



## Concerns Regarding OFCCP's Proposed Regulation (1250-AA09)

June 4, 2019

The National Center for Transgender Equality appreciates the opportunity to share our concerns regarding an anticipated proposed regulation from the Office of Federal Contract Compliance Program. As indicated by its August 10, 2018 directive on the issue,<sup>i</sup> the regulation is expected to expand religious exemptions for federal contractors, including those who object to nondiscrimination requirements based on transgender status.

### **Expanding EEO exemptions for federal contractors is contrary to law.**

- **Case law does not support the expansion of religious exemptions for federal contractors.** While OFCCP's August 2018 directive suggested that recent Supreme Court cases justify expanded religious exemptions, this claim fundamentally mischaracterizes applicable law. None of the three cases cited in the directive support a right to exemption from EEO protections,<sup>ii</sup> and indeed the only Supreme Court cases to have addressed the issue have rejected such claims.<sup>iii</sup>
- **Expanding EEO exemptions misconstrues the language of Executive Order 11246.** The Executive Order, which establishes nondiscrimination requirements for federal contractors, provides a narrow exemption for religious contractors permitting them to prefer individuals of a particular religion. The Executive Order explicitly states that religious contractors "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, and national origin.
- **OFCCP cannot create exemptions contrary to Title VII's nondiscrimination requirements.** Expanding religious exemptions beyond those currently reflected in the Executive Order and OFCCP policy would create exemptions that go beyond what Title VII currently permits. A regulation that invites federal contractors to violate their obligations as employers under Title VII would subject both contractors and the Department to litigation.
- **It is inappropriate and unnecessary for OFCCP to proceed with rulemaking while the Supreme Court considers cases of anti-LGBTQ employment discrimination.** The Court is expected to provide highly relevant guidance regarding Title VII's requirements with respect to discrimination based on sexual orientation and gender identity in three cases that are currently before it. These rulings could bear greatly on OFCCP's planned rulemaking, it should not proceed until these rulings are handed down.

### **Expanding EEO exemptions would undermine OFCCP's essential mission of ensuring equal opportunity and the effective use of taxpayer dollars.**

- **Employment discrimination against transgender workers continues to be a significant problem.**
  - For example, a 2015 national study of nearly 28,000 transgender adults revealed that out of those who have been employed, nearly one in six (16%) have lost a job due to anti-transgender discrimination. And within the previous year, out of those who had a