



The Office of Federal Contract Compliance Programs (OFCCP) published its final order on March 1, 2023, rescinding the Trump-era Religious Exemption Rule for federal contractors. In a midnight rulemaking, the OFCCP in the Trump administration made it easier for religiously affiliated federal contractors and subcontractors to make employment decisions based on religion. Opponents of the rule argued that it provided opportunities for federal contractors to engage in employment discrimination. The back-and-forth on religious exemption is part of a broader and increasing legal tension on the issue of whether the expansion of civil rights protections on the basis of sexual orientation and gender identity infringes on the beliefs of some religious organizations. The rescission goes into effect on March 31, 2023, 30 days after publication in the *Federal Register*.

## **Religious Exemption Under EO 11246**

Under [Executive Order 11246](#), federal contractors and subcontractors are prohibited from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, and national origin. Federal contractors and subcontractors are additionally required under EO 11246 to take affirmative action in hiring and to provide the OFCCP with certification of their Affirmative Action Program compliance.

Although EO 11246 broadly bans workplace discrimination among federal contractors, the order exempts certain religiously affiliated organizations from nondiscrimination obligations. A federal contractor or subcontractor that is a "religious corporation, association, educational institution, or society" may make otherwise impermissible employment decisions "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities."

By way of background, the Executive Order exemption was introduced during the George W. Bush administration and derives from the religious exemption of Title VII of the Civil Rights Act of 1964. The U.S. Supreme Court affirmed the Title VII exemption in the seminal case *Hosanna-Tabor v. EEOC*, where the Court determined that the civil rights law in question, the Americans with Disabilities Act, did not apply to the hiring of ministers of a religiously affiliated organization. The Executive Order exemption does not exempt federal contractors and subcontractors from complying with other EO 11246 requirements.

## **The 2020 Religious Exemption Rule**

Requiring that the exemption be "construed in favor of the broadest protections of religious exercise permitted by the U.S. Constitution and law," the Trump administration's rule expanded the scope of the exemption. The 2020 rule established a generous rule of construction for the Executive Order and enunciated a broader interpretation of the terms "religion;" "particular religion;" "religious corporation, association, educational institution, or society;" and "sincere." Additionally, it provided that for-profit institutions could qualify for the exemption if they presented "other strong evidence" of a "substantial religious purpose." These changes amounted to a more extensive religious exemption for federal contractors and subcontractors under the Trump administration's 2020 rule. For instance, the 2020 rule identified for-profit catering companies that specialize in kosher meals and promote their religious affiliation in marketing but do not service exclusively religious clients or exclusively employ religious employees as examples of companies that would qualify as religious organizations under the rule.

## **Religious Exemption for Federal Contractors Following Rescission**

In rescinding the 2020 Religious Exemption Rule, the Biden administration returns the exemption for religiously affiliated federal contractors and subcontractors to the pre-Trump standard. Rather than a "substantial religious purpose" inquiry, which the Trump-era rule had enshrined, the exemption returns the analysis for religiously

affiliated organizations to a "primarily religious" inquiry, with fewer covered institutions. The current rule also withdraws the broad coverage for "for-profit" organizations. Instead, federal contractors and subcontractors seeking to receive the religious exemption will need to look to the multifactor *LeBoon* analysis, which asks the following:

(1) Whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

The return to this multifactor analysis for "primarily religious" organizations, paired with the rescission of the rule of construction provided in the 2020 rule, which required the OFCCP to construe the exemption "in favor of the broadest protections of religious exercise permitted by the U.S. Constitution and law," amounts to a significantly leaner exemption for federal contractors and subcontractors.

## **Rationale for the Rescission**

Despite the Trump-era rule's attempts to clarify the religious exemption for federal contractors and subcontractors, the current U.S. Department of Labor (DOL) has criticized that now-rescinded rule for its tendency to muddy the waters of the religious exemption available to certain federal contractors. The agency has noted that the departure from Title VII principles, which were familiar to employers, led to increased confusion amongst contractors by requiring them to consider a distinct framework for federal contractor exemptions. Additionally, the agency has identified the rule's tendency to confuse contract workers by adding ambiguity to the question of which protections from workplace discrimination are guaranteed to them. Of particular note, the DOL has cited concerns that the Trump-era rule had the potential to be used abusively against LGBTQ+ workers, who were at risk of their employer's suddenly asserting a substantially religious purpose and thereby avoiding the anti-discrimination provisions of EO 11246.

## **What Does the Rescission Mean for Federal Contractors?**

Under the Trump-era rule, the potential existed for more organizations to take advantage of the exemption from the nondiscrimination provisions of EO 11246. In practice, however, a narrow set of contractors would qualify for an exemption under either test. As such, most federal contractors and subcontractors will not be affected by the OFCCP's change of course. However, religiously affiliated organizations that had relied on the previous, expanded rule should evaluate their employment practices and reassess their qualifications for the exemption under the new rule. This holds particularly true for organizations that adopted changes to their employment practices in reliance on the 2020 rule.

Religiously affiliated federal contractors and subcontractors should also be prepared for future changes to the qualifications for religious exemption. The extent of religious protections, and how those protections interact with anti-discrimination principles, has become an increasingly contested issue in the courts. Although the new rule seeks to retether the federal contractor religious exemption to Title VII principles, those principles may soon change. A much-awaited Supreme Court case, *Groff v. DeJoy*, is expected to address the treatment of religious accommodations under Title VII. Depending on its outcome, the case may be a harbinger of future changes to the treatment of religion by the DOL.

Federal contractors and subcontractors seeking additional information on this changing landscape should consult with experienced labor and employment counsel.

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