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# United States Senate

COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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<http://help.senate.gov>

September 16, 2019

The Honorable Patrick Pizzella  
Acting Secretary of Labor  
U.S. Department of Labor  
200 Constitution Ave, NW  
Washington, DC 20210

Dear Acting Secretary Pizzella:

We write to oppose the Department of Labor's (the Department) Office of Federal Contract Compliance Programs (OFCCP) proposed regulation, "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," which was published in the Federal Register on August 15, 2019.<sup>1</sup> The proposed rule seeks to limit the scope of Executive Order (EO) 11246 – an executive order prohibiting federal contractors and subcontractors from discriminating "against any employee or applicant for employment because of race, color, religion, sex, or national origin" – by dramatically expanding the religious exemption from EO 11246's requirements.<sup>2</sup> This proposed rule could allow taxpayer-funded employment discrimination against LGBTQ people, women, and members of certain religious groups. The government cannot use religious exemptions as a pretext to permit discrimination against or harm others, and we demand the Department immediately withdraw this proposed rule and cease any action that could subject workers and job applicants to discrimination and harassment.

## **1. The Proposed Rule Could Negatively Impact Federal Contract Workers Who Are LGBTQ, Women, and Members of Certain Religious Groups**

The proposed rule could undermine critical protections for women, individuals from certain religious groups, and LGBTQ employees working for federal contractors. The proposed rule could be particularly destructive given that meaningful employment and safe working conditions have a significant impact on the quality of a worker's life. We strongly oppose any steps that encourage or fail to prevent discrimination and harassment in hiring and during the job, which are already significant barriers that often keep workers from finding meaningful employment.

This proposed rule will exacerbate ongoing forms of discrimination and harassment against the LGBTQ community. In a 2017 nationally representative survey reporting harassment and violence in the LGBTQ community, 20 percent of LGBTQ individuals said they were personally discriminated against when applying for jobs.<sup>3</sup> In the same survey, nearly 60 percent of LGBTQ people agreed with the statement, "LGBTQ people where I live have fewer employment

<sup>1</sup> <https://www.govinfo.gov/content/pkg/FR-2019-08-15/pdf/2019-17472.pdf>

<sup>2</sup> *Id.*

<sup>3</sup> <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>

opportunities.<sup>4</sup> In a March 2018 report on LGBTQ poverty and economic justice, between 15 percent and 43 percent of LGBTQ workers reported having experienced discrimination on the job.<sup>5</sup> In the 2015 U.S. Transgender Survey, 30 percent of survey respondents who had a job the previous year reported being fired, were denied a promotion, or experienced some form of mistreatment.<sup>6</sup> Nearly one-quarter of survey respondents reported other forms of mistreatment based on their gender identity or expression, including having private information about their gender identity shared or being told by their employer to present as the wrong gender to keep their job.<sup>7</sup> Seventy-seven percent of respondents hid their gender or quit their jobs to avoid mistreatment in their workplace.<sup>8</sup> Other transgender workers commented on how their coworkers felt they had the right to disrespect them because the employers set the tone.<sup>9</sup> And for LGBTQ workers living in a jurisdiction without explicit statutory protections, the changes from the proposed rule will be even more harmful.

The proposed rule will make it easier for employers to discriminate against women and pregnant workers. Women already face significant discrimination in the workplace, and this rule would only further embolden discrimination. Women report substantially higher rates of sexual harassment in the workplace than men. In a 2017 survey, 27 percent of women reported being victims of sexual harassment in the workplace, compared with only 10 percent of men.<sup>10</sup> A 2018 survey found 38 percent of women reported sexual harassment at their workplace, compared with 13 percent of men.<sup>11</sup> Women file the majority of workplace harassment and sexual harassment charges with the Equal Employment Opportunity Commission (EEOC).<sup>12</sup>

Additionally, women face discrimination in the workplace based on their reproductive health decisions. For example, pregnancy discrimination cases filed with the EEOC have risen substantially over recent decades.<sup>13</sup> A 2014 survey estimated that nearly a quarter million women are denied requests for accommodations related to pregnancy each year.<sup>14</sup> Some employers have threatened to fire their employees for using contraception, and some have fired their workers for being unmarried and pregnant<sup>15</sup> or for having an abortion.<sup>16</sup> Expanding religious exemptions

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<sup>4</sup> *Id.*

<sup>5</sup> [https://socialjusticesexuality.com/intersecting\\_injustice/](https://socialjusticesexuality.com/intersecting_injustice/)

<sup>6</sup> <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> <https://www.cnn.com/2017/12/19/one-fifth-of-american-adults-have-been-sexually-harassed-at-work.html>

<sup>11</sup> <http://www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf>

<sup>12</sup> <https://www.help.senate.gov/imo/media/doc/Senator%20Murray%20Harassment%20Report%20Final.pdf>

<sup>13</sup> <https://www.americanprogress.org/issues/women/news/2018/11/02/460353/efforts-combat-pregnancy-discrimination/>

<sup>14</sup> <http://www.nationalpartnership.org/our-work/resources/workplace/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf>

<sup>15</sup> [https://www.huffpost.com/entry/tom-price-women-fired-reproductive-rights\\_n\\_587fca54e4b00d44838ca8a5](https://www.huffpost.com/entry/tom-price-women-fired-reproductive-rights_n_587fca54e4b00d44838ca8a5)

<sup>16</sup> <https://louisanarecord.com/stories/512676950-u-s-district-court-rules-that-state-law-forbids-abortion-discrimination-in-workplace>

would only erode existing protections for women and embolden employers to discriminate against and harass women and pregnant workers.

The rule will also embolden discrimination based on gender-based stereotypes. Employers have refused to hire women based on a religious belief that women, or mothers, should not work outside of the home.<sup>17</sup> Women workers also have been discriminated against in terms of pay and benefits and working conditions because of religious beliefs about the appropriate role of women in society. For example, a religious school denied women health insurance by providing it only to the “head of household,” defined to be married men and single persons, based on its belief that a woman cannot be the “head of household.”<sup>18</sup>

The proposed rule could also allow federal contractors to further discriminate against someone if they do not share the same religious beliefs of the employer. Expanding the religious exemption could allow employers to refuse to interview anyone—no matter their qualifications—if they do not regularly attend religious services in the faith belonging to the employer.<sup>19</sup> This could create a situation where religious employers are discriminating against their workers who practice their faith differently—a fundamental right guaranteed by the Constitution.

Yet, instead of recognizing these challenges and preventing or addressing them, the Department is instead proposing to expand opportunities for federal contractors to discriminate against or harass workers while using federal dollars to do so. By allowing federal contractors to use their religious beliefs to justify discrimination against LGBTQ people, women, and workers from various religions, the Department is exacerbating the challenges many individuals already face in being hired for and retaining employment.

## **2. The Proposed Rule Could Apply the Religious Exemption to Any Entity Generally Holding Itself Out to the Public As Carrying Out a Religious Mission**

The proposed rule seeks to inappropriately expand the types of organizations and employers that can qualify for a religious exemption. In determining what constitutes a religious organization, the proposal adopts the test proposed by a concurring judge—not the opinion of the full Ninth Circuit panel—in *Spencer v. World Vision, Inc.*, but then broadens it even further and eliminates key limits. The rule’s proposed modified version of the Ninth Circuit’s *World Vision* test selectively adopts certain elements of the test and then abandons other elements in order to drastically expand the type of organizations that can qualify for a religious exemption.

Cherry-picking and modifying a court test to expand what constitutes a religious organization fundamentally mischaracterizes and obscures applicable law. In *World Vision*, former employees brought an action against World Vision, a Christian humanitarian organization, alleging the employees were terminated on the basis of their religious beliefs. In the *per curiam* opinion of *World Vision*, the Ninth Circuit held the test of whether an entity is eligible for an exemption will determine whether the entity “is organized for a religious purpose, is engaged primarily in

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<sup>17</sup> Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc., 477 U.S. 619, 623 (1986).

<sup>18</sup> EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1367 (9th Cir. 1986).

<sup>19</sup> <https://www.au.org/tags/employment-discrimination-rule>

carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.”<sup>20</sup> The proposed rule drops the requirement from the test in the *World Vision per curiam* decision that an entity be “engaged primarily in carrying out” the religious purpose for which it was organized.<sup>21</sup> Then it replaces this prong with a portion of the test from the concurring opinion that the entity “[engage] in activity consistent with, and in furtherance of, those religious purposes.”<sup>22</sup> This prong is further diluted with the adoption of an extremely broad definition of the term “engage in religious exercise.”

The proposed rule also drops the requirement from the *World Vision per curiam* decision that an entity “not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.”<sup>23</sup> Instead, the proposed rule explicitly permits for-profit organizations to qualify for the exemption. Even the concurring opinion, which the proposed rule relies upon heavily, states that “looking at how an institution charges offers an objective test for sorting out which institutions are designed to exchange goods or services for money” and that “this objective measure relates closely to the purpose of the exemption.”<sup>24</sup> If money is available as an incentive for the employer, then it is strong evidence that the exercise of religion is not the objective of the entity. Excluding this part of the test would allow for-profit corporations to be deemed religious organizations entitled to religious exemptions for employment purposes. This clearly contradicts the plain language articulated in *World Vision* and constitutes an expansion of religious exemptions beyond what the Ninth Circuit addressed.

### **3. The Proposed Rule Misinterprets Supreme Court Decisions on Religious Exercise and Privileges the Interests of Religious Federal Contractors Over Members of Protected Classes**

The proposed rule falsely claims that the Supreme Court decisions in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission*, and *Burwell v. Hobby Lobby Stores, Inc.* require a much broader religious exemption from equal employment protections than what is contemplated by the text of the Executive Order. These cases were narrowly decided and are distinguishable from circumstances surrounding religious exemptions and federally-funded contractors and subcontractors. The proposed rule could allow OFCCP to expand the holdings of these cases in a way that could substantially broaden the scope of religious exemptions for federal contractors.

The Court has long held federally-funded employers cannot use religion to discriminate. Each of the cases cited in the proposed rule are consistent with that approach. In *Trinity Lutheran*, there was no question as to whether the entity was a church, nor did the Court address on what basis a church—or any government-funded entity for that matter—can discriminate against its

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<sup>20</sup> *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 734.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 747.

employees.<sup>25</sup> In *Masterpiece Cakeshop*, the Court held that “while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”<sup>26</sup> *Hobby Lobby* was related to whether the government could require a closely held, for-profit employer to cover birth control in a health insurance plan for purposes of the Religious Freedom Restoration Act; the Court was interpreting the word “person”—not any of the words being defined in the proposed rule—and expressly recognized that its decision provided “no shield,” even for for-profit entities and corporations, to discriminate “cloaked as religious practice.”<sup>27</sup>

Broadly referring to religious freedom and exemption principles from *Trinity Lutheran*, *Masterpiece*, and *Hobby Lobby*, this proposed rule could adopt an unreasonably expansive view of religious exemptions. These cases do not allow the federal government to permit federal contractors to apply a religious litmus test on its employees, and they do not justify a religious exemption that denies employees equal access to taxpayer-funded jobs. Yet the proposed rule could allow—for example—contractors to assert the exemption to deny employment or health benefits on the basis of sexual orientation, deny employment to transgender employees, and refuse employment to anyone who did not regularly attend religious services or participate in the “right” religion. The proposed rule misconstrues the narrow reasoning outlined in *Trinity Lutheran*, *Masterpiece*, and *Hobby Lobby*, all of which is completely inapplicable to the permissible scope of the exemption.

#### **4. The Proposed Rule Could Allow Entities to Condition Employment on Discriminatory Criteria**

The proposed rule could allow contractors and subcontractors to condition employment and job benefits on an employee’s adherence to certain religious tenets.<sup>28</sup> Under section 204(c) of EO 11246, the contractor agreement does “not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion . . . .”<sup>29</sup> Prior statements of OFCCP and the EEOC have adhered to the dominant interpretation that this exemption is narrow in scope and permits religious organizations in employment to limit or prefer individuals of the faith only when making hiring decisions.<sup>30</sup> Yet, this proposed rule expands that position by allowing an employer to discriminate against employees on other bases beyond religion. Permitting employers to justify sex discrimination based on their religious tenets, for example, is inconsistent with the text, legal precedent, and history of the exemption.

The proposed rule adopts an extremely broad definition of “exercise of religion” and provides no guardrails for the manner in which employers can require their employees to adhere to certain

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<sup>25</sup> *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024 n.3 (2017).

<sup>26</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

<sup>27</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

<sup>28</sup> <https://www.govinfo.gov/content/pkg/FR-2019-08-15/pdf/2019-17472.pdf>

<sup>29</sup> <https://www.dol.gov/ofccp/regs/statutes/eo11246.htm>


<sup>30</sup> <https://www.govinfo.gov/content/pkg/FR-2014-12-09/pdf/2014-28902.pdf>

principles. While the Department claims that its proposal does not permit discrimination “on other grounds” than religion, the text of the proposed rule directs that employers’ ability to impose religious criteria be interpreted as broadly as possible, and does not limit this principle to criteria that are not themselves based on race, color, national origin, or sex (including sexual orientation and gender identity). Additionally, the proposed rule does not require consistency in the application of policy based upon religious tenets. For example, an entity could give benefits to the spouse of an employee who has been previously divorced but deny benefits to a same-sex spouse. Another entity opposed to body modification could ignore tenets regarding tattoos but fire a transgender worker for seeking health care. The proposed rule could create situations where employers can apply religious tenets in a discriminatory manner.

Taxpayer-funded discrimination is wrong, and wastes taxpayer funds. Implementing the proposed rule could jeopardize the existing protections under EO 11246 for a number of protected classes, including LGBTQ people, women, and various religious groups. This proposed rule could allow religious organizations to avoid EO 11246’s antidiscrimination provisions by asserting that complying with those provisions violates the entity’s religious beliefs.

We strongly urge you to withdraw the proposed rule and instead carry out the Department’s role of ensuring workers can function free from discrimination and harassment.

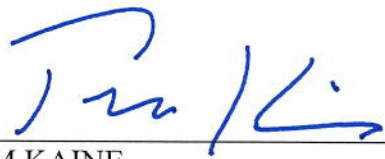
Sincerely,

  
PATTY MURRAY  
Ranking Member, Senate Committee on  
Health, Education, Labor & Pensions

  
TAMMY BALDWIN  
United States Senator

  
ELIZABETH WARREN  
United States Senator

  
BERNARD SANDERS  
United States Senator

  
TIM KAINE  
United States Senator