

September 4, 2018

Secretary R. Alexander Acosta
Department of Labor
200 Constitution Avenue Northwest
Washington, DC 20210

Re: Directive 2018-03

Dear Secretary Acosta:

On behalf of the undersigned organizations, we write to express our grave concerns regarding Directive 2018-03, the August 10 guidance for Office of Federal Contract Compliance Programs (OFCCP) staff on equal employment opportunity requirements for federal contractors. By misrepresenting the state of the law and creating ambiguity regarding federal contractors' obligations to comply with nondiscrimination requirements, this guidance may encourage unlawfully discriminatory practices by businesses and organizations receiving federal funds. This guidance, along with the deletion of key language from a related OFCCP Frequently Asked Questions document, undermines the clear and consistent enforcement of Executive Order 11246 and other nondiscrimination laws. We urge you to withdraw the August 10 directive and to refrain from moving forward with any rulemaking that would unlawfully expand existing exemptions to equal employment opportunity requirements.

Executive Order 11246 serves a vital mission: to ensure that the entities that contract with the federal government do not engage in discrimination. This Executive Order has been amended over the years to strengthen protections for federal contract workers, including in 1967 to prohibit discrimination based on sex and in 2014 to explicitly prohibit discrimination based on sexual orientation and gender identity. These protections reflect the federal government's interest in ensuring that federal contractors—who employ about one fifth of the civilian workforce in the U.S.—make use of the most qualified workers and do not use taxpayer funding to discriminate. Unfortunately, employment discrimination on the bases prohibited by EO 11246 remains a significant problem. For example, a 2015 national study of nearly 28,000 transgender adults revealed:

- Out of those who have been employed, nearly one in six (16%) have lost a job due to anti-transgender discrimination.¹
- Out of those who had or applied for a job in the previous year, 27% were fired, denied a promotion, or not hired because of being transgender during that year.²
- Out of those who had a job in the previous year, 30% faced anti-transgender discrimination during that year, including being fired, harassed, or assaulted at work for being transgender.³

¹ Sandy E. James et al., *Report of the 2015 U.S. Transgender Survey* 149 (2016), www.ustranssurvey.org/reports.

² *Id.* at 151.

³ *Id.* at 155.

Studies also indicate widespread discrimination against LGBTQ employees more broadly. For example, one national study found that 20% have experienced discrimination because of their sexual orientation or gender identity when applying for jobs and 22% have experienced discrimination with respect to equal pay or promotion, with even higher rates among LGBTQ people of color.⁴ While complaints filed with OFCCP represent only a fraction of instances of workplace discrimination, the agency received 118 complaints of discrimination based on sexual orientation or gender identity between FY 2014 and the first three quarters of FY 2018.⁵

Combatting this pervasive discrimination is core to OFCCP's mission of striving to "protect workers, promote diversity and enforce the law" and to "hold[] those who do business with the federal government...responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran."⁶ Maintaining and enforcing robust nondiscrimination protections—and ensuring that those protections are not eroded by excessively and unlawfully broad exemptions—is critical for furthering this mission. OFCCP's August 10 directive, however, represents a perversion of its basic goal of preventing discrimination by federal contractors. By suggesting that federal contractors may have a right to sweeping religious exemptions, OFCCP is signaling its willingness to subject many workers, including LGBTQ employees, to discrimination funded by their own tax dollars.

In accordance with Executive Order 11246, a federal contractor or subcontractor that is a religious corporation, association, educational institution, or society may prefer individuals of a particular religion. As explicitly stated in the Executive Order, "Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order," namely nondiscrimination on the basis of race, color, sex, sexual orientation, gender identity, or national origin.⁷ OFCCP's new directive, while purporting to interpret the Executive Order, fails to acknowledge the express limitation of this exemption.

Compounding this concern is the Directive's statement that it "supersedes" previous guidance, and the singling out of language from OFCCP's Frequently Asked Questions document regarding discrimination based on sexual orientation and gender identity, which was recently deleted. This FAQ simply reiterated what the Order itself says: that while religious organizations are permitted to hire members of their own religion, the exemption "does not allow religious organizations to discriminate in employment on the basis of race, color, sex, sexual orientation, gender identity, or

⁴ Nat'l Public Radio, Robert Wood Johnson Found., & Harvard T. H. Chan Sch. of Public Health, *Discrimination in America: Experiences and Views of LGBTQ Americans* 9–10 (2017), www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf. See also Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways* (2017), www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways; Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People* (2011), williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf.

⁵ Dep't of Labor, *Complaints Received, by Basis*, <https://www.dol.gov/ofccp/BTN/sheets/ComBasis.xlsx> (2018).

⁶ Office of Fed. Contract Compliance Programs, *About OFCCP: Mission Statement* (accessed August 28, 2018), <https://www.dol.gov/ofccp/aboutof.html>.

⁷ Exec. Order No. 11,246.

national origin.”⁸ The deletion of this language can only be read to imply that OFCCP now believes some contractors may, in fact, discriminate on the basis of race, color, sex, sexual orientation, gender identity, or national origin.

We are further concerned that the Directive appears to fundamentally mischaracterize applicable law. The guidance points to three Supreme Court decisions to support the assertion that “[r]ecent court decisions have addressed the broad freedoms and anti-discrimination protections that must be afforded to religion-exercising organizations and individuals under the United States Constitution and federal law”—obscuring the narrow holdings of these cases and misleadingly suggesting that they require the federal government to grant broad religious exemptions to federal contractors. For example, the Directive points to the Court’s decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, where the Supreme Court declined to hold that a baker’s religious beliefs entitled him to the exemption he sought from a nondiscrimination law.⁹ Instead, the Court found that statements made during the state civil rights commission’s hearings suggested hostility to the baker’s religious beliefs, and concluded that the process in this case—rather than the commission’s substantive application of the law—violated his rights. The Directive also points to *Trinity Lutheran Church of Columbia v. Comer*, a case where the Court held that a church’s mere status as a religious entity—regardless of its actions or compliance with otherwise applicable requirements—should not preclude its participation in specific government grant programs. The Supreme Court explicitly distinguished this case from ones in which it permitted restrictions based on entities’ *activities* rather than their religious affiliation.¹⁰ Finally, the Directive points to *Burwell v. Hobby Lobby Stores*, even though the Court expressly emphasizes in its opinion that its fact-specific rationale would not exempt employers from prohibitions on employment discrimination.¹¹ The out-of-context citations to these cases fail to provide any clear guidance to OFCCP personnel or to federal contractors and their employees, and instead serve only to vaguely imply that federal contractors may engage in discriminatory practices of some undetermined scope that goes beyond the exemption established by Executive Order. The implication that these cases permit or even require the government to grant new exemptions to the clear requirements of Executive Order 11246 reflects a misinterpretation of their holdings.

By obscuring the requirements of Executive Order 11246 and other applicable nondiscrimination laws and signaling OFCCP’s intent to expand the exemptions granted for employment discrimination, the Directive undermines the rights of federal contract employees, and opens the door to the overt use of taxpayer funds for discrimination. Doing so is both unsupported by the law and is antithetical to OFCCP’s mission. We urge you to rescind this Directive and to refrain

⁸ See [web.archive.org/web/20180308221555/https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q7](https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q7). OFCCP has now removed all six questions on religious exemptions from this section of the website. See www.dol.gov/ofccp/LGBT/LGBT_FAQs.html.

⁹ 138 S. Ct. 1719 (2018).

¹⁰ 137 S. Ct. 2012, 2016 (2017).

¹¹ 134 S. Ct. 2751, 2783 (2014) (responding to the dissent’s concern that “discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction” by stating: “Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”).

from initiating any rulemaking aimed at expanding the exemption in section 204(c) of Executive Order 11246.

Thank you for considering our views on this important matter. Please contact **Harper Jean Tobin**, Director of Policy at the National Center for Transgender Equality, at hjtobin@transequality.org or (202) 804-6047 with any questions regarding the concerns raised in this letter.

Respectfully,

Advocates for Youth
American Atheists
American Civil Liberties Union
American Psychological Association
Americans for Religious Liberty
Anti-Defamation League
Center for American Progress
Center for Inquiry
CenterLink: The Community of LGBT Centers
Economic Policy Institute
Equality California
Equality North Carolina
Family Equality Council
Family Values @ Work
Freedom for All Americans
GLMA: Health Professionals Advancing LGBT Equality
Human Rights Campaign
Interfaith Alliance
Lambda Legal
Lawyers' Committee for Civil Rights Under Law
Leadership Conference on Civil and Human Rights
Los Angeles LGBT Center
Movement Advancement Project
NAACP
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women
National Employment Law Project
National Employment Lawyers Association
National LGBTQ Task Force
National Partnership for Women & Families
Pride at Work
SAGE
Sargent Shriver National Center on Poverty Law

Secular Coalition for America

Secular Policy Institute

Sexuality Information and Education Council of the United States (SIECUS)

Transcend Legal

URGE: Unite for Reproductive & Gender Equity

Whitman-Walker Health

Women Employed