,464,000	$1,360,464	0.01%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,942	41,651	21.4	$71	$3,120,558,000	$1,606,878	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,423	34,363	24.1	$71	$2,997,064,000	$2,106,159	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,075	30,583	28.4	$71	$2,508,188,000	$2,333,198	0.00%

Table 15: Cost per small firm in the administrative and support and waste management and remediation services industry.

Administrative and Support, Waste Management and Remediation Services Industry							
Small Business Size Standard: $5.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	99,021	139,832	1.4	$71	$4,500,981,000	$45,455	0.16%
Firms with sales/receipts/revenue of $100,000 to $499,999	129,948	513,457	4.0	$71	$31,661,803,000	$243,650	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	40,405	409,563	10.1	$71	$28,444,220,000	$703,978	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	31,127	725,649	23.3	$71	$47,963,623,000	$1,540,901	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	12,294	678,340	55.2	$71	$42,093,718,000	$3,423,924	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,589	434,622	94.7	$71	$26,428,877,000	$5,759,180	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,411	311,321	129.1	$71	$19,304,673,000	$8,006,915	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,309	424,912	184.0	$71	$24,412,659,000	$10,572,828	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,266	292,501	231.0	$71	$17,408,483,000	$13,750,776	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	724	208,939	288.6	$71	$12,542,375,000	$17,323,722	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	528	174,359	330.2	$71	$10,341,768,000	$19,586,682	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	402	173,953	432.7	$71	$9,015,658,000	$22,427,010	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	267	122,013	457.0	$71	$6,382,657,000	$23,905,082	0.00%

Table 16: Cost per small firm in the educational services industry.

Educational Services Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	21,831	50,906	2.3	$71	$1,003,931,000	$45,986	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	27,938	158,913	5.7	$71	$6,788,475,000	$242,984	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	8,504	112,142	13.2	$71	$5,984,604,000	$703,740	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	8,465	213,786	25.3	$71	$13,376,338,000	$1,580,194	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,302	209,778	48.8	$71	$14,792,101,000	$3,438,424	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,588	117,648	74.1	$71	$9,314,307,000	$5,865,433	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	888	83,741	94.3	$71	$7,129,969,000	$8,029,244	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,003	127,781	127.4	$71	$11,306,008,000	$11,272,191	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	461	79,059	171.5	$71	$6,983,007,000	$15,147,521	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	355	73,045	205.8	$71	$6,992,060,000	$19,695,944	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	268	70,191	261.9	$71	$6,343,422,000	$23,669,485	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	172	60,202	350.0	$71	$5,119,182,000	$29,762,686	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	138	55,753	404.0	$71	$4,536,897,000	$32,876,065	0.00%

Table 17: Cost per small firm in the health care and social assistance industry.

Health Care and Social Assistance Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	107,112	162,265	1.5	$71	$5,064,756,000	$47,285	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	242,566	1,027,234	4.2	$71	$66,168,531,000	$272,786	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	125,095	1,054,985	8.4	$71	$88,227,442,000	$705,284	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	84,361	1,466,391	17.4	$71	$126,989,626,000	$1,505,312	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	26,466	1,107,445	41.8	$71	$91,034,690,000	$3,439,685	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	9,453	712,840	75.4	$71	$56,541,818,000	$5,981,362	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	4,867	501,258	103.0	$71	$41,063,966,000	$8,437,223	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	5,198	760,603	146.3	$71	$61,116,459,000	$11,757,687	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,468	497,184	201.5	$71	$40,851,963,000	$16,552,659	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,374	347,358	252.8	$71	$29,140,498,000	$21,208,514	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	978	284,827	291.2	$71	$25,026,728,000	$25,589,701	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	665	230,360	346.4	$71	$20,167,268,000	$30,326,719	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	485	185,982	383.5	$71	$16,744,181,000	$34,524,085	0.00%

Table 18: Cost per small firm in the arts, entertainment, and recreation industry.

Arts, Entertainment, and Recreation Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	33,186	53,994	1.6	$71	$1,569,733,000	$47,301	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	46,210	199,647	4.3	$71	$11,295,277,000	$244,434	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	15,493	162,642	10.5	$71	$10,894,947,000	$703,217	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	12,148	259,480	21.4	$71	$18,531,141,000	$1,525,448	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,674	209,762	44.9	$71	$16,040,448,000	$3,431,846	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,718	120,586	70.2	$71	$9,983,571,000	$5,811,159	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	806	74,628	92.6	$71	$6,466,756,000	$8,023,270	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	660	77,131	116.9	$71	$7,102,423,000	$10,761,247	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	344	49,061	142.6	$71	$4,965,644,000	$14,435,012	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	224	40,309	180.0	$71	$4,136,002,000	$18,464,295	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	155	33,220	214.3	$71	$3,428,904,000	$22,121,961	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	115	28,855	250.9	$71	$2,873,044,000	$24,982,991	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	84	25,163	299.6	$71	$2,569,574,000	$30,590,167	0.00%

Table 19: Cost per small firm in the accommodation and food services industry.

Accommodation and Food Services Industry							
Small Business Size Standard: $7.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	99,592	207,093	2.1	$71	$4,845,922,000	$48,658	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	216,446	1,349,187	6.2	$71	$55,536,558,000	$256,584	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	79,875	1,260,097	15.8	$71	$55,913,962,000	$700,018	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	56,476	1,777,649	31.5	$71	$84,117,236,000	$1,489,433	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	14,095	896,373	63.6	$71	$46,231,300,000	$3,279,979	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,720	403,866	108.6	$71	$21,249,810,000	$5,712,315	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,621	244,772	151.0	$71	$12,835,230,000	$7,918,094	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,628	340,741	209.3	$71	$17,984,834,000	$11,047,195	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	859	252,279	293.7	$71	$13,054,878,000	$15,197,763	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	446	170,201	381.6	$71	$8,420,579,000	$18,880,222	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	363	153,594	423.1	$71	$7,987,110,000	$22,003,058	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	241	115,452	479.1	$71	$6,405,041,000	$26,576,934	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	170	90,301	531.2	$71	$4,832,335,000	$28,425,500	0.00%

Table 20: Cost per small firm in the other services (except public administration) industry.

Other Services Industry							
Small Business Size Standard: $5.5 million – $38.5 million							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	195,234	322,002	1.6	$71	$9,308,948,000	$47,681	0.15%
Firms with sales/receipts/revenue of $100,000 to $499,999	307,613	1,225,144	4.0	$71	$75,113,021,000	$244,180	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	87,833	756,186	8.6	$71	$61,131,552,000	$695,998	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	55,883	926,035	16.6	$71	$84,065,314,000	$1,504,309	0.00%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	16,522	531,104	32.1	$71	$55,620,907,000	$3,366,475	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,967	252,838	50.9	$71	$28,838,406,000	$5,806,001	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,326	151,376	65.1	$71	$18,502,407,000	$7,954,603	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,114	173,393	82.0	$71	$23,140,184,000	$10,946,161	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,005	104,997	104.5	$71	$14,696,909,000	$14,623,790	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	620	73,209	118.1	$71	$11,076,548,000	$17,865,400	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	405	50,974	125.9	$71	$8,159,095,000	$20,145,914	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	274	42,041	153.4	$71	$6,643,223,000	$24,245,339	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	227	37,259	164.1	$71	$5,392,740,000	$23,756,564	0.00%

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Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement, unless it displays a currently valid OMB control number.

OFCCP has determined that there is no new requirement for information collection associated with this proposed rule. This proposed rule clarifies and updates current part 60–20 and removes outdated provisions so that the requirements conform to current sex discrimination law. The information collection requirements contained in the existing Executive Order 11246 regulations are currently approved under OMB Control No. 1250–0001 (Construction Recordkeeping and Reporting Requirements) and OMB Control No. 1250–0003 (Recordkeeping and Reporting Requirements—Supply and Service). Consequently, this proposed rule does not require review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this NPRM does not include any Federal mandate that may result in excess of $100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

Executive Order 13132 (Federalism)

OFCCP has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' This proposed rule will not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This proposed rule does not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Effects on Families

The undersigned hereby certifies that the NPRM would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999. To the contrary, by better ensuring that working mothers do not suffer sex discrimination in compensation, benefits, or other terms and conditions of employment, and that working fathers do not suffer

discrimination on the basis of sex-based stereotypes about caregiver responsibilities, the NPRM would have a positive effect on the economic well-being of families, especially of families headed by single mothers.

Executive Order 13045 (Protection of Children)

This NPRM would have no environmental health risk or safety risk that may disproportionately affect children.

Environmental Impact Assessment

A review of this NPRM in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.;* the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.;* and DOL NEPA procedures, 41 CFR part 11, indicates the NPRM would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

Executive Order 13211 (Energy Supply)

This NPRM is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 12630 (Constitutionally Protected Property Rights)

This NPRM is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

Executive Order 12988 (Civil Justice Reform Analysis)

This NPRM was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The NPRM was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 41 CFR Part 60–20

Civil rights, Discrimination in employment, Employment, Equal employment opportunity, Government procurement, Labor, Sex, Women.

Patricia A. Shiu,

Director, Office of Federal Contract Compliance Programs.

For the reasons set forth in the preamble, OFCCP proposes to revise 41 CFR part 60–20 to read as follows:

PART 60–20—DISCRIMINATION ON THE BASIS OF SEX

Sec.
60–20.1 Purpose.
60–20.2 General prohibitions.
60–20.3 Sex as a *bona fide* occupational qualification.
60–20.4 Discriminatory compensation.
60–20.5 Discrimination on the basis of pregnancy, childbirth, or related medical conditions.
60–20.6 Other fringe benefits.
60–20.7 Employment decisions made on the basis of sex-based stereotypes.
60–20.8 Harassment and hostile work environments.

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339 as amended by E.O. 11375, 32 FR 14303, 3 CFR 1966–1970 Comp., p. 684; E.O. 12086, 43 FR 46501, 3 CFR 1978 Comp., p. 230; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; and E.O. 13672, 79 FR 42971.

§ 60–20.1 Purpose.

The purpose of this part is to set forth specific requirements that covered Federal Government contractors and subcontractors, including those performing work under federally-assisted construction contracts (''contractors''),[1] must meet in fulfilling their obligations under Executive Order 11246, as amended, to ensure nondiscrimination on the basis of sex in employment. These regulations are to be read in conjunction with the other regulations implementing Executive Order 11246, as amended, set forth in parts 60–1, 60–2, 60–3, 60–4, and 60–30 of this chapter.

§ 60–20.2 General prohibitions.

(a) *In general.* It is unlawful for a contractor to discriminate against any employee or applicant for employment because of sex. The term sex includes, but is not limited to pregnancy, childbirth, or related medical conditions; gender identity; and transgender status.

(b) *Disparate treatment.* Unless sex is a *bona fide* occupational qualification reasonably necessary to the normal operation of a contractor's particular business or enterprise, the contractor may not make any distinction based on sex in recruitment, hiring, firing, promotion, compensation, hours, job assignments, training, benefits, or other terms, conditions, or privileges of employment. Such unlawful sex-based discriminatory practices include, but are not limited to, the following:

(1) Making a distinction between married and unmarried persons that is not applied equally to both sexes;

(2) Denying women with children an employment opportunity that is available to men with children;

(3) Firing, or otherwise treating adversely, unmarried women, but not unmarried men, who become parents;

(4) Imposing any differences in retirement age or other terms, conditions, or privileges of retirement on the basis of sex;

(5) Restricting job classifications on the basis of sex;

(6) Maintaining seniority lines and lists based upon sex;

(7) Recruiting or advertising for individuals for certain jobs on the basis of sex, including through use of gender-specific terms for jobs (such as ''lineman'');

(8) Distinguishing on the basis of sex in apprenticeship or other formal or informal training programs; in other opportunities such as networking, mentoring, sponsorship, individual development plans, rotational assignments, and succession planning programs; or in performance appraisals that may provide the basis of subsequent opportunities;

(9) Making any facilities and employment-related activities available only to members of one sex, except that if the contractor provides restrooms or changing facilities, the contractor must provide separate or single-user restrooms or changing facilities to assure privacy between the sexes;

(10) Denying transgender employees access to the bathrooms used by the gender with which they identify; and

(11) Treating an employee or applicant for employment adversely because he or she has undergone, is undergoing, or is planning to undergo sex-reassignment surgery or other processes or procedures designed to facilitate the adoption of a sex or gender other than the individual's designated sex at birth.

(c) *Disparate impact.* Employment policies or practices that have an adverse impact on the basis of sex, and are not job related and consistent with business necessity, violate Executive Order 11246, as amended, and this part. Examples of policies or practices that may violate Executive Order 11246 in terms of their disparate impact on the basis of sex include, but are not limited to:

(1) Minimum height and/or weight qualifications that are not necessary to the performance of the job and that negatively impact women substantially more than men;

[1] This part also applies to entities that are ''applicants'' for Federal assistance involving a construction contract as defined in part 60–1 of this title.

(2) Strength requirements that exceed the strength necessary to perform the job in question and that negatively impact women substantially more than men;

(3) A policy prohibiting large equipment operators from using a restroom while on the job, which adversely impacts women, who may require the use of restrooms more than men; and

(4) Conditioning entry into an apprenticeship program on passing a scored written test that has an adverse impact on women where the contractor cannot establish the validity of the test consistent with the Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60–3.

§ 60–20.3 Sex as a bona fide occupational qualification.

Contractors may not hire and employ employees on the basis of sex unless sex is a *bona fide* occupational qualification (BFOQ) reasonably necessary to the normal operation of the contractor's particular business or enterprise.

§ 60–20.4 Discriminatory compensation.

Compensation may not be based on sex. Contractors may not engage in any employment practice that denies equal wages, benefits, or any other forms of compensation, or equal access to earnings opportunities, on the basis of sex, on either an individual or systemic basis, including but not limited to the following:

(a) Contractors may not pay different compensation to similarly situated employees on the basis of sex. For purposes of evaluating compensation differences, the determination of similarly situated employees is case specific. Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.

(b) Contractors may not grant or deny higher paying wage rates, salaries, positions, job classifications, work assignments, shifts, or development opportunities, or other opportunities on the basis of sex. Contractors may not grant or deny training, work assignments, or other opportunities that may lead to advancement in higher paying positions on the basis of sex.

(c) Contractors may not provide or deny earnings opportunities because of sex, for example, by denying women equal opportunity to obtain regular and/or overtime hours, commissions, pay increases, incentive compensation, or any other additions to regular earnings.

(d) Contractors may not implement compensation practices, including performance review systems, that have an adverse impact on the basis of sex and are not shown to be job related and consistent with business necessity.

(e) A contractor will be in violation of Executive Order 11246 and this part any time it pays wages, benefits, or other compensation that is the result in whole or in part of the application of any discriminatory compensation decision or other practice described in this section.

§ 60–20.5 Discrimination on the basis of pregnancy, childbirth, or related medical conditions.

(a) Discrimination on the basis of pregnancy, childbirth, or related medical condition, including childbearing capacity, is a form of unlawful sex discrimination. Contractors must treat people of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, including receipt of benefits under fringe-benefit programs, as other persons not so affected, but similar in their ability or inability to work. Related medical conditions include, but are not limited to, lactation; disorders directly related to pregnancy, such as preeclampsia (pregnancy-induced high blood pressure), placenta previa, and gestational diabetes; symptoms such as back pain; complications requiring bed rest; and the after-effects of a delivery. A contractor is not required to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or except where medical complications have arisen from an abortion, provided that nothing herein precludes a contractor from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

(b) Examples of unlawful pregnancy discrimination include, but are not limited to:

(1) Refusing to hire pregnant people or people of childbearing capacity, or otherwise subjecting such applicants or employees to adverse employment treatment, because of their pregnancy or childbearing capacity;

(2) Firing a female employee or requiring her to go on leave because the employee becomes pregnant or has a child;

(3) Limiting a pregnant employee's job duties based solely on the fact that she is pregnant, or requiring a doctor's note in order for a pregnant woman to continue employment while pregnant when doctors' notes are not required for employees who are similarly situated;

(4) Providing employees with health insurance that does not cover hospitalization and other medical costs for pregnancy, childbirth, or related medical conditions, including contraceptive coverage, to the same extent that hospitalization and other medical costs are covered for other medical conditions; and

(5) Denying an alternative job assignment, modified duties, or other accommodations to a pregnant employee who is temporarily unable to perform some of her job duties because of pregnancy, childbirth, or related medical conditions when such assignments, modifications, or other accommodations are provided, or are required to be provided by a contractor's policy or by other relevant laws, to other employees whose abilities or inabilities to perform their job duties are similarly affected.

(c) *Leave*—(1) *In general.* To the extent that a contractor provides family, medical, or other leave, such leave must not be denied or provided differently on the basis of sex.

(2) *Disparate treatment.* (i) A contractor must provide job-guaranteed medical leave, including paid sick leave, for employees' pregnancy, childbirth, or related medical conditions on the same terms that medical or sick leave is provided for medical conditions that are similar in their effect on employees' ability to work.

(ii) A contractor must provide job-guaranteed family leave, including any paid leave, for male employees on the same terms that family leave is provided for female employees.

(3) *Disparate impact.* Contractors that have employment policies or practices under which insufficient or no medical or family leave is available must ensure that such policies or practices do not have an adverse impact on the basis of sex unless they are shown to be job related and consistent with business necessity.

§ 60–20.6 Other fringe benefits.

(a) It shall be an unlawful employment practice for a contractor to discriminate on the basis of sex with regard to fringe benefits.

(b) As used herein, ''fringe benefits'' includes, but is not limited to, medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; dependent care assistance; educational assistance; employee discounts; stock options; lodging; meals; moving expense

reimbursements; retirement planning services; and transportation benefits.

(c) The greater cost of providing a fringe benefit to members of one sex is not a defense to a contractor's failure to provide benefits equally to members of both sexes.

§ 60–20.7 Employment decisions made on the basis of sex-based stereotypes.

Contractors must not make employment decisions on the basis of sex-based stereotypes, such as stereotypes about how males and/or females are expected to look, speak, or act. Such employment decisions are a form of sex discrimination prohibited by Executive Order 11246, as amended. Examples of discrimination based on sex-based stereotyping include, but are not limited to:

(a) Adverse treatment of an employee or applicant for employment because of that individual's failure to comply with gender norms and expectations for dress, appearance and/or behavior, such as:

(1) Failure to promote a woman, or otherwise subjecting her to adverse employment treatment, based on sex stereotypes about dress, including wearing jewelry, make-up, or high heels;

(2) Harassment of a man because he is considered insufficiently masculine, or effeminate; and

(3) Adverse treatment of an employee because he or she does not conform to sex-role expectations by being in a relationship with a person of the same sex.

(b) Adverse treatment of an employee or applicant for employment because of his or her actual or perceived gender identity or transgender status.

(c) Adverse treatment of an employee or applicant for employment based on sex-based stereotypes about caregiver responsibilities. For example, adverse treatment of a female employee because of a sex-based assumption that she has (or will have) family caretaking responsibilities, and that those responsibilities will interfere with her work performance, is discrimination based on sex. Other examples of such discriminatory treatment include, but are not limited to:

(1) Adverse treatment of a male employee because he has taken or is planning to take leave to care for his newborn or recently adopted or foster child based on the sex-stereotyped belief that women and not men should care for children;

(2) Denying opportunities to mothers of children based on the sex-stereotyped belief that women with children should not or will not work long hours, regardless of whether the contractor is acting out of hostility or belief that it is acting in the employee's or her children's best interest.

(3) Evaluating the performance of female employees who have family caregiving responsibilities adversely, based on the sex-based stereotype that women are less capable or skilled than their male counterparts who do not have such responsibilities.

§ 60–20.8 Harassment and hostile work environments.

(a) Harassment on the basis of sex is a violation of Executive Order 11246, as amended. Unwelcome sexual advances, requests for sexual favors, offensive remarks about a person's sex, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) Harassment because of sex includes sexual harassment (including sexual harassment based on gender identity); harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but that is because of sex (including harassment based on gender identity).

(c) Though not required by this part, to ensure an environment in which all employees feel safe, welcome, and treated fairly, it is a best practice for a contractor to develop and implement procedures to ensure its employees are not harassed because of sex. Examples of such procedures include:

(1) Communicating to all personnel that harassing conduct will not be tolerated;

(2) Providing anti-harassment training to all personnel;

(3) Establishing and implementing procedures for handling and resolving complaints about harassment and intimidation based on sex.

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