

United States Senate

December 9, 2021

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Dear Secretary Walsh:

We write in strong opposition to the Office of Federal Contractor Compliance Program's (OFCCP) proposed rescission of the regulation clarifying religious exemptions for federal contractors (RIN: 1250-AA09). This rescission will not only strip religious entities who contract with the federal government of much-needed policy clarifications regarding how contracts will be enforced, but in the process, OFCCP has also provided poor and inaccurate analysis of the religious exemptions that Congress passed in Title VII.

It remains a basic principle of public policy and good governance that federal contractors deserve to understand at the outset of the contract how the terms of such contract will be interpreted and enforced.

When President Obama expanded Executive Order 11246's categories of nondiscrimination, he also maintained a religious exemption that parallels the exemption for religious employers in Title VII of the Civil Rights Act. However, soon after President Obama expanded the EO, White House staff implied that the exemption language of the EO would be interpreted to apply far more narrowly than the text of EO 11246, Title VII, and the predominant body of applicable case law requires. This resulted in a great uncertainty for a subset of federal contractors, which caused a chilling effect even among faith-based applicants.

In response to this confusion, the Trump Administration issued a clarifying rule to promote the full and equal participation of faith-based organizations as federal contractors. The Trump rule removed the uncertainty regarding the applicable statutory requirements. It clarified the scope of the existing religious exemption by providing examples of which employers qualify and stating that qualifying religious employers can make employment decisions based on its sincere religious tenets.

By rescinding the Trump Administration's clarifying rule, the agency is threatening to revert back to the ambiguous and hostile policies of the Obama Administration. This will create uncertainty and limit the ability of faith-based contractors to partner with the federal government unless they surrender the tenets of their faith.

Faith-based organizations should not be prohibited from partnering with the federal government simply because of their religious identity. As the Supreme Court showed in *Trinity Lutheran v. Comer* and *Fulton v. City of Philadelphia*, religious organizations can live out their faith and still participate in government programs. The federal government should welcome faith-based entities as partners to serve our communities.

Religious entities (just like thousands of non-religious entities) faithfully provide services and fulfill the needs of many in our communities. These organizations feed the hungry, support refugees, care for veterans, serve individuals who are incarcerated, and educate students. Just last year, faith-based organizations stepped up to partner with the government and service individuals in need during the height of the COVID-19 pandemic. Partnering with faith-based organizations in a way that allows them to live by their faith while still serving everyone equally is a win-win for the government.

The Constitution explicitly protects the free exercise of religion. To ensure that religious entities are able make employment decisions and retain employees in a manner consistent with the tenets of their faith, Congress included specific protections for religious employers in Title VII. Title VII broadly defines religion to include “all aspects of religious observance and practice, as well as belief.” Yet OFCCP’s proposal wrongly seeks to limit the statutory exemptions’ protections solely to hiring.

Further, the phrase “individuals of a particular religion” has been interpreted by courts to mean more than just the right to hire individuals of the same denomination; it also includes the right to hire individuals who actually adhere to the organization’s religious tenets as understood by the employer. The “particular religion” is determined by the employer’s religious beliefs, observances, and practices.

The analysis OFCCP provided in support of its proposal is far more restrictive than the text of EO 11246 and Title VII; it also conflicts with both Title VII case law and EEOC Title VII guidance. It purports to narrow the allowable expression of religious observance in employment to less than what the law requires. A plain reading of the statute, as well as the Supreme Court’s decision in *Bostock v. Clayton County*, further counsel that the religious exemption does not just apply to claims of religious discrimination, but to the full scope of discrimination claims under Title VII.

Finally, the Religious Freedom Restoration Act (RFRA), a critical and invaluable civil rights statute that became law with sweeping bipartisan support, applies across all of the federal government. That includes the Department of Labor and OFCCP. Yet this proposal strips out references to RFRA. This is a disservice to the Department, as moving forward with this rule will inevitably raise concerns about the substantial burden OFCCP will then place on faith-based contractors by compelling them to choose between maintaining a contract and adhering to their sincere religious tenets.

Beyond the Constitutional protections for religious exercise, Congress has been clear. Religious employers are protected under Title VII and RFRA. OFCCP does not have the authority to limit

those protections. No one should have to abandon their faith to partner with their own government as a contractor.

We urge you to withdraw this proposal and maintain the Trump Administration's rule to ensure constitutional, statutory, and presidentially ordered religious protections for employers are upheld.

Sincerely,



James Lankford
United States Senator



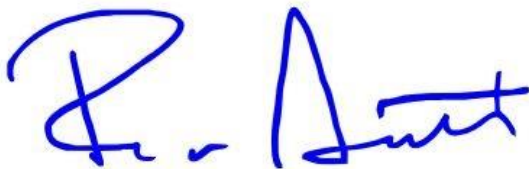
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