

christian employers alliance

November 29, 2021

Jenny R. Yang
Director
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue NW
Washington, DC 20210

Re: CEA Comment Opposing "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," RIN 1250-AA09

Dear Ms. Yang:

The Christian Employers Alliance (CEA) writes in strong opposition to the "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption" (the Proposal) 86 Fed. Reg. 62115. CEA's mission is to unite, equip, and represent Christian-owned businesses to protect religious freedom and provide the opportunity for employees, businesses, and communities to flourish. CEA's membership includes for-profit and non-profit Christian-owned businesses and organizations that seek to operate in a way that honors God and is consistent with their Christian values. The Proposal would limit religious protections for CEA employers that are or wish to be federal contractors.

CEA has three concerns with the Proposal to rescind the 2020 rule:

1. Baseless Non-Profit Requirement

First, the Proposal implies that for-profit organizations cannot qualify for OFCCP's religious organization exemption. However, when discussing Title VII's religious organization exemption—which OFCCP purports to follow for EO 11246's religious exemption--EEOC Religion Guidance states:

The Title VII statutory exemption provisions do not mention non-profit and for-profit status. Title VII case law has not definitively addressed whether a for-profit corporation that satisfies the other factors can constitute a religious corporation under Title VII.”¹

Similarly, the religious exemption in Section 204 of EO 11246 does not mention non-profit or for-profit status. The text of Title VII and EO 11246 thus do not limit their religious organization exemptions to non-profit organizations, and neither should OFCCP. Where a for-profit organization is sufficiently religious based on a consideration of all the facts, it should qualify for the religious exemption for federal contractors.

2. Inconsistencies with Current Law

Second, the Proposal, while purporting to follow Title VII and its caselaw directly contradicts the EEOC Religion Guidance based on that caselaw. The Proposal states:

The religious exemption does not permit qualifying employers to make employment decisions about nonministerial positions that amount to discrimination on the basis of protected characteristics other than religion, *even if those decisions are based on sincere religious beliefs and tenets.*

86 Fed. Reg. at 62120 (emphasis added). This statement is at odds with the EEOC Religion Guidance which explains that Title VII's religious exemptions "allow a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision *on the basis of religion.*"²

The Proposal is further at odds with section 204(c) of EO 11246, which states:

Section 202 of this Order shall 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 to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Section 202 of EO 11246 states:

Except in contracts exempted in accordance with Section 204 of this Order, the contractor agrees . . . [it] will not discriminate against any employee or applicant

¹ <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> (emphasis added).

² <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> (emphasis added).

for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.

Thus, together, these two sections of EO 11246 make clear that "with respect to the employment of individuals of a particular religion" at a religious organization, Section 202's non-discrimination prohibitions do not apply. CEA employers should be free to make employment decisions based on sincere religious beliefs, without regard to otherwise protected characteristics.

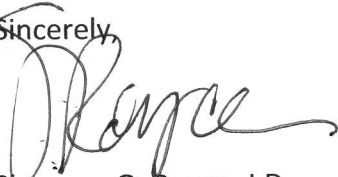
3. Flawed Cost-Benefit Analysis

Third, the Proposal's cost-benefit analysis is flawed. It states the Proposal "does not include any costs." 86 Fed. Reg. at 62121. This is incorrect.

If the 2020 rule is rescinded, CEA employers and other federal contractors and would-be contractors will lack clarity over whether employment decisions based on sincere religious beliefs are protected. The Proposal's contradictions of and inconsistencies with Title VII, EEOC Guidance, and Sections 202 and 204 of EO 11246, will decrease consistency and stability for religious contractors, resulting in self-exclusion of some qualified and talented contractors solely on the basis of their sincere religious beliefs.

OFCCP lacks authority to limit the religious freedom protections of the First Amendment, the Religious Freedom Restoration Act, Title VII, and EO 11246. These protections should be fully recognized by OFCCP and the clarifying language from the 2020 rule should be retained. In sum, CEA urges OFCCP to withdraw the proposal to rescind the 2020 rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannon O. Royce", with a stylized flourish at the end.

Shannon O. Royce, J.D.

President

Christian Employers Alliance