

Discrimination on the Basis of Sex

41 C.F.R. 60-20

Goes into Effect on August 14, 2016

- 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.

§ 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. For instance, under no circumstances will a contractor’s good faith efforts to comply with the affirmative action requirements of part 60-2² of this chapter be considered a violation of this part.

§ 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; transgender status; and sex stereotyping.

(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,

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 chapter.

² This part requires government contractors to have affirmative action programs.

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 men and women;
- (2) Denying women with children an employment opportunity that is available to men with children;
- (3) Treating men and women differently with regard to the availability of flexible work arrangements;
- (4) Firing, or otherwise treating adversely, unmarried women, but not unmarried men, who become parents;
- (5) Applying different standards in hiring or promoting men and women on the basis of sex;
- (6) Steering women into lower-paying or less desirable jobs on the basis of sex;
- (7) Imposing any differences in retirement age or other terms, conditions, or privileges of retirement on the basis of sex;
- (8) Restricting job classifications on the basis of sex;
- (9) Maintaining seniority lines and lists on the basis of sex;
- (10) Recruiting or advertising for individuals for certain jobs on the basis of sex;
- (11) Distinguishing on the basis of sex in apprenticeship or other formal or informal training programs; in other opportunities such as on-the-job training, networking, mentoring, sponsorship, individual development plans, rotational assignments, and succession planning programs; or in performance appraisals that may provide the basis of subsequent opportunities;
- (12) Making any facilities and employment-related activities available only to members of one sex, except that if the contractor provides restrooms, changing rooms, showers, or similar facilities, the contractor must provide same-sex or single-user facilities;
- (13) Denying transgender employees access to the restrooms, changing rooms, showers, or similar facilities designated for use by the gender with which they identify; and

(14) Treating employees or applicants adversely because they have received, are receiving, or are planning to receive transition-related medical services 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) Height and/or weight qualifications that are not necessary to the performance of the job and that negatively impact women substantially more than men;

(2) Strength, agility, or other physical requirements that exceed the actual requirements necessary to perform the job in question and that negatively impact women substantially more than men;

(3) Conditioning entry into an apprenticeship or training program on performance on a written test, interview, or other selection procedure that has an adverse impact on women where the contractor cannot establish the validity of the selection procedure consistent with the Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60-3; and

(4) Relying on recruitment or promotion methods, such as “word-of-mouth” recruitment or “tap-on-the-shoulder” promotion, that have an adverse impact on women where the contractor cannot establish that they are job-related and consistent with business necessity.

§ 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 discriminates in wages, benefits, or any other forms of compensation, or denies access to earnings opportunities, because 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, development opportunities, or other opportunities on the basis of sex. Contractors may not grant or deny training, apprenticeships, work assignments, or other opportunities that may lead to advancement to 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 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.

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

(a) In general.

(1) Discrimination on the basis of pregnancy, childbirth, or related medical conditions, 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.

(2) 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.

(b) Examples. 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 female employees or requiring them to go on leave because they become pregnant or have a child;
- (3) Limiting pregnant employees' job duties based solely on the fact that they are pregnant, or requiring a doctor's note in order for a pregnant employee to continue working; and
- (4) Providing employees with health insurance that does not cover hospitalization and other medical costs for pregnancy, childbirth, or related medical conditions to the same extent that hospitalization and other medical costs are covered for other medical conditions.

(c) Accommodations—

(1) Disparate treatment. It is a violation of Executive Order 11246 for a contractor to deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions where:

- (i) The contractor denies such assignments, modifications, or other accommodations only to employees affected by pregnancy, childbirth, or related medical conditions;
- (ii) The contractor provides, or is required by its policy or by other relevant laws to provide, such assignments, modifications, or other accommodations to other employees whose abilities or inabilities to perform their job duties are similarly affected, and the denial of accommodations imposes a significant burden on employees affected by pregnancy, childbirth, or related medical conditions and the contractor's asserted reasons for denying accommodations to such employees do not justify that burden;
or
- (iii) Intent to discriminate on the basis of pregnancy, childbirth, or related medical conditions is otherwise shown.

(2) Disparate impact. Contractors that have policies or practices that deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions 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. For example, where a contractor's policy of offering light duty only to employees with on-the-job injuries has an adverse impact on employees affected by pregnancy, childbirth, or related medical conditions, the policy would be impermissible unless shown to be job-related and consistent with business necessity.

(d) 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, the term "fringe benefits" includes, but is not limited to, medical, hospital, accident, life insurance, and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(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 may 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) Failing 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) Harassing a man because he is considered effeminate or insufficiently masculine; or

(3) Treating employees or applicants adversely based on their sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes;

(b) Adverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status;

(c) Adverse treatment of a female employee or applicant because she does not conform to a sex stereotype about women working in a particular job, sector, or industry; and

(d) Adverse treatment of employees or applicants 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; and

(4) Adverse treatment of a male employee who is not available to work overtime or on weekends because he cares for his elderly father, based on the sex-based stereotype that men do not have family caregiving responsibilities that affect their availability for work, or that men who are not available for work without constraint are not sufficiently committed, ambitious, or dependable.

§ 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 or transgender status); harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but that is because of sex or sex-based stereotypes.

Appendix to Part 60-20– Best Practices

Best practices. Although not required by this part, following are best practices for contractors:

(1) Avoiding the use of gender-specific job titles such as “foreman” or “lineman” where gender-neutral alternatives are available;

(2) Designating single-user restrooms, changing rooms, showers, or similar single-user facilities as sex-neutral;

(3) Providing, as part of their broader accommodations policies, light duty, modified job duties or assignments, or other reasonable accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions;

- (4) Providing appropriate time off and flexible workplace policies for men and women;
- (5) Encouraging men and women equally to engage in caregiving-related activities;
- (6) Fostering a climate in which women are not assumed to be more likely to provide family care than men; and
- (7) Fostering an environment in which all employees feel safe, welcome, and treated fairly, by developing and implementing procedures to ensure that employees are not harassed because of sex. Examples of such procedures include:
 - (a) Communicating to all personnel that harassing conduct will not be tolerated;
 - (b) Providing anti-harassment training to all personnel; and
 - (c) Establishing and implementing procedures for handling and resolving complaints about harassment and intimidation based on sex.