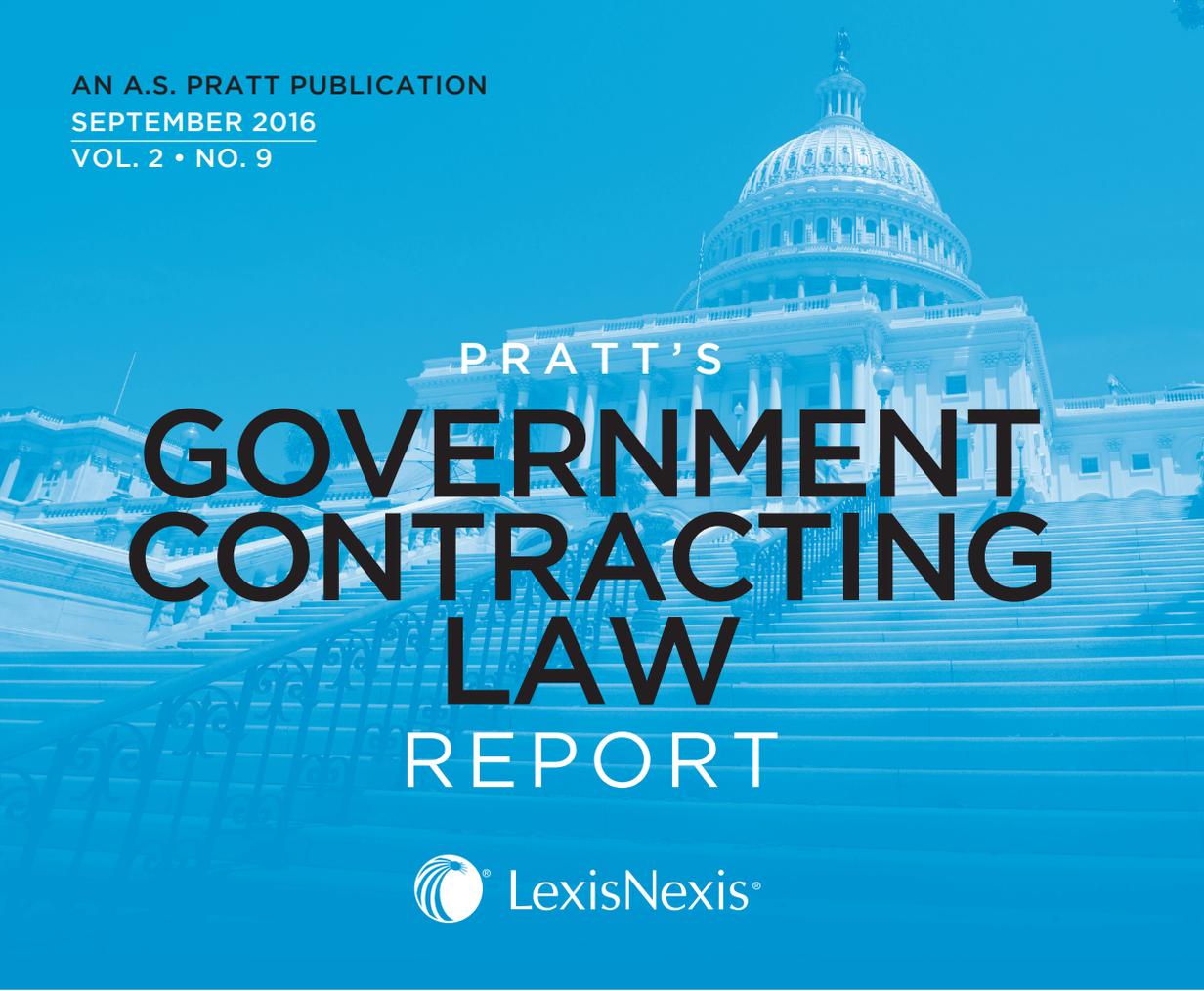


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SEPTEMBER 2016

VOL. 2 • NO. 9



PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Victoria Prussen Spears

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Controversial Updated Sex Discrimination Guidelines for Federal Contractors

*By Kristin Jones Pierre, Sarah Benjes, and Reagan W. Oden**

The Office of Federal Contract Compliance Programs recently updated the existing sex discrimination guidelines for the first time since their implementation in the 1970s. The authors of this article explain the changes.

Effective August 15, 2016, the final rule¹ of the Office of Federal Contract Compliance Programs (“OFCCP”) substantively updated the existing sex discrimination guidelines for the first time since their implementation in the 1970s. These regulations apply to federal contractors and subcontractors under Executive Order 11246, which established nondiscrimination and affirmative action requirements, including prohibiting sex discrimination in employment. While the revised rule purports to clarify contractors’ obligations and harmonize them with historic changes to federal antidiscrimination statutes and case law, many of the regulatory changes extend beyond current law to address what the OFCCP refers to as the “realities of today’s workforce and workplaces.” Although the OFCCP contends that contractors are already subject to many of these provisions, contractors are advised to consider the expanded compliance requirements and recommended (but not required) best practices. Some important changes include the following:

TRANSGENDER PROTECTIONS

Last year, Executive Order 13672 added sexual orientation and gender identity as prohibited bases of discrimination to Executive Order 11246, and the guidelines have been revised to define sex discrimination in employment (both disparate treatment and disparate impact) and sexual harassment to incorporate gender identity and transgender status. New regulations include the following:

- ***Bathrooms, changing rooms, and showers:*** Echoing the Obama

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¹ <https://www.dol.gov/ofccp/sexdiscrimination.html>.

administration's guidance directing public schools to allow transgender students to use bathrooms matching their gender identity, contractors are prohibited from denying transgender employees access to the restrooms designated for use by the gender with which they identify—as well as changing rooms, showers or similar facilities.

- **Health care coverage:** Explicit exclusion of health coverage for all care related to gender dysphoria or gender transition is facially discriminatory and unlawful.

PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS

The rule newly incorporates the protections of the Pregnancy Discrimination Act and prohibits contractors from treating employees differently on the basis of pregnancy, childbirth or related medical conditions (including childbearing capacity).

- **Accommodations:** Contractors are required to provide comparable accommodations to pregnant employees if such accommodations are available to other employees with a similar inability to perform their job duties (such as disabilities or occupational injuries), including light duty assignments, flexible work arrangements, and position transfers.
- **Medical or family leave:**
 - To the extent that a contractor provides job-guaranteed medical leave (including paid sick leave) for other medical conditions, such leave must be provided on the same terms for employees' pregnancy, childbirth or related medical conditions.
 - To the extent that a contractor provides job-guaranteed family leave, such leave must be provided for male employees on the same terms that family leave is provided to female employees.
 - Where insufficient or no medical or family leave is provided, contractors 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.

COMPENSATION, BENEFITS, AND TRAINING

Contractors may not pay different compensation to similarly situated employees on the basis of sex, including denying opportunities for overtime work, training or higher-paying positions.

- ***Comparable factors:*** Under the new regulations, employees may be considered “similarly situated” where they are “comparable” on some factors—even if they are not similar on others—including tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors.
- ***Equal benefits:*** Discrimination on the basis of sex with respect to fringe benefits, such as medical, hospital, accident, life insurance, retirement benefits, profit-sharing, bonuses, leave and other employment privileges is also prohibited. The increased 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.
- ***Informal recruiting or promotions:*** Sex-based discriminatory practices also include relying on certain 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.

The rule does not require any new Equal Employment Opportunity statements or additional data analysis or collection on the part of contractors. The OFCCP also includes an appendix listing optional best practices for consideration (e.g., avoiding the use of gender-specific job titles).