

# FREEDOM FROM RELIGION *foundation*

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August 15, 2019

Harvey D. Fort  
Acting Director, Div. of Policy & Program Dev., OFCCP  
Room C-3325  
200 Constitution Avenue NW  
Washington, DC 20210

**Re: Docket ID: 2019-17472**  
**Comment on OFCCP Proposed Rule**  
**RIN 1250-AA09**

Dear Acting Director Fort:

We are writing on behalf of the Freedom From Religion Foundation, and our members in all 50 states, in response to the request for public comments regarding proposed rulemaking that will allow widespread discrimination by religiously affiliated federal contractors. Religion should never be an excuse to deny employment based on immutable characteristics, and this rule would allow exactly that.

FFRF is a national nonprofit organization with more than 30,000 members nationwide. Our purposes are to protect the constitutional principle of separation between state and church, and to educate the public on matters relating to nontheism.

The proposed rule includes troubling definitions of “religion” and “particular religion” under Title VII that would allow religiously affiliated federal contractors to discriminate based on an applicant’s religious affiliation *and* also on whether the employee’s *conduct* is consistent with the employer’s beliefs. In other words, Christian employers can refuse to hire Jews, Muslims, and atheists, but Christian employers can also refuse to hire anyone they deem to be a “bad Christian.”

This has immediate and serious anti-LGBTQ ramifications. Anti-gay employers have a long history of disingenuously arguing that they are not discriminating on the basis of someone’s sexual orientation, but only based on their “lifestyle” choices.

Telling religious employers they may deny employment based on an employee’s conduct puts the federal government’s stamp of approval on anti-LGBTQ bigotry, and opens the door to many other forms of discrimination, such as against single mothers/parents, and nonreligious or religious minority applicants. This is shameful and unacceptable.

This new twist on using religion to discriminate allows contractors to draw absurd, arbitrary and capricious lines. For instance, an evangelical Christian might refuse to hire a gay man, but would happily hire a twice-divorced, thrice-married man—even though both homosexuality and divorce are prohibited by evangelical Christianity.

Additionally, the proposed rule adopts a modified test for whether a federal contractor counts as “religious,” loosely based on the decision *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011). To qualify, a federal contractor needs to show only that it: 1) is organized for a religious purpose; 2) holds itself out to the public as carrying out a religious purpose; and 3) exercises religion consistent with, and in furtherance of, a religious purpose.

There are two major problems with this test. First, the rule states that contractors will be given great deference as to their claim that a “particular activity or purpose has religious meaning,” so long as the claim is found to be sincere. This more deferential modification of the test allows contractors to simply declare that their activities or purposes are religious in nature. So long as they do not make their pretext too obvious, this rule effectively grants them an exemption to Title VII. Second, the proposed rule omits a critical fourth requirement from the *World Vision* test, that the entity “does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.” This omission allows even contractors that exist primarily to earn a profit to claim protections that were designed for churches. In other words, federal contractors explicitly organized as for-profit businesses would be allowed to claim exemptions due to “religious purposes.” This makes a mockery of claiming a religious purpose and mission.

Together, the two alterations to the test in the proposed rule allow for-profit entities to generally ignore Title VII so long as they do so in the language of religion.

This proposal is needlessly harmful and rolls back decades of progress on protecting the rights of LGBTQ and other individuals who will inevitably be discriminated against, including single parents, atheists, and members of minority religions. FFRF strongly opposes this proposed rule and urges the OFCCP to reject it, and instead to adopt a rule that will *protect* employees who have a history of suffering discrimination, rather than legalizing invidious discrimination.

Thank you for the opportunity to comment on this proposal. If you should have any questions regarding FFRF’s comments on this proposed rulemaking, please contact us at 608-256-8900 or via email at [info@ffrf.org](mailto:info@ffrf.org).

Very truly,

Handwritten signatures of Dan Barker and Annie Laurie Gaylor in blue ink. The signature of Dan Barker is on the left and Annie Laurie Gaylor is on the right.

Dan Barker and Annie Laurie Gaylor  
Co-Presidents