April 14, 2015

Debra A. Carr, Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Ave. NW, Room C-3325
Washington, DC 20210

Via online submission

RE: RIN 1250-AA05 – Discrimination on the Basis of Sex

Dear Ms. Carr:

On behalf of the undersigned organizations, we write to express our strong support for the Office of Federal Contract Compliance Program's (OFCCP) proposal to update the Sex Discrimination Guidelines for federal contractors to align the standards with Executive Order 11246 and current law. This rule will promote the critically important goal of reducing the instances of sex-based discrimination in the workforce.

The Proposed Rule Will Reduce Instances of Pay Discrimination, Narrow the Wage Gap, and Hold Employers Accountable. OFCCP's proposed §§ 60-20.3 and 60-20.4 include important clarifications of the law to prevent and reduce sex-based pay discrimination and therefore narrow the wage gap between women and men who work full time, year round, which still remains at 78 cents on the dollar. OFCCP's proposal to update the definition of "compensation" brings it in line with the current understanding of compensation in other areas of OFCCP's enforcement, which is a more inclusive, modern, and accurate reflection of what employees receive in exchange for work than the term "wage schedules" that currently exists in the Guidelines. OFCCP's proposal to include examples of pay discrimination—for example, by contractors limiting career advancement opportunities based on sex—and clarifying the relevant factors in examining "similarly situated" employees, will make it easier for employers to self-correct discrimination and for courts to identify it. For enforcement, OFCCP's proposal to conduct independent compliance reviews so that it may stop pay discrimination even if individual employees have no knowledge of it will ensure that even where employees may stay quiet for fear of retaliation by their employer, the employer will nonetheless be held accountable for pay discrimination. This also aligns with the goal of OFCCP's proposed rule to implement Executive Order 13655 by prohibiting punitive pay secrecy policies in federal contracts.

There are three ways that the equal pay portion of the proposed rule can be strengthened. First, we recommend explaining in plain language within § 60-20.3, the section addressing sex as a bona fide occupational qualification, that factors other than sex must be business related and actually account for the discrimination that occurred. Second, in § 60-20.4, the proposed rule should clarify that punitive pay secrecy policies that interfere with enforcement of wage discrimination protections violate antidiscrimination law. Lastly, OFCCP should also exercise its authority under Executive Order 11246 to encourage employers to take affirmative steps toward achieving equal pay by

advising employers on developing more transparent pay practices and clear methodologies for setting pay.

The Proposed Rule Will Clarify Employers' Obligations to Protect Against and Respond to Sex-Based Harassment. Women workers—particularly those in low-wage jobs and in nontraditional fields—and LGBT workers face high rates of sex-based harassment at work, but often do not report it for fear of retaliation. OFCCP's proposal to add § 60-20.8 to address the pervasiveness of sex-based harassment and specify that it continues to be a significant barrier to women's entry into nontraditional fields is an important reflection of reality. Because sex-based harassment takes various forms, OFCCP's specification that harassment "because of sex" should be broadly interpreted ensures that the rule will reach all types of harassing behavior that interferes with an individual's ability to feel safe at work. And its proposal to incorporate the Equal Employment Opportunities Commission's (EEOC) Guidelines related to sexual harassment will add much needed clarity for employers regarding their obligations to protect against and respond to sexual harassment in the workplace.

OFCCP should make employers' obligations and expectations even clearer by stating that an employer may be vicariously liable for the harassment perpetrated by lower-level supervisors with the authority to take tangible employment actions (such as hiring, firing, or demoting). This is consistent with Supreme Court precedent and would resolve inconsistencies in courts' interpretations of employer liability for supervisor harassment. OFCCP should likewise explain that an employer is liable for harassment by coworkers if it was negligent in addressing the harassment; that is, if it knew or had reason to know about the harassing conduct and failed to stop it. Lastly, OFCCP should elaborate on what constitutes harassment against individuals based on gender identity or transgender status by stating that it includes intentional and repeated use of a former name or pronouns that are inconsistent with an employee's current gender identity.

The Proposed Rule Makes Clear that Anti-LGBT Bias is a Form of Unlawful Sex-Based Discrimination. The protections proposed in the NPRM for transgender and gender nonconforming workers make unequivocally clear that discrimination against individuals based on gender identity and gender-based stereotypes is sex discrimination in violation of Executive Order 11246 and Title VII. This is an accurate reflection of the state of the law and EEOC guidance. For too many transgender workers, going to work means not knowing whether they will be allowed to simply use the bathroom that aligns with their gender identity. OFCCP's proposed explanation that denying transgender employees access to the bathrooms they need is unlawful sex-based discrimination is critical for these workers and clarifies for employers that transgender workers are entitled to the same comforts at the workplace as non-transgender employees. This provision should be strengthened by extending the example to include all workplace facilities, and by providing that single-user restrooms may not be segregated by sex. Because § 60-20.3 contains an exception for bona fide occupational qualification (BFOQs), it should also clarify that a valid BFOQ must be applied based on an employee's gender identity.

As currently written, § 60.27(a)(3) sets out an example of illegal sex discrimination based on an employee's nonconformity to "sex-role expectations by being in a relationship with a person of the same sex." While we support this provision, we strongly urge OFCCP to clearly recognize the full scope of sex-based discrimination affecting LGBT workers by including "sexual orientation" along

with gender identity in § 60-20.2(a), § 60-20.7(b), and § 60-20.8(b). This addition would better align the proposed rule with recent case law and EEOC decisions, and would bring needed clarity for employers and employees.

The Proposed Rule Advises Employers that they May Not Use Stereotypes about Caregiving to Deny Women Access to High-Paying Jobs or Career Advancement Opportunities. Sex-based stereotypes remain a serious obstacle to women's entry into and success in the workplace. Outdated assumptions about caregiving and women not being major earners for their families result in occupational segregation and fewer opportunities for women's career advancement. This, in turn, contributes to lower wages and reduced financial security in the short and long term for women. Harmful stereotypes also undermine women's access to higher-paying, nontraditional jobs, and contribute to their overall discrimination in the workplace. By advising federal contractors on their obligations not to discriminate against workers with caregiving responsibilities based on gender stereotypes; not to discriminate based on the assumption that a woman has or will have caregiving responsibilities; and not to distinguish on the basis of sex in apprenticeship or other training or career advancement opportunities, the proposed rule goes a long way towards addressing occupational segregation and the sex-based barriers that keep women from entering higher-paid, traditionally male fields.

We urge OFCCP to adopt more examples illustrative of the problems women face at work based on their position as caretakers. OFCCP should include additional examples of caregiver discrimination under § 60-20.7(c), such as employment decisions based on assumptions that women with caregiving responsibilities cannot succeed in a fast-paced environment, prefer to spend time with family rather than work, or are less committed to their jobs than full-time employees. Second, OFCCP should add that discussing current and future plans about family during the interview process may be evidence of caregiver discrimination, which would align the rule with requirements under the Americans with Disabilities Act (ADA) not to make disability-related inquiries in the pre-offer stage. Finally, OFCCP should include examples of discrimination against women who return to work after having a baby and face adverse action because they are breastfeeding or request accommodations to express breast milk. Just as the ADA operates to ensure that candidates with disabilities are judged on their qualifications for the job rather than their disabilities, incorporating this language into the proposed rule would likewise ensure that candidates are judged on their merits rather than their caregiving or potential caregiving responsibilities.

We likewise urge OFCCP to make clear that employers may not rely on stereotypes that do not relate to caregiving to deny women access to jobs, pay, or opportunities. This includes reliance on stereotypes about the job in question and women's suitability for work in sectors where women participate at low rates.

The Proposed Rule Correctly Clarifies that Workplace Leave Must be Provided Equally to Women and Men. By specifying that any paid leave must be provided equally to women and to men, OFCCP not only restates the clear requirement of Title VII and Executive Order 11246 but also makes an important statement that employer policies must not reinforce sex-based stereotypes about family caregiving. This is an important statement of the law that employers should heed because, currently, many employers often provide parental leave unequally. A recent study commissioned by DOL found that just over one-third of employers (35.1 percent) offer paid

maternity leave to most or all employees, whereas one-fifth of employers (20 percent) offer paid *paternity* leave to most or all employees. A separate survey of private employers with 50 or more employees (an employer sample deemed to be covered by the requirements of the Family and Medical Leave Act (FMLA)) found that, on average, employers offer more than the statutorily required 12 weeks of job-guaranteed leave for women after the birth of a child (13.8 weeks) but offer less than the required 12 weeks of job-guaranteed leave for spouses or partners of women following the birth of a child (10.9 weeks). Indeed, even companies that are held up as exemplary in terms of their workplace practices routinely offer fewer weeks of "paternity" leave than "maternity" leave. This amounts to both disparate treatment under Title VII and E.O. 11246 and could potentially contribute to disparate impact analysis if women in such workplaces are subject to sex stereotyping as caregivers, suffer compensation discrimination or are denied workplace opportunities because they have or are expected to take longer or more periods of leave.

The Proposed Rule Will Help Ensure that Workers Affected by Pregnancy and Related Conditions Cannot be Pushed Out of their Jobs or Forced to Choose between the Health of their Pregnancy and their Paychecks. Many women are able to work throughout their pregnancies without any need for changes at work, but some pregnant women require temporary accommodations to protect their health and safety on the job, particularly pregnant workers in physically demanding, inflexible, or hazardous jobs. These are often jobs that pay low wages or jobs traditionally held by men. With women's income more critical to families than ever before, women cannot afford to choose between the health of their pregnancies and their paychecks. OFCCP's proposal to incorporate the language of the Pregnancy Discrimination Act (PDA)—prohibiting discrimination on the basis of pregnancy, childbirth, or related medical conditions as forms of sex-based discrimination, and requiring contractors to treat people of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected, but similar in their ability or inability to work—appropriately recognizes that pregnancy discrimination constitutes sex discrimination. The proposed regulations acknowledge that this rule requires employers to make accommodations for workers with limitations arising out of pregnancy when employers make or are obligated to make accommodations for others similar in ability to work. Last week, in *Young v. UPS*, the Supreme Court confirmed that, under Title VII, employers may not use accommodations policies that leave pregnant workers out or that impose, in the Court's words, a "significant burden" upon pregnant workers that outweighs any proffered justification.[1] The Court indicated that employers impose such a significant burden when they "accommodate[] a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers." The Supreme Court's interpretation of the PDA in *Young* may helpfully inform OFCCP's interpretation of Executive Order 11246 and reaffirms the proposed rule's interpretation.

The 2008 passage of the Americans with Disabilities Act Amendments Acts (ADAAA), and the EEOC's interpretation of the amendments, informs the analysis required by *Young*. The ADAAA's expansive coverage means that employers will accommodate most non-pregnant employees similar in ability to work to pregnant workers with physical limitations; *Young* makes clear that employers who refuse to also accommodate pregnant workers in this situation likely violate the PDA. As a result, employers will typically be required to provide these accommodations to pregnant workers

[1] Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354 (2015)..

as well under the standard articulated by the Court in *Young*. The rule proposed in the NPRM appropriately reflects this result.

Moreover, Executive Order 11246's prohibition of sex discrimination explicitly includes an obligation requiring federal contractors and subcontractors to take affirmative action to ensure applicants are employed and treated during employment without regard to sex. Employers have traditionally used pregnancy as an occasion to push women out of work, including by refusing to make accommodation for pregnancy and related medical conditions, and this treatment continues. Refusal to accommodate pregnancy can thus enhance and perpetuate occupational segregation. Pursuant to Executive Order 11246, OFCCP should address the need to provide reasonable accommodation for pregnancy and related conditions, not only as a nondiscrimination measure, but as a form of affirmative action aimed at breaking down barriers to women's acceptance and advancement in the workplace. This affirmative obligation complements and reinforces the Supreme Court's recent statements to the effect that employers may not place significant burdens on pregnant workers by excluding them from accommodations offered to most other workers who need them, and empowers OFCCP to adopt the standard set out in the NPRM.

We also urge OFCCP to provide additional examples of disparate impact discrimination in the context of pregnancy and related medical conditions, rather than addressing those conditions solely in the context of leave, and to note that the examples provided are illustrative rather than exhaustive. The proposed regulations appropriately note that employment policies or practices of providing insufficient or no medical or family leave policies may discriminate on the basis of sex because of the disparate impact that such policies may have on pregnant women. While this is correct, it is important to note that other policies of contractors may also constitute pregnancy discrimination based on their disparate impact. For example, a policy of only offering "light duty" to employees with on-the-job injuries, which excludes pregnant employees, may have a disparate impact and thus would be impermissible unless shown to be job-related and consistent with business necessity, in addition to imposing an impermissible "significant burden" by excluding pregnant workers from accommodations that a "large percentage" of other workers are afforded.

Section 503 of the Rehabilitation Act requires nondiscrimination and affirmative action for qualified individuals with disabilities. For example, under the ADAAA, pregnancy-related impairments related to high-risk pregnancies, gestational diabetes, episodes of pre-term labor, severe morning sickness, and pregnancy-related carpal tunnel syndrome, among many others, may substantially limit major life activities and constitute disabilities. As a result, contractors will frequently be obligated to provide reasonable accommodations to workers with pregnancy-related impairments pursuant to their obligations under federal disability law, as explained in the EEOC's recent pregnancy discrimination guidance. Currently, the NPRM at 5257 and fn. 72 could be read to suggest that pregnant employees cannot be covered by the Americans with Disabilities Act and its corollary in the Rehabilitation Act; however, the EEOC has clarified that, in the wake of the 2008 ADA Amendments Act and accompanying regulations, many pregnant workers will be entitled to reasonable workplace accommodations for their temporary, pregnancy-related impairments. To avoid confusion, it would be beneficial to refer to contractors' obligations to workers with pregnancy-related disabilities under Section 503 in the final rule and to the relevant EEOC discussion, to alert contractors to these separate Section 503 accommodation obligations to pregnant workers with pregnancy-related disabilities.

The Proposed Rule Meets the Needs of Employers and Employees. Although the section protecting workers affected by pregnancy, childbirth, and related medical conditions from discrimination and requiring reasonable accommodations is a new provision for the Sex Discrimination Guidelines, its obligations are not new to contractors and so should not be burdensome to implement. The PDA has been the law of the land since 1978, and the EEOC has consistently interpreted it to require that employers treat pregnant workers in the same way they treat non-pregnant workers who are similar in their ability or inability to do work and provided further guidance as to employers' accommodation obligations almost a year ago. Additionally, twelve states have laws explicitly requiring accommodations for pregnant workers, as do New York City, the District of Columbia, Philadelphia, Providence, and Pittsburgh. Covered contractors operating in these states can claim no doubt as to whether they were already required to make reasonable accommodations for limitations arising out of pregnancy, childbirth, and related medical conditions.

Accommodating pregnant workers is good for business and not financially burdensome on employers. Employers' experiences accommodating people with disabilities show that most accommodations for pregnant workers are likely to be low or no cost. Thus, we support OFCCP's estimation of burdens on employers. Many of the accommodations requested by pregnant workers, such as sitting rather than standing, avoiding heavy lifting, and taking breaks to go to the bathroom, are accommodations employers frequently provide to employees with disabilities. A survey by the Job Accommodation Network, a technical assistance provider to the Department of Labor's Office of Disability Employment Policy, found that the majority of employers that provided accommodations to employees with disabilities reported that they did not impose any new costs on the employer. Of those employers that reported a cost for accommodations, the majority reported a one-time cost of $500 or less. Significantly, because accommodations provided to pregnant workers are temporary, the costs associated with these accommodations, if any, are likely to be substantially less than the costs associated with providing accommodations to workers with permanent disabilities.

In addition, the experience of employers in accommodating workers with disabilities and in providing voluntary workplace flexibility programs strongly suggests that accommodating pregnancy has benefits for business that outweigh any accommodation costs. Employers that provide accommodations to workers with disabilities and voluntary workplace flexibility programs report a strong return on investment. The data show not only that the direct costs of, for example, altering start and end times, providing break time, honoring lifting restrictions, or redistributing particular physical tasks among members of a workplace team are typically minimal, but also that these practices result in bottom line benefits to employers, which include reduced workforce turnover, increased employee satisfaction and productivity, and savings in workers' compensation and other insurance costs. Making room for pregnancy on the job promises the same benefits.

We urge OFCCP to adopt final regulations on the prohibition against discrimination on the basis of sex swiftly and without any unnecessary delay. The proposed rule, applied to federal contractors and intended to update the outdated sex discrimination guidelines so that it will be perfectly clear that employers cannot discriminate on the basis on sex, will be an effective measure to combat pay

discrimination, shrink the wage gap, end occupational segregation and sex-based harassment, provide equal access to career opportunities and equal opportunity for LGBT workers, and prohibit pregnancy discrimination.

Thank you for the opportunity to submit comments on this proposed rule.

Sincerely,

9to5, National Association of Working Women
- 9to5 California
- 9to5 Colorado
- 9to5 Georgia
- 9to5 Wisconsin

AFL-CIO
- American Federation of Teachers, AFL-CIO
- Asian Pacific American Labor Alliance (APALA), AFL-CIO
- Pride at Work, AFL-CIO

African American Ministers in Action
American Association of University Women (AAUW)
American Civil Liberties Union
Anti-Defamation League
Apprenticeship and Nontraditional Employment for Women (ANEW)
Bend the Arc: A Jewish Partnership for Justice
Central Conference of American Rabbis
Coalition of Labor Union Women
Disciples Women, Christian Church (Disciples of Christ)
Equal Rights Advocates
Family Equality Council
Feminist Majority
FORGE, Inc.
Human Rights Campaign
Institute for Science and Human Values
Kentucky Religious Coalition for Reproductive Choice
Legal Aid Society-Employment Law Center
Legal Momentum
Los Angeles LGBT Center
Marriage Equality USA
Mississippi Center for Justice
Missouri Women In Trades
Movement Advancement Project
National Advocacy Center of the Sisters of the Good Shepherd
National Asian Pacific American Women's Forum
National Association for the Advancement of Colored People
National Association of Human Rights Workers (NAHRW)
National Black Justice Coalition
National Center for Transgender Equality

National Committee on Pay Equity
National Council of Jewish Women
National Employment Law Project
National Employment Lawyers Association
National Latina Institute for Reproductive Health
National LGBTQ Task Force
National Organization for Women
    National Organization For Women, Brevard Chapter
    National Organization for Women, Missouri
    National Organization for Women, New Jersey
    National Organization for Women, NJ-Middlesex County
    National Organization for Women, Northern NJ Chapter
    National Organization for Women, San Gabriel Valley/Whittier
National Partnership for Women and Families
National Task Force on Tradeswomen's Issues
National Women's Health Network
National Women's Law Center
On Equal Terms Project
PFLAG National
PowHer New York, Equal Pay Campaign
Restaurant Opportunities Centers United
Sargent Shriver National Center on Poverty Law
Southwest Women’s Law Center
The Make It Work Campaign
UltraViolet
Union for Reform Judaism
UNITED SIKHS
Voices for Freedom
Wider Opportunities for Women
Women Build Too Education and Trades Foundation
Women Employed
Women of Reform Judaism
Women's Law Project