

ALERT

DOL OFCCP Finalizes Rule on Religious Exemptions for Government Contractors

December 10, 2020

WHAT: On December 8, 2020, the U.S. Department of Labor (DOL) released a final rule expanding the religious exemption from anti-discrimination laws for federal contractors. Issued by the Office of Federal Contract Compliance Programs (OFCCP), the rule will make the religious exemption applicable to any employer that holds itself out to the public as “carrying out a religious purpose.” OFCCP stated that this codification of the exemption is to encourage “full and equal participation” of religious groups as federal contractors, as well as clarify what kinds of organizations will qualify for the exemption and the obligations that apply to those organizations.

WHEN: The Rule goes into effect on January 8, 2021.

WHAT DOES IT MEAN FOR INDUSTRY: The rule clarifies which organizations may qualify for the existing religious exemption. While the entity does not have to be connected to a house of worship or a non-profit, a “religious corporation, association, educational institution, or society” must show “strong evidence that it possesses a substantial religious purpose.” The rule states that this test is intended to be a fairly high bar (for example, simply citing scripture would not be sufficient) that nonetheless allows *bona fide* religious organizations can then maintain their religious employment qualifications when they become federal contractors.

While the rule attempts to provide clarification, just how the OFCCP will evaluate individual cases will be an issue to watch in the coming months. OFCCP has stated that the rule does not allow an employer to discriminate against an LGBTQ+ employee or someone of a different faith based on a religious rationale, but instead allows an organization to first prove that it is a religious organization (as

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defined under the rule) and then allows the organization to factor in its religious beliefs when making employment decisions. Yet, critics have stated that this rule has the potential for abuse, and just how the OFCCP will monitor such activities, as well as administer the requirements for establishing that an organization is religious, remains to be seen.

Also worth monitoring is the extent to which the rule is enforced overall. The rule has drawn intensive comment since first being proposed. Some advocates have argued that the rule gives contractors too much room to discriminate and also rolls back recent advances for LGBTQ+ rights. Concerns have also been raised that the rule permits impermissible mingling of church and state, given the religious purpose of these organizations and the contracts they are performing. But others predicted that the rule will encourage religious organizations, many of them non-profits, to become or remain contractors—in some cases providing essential services. Contractors should thus monitor whether and how the rule is addressed by the Biden Administration—just one aspect of the impending transition that Wiley attorneys are helping contractors prepare to navigate.