

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 › MADISON, WI 53701 › (608) 256-8900 › WWW.FFRF.ORG

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SUBMITTED ELECTRONICALLY

Tina Williams
Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs
Department of Labor
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comment in strong support of proposal rescinding discriminatory rules on federal contractors, but noting imperfection
RIN#: 1250-AA09

To Whom it May Concern:

The Freedom From Religion Foundation (FFRF) strongly supports the OFCCP's proposed rule to remove harmful Trump-era rules that needlessly allowed religious-based discrimination. FFRF is a national nonprofit organization with more than 35,000 members across the country, including members in all 50 states, D.C., and Puerto Rico. FFRF protects the constitutional separation between state and church and educates about nontheism.

The proposed rule, entitled "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," reverses the Trump administration's harmful lurch toward discrimination. This latest development in the complicated history of Executive Order 11246 restores anti-discrimination requirements for federal contractors to a prior, more equitable version, but unfortunately still falls short of adequately ensuring that taxpayer dollars will not be used to fund discrimination. So we indicate what we consider to be the only flaw below.

Executive Order 11246 was originally signed into law in 1965 by President Lyndon B. Johnson, and was amended in 2002 by President George W. Bush to include

religious exemption language almost verbatim from Title VII of the Civil Rights act of 1964. Case law established that faith-based organizations could discriminate based on an employee's religion under Title VII, which was explicit in Bush's 2002 amendment to EO 11246.

The Trump administration enacted a new rule in 2020 and this existing rule departed from the established practice of following Title VII caselaw, substituting instead a Christian Nationalist interpretation of the Religious Freedom Restoration Act that presumes a federal contractor's discrimination is permissible so long as it is done in the name of religion. This was not only a departure from established practice and the text of EO 11246, but also guaranteed that taxpayers would be forced to fund religiously based discrimination, violating the religious freedom every American taxpayer.

In short, restoring the previous version of this rule will advance true religious freedom by ensuring taxpayers are not funding religiously based discrimination.

Rescinding the 2020 rule will also promote economy and efficiency in federal procurement by ensuring that qualified candidates are not excluded from employment due to characteristics that have no bearing on their ability to perform government contracts. Plainly stating when contractors and would-be contractors are eligible for a religious exemption also provides much-needed clarity for contractors, and with that added clarity comes reassurance to taxpayers that their funds are not being used to discriminate.

The only flaw with the new rule is based on a flaw in EO 11246: While courts have held that Title VII does not prevent faith-based organizations from discriminating in their hiring based on religion, there is no need to carry this exemption over to federal contractors. A Mormon organization may wish to only hire Mormon employees for its preaching or missionary work, but that religious work is not the sort of activity that can be funded by federal taxpayers. If that same organization wants taxpayer funds to perform a secular public service, there is no reasonable justification for requiring *those* workers to be Mormon.

To be eligible for a federal contract, faith-based organizations should have to play by the same rules as everyone else, meaning they may not discriminate in their use of the funds based on religion. This would not only protect taxpayers from inadvertently funding discrimination, but would also ensure that Americans will not be excluded from taxpayer-funded jobs simply because they are not religious or

are the “wrong” religion. It is worthy of note that today, non-religious Americans are the fastest growing segment of the U.S. population by religious identification, with more than one in four Americans who now identify as religiously unaffiliated.¹ Younger Americans are not just religiously unaffiliated, they are largely atheist or agnostic. A 2018 survey found that 21 percent of Americans born after 1999 are atheist or agnostic.² The proposed rule, while a major improvement over the 2020 rule, still allows faith-based organizations to discriminate against these young freethinkers. To correct this, EO 11246 must be updated to remove this needless exemption.

The federal government should never sanction discrimination. The proposed rule moves steadily in this direction, even if it does not fully arrive there. FFRF strongly supports this rescission of the 2020 rule. Thank you for your time and attention.

Very truly,



Annie Laurie Gaylor & Dan Barker

Co-presidents

ALG/DB:rdj

¹ Pew Research Center, “In U.S., Decline of Christianity Continues at Rapid Pace,” (Oct. 17, 2019) at <https://pewrsr.ch/2VPiFS7>.

² *Atheism Doubles Among Generation Z*, The Barna Group (Jan. 24, 2018), <https://www.barna.com/research/atheism-doubles-among-generation-z/>.