



December 9, 2021

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

Re: NRB Comment Opposing “Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” RIN 1250-AA09

Dear Ms. Yang:

The National Religious Broadcasters (NRB) writes in strong opposition to the “Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption.” 86 Fed. Reg. 62115. NRB is a non-profit, membership association with offices in Washington, D.C., and Nashville, Tennessee, that since 1944 represents the interests of Christian broadcasters, ministries, Christian schools, and faith-based humanitarian and charitable organizations throughout the nation. This includes both for-profit and non-profit organizations that seek to operate their businesses in a manner consistent with Christian values and biblical teaching. The range of Christian groups that we represent gives us a valuable perspective on this issue.

The Proposal seeks to limit religious protections for employment decisions by religious organizations, including the types of organizations we represent, that are or wish to be federal contractors, chiefly by burdening their freedoms to make faith-based employment decisions. NRB has three main concerns with the proposal to rescind the 2020 rule.

1. The religious exemption should apply to employment decisions based on sincere religious beliefs and tenets.

The Proposal states: “The religious exemption does not permit qualifying employers to make employment decisions about non-ministerial 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). The proposed limitation of the religious exemption to *only* claims of religious discrimination rather than employment decisions based on religion is at odds with Title VII, which the Proposal purports to follow. EEOC’s Title VII Religion Guidance 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.*" § 12-I-C-1.¹

The Proposal is further at odds with EO 11246, the executive order underlying the regulations at issue. Section 204(c) of the executive order 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 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 for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin." Taken together, both sections make clear that "with respect to the employment of individuals of a particular religion" at a religious organization, *all* of Section 202's discrimination prohibitions do not apply.

If the Proposal is adopted, it would create an end run of the religious exemption and allow employees to recharacterize their employers' employment actions based on sincere religious tenets as discrimination on a basis other than religion to avoid application of the exemption. This cannot stand. A religious organization's ability to make employment decisions based on its sincere religious tenets should not be contingent on whether an employee can recharacterize the action as "discrimination" on a protected characteristic. Religious organization should be free to make employment decisions based on sincere religious beliefs and tenets, without regard to otherwise protected characteristics.

The Proposal claims a broad religious exemption is "inconsistent with the government's interest in ensuring equal employment opportunity by federal contractors." 86 Fed. Reg. at 62120. But per Congressional direction in Title VII and presidential mandate in EO 11246, that interest does not extend to the "employment of individuals of a particular religion" at qualifying religious organizations. As EEOC Religion Guidance makes clear a "particular religion" is determined by the employer's sincere religious beliefs and tenets, not merely the denominational affiliation of an employee. § 12-I-C-1.

OFCCP cannot disclaim an interest in, or its obligation to ensure, the free exercise of religious under the First Amendment and other laws protecting religious exercise—including employment decisions by religious organizations based on sincere religious beliefs and tenets.

2. The Proposal cannot change rightful protections for religious exercise.

The Proposal would delete: "(e) Broad interpretation. This subpart 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, as amended, 42 U.S.C. 2000bb et seq."

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

But even without this provision, OFCCP is still subject to the constraints of the First Amendment and RFRA. Nothing the Proposal does or says can change that or limit those protections. Likewise, regardless of what the Proposal purports to do and the provisions the Proposal would delete, OFCCP does not have authority to limit religious freedom protections under Title VII or EO 11246. Nevertheless, all these protections should be fully recognized by OFCCP and the clarifying language and explicit religious protections from the 2020 rule should be retained.

3. The Proposal would create significant costs, especially for religious organizations.

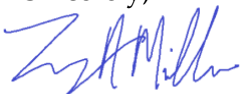
As the Proposal acknowledges, there are only “comparatively few” religious contractors or potential contractors. 86 Fed. Reg. at 62118. Yet the Proposal seeks to remove the religious protections to which those few are entitled. Despite the few religious organizations that this rule will impact, that impact for those employers is significant. Religious contractors or potential contractors will be forced to choose whether to partner with the federal government and potentially give up adhering to their sincere religious beliefs and tenets or to forgo potential government contracts to ensure that they can continue to make employment decisions according to their faith. Such a choice will chill religious organizations from even applying to be federal contractors.

The Proposal absurdly states there are no costs because it would not add any new compliance requirement for contractors. 86 Fed. Reg. at 62121. But the proposal ignores the costs on religious organizations in determining whether they qualify for the exemption under a less clear standard, the costs on not being able to make employment decisions based on religion, and the costs associated with giving up being federal contractors. Moreover, there is a cost to the federal government and the American people with excluding qualified religious organizations from federal contracts based not on their ability to do the work required by the government contract, but solely on their desire to make employment decisions based on their sincere religious beliefs and tenets. NRB’s membership includes well-respected charitable organizations, such as Samaritan’s Purse and Mercy Ships, the latter of which operates the largest non-governmental hospital ships in the world. Charitable organizations like these offer valuable and specialized services that should not be excluded from federal contracting simply for adherence to religious beliefs. In short, this Proposal is not without significant cost.

Conclusion

In sum, NRB urges OFCCP to withdraw the proposal to rescind the 2020 rule.

Sincerely,



Troy A. Miller
CEO