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 Director Carr:

We, A Better Balance, the Center for WorkLife Law, and Workforce 21C, write to express our strong support for the Office of Federal Contract Compliance Program's (OFCCP's) proposal to update the Sex Discrimination Guidelines for federal contractors. We ask you to consider including in the final rule the changes and additional examples we present below, which are designed to provide even greater clarity.

A Better Balance is a non-profit legal advocacy organization dedicated to promoting workplace equality and the expansion of choices so that workers may care for their families without sacrificing economic security. As a policy organization we have nearly a decade of experience promoting workplace fairness, pregnancy accommodation, and equal pay, as well as preventing and combating the myriad forms of sex discrimination.

The Center for WorkLife Law is a research and advocacy organization housed at the University of California, Hastings College of the Law. WorkLife Law seeks to advance gender equality in the workplace and in education and to promote work-life balance for all employees. The Center pioneered the research and documentation of family responsibilities discrimination, also known as "caregiver discrimination," which includes pregnancy discrimination, and has played a central role in the development of law and policy concerning gender equality.

Workforce 21C helps employers manage today's workforce, including preventing family responsibilities and pregnancy discrimination, advancing women, increasing inclusion and engagement, and implementing effective flexible work programs.

We agree with the OFCCP that the proposed rule is critical precisely because sex discrimination persists in the contemporary workplace, and in a way that is often less overt than in 1970, when the current regulations were adopted. The proposed rule also provides clarity to federal contractors who are currently using outdated provisions that conflict with established federal law. The updates related to pregnancy and gender identity discrimination, stereotypes faced by men, protections for caregivers, and clearer standards around equal pay and pregnancy accommodations are particularly important in this regard.

We appreciate the opportunity to comment on the proposed rule and have offered additional language and examples that we believe will provide greater clarity to federal contractors and assist them in preventing sex discrimination.

§ 60-20.2 General Prohibitions

We fully support the OFCCP's proposed amendments to section 60-20.2 and believe the comprehensive overview provided will assist employers in complying with the non-discrimination mandate of Executive Order 11246. In particular, we strongly endorse the OFCCP's explicit inclusion of "pregnancy, childbirth, or related medical conditions" in the definition of sex, as discussed in more detail below. We also appreciate the OFCCP's inclusion of discrimination against caregivers in the examples it provides in this section. Last, we commend the OFCCP's recognition that discrimination on the basis of "gender identity" and "transgender status" is discrimination on the basis of sex, in conformity with the EEOC's decision in *Macy v. DOJ*, EEOC Appeal No. 0120120821 (Apr. 20, 2012) and the numerous appellate and district courts that have so held.[1]

…

The eleven examples of practices that would constitute disparate treatment provided by the OFCCP in proposed section 60-20.2(b)(1) – (11) will be of great value in assisting government contractors in understanding the range of ways in which sex discrimination occurs in the modern workplace. We particularly commend the OFCCP for recognizing in proposed section 60-20.2(b)(8) that sex discrimination often manifests as differential treatment in *informal* opportunities, such as *networking* and *succession planning*. It is valuable to bring to employers' attention the subtle ways bias appears in the workplace.

We recommend that the OFCCP add a twelfth example to proposed section 60-20.2(b)(1) – (11) to highlight that men also can be subject to gender-based discrimination based on their family caregiving responsibilities. Despite the fact that men have become increasingly responsible for

[1] *See Glenn v. Brumby*, 663 F.3d 1312, 1354, 1316-18 (11th Cir. 2011) (finding discrimination against a transgender individual because of her gender-nonconformity is sex discrimination and citing similar holdings from the First, Sixth, and Ninth Circuits and district courts in Arizona, New York, Pennsylvania, Texas, and the District of Columbia).

providing care to children, the elderly, and ill family members, traditional expectations of men as workers have not changed. The stereotype that men have stay-at-home or part-time working spouses who can be available to provide family caregiving persists, reinforcing the expectation that men should be available to their employers at all times, uninterrupted by family obligations.[2]

As a result, more men are facing sex-based discrimination stemming from their status as caregivers. In recent years, men have been filing cases alleging that they have been denied leave, flexible work, and other benefits routinely granted to women; discouraged from using leave; and harassed, retaliated against, and terminated for taking leave. Men may face blatant discrimination based on their caregiver status, such as statements that caregiving is women's work, that men who are caregivers are unreliable or bad workers, and that men who are caregivers are not masculine.[3]

We strongly encourage the OFCCP to provide notice to employers of this form of sex discrimination by including the example below in proposed section 60-20.2(b). This suggested example is based on facts alleged in *Ehrhard v. LaHood*:[4]

> Denying to male employees parental leave or flexible work arrangements that are available to female employees, or discouraging male employees from taking parental leave and/or utilizing flexible work arrangements.

…

The examples of policies and practices that may have a disparate impact on the basis of sex the OFCCP provided in proposed section 60-20.2(c)(1)-(4) will be of significant value to employers in understanding the types of policies that may lead to unintended sex discrimination. We recommend the OFCCP provide two additional examples that illustrate for employers other ways in which their seemingly neutral policies may expose them to liability for sex discrimination based on disparate impact. The following examples demonstrate how facially neutral policies regarding leave may discriminate against women, because women are more likely to require leave due to their frequent roles as caregivers and child-bearers.

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[2] *See e.g.*, Brad Harrington, Fred Van Deusen, & Beth Hubbard, *The New Dad: Caring, Committed and Conflicted* (Boston College 2011), available at http://www.bc.edu/content/dam/files/centers/cwf/pdf/FH-Study-Web-2.pdf; Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 Colum. J. Gender & L. No. 3 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2351545; David Koeppel, *More Male Caregivers, More Discrimination at Work*, Fortune (Feb. 5, 2013), available at http://fortune.com/2013/02/05/more-male-caregivers-more-discrimination-at-work/.

[3] Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 Hastings L.J. 1297, 1323-25 (June 2012), available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311754.*

[4] 2012 WL 1038803 (E.D.N.Y. Mar. 28, 2012) (finding male employee made out a prima facie case of discrimination under Title VII where he claimed his family leave requests were denied and ignored whereas the requests of similarly situated female employees were routinely granted).

The first recommended additional example is based on the alleged facts in *Roberts v. U.S. Postmaster General*, 284 (E.D. Tex. 1985) (finding sick leave policy limited to employee's own illness that allegedly forces women to resign due to their frequent role as caregivers is "exactly [the] type of harm that Title VII seeks to redress."):

> A sick leave policy limited to the ability to take leave due to an employee's own illness, but not to care for ill family members, which adversely impacts women who may be forced to resign more frequently than men due to their caregiving roles.

We encourage the OFCCP to also include the following related policy example:

> A policy prohibiting leave during the first year of employment, which adversely impacts women due to the need to take leave associated with pregnancy and childbirth.

§ 60-20.4 Discriminatory Compensation

We fully support the OFCCP's proposed amendments to section 60-20.4 and its acknowledgement that compensation discrimination is an ongoing and insidious problem. We strongly encourage, however, that the OFCCP slightly revise the proposed rule to make clear the range of ways in which sexually discriminatory compensation can occur.

First, we find that some employers use the part-time classification to take away benefits and pay from employees, even though part-time workers may be performing essentially the same work as certain full-time employees. This has a disproportionate effect on female workers, who are more likely to work part-time,[5] and has been recognized as unlawful sex discrimination under the Equal Pay Act.[6]

Second, discriminatory measures are often used to justify compensation differences and allow unconscious bias to influence compensation decisions. For example, where a male comparator has negotiated a higher starting salary, the prior salary of the male employee and prevailing market rates have been used to justify compensation discrepancies despite the fact that such factors are often the product of discrimination.[7] This is why several states and localities have

[5] U.S. Bureau of Labor Statistics, *Highlights of women's earnings in 2013*, p. 6 (December 2014), available at http://www.bls.gov/opub/reports/cps/highlights-of-womens-earnings-in-2013.pdf.

[6] *Lovell v. BBNT Solutions, LLC*, 295 F.Supp.2d 611, 619 (E.D. Va. 2003) ("[W]here ... the plaintiff is required to work three quarters of the hours worked by the putative comparator and in fact on occasion works more, and where the plaintiff's actual tasks, duties, and responsibilities are essentially similar to those of the putative comparator, then the issue becomes one of fact for the jury to resolve.").

[7] *See Balmer v. HCA, Inc.*, 423 F.3d 606, 609 (6th Cir. 2005) (employer justifying a wage discrepancy by stating that the comparator had negotiated a higher salary); Jeanne M. Hamburg, Note, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 Colum. L. Rev.

taken the initiative to exclude these types of wage practices from the list of possible justifications for a pay discrepancy in proposed and enacted legislation.[8]

In order to help contractors avoid these pitfalls, which can lead to unintended sex discrimination, we recommend that the OFCCP amend Section 60-20.4(a) to incorporate these points as indicated by the underlined portions below:

> (a) Contractors may not pay differential compensation to similarly situated employees on the basis of sex. For purposes of evaluating compensation differences, the determination of similarly situated employees is case specific. Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. Negotiating skills, prior salary, and prevailing market rates are not relevant. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others. For example, the fact that an employee is employed part-time, rather than full-time, is not enough, on its own, to justify a non-proportional difference in compensation.

§ 60-20.5 Discrimination on the basis of pregnancy, childbirth, or related medical conditions

We strongly support this proposed new section, which will provide helpful clarification of long-standing legal principles governing the increasing number of women in the workforce affected by pregnancy, childbirth, and related medical conditions.[9]

We strongly support the OFCCP's inclusion, in section 60-20.5(a), of an enumerated list of conditions that qualify as "related medical conditions" upon which employers may not base unfair treatment, and applaud the OFCCP for recognizing, as many courts have, that lactation and lactation-related conditions, such as mastitis and thrush, are pregnancy-related.[10] Breastfeeding has been shown to have significant maternal and infant health benefits, yet

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1085 (1989) (explaining why prior salary is not a proper justification for a wage discrepancy); *Drum v. Leeson Electric Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009) (employer justifying a wage discrepancy by using the prevailing market rate defense).

[8] *See*, *e.g.* Vermont, 21 V.S.A. § 495 (amending the "any factor other than sex" defense to wage discrimination claims to a "bona fide factor other than sex," which the employer must show "does not perpetuate a sex-based differential in compensation, is job-related with respect to the position in question, and is based upon a legitimate business consideration.").

[9] Catalyst, *Statistical Overview of Women in the Workplace* (Dec. 2011), available at http://www.catalyst.org/publication/219/statistical-overview-of-women-in-the-workplace; Alexandra Cawthorne & Melissa Alpert, *Labor Pains: Improving Employment and Economic Security for Pregnant Women and New Mothers* (Aug. 2009), available at http://www.americanprogress.org/issues/2009/08/pregnancy_support.html.

[10] *See*, *e.g. E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) ("[W]e hold that lactation is a related medical condition of pregnancy for purposes of the PDA.").

women often fail to initiate breastfeeding or wean prematurely because of the challenges of continuing lactation while working.[11] Clarification that discrimination on the basis of lactation is illegal not only will help to keep nursing mothers on the job, but may also help to increase rates of breastfeeding to the benefit of both mothers and their babies.

We also commend the OFCCP for specifying that certain disorders and symptoms related to pregnancy, as well as the after-effects of delivery, are prohibited bases for discrimination. We urge the OFCCP to expand this section to include preventative restrictions that may not be symptom or disorder-related, but are, nonetheless, related to pregnancy. For example, if a pregnant woman is advised by her doctor to avoid exposure to toxic chemicals, dangerous scenarios, or physically strenuous work to prevent problems from happening before they occur, these are still conditions related to pregnancy and should be explicitly covered by the rule. We have seen numerous such cases where women are pushed out of work simply because they wish to avoid unnecessary risks to their pregnancy as advised by their doctors. Finally, fertility treatments and other conditions related to conception, or difficulty conceiving a child, should similarly be included as "related medical conditions," in line with Title VII case law.[12]

We recommend amending section 60-20.5(a) to incorporate these points as indicated by the underlined portions below:

> (a) . . . Related medical conditions include, but are not limited to, lactation; disorders directly related to pregnancy, such as preeclampsia (pregnancy-induced high blood pressure), placenta previa, and gestational diabetes; symptoms such as back pain <u>and joint laxity</u>; complications requiring bed rest <u>or other preventative measures; propensity for pregnancy-related risks that require restrictions, such as avoiding exposure to toxic chemicals; complications related to conception;</u> and the after-effects of delivery.

…

The proposed rule in Section 60-20.5(b)(5) is consistent with the Supreme Court's recent ruling in *Young v. UPS*, which clarified that employers may not fail to accommodate pregnant workers while accommodating other non-pregnant workers when doing so imposes a significant burden on pregnant women and the employer lacks a sufficiently strong non-discriminatory reason

[11] U.S. Dept. of Health and Human Serv., Office of the Surgeon General, *The Surgeon General's Call to Action to Support Breastfeeding* (2011), available at http://www.surgeongeneral.gov/library/calls/breastfeeding/calltoactiontosupportbreastfeeding.pdf.

[12] *See*, *e.g. Hall v. Nalco Co*., 534 F.3d 644, 649 (7th Cir. 2008) (finding a "cognizable claim of sex discrimination under Title VII" for an "adverse employment action based on childbearing capacity."); *Herx v. Diocese of Ft. Wayne-S. Bend Inc*., No. 1:12-CV-122 RLM, 2014 WL 4373617, at 8 (N.D. Ind. Sept. 3, 2014) *appeal dismissed sub nom. Herx v. Diocese of Fort Wayne-S. Bend, Inc*., 772 F.3d 1085 (7th Cir. 2014) (holding that there was a triable issue of fact as to whether the plaintiff was fired for impermissible discriminatory reasons when she was fired for receiving fertility treatments.").

(other than cost or inconvenience) to impose the burden.[13] The proposed rule closely tracks the Court's analysis, looking at the population of other workers who employers accommodate in defining unlawful pregnancy discrimination.

In addition, providing reasonable accommodations to employees with conditions related to pregnancy, childbirth and related medical conditions fulfills the goal of Executive Order 11246, as amended, of prohibiting sex discrimination by contractors. It also advances the Executive Order's affirmative action requirement by breaking down barriers to women's participation in the workforce. While the PDA requires that pregnant workers be treated the same as other workers similar in their ability or inability to work, many women—especially those in physically strenuous jobs—continue to face barriers to employment, and are forced to exit the workforce, when they need adjustments to their work because of pregnancy or a related medical condition. Providing accommodations is an affirmative action employers should take to ensure equal treatment for women.

Proposed Section 60-20.5(b)(5) will also ensure economic security for women and the families that rely on their salaries to make ends meet. Women are the primary or co-breadwinners in almost two-thirds of families in the United States.[14] By preventing needless exits from the workforce and encouraging female labor participation, accommodation of pregnant workers can help to preserve families' financial security and to forestall the cascade of economic harm that befalls pregnant women who are pushed out of work unnecessarily only to struggle to get back in.[15] This, in turn, can help to close the stubborn gender pay gap and the even more insidious motherhood wage gap.

Providing reasonable accommodations for pregnant workers is also important for public health. Far too many workers cannot afford to go without a paycheck when they need an accommodation to stay healthy—these women often have no choice but to put their health, or their baby's health, at risk. Approximately 250,000 women are denied accommodations annually.[16] Many more do not even make such requests, for fear of retaliation. Yet physically demanding work places pregnant women at a statistically significant increased risk for preterm birth,[17] which, along with low birth weight, is one of the leading causes of infant mortality.[18]

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[13] *Young v. United Parcel Serv., Inc.*, No. 12-1226, 2015 WL 1310745, at 13 (U.S. Mar. 25, 2015).
[14] Heather Boushey & Ann O'Leary, *The Shriver Report: A Woman's Nation Changes Everything: Executive Summary* (Oct. 2009), available at http://www.americanprogress.org/issues/2009/10/womans_nation.html.
[15] Amicus Curiae Brief of the American Civil Liberties Union and A Better Balance et al. in Support of Petitioner, *Young v. United Parcel Serv., Inc.*, No. 12-1226, 2015 WL 1310745 (U.S. Mar. 25, 2015), available at https://www.aclu.org/files/assets/12-1226_tsac_aclu.pdf.
[16] National Partnership for Women & Families, *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace* (Jan. 2014), available at http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf.
[17] Renee Bischoff & Wendy Chavkin, *The Relationship between Work-Family Benefits and Maternal, Infant and Reproductive Health: Public Health Implications and Policy Recommendations* (June 2008), available at http://otrans.3cdn.net/70bf6326c56320156a_6j5m6fupz.pdf.

This risk is particularly troubling considering that even the simplest accommodations, like allowing a woman to carry a water bottle to stay hydrated, can prevent some of the most serious medical complications, such as miscarriage.[19]

We commend the OFCCP for tackling the problem of accommodations and providing pregnant workers with the support they need to stay healthy and stay employed.

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As the OCFFP recognizes in Section 60-20.5(c)(3) with regard to leave, seemingly neutral employer policies can have a disparate discriminatory impact on pregnant women, and this is particularly true in the case of workplace accommodations.[20] In light of this, we suggest adding a sixth example of unlawful pregnancy discrimination to Section 60-20.5(b) to read as follows:

> (b)(6) Maintaining policies and practices related to provision of workplace accommodations (including light duty) that have a disparate impact on pregnant women.

…

We commend the OFCCP for reinforcing that contractors who provide family and medical leave must do so on the same terms for men as for women. However, because we have encountered confusion among employers as to what such equal treatment entails, we encourage the OFCCP to offer further clarification in Section 60-20.5(c)(1)(ii) that all non-birth parents should have equal bonding time with new children, including adoptive parents, foster parents, and workers standing in loco parentis to a child as defined by the Department of Labor with regard to the Family and Medical Leave Act. While birth mothers may legally have additional time to recover physically from childbirth, it is critical to combating gender role stereotypes often faced by gay men and lesbians,[21] that non-birth parents be entitled to the same bonding leave—and with the same pay—as birth mothers. Indeed, for same-sex couples, second parent adoption and joint adoption are common and on the rise. Recent data shows that among couples with children, the proportion of same-sex couples who have adopted children nearly doubled from 10% to 19% between 2000 and 2009.[22] Ensuring equal access to family

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[18] *Ibid.*

[19] Dr. Lucy Willis, *Letter to New York City Council Member James Vacca* (Dec. 4, 2012), available at http://www.abetterbalance.org/web/images/stories/Willis_letter_of_support.pdf.

[20] *See Germain v. Cnty. of Suffolk*, No. 07-CV-2523ADSARL, 2009 WL 1514513, at 1 (E.D.N.Y. May 29, 2009) (holding that an employer's policy limiting light-duty to assignments only to employees who suffer from occupational injuries has a disparate impact on pregnant women.).

[21] Sarah Allen & Kerry Daly, *The Effects of Father Involvement: An Updated Research Summary of the Evidence* (May 2007) available at http://www.fira.ca/cms/documents/29/Effects_of_Father_Involvement.pdf.

[22] *See*, Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, Family Focus, Issue FF51, at F2 (Winter 2011) available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf

leave for non-birth parents combats discrimination against gay and lesbian employees that occurs because of sex-based stereotypes.

We propose that the OFCCP amend Section 60-20.5(c)(1)(ii) by inserting the underlined text below as follows:

> (c)(1)(ii) A contractor must provide job-guaranteed family leave, including any paid leave, for male employees and non-birth parents, including adoptive parents, foster parents, and employees standing in loco parentis to a child, on the same terms that family leave is provided to female employees and birth parents.

§ 60-20.6 Other Fringe Benefits

We fully support the OFCCP's proposed amendments to section 60-20.6, especially Section C, which reflects current law. In addition, we recommend that the OFCCP clarify that "benefits" also include flexible or alternative work schedules. Research has shown that men are disproportionately provided with greater flexibility and access to alternative schedules,[23] but also that they may encounter more resistance than women when using such flexibility for extensive and intensive caregiving.[24]

Ensuring that contractors offer workplace flexibility equally to men and women not only directly ensures gender equality in receipt of fringe benefits, but it also will help eliminate sex discrimination in at least two additional ways. First, by making alternative work arrangements available on an equal basis, the rule helps women achieve their potential in the workplace by addressing the reality that they are still more likely to require flexibility due to their frequent roles as caregivers and child-bearers. Second, the rule helps to dismantle the stereotype that men are unlikely to have caregiving responsibilities that might lead them to take advantage of alternative work schedules.

In order to ensure a non-discriminatory offering of flexible work benefits by federal contractors, we suggest that the OFCCP amend Section 60-20.6(b) as to include the underlined text below:

> (b) As used herein, "fringe benefits" includes, but is not limited to, medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; flexible work arrangements; dependent care assistance;

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[23] American Sociological Association, *Men Viewed More Favorably Than Women When Seeking Work-Life Balance*, (Aug. 8, 2014), available at http://www.asanet.org/press/men_viewed_more_favorably_than_women.cfm (finding that 69.7 percent of study participants would be "likely" or "very likely" to approve a request from a man seeking to work from home for childcare related reasons, compared to 56.7 percent of those willing to grant the same to a woman.).

[24] *See* Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, Journal of Social Issues, Vol. 69 No.2, pp. 332-40 (June 2013).

> educational assistance; employee discounts; stock options; lodging; meals; moving expense reimbursements; retirement planning services; and transportation benefits.

§ 60-20.7 Employment decisions made on the basis of sex-based stereotypes

We strongly support the OFCCP's proposed section 60-20.7 that rightfully recognizes that employment decisions made on the basis of sex-based stereotypes are discriminatory. We commend the OFCCP for its excellent treatment in section 60-20.7(c) of sex discrimination stemming from sex-based stereotypes about caregivers. As long recognized by the EEOC, both male and female workers may be subject to sex discrimination based on their caregiving responsibilities.[25] Courts also recognize how stereotypes about caregivers may result in unlawful sex discrimination in violation of Title VII.[26] We also particularly appreciate the OFCCP's recognition in section 60-20.7(b) that adverse treatment of an employee based on transgender status or gender identity is unlawful discrimination on the basis of sex.

…

The role that motherhood—and stereotypes about mothers—commonly plays in creating disparate workplace outcomes for female employees cannot be overstated. Once a woman's motherhood status becomes salient, she may likely be perceived at work as less competent, ambitious, hardworking, intelligent, and dominant.[27] The effect of such bias is often unlawful disparate treatment that limits employment opportunities for women.[28] The OFCCP's proposed example in section 60-20.7(c)(2) illustrating how mothers may be discriminated against is critical. We recommend augmenting that example by highlighting an additional assumption employers often make about mothers which results in adverse treatment: that they are unwilling or unable to travel or relocate their families for career advancement. Our recommended supplemental language can simply be added to the language already proposed by the OFCCP in section 60-20.7(c)(2), as indicated by the underlined portion here:[29]

> (2) Denying opportunities to mothers of children based on the sex-stereotyped belief that women with children should not or will not work long hours, travel, or

[25] *See* Equal Employment Opportunity Center, *Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities*, (May 23,2007), available at http://www.eeoc.gov/policy/docs/caregiving.html.
[26] Cynthia Thomas Calvert, Joan C. Williams, & Gary Phelan, *Family Responsibilities Discrimination*, Bloomberg BNA (2014), 85-95 (collecting cases).
[27] Joan Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harvard Women's L.J. 77 (2003), 90-94, available at http://www.law.harvard.edu/students/orgs/jlg/vol26/williams.pdf.
[28] *Ibid.* at 94-98.
[29] *See*, *e.g.*, *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004) (denying female employee's promotion based on belief that she would not, or should not, move her family is unlawful sex stereotyping).

> relocate, regardless of whether the contractor is acting out of hostility or belief that it is acting in the employee's or her children's best interest.

…

We believe the stereotyping example provided in section 60-20.7(c)(1) will be particularly useful to contractors seeking guidance on avoiding sex stereotyping, as that example illustrates how men can also be subject to unlawful discrimination on the basis of sex. As noted above on pages 2-3, as more men become caregivers, they have become increasingly subject to adverse treatment as a result. In fact, men who seek to fulfill caregiving responsibilities are often treated *more* harshly than women who do so. This is based on expectations employers often hold of men—that they devote themselves fully to their work and that it is unreasonable for them to take time to care for their families.[30] When men act against expectations by doing "women's work," they are often viewed as unreliable, not committed to their jobs, not team players, or lacking in ambition.[31]

We recommend a second example concerning stereotype-based discrimination against men. Adding an additional example pertaining to men is important because it emphasizes the less known fact that men too may be subject to sex stereotyping. Taking steps to avoid discrimination against male caregivers is as important as taking steps to avoid discrimination against female caregivers to ensure equality for men, as well as for women. Our recommended additional example also highlights that the discrimination men face is not limited only to taking short-term leave to bond with new children. Men, who now provide one-third of elder care,[32] are often subject to stereotyping based on long-term eldercare responsibilities as well. Finally, the suggested example highlights for employers one of the major underlying causes of discrimination against men based on caregiving responsibilities—that men, much more so than women, are expected to be fully devoted to their jobs and available to work long and unpredictable hours, unhindered by family responsibilities.

We recommend the OFCCP add a fourth example to section 60-20.7(c) as follows:

> (_) Adverse treatment of a male employee who is not available to work overtime or weekends because he cares for his elderly father on the sex-stereotyped beliefs that men do not have family caregiving responsibilities that affect their

[30] Joan Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harvard Women's L.J. 77 (2003), 101-102, available at http://www.law.harvard.edu/students/orgs/jlg/vol26/williams.pdf; Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 Colum. J. Gender & L. No. 3 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2351545.

[31] Cynthia Thomas Calvert, Joan C. Williams, & Gary Phelan, *Family Responsibilities Discrimination*, Bloomberg BNA (2014), pp. 25-26 (collecting cases and scholarly articles).

[32] National Alliance for Caregiving, American Association of Retired Persons (AARP), & the MetLife Foundation, *Caregiving in the U.S. 2009*, p. 14 (2009), available at http://assets.aarp.org/rgcenter/il/caregiving_09_fr.pdf.

availability and that men who are not available without constraint are not committed, ambitious, or dependable.

60-20.8 Harassment and hostile work environments

We strongly support the OFCCP's inclusion of harassment based on transgender status and harassment based on pregnancy, childbirth, or related medical conditions as forms of sexual harassment. Employers may harass pregnant women in an attempt to make work unpleasant for them and to encourage them to quit their jobs.[33] We appreciate that the agency has recognized this reality in the proposed regulations.

…

We are concerned, however, that section 60-20.8(b) does not make clear that men may be subject to harassment or a hostile work environment based on their status as caregivers. It is well documented that men who violate rules of manhood by engaging in caregiving face sanctions at work that are often more severe than penalties faced by female caregivers. Male caregivers may be victims of harassment or suffer retaliation at work for transgressing gender norms of men as breadwinners and as not caregivers.[34] We recommend that the OFCCP expand section 60-20.8(b) to make clear that harassment of men for failing to conform to norms of how men should behave—including of men who engage in family caregiving—is sex harassment. Section 60-20.8(b) could be amended to incorporate this point as indicated by the underlined portions below:

> (b) Harassment because of sex includes sexual harassment (including sexual harassment based on gender identity); harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but that is because of sex (including harassment based on gender identity and harassment of male caregivers based on stereotypes of how men should behave at work and at home).

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Last, we encourage the OFCCP to clarify that harassment on the basis of sexual orientation, which stems from gender stereotypes regarding how men or women should behave, is prohibited sex discrimination. Consistent with Executive Order 13672's

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[33] Joan Williams & Consuela Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 Lab. Law 293, 305 (2007), available at http://librarysource.uchastings.edu/repository/Williams/22LabLaw293.pdf; *see also Zisumbo v. McCleod USA Telecommunication Serv., Inc.*, 154 Fed. Appx. 715, 726-27 (10th Cir. 2005) (alleged harassment of pregnant employee amounted to objectively hostile work environment).

[34] Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 Colum. J. Gender & L. 3 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2351545.

prohibition of discrimination on the basis of sexual orientation,[35] the EEOC's interpretation of the meaning of sex discrimination,[36] and numerous judicial decisions,[37] the OFCCP should amend proposed section 60-20.8(b) to make clear that harassment against lesbian, gay, and bisexual people on the basis of sex stereotypes is prohibited, as indicated by the following underlined text:

> Harassment because of sex includes sexual harassment (including sexual harassment based on gender identity and/or sexual orientation); . . .

Regulatory Procedures -- Cost of Proposed Provisions

We agree with the OFCCP that the burden on contractors associated with providing accommodations to pregnant workers, as calculated in the proposed rule, may be an overestimate and highlight two additional reasons that support this conclusion.

First, we would expect the cost of pregnancy accommodations to be significantly lower than the $500 per accommodation the OFCCP uses for its estimate. The $500 per accommodation JAN calculation used in the estimate incorporates the costs of disability accommodations that are often long-term, or even permanent. In contrast, pregnancy accommodations are always limited and are frequently needed for only a few weeks. Similarly, JAN's calculation envisions each employee's accommodation as a separate and distinct cost. With pregnant employees, an employer may encounter the same accommodation multiple times without any additional cost (e.g. purchasing a stool for one worker that can be used for later employees who become pregnant and require the same accommodation). Last, JAN's calculation includes data from extensive accommodations for severe disabilities. Conditions stemming from pregnancy, however, are typically not severe and can be accommodated with modest measures such as allowing an employee to carry a water bottle, to take more frequent restroom breaks, or to sit down during the day.

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[35] *See* Executive Order 13672 (July 21, 2014) (amending Executive Order 11246 to extend protections against discriminatory practices to individuals based on their sexual orientation).

[36] The EEOC has found that discrimination against lesbian, gay, and bisexual individuals based on sex-stereotypes, such as the belief that men should only date women or that women should only marry men, is discrimination on the basis of sex under Title VII. *See Veretto v. United States Postal Service*, EEOC DOC 0120110873 (July 1, 2011) (accepting Title VII sex discrimination claim alleging that supervisor harassment was motivated by a sexual stereotype that men should only marry women); *Castello v. United States Postal Service*, EEOC DOC 0520110649 (December 20, 2011) (accepting Title VII sex discrimination claim alleging that supervisor harassment was motivated by sexual stereotype that having relationships with men is an essential part of being a woman); *Complainant v. Dep't of Homeland Sec.*, EEOC DOC 0120110576 (August 20, 2014) (reaffirming prior findings that federal employees discriminated against on the basis of sexual orientation can establish violations of Title VII based on the sex stereotyping theory).

[37] *See e.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002); *Terveer v. Billington*, 34 F.Supp.3d 100 (D.D.C. 2014).

Second, savings to employers will significantly offset the cost of reasonable accommodations. By investing in accommodations for pregnant workers, employers experience increased productivity from accommodated employees who would otherwise be unable to work or have greater difficulty in working. Accommodations also reduce absenteeism and allow the employer to retain the services of the pregnant employee during her period of disability. Furthermore, without accommodations, employers would be forced to search for, recruit, and train replacements for pregnant workers they would otherwise fire or force out on leave. While it is difficult to monetize the offset in costs produced by accommodating pregnant workers, we believe that the OFCCP should further lower the cost estimate it uses in calculating the burden imposed on federal contractor and subcontractors by a reasonable accommodation requirement.

Conclusion

We applaud the OFCCP's proposed rule regarding sex discrimination, which we believe would provide clear standards to federal contractors and serve to reduce the instances of sex discrimination for the millions of workers covered under the rule's protections.

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

Respectfully submitted,

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