

September 16, 2019

Acting Director Harvey D. Fort  
Division of Policy and Program Development  
Office of Federal Contract Compliance Programs  
U.S. Division of Labor

Room C-3325  
200 Constitution Avenue NW  
Washington, DC 20210

RE: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption

The Fenway Institute at Fenway Health submits the following comment regarding the proposed rule titled "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," released by the U.S. Division of Labor's Office of Federal Contract Compliance Programs (DOL OFCCP). The Fenway Institute is the research, education and training, and policy arm of Fenway Health, a federally qualified health center in Boston, MA. We provide care to about 32,000 patients every year. Half of our patients are lesbian, gay, bisexual and transgender (LGBT). We have strong concerns that this proposed rule would harm American workers, and LGBT workers in particular, by allowing a wider range of federal contractors to discriminate against LGBT people under the pretext of religious freedom. This would exacerbate anti-LGBT discrimination, which is a major driver of minority stress and an important social determinant of health for LGBT people. Discrimination has negative effects on LGBT people's health and well-being.<sup>1,2</sup>

The mission of the OFCCP is to ensure that federal contractors comply with Executive Order (EO) 11246, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. In 2014, President Obama issued an EO to add sexual orientation and gender identity as protected classes under EO 11246. EO 11246 includes a narrow religious exemption for religious organizations. The new proposed rule threatens to jeopardize the very mission of OFCCP and the original intent of the EO 11246 to protect workers from discrimination by using overly broad and simplified definitions that would vastly expand what organizations can claim the religious exemption to the nondiscrimination provisions of EO 11246. This could in turn lead to increased anti-LGBT discrimination under the guise of religious freedom.

One of the stated goals of the proposed rule is to clarify that the religious exemption in EO 11246 does not only apply to churches and other traditionally religious organizations. As such, the proposed rule would create a new expanded and very broad definition for the term "religious

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<sup>1</sup> Reisner SL, White Hughto JM, Dunham E, Heflin K, Begenyi JB, Coffey-Esquivel J, Cahill S (2015). Legal protections in public accommodations settings: A critical public health issue for transgender and gender nonconforming people. *Milbank Quarterly*. 1-32.

<sup>2</sup> Mirza S and Rooney C. (2018). *Discrimination Prevents LGBTQ People from Accessing Health Care*. Center for American Progress.

corporation, association, educational institution or society.” Entities that meet this definition would qualify for the broadened religious exemption.

The proposed rule cites *Spencer v. World Vision* as legal precedent for the proposed definition for determining whether an entity qualifies for the religious exemption, but the proposed rule broadens the *Spencer v. World Vision* definition in several ways. In the *Spencer v. World Vision* case, an entity qualifies for a religious exemption if it: (1) is organized for a religious purpose, (2) is engaged primarily in carrying out that religious purpose, (3) holds itself out to the public as an entity for carrying out that religious purpose, and (4) does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts. The proposed rule drops the requirement that the entity be “engaged primarily” in a religious purpose, and also drops the requirement that the entity be a non-profit organization. While it keeps the requirement that the entity “holds itself out to the public as an entity for carrying out” a religious purpose, the proposed rule would allow an entity to meet this requirement if it merely “affirms a religious purpose in response to inquiries from a member of the public or a government entity.” Under the proposed rule, a for-profit organization minimally involved in carrying out any religious purpose that simply responds “yes” to a question of whether or not it is religious from OFCCP could claim a religious exemption.

This is a vast expansion on both the cited legal precedent and the original religious exemption in EO 11246, which use much narrower definitions for entities qualified for religious exemptions. EO 11246’s existing religious exemption also clearly states that contractors and subcontractors that claim a religious exemption are “not exempted or excused from complying with the other requirements contained in this Order.” The proposed rule, on the other hand, explicitly states that federal contractors may condition employment on adherence to specific religious tenets, and the proposed rule fails to emphasize that discrimination on the basis of other protected classes under the pretext of religious tenets is still not permitted. Courts have previously held that religious employers cannot discriminate on the basis of other protected classes and that religious motivations for discrimination do not convert unlawful discrimination to permissible religious discrimination.<sup>3,4</sup>

The proposed rule’s broadened religious exemption and oversimplified description of case law could have negative consequences for all American workers, but especially for LGBT workers. While the rule does not specifically call out sexual orientation or gender identity, the rule does cite the *Masterpiece Cake Shop* case in which a baker refused to bake a cake for a same-sex couple. The proposed rule also follows a recent pattern of both federal and state governments using religious freedom arguments and legislation to codify anti-LGBT discrimination. Altogether, 12 states have some form of religious refusal legislation that could authorize discrimination in service provision against LGBT people—such as refusing to allow LGBT people to adopt children, refusing to marry same-sex couples, and refusing to provide medical services

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<sup>3</sup> *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *E.E.O.C. v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1277 (9th Cir. 1982).

<sup>4</sup> See *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 163 (9th Cir. 1986); *Pac. Press*, 676 F.2d at 1276; *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014).

to LGBT people—based on religious beliefs.<sup>5</sup> For example, Mississippi law HB 1523 allows discrimination based on the religious belief or moral conviction that “marriage is or should be recognized as the union of one man and one woman; sexual relations are properly reserved to such a marriage; and male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”<sup>6</sup> Several federal agencies have released guidance mirroring the language of anti-LGBT state religious exemption legislation, including HHS<sup>7</sup> and the Department of Justice.<sup>8</sup>

Given the proposed rule’s broadened religious exemption and the current context of anti-LGBT religious liberty guidance and legislation, a wider array of federal contractors and subcontractors could feel wrongly empowered to discriminate against LGBT workers based on religious beliefs. For example, some federal contractors could assert that the proposed rule’s expansion of the religious exemption would allow them to deny employment to a transgender individual or fire someone who marries their same-sex partner because it does not align with the contractor’s religious tenets. This is especially concerning given that LGBT Americans already experience widespread employment discrimination. A research study by Harvard, NPR, and the Robert Wood Johnson Foundation found that at least one in five LGBT Americans experienced discrimination based on their sexual orientation or gender identity when applying for jobs (20%) and being paid equally or considered for promotion (22%).<sup>9</sup> Codifying anti-LGBT employment discrimination under the pretext of religion will only worsen existing discrimination. Employment discrimination can have wide reaching effects on economic stability and health and well-being.

If this sort of discrimination were to occur, the proposed rule would also make it harder for employees to challenge discrimination where religion is being used as a pretext for other prohibited discrimination. When evaluating whether a claim of discrimination is based in religion or is based on another protected class, the proposed rule would “apply a but-for standard of causation” rather than the “motivating factor” standard. Under a “motivating-factor” standard, an employee can show that an action was discriminatory by proving that action was even partially motivated by a protected characteristic. In contrast, under the “but-for” standard that is proposed in the new rule, an employee can only establish that an action was discriminatory by proving that, but for the protected characteristic, it would not have happened. The “but-for” standard is more deferential to employers and would impose a higher burden on employees to prove improper discrimination.

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<sup>5</sup> Movement Advancement Project. (2017.) *State Religious Exemption Laws*. Available online at: [http://www.lgbtmap.org/equality-maps/religious\\_exemption\\_laws](http://www.lgbtmap.org/equality-maps/religious_exemption_laws)

<sup>6</sup> Mississippi House of Representatives. (2016.) House Bill No. 1523. <http://billstatus.ls.state.ms.us/documents/2016/pdf/HB/1500-1599/HB1523SG.pdf>

<sup>7</sup> U.S. Department of Health and Human Services. (2017, September.) *Draft Strategic Plan FY 2018-2022*. <https://www.hhs.gov/about/strategic-plan/index.htm>

<sup>8</sup> Attorney General Jeff Sessions. (2017, October 6.) *Federal law protections for religious liberty. Memorandum for all executive departments and agencies*. Washington, DC. <https://www.justice.gov/opa/press-release/file/1001891/download>

<sup>9</sup> National Public Radio, the Robert Wood Johnson Foundation, and The Harvard T.H. Chan School of Public Health. (2017). *Discrimination in America: Experiences and Views of LGBTQ Americans*. Available online at: <https://www.rwjf.org/en/library/research/2017/10/discrimination-in-america-experiences-and-views.html>

As health care providers and researchers, we are concerned about the deleterious effects on LGBT people's health that this rule could exacerbate if finalized as is. Discrimination on the basis of sexual orientation and gender identity is a major public health concern. It occurs across the life spectrum and intersects with discrimination on the basis of sex, race/ethnicity, religion, and other demographic factors. In fact, many surveys indicate that anti-LGBT discrimination disproportionately affects LGBT people of color. A survey of 294 LGBT youth of color in Boston in 2015 found that 45% reported experiencing racial/ethnic discrimination, 41% reported experiencing sexual orientation discrimination, and 35% reported experiencing gender expression discrimination. A third (33%) reported experiencing five or more types of discrimination over the past year, while only 12% reported experiencing no discrimination in the past year.<sup>10</sup>

Experiencing discrimination in employment, housing, and public accommodations correlates with negative physical and mental health symptoms, including headache, upset stomach, pounding heart, feeling sad, feeling upset, and feeling frustrated.<sup>11</sup> Anti-LGBT discrimination in health care is widespread,<sup>12</sup> and correlates with poorer health and well-being for LGBT people, and can cause LGBT people to not access health care. This exacerbates health disparities that LGBT people experience.<sup>13</sup>

Discrimination—and even the potential for discrimination—can deter LGBT people from seeking care. A survey by the Center for American Progress found that 14 percent of LGBTQ people who had experienced discrimination on the basis of their sexual orientation or gender identity in the past year reported avoiding or postponing care that they needed.<sup>14</sup>

A study that the Fenway Institute conducted with 452 transgender residents of Massachusetts found that one in four (24%) reported experiencing discrimination in a health care setting in the past year. Of those reporting discrimination in health care, 19% did not seek care when they were sick or injured subsequent to that experience of discrimination, and 24% did not seek subsequent preventive or routine care.<sup>15</sup>

Altogether, this proposed rule could allow a wider range of federal contractors and subcontractors to discriminate against qualified LGBT workers and applicants due to religious beliefs, even if the contractors are for-profit organizations only minimally engaged in carrying out a religious purpose. The proposed rule would also make it more difficult for employees to challenge this type of discrimination, which is especially troubling for LGBT Americans who

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<sup>10</sup> Conron K, Wilson J, Cahill S, Flaherty J, Tamanaha M, Bradford J (2015, November 30). *Our health matters: Mental health, risk, and resilience among LGBTQ youth of color who live, work, or play in Boston*. Fenway Institute. <https://fenwayhealth.org/wp-content/uploads/our-health-matters.pdf>

<sup>11</sup> Reisner et al., 2015.

<sup>12</sup> Lambda Legal. 2010. *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination against LGBT People and People with HIV*. New York: Lambda Legal.

<sup>13</sup> Institute of Medicine Committee on Lesbian, Gay, Bisexual, and Transgender Health Issues and Research Gaps and Opportunities (2011). *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*. Washington, DC: National Academies Press, 2011.

<https://www.iom.edu/~/media/Files/Report%20Files/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People/LGBT%20Health%202011%20Report%20Brief.pdf>.

<sup>14</sup> Mirza S and Rooney C., 2018.

<sup>15</sup> Reisner et al., 2015.

already experience discrimination in employment and lack federal protections. For these reasons, we strongly urge the DOL OFCCP to reconsider this proposed rule.

Sincerely,

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