

DOL rescinds Trump Administration rule that broadened religious exemption for contractors

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On March 31, the Office of Federal Contract Compliance Programs (OFCCP) rescinded a Trump Administration rule¹ that provided a faith-based carve-out exempting federal contractors from compliance with certain anti-discrimination obligations.

Federal law has long recognized a religious exemption to anti-discrimination obligations for federal contractors. The Trump Administration rule, which went into effect on January 8, 2021, expanded this faith-based carve-out. The rescission of the 2021 rule, which was published in the Federal Register on March 1,² returns OFCCP to its pre-2021 religious exemption rule.

The Civil Rights Act of 1964 and Executive Order 11246

The OFCCP's religious exemption rules have their origins in the passage of the Civil Rights Act of 1964.³ In Title VII of the Act,⁴ Congress prohibited employment discrimination on the basis of race, color, religion, sex, or national origin. Congress included an accommodation for religious employers in Title VII, which allowed these employers to take religion into account for employees performing religious activities. Congress provided a similar accommodation to religious educational institutions.

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President Johnson signed Executive Order 11246⁵ in 1965. This executive order required all federal government contracts to include a provision prohibiting the contractor from discriminating against any employee or applicant for employment because of race, creed, color, or national origin. Two years later, President Johnson expanded Executive Order 11246 to prohibit discrimination on the basis of sex or religion.

The Department of Labor imported Title VII's exemption for religious educational institutions in its regulations implementing Executive Order 11246, and President George W. Bush amended Executive Order 11246 to expressly import Title VII's exemption for religious organizations.

Directive 2018-03's expansion of the religious exemption

Recognizing that there has been variation in how federal courts have interpreted the scope and application of the religious exemption in Executive Order 11246, the OFCCP issued Directive 2018-03 on August 10, 2018, to clarify how the religious exemption should be interpreted and applied. OFCCP published the final rule implementing Directive 2018-03 in the Federal Register on December 9, 2020. The final rule expanded the religious exemption contained in Executive Order 11246 in two primary ways.

First, the final rule included broad definitions of four terms — "particular religion," "religion," "religious corporation, association, educational institution, or society," and "sincere" — that expanded the application of the religious exemption. For example, the rule defined "religion" to provide that the term is not limited to religious belief, "but also includes all aspects of religious observance and practice."

The final rule implementing Directive 2018-03 expanded the religious exemption contained in Executive Order 1124.

The rule also expressly provided that in rare situations, an organization may be "legally constituted as a for-profit enterprise yet infused with a religious purpose," and such an enterprise could qualify as a religious organization under the rule.

Second, the final rule broadened the application of the exemption. The final rule added a provision stating that the exemption "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the Religious Freedom Restoration Act of 1993."

The final rule went into effect on January 8, 2021.

OFCCP's rescission of the 2021 final rule

Opponents of the 2021 rule challenged the rule when it was formally proposed in August 2019. Critics argued that the rule

undermined the rights of individuals who are frequently subjected to religious discrimination, including members of the LGBTQ community. Opponents also argued that the rule would permit taxpayer-funded discrimination, and that the new rule would increase rather than decrease confusion regarding the application of the religious exemption.

The rescission of the 2021 rule will require some federal contractors who had been exempt from certain anti-discrimination obligations to now comply with those obligations.

In response to this criticism, on March 1 the Biden Administration published the rescission of the 2021 final rule. The Department of Labor noted⁶ that the rescission returns to OFCCP's longstanding practice of using the nine-factor *LeBoon* test⁷ to determine whether an employer's purpose and character are primarily religious, and thus whether the employer qualifies for the exemption.

DOL added that the rescission preserves Executive Order 11246's religious exemption, and the rescission reestablishes OFCCP's long-established view that the exemption does not permit qualifying employers to discriminate on the basis of race, color, sex, sexual orientation, gender identity, or national origin, even if such discrimination is religiously motivated. The rescission went into effect on March 31.

Key takeaways for employers

The rescission of the 2021 rule will require some federal contractors who had been exempt from certain anti-discrimination obligations under the 2021 rule to now comply with those obligations. Federal contractors that have developed employment policies in reliance on

OFCCP's expanded religious exemption should revisit their policies to ensure that they are compliant with OFCCP rules now that the 2021 rule has been rescinded.

Federal contractors who no longer benefit from the religious exemption should consult with legal counsel to ensure that their employment policies and practices are consistent with all federal laws that apply to them.

Additionally, the expanded exemption shielded federal contractors from some of the risks of litigation if the contractor could establish that the alleged discrimination, if true, was not unlawful because the contractor was protected by the religious exemption. Contractors could use the expanded exemption to dispose of cases in the early stages of litigation, and thus even contractors in compliance with all relevant anti-discrimination laws found value in the expanded exemption.

In light of the OFCCP's rescission of the 2021 rule, fewer federal contractors will be able to dispose of cases in such early stages of litigation, and therefore they will need to prepare for the increased likelihood that a claim may move forward and ultimately end up in trial.

Federal contractors who are uncertain about whether the religious exemption continues to apply to them should consult with legal counsel to ascertain whether they may be covered by the exemption post-rescission.

Notes

¹ <http://bit.ly/3od0szN>

² <https://bit.ly/3GGQ4Xf>

³ <http://bit.ly/41dv7f6>

⁴ <http://bit.ly/3oe3XWu>

⁵ <http://bit.ly/3UwCxYd>

⁶ <http://bit.ly/3GLCbHp>

⁷ <https://bit.ly/43tR5fb>

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