

Religious Exemption Rule Rescission Briefing Transcript

Moderator: Sumit Dasgupta

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SUMIT DASGUPTA:

Welcome to this webinar entitled Rescission of the Rule, Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption. Thank you for joining us today. I am Sumit Dasgupta, your moderator. Before we start, this webinar is being recorded. Also, live closed captioning is being provided. To enable captioning, you can click on the CC icon that should be located on the bottom left side of the viewing stage.

Now it is my pleasure to introduce our presenters for this webinar. Sarah Carson is the Senior Regulatory Analyst in OFCCP's Division of Policy and Program Development, Branch of Legislative and Regulatory Development. Prior to this role, she served as the branch's labor policy economist. She's responsible for serving as the agency's lead point of contact for communicating with other DOL offices on OFCCP's rulemaking and information collection requests. She also works on drafting, reviewing, and conducting the economic analysis for rulemaking and information collection requests.

Marla Tumiel is a Policy Specialist in OFCCP's Division of Policy and Program Development, Branch of Policy Development. She's responsible for developing and coordinating new and updated sub-regulatory guidance materials, including directives, internal guidance, and administrative guidance. She also responds to inquiries regarding OCP's policies and procedures from stakeholders and internal OCP staff.

We also have Jonide Corbin, Branch chief of OFCCP's Branch of Regulatory and Legislative Development, and Anna Laura Bennett, Senior Attorney with the Civil Rights Labor Management Division of the Office of Solicitor. They will be assisting in answering questions at the conclusion of today's presentation. So without further adieu, I will turn it over to Sarah Carson.

SARAH CARSON:

Thanks, Summit. So today, we're going to start with an overview of the topics we will cover. First, we will give a background of the three legal authorities OCP enforces and the religious exemptions contained in Executive Order 11246 and Title VII of the Civil Rights Act of 1964.

Then we will discuss Directive 2018-03 and the 2020 religious exemption rule. After that, we will discuss the purpose of rescinding the 2020 religious exemption Rule and Directive 2018-03.

Finally, we'll cover clarifications from Title VII case law and requesting a religious exemption.

Established in 1965, the Office of Federal Contract Compliance Programs, or OFCCP, is a civil rights agency within the United States Department of Labor. OFCCP enforces three key legal authorities. Executive Order 11246 requires affirmative action and prohibits federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. Contractors are also prohibited from discriminating against applicants or employees because they inquire about, discuss or disclose their compensation or that of others.

Section 503 of the Rehabilitation Act of 1973 prohibits federal contractors and subcontractors from discriminating and employment against individuals with disabilities and requires employers to take affirmative action to recruit, hire, promote, and retain these individuals.

The Vietnam Era Veterans Readjustment Assistance Act, or VEVRAA, prohibits federal contractors and subcontractors from discriminating in employment against protected veterans and requires employers to take affirmative action to recruit, hire, promote, and retain these individuals.

Executive Order 11246 was amended in 2002 to include a religious exemption in section 204 C for religious corporations, associations, educational institutions, and societies with respect to the employment of individuals of a particular religion.

In 2003, OFCCP updated executive order 11246 regulations to incorporate this religious exemption at 41 CFR 60-1.5(a)5. The Executive Order 11246 religious exemption is expressly modeled on Title VII's religious exemption, which, as amended in 1972, exempts religious

corporations, associations, educational institutions, and societies regarding employment of individuals of a particular religion to perform work connected with their activities.

Prior to the 2020 religious exemption Rule, OFCCP determined the scope and applicability of the Executive Order 11246 religious exemption by applying Title VII case law and principles to the facts and circumstances of each situation where a religious exemption was requested by a federal contractor.

On August 10th, 2018, OFCCP issued Directive 2018-03 addressing Executive Order 11246 religious exemption. The directive noted that the agency had not provided formal guidance and stated that the Agency anticipated rulemaking on the topic that would be informed further by public comment.

In 2020, OFCCP finalized implementing legal requirements regarding the equal opportunity clauses religious exemption, otherwise referred to as the 2020 Religious Exemption rule, which was effective January 8th, 2021.

The legal interpretations and policy of Directive 2018-03 were reflected in the 2020 religious exemption rule. The 2020 religious exemption rule purported to clarify the scope and application of the executive order 11246 religious exemption. On balance, however, the 2020 rule increased confusion and uncertainty about the religious exemption because of its divergence from the approach to the Title VII religious exemption taken by courts and the Equal Employment Opportunity Commission, as well as OFCCP's past practice.

Now let's discuss the rescissions of the 2020 religious exemption rule and Directive 2018-03. OFCCP published its notice of proposed rescission in November 2021 and received over 700 unique comments. The comments were carefully considered by the agency before making the decision to finalize the rescission.

The rescission of the 2020 religious exemption rule was published in the Federal Register on March 1st, 2023, and will take effect today, March 31st, 2023. The rescission of Directive 2018-03 was effective March 1st, 2023. Now I'm going to turn it over to Marla to discuss the purpose of the rescissions.

MARLA TUMIEL:

Thank you, Sarah, and good afternoon, everyone. The rescission of the 2020 religious exemption rule will remove confusion by clarifying that the religious employer test or the Executive Order 11246 religious exemption is the same as that established by Title VII case law.

The rescission will reaffirm the long-standing test from extensive Title VII case law for a religious corporation, association, educational institution, or society that can qualify for the religious exemption, replacing the new unprecedented religious employer test announced in the 2020 rulemaking.

The rescission will return OFCCP to the long-standing approach of assessing the applicability of the Executive Order 11246 religious exemption using a case by case in fact specific approach. The Executive Order 11246 religious exemption will remain available to contractors that are religious corporations, associations, educational institutions, or societies.

Returning to this long-standing approach for Executive Order 11246, religious exemption does not change religious entities' ability to pursue federal contracts.

Now let's turn our attention to which employers may qualify for their religious exemption. There are two principal questions regarding the religious exemption. Which employers can qualify as religious organizations that may exercise the exemption, and also, what is the scope of the exemption for those qualifying employers?

With the rescission of the 2020 religious exemption rule, OFCCP will again be guided by case law interpreting and applying the Title VII religious exemption to guide its interpretation and application of Executive Order 11246 religious exemption.

As to the first question, under established Title VII case law an employer can qualify for the exemption if its purpose and character are primarily religious. In general, the courts have weighed the following nine factors in assessing whether this test is satisfied. Number 1 - whether the entity operates for a profit. Number 2 - whether it produces a secular product. Number 3 - whether the entities' articles of incorporation or other pertinent documents state a religious purpose. Number 4 - whether it is owned, affiliated with, or financially supported by a formally religious entity such as a church or a synagogue. Number 5 - whether a formally religious entity participates in the management, for instance, by having representatives on the board of trustees.

Number 6 - whether the entity holds itself out to the public as a secular or sectarian entity.
Number 7 - whether the entity regularly includes prayer or other forms of worship in its activities. Number 8 - whether it includes religious instruction in its curriculum to the extent that it's an educational institution. And finally, Number 9 - whether its membership is made-up by Co religionists.

On to the second question. The overwhelming weight of Title VII case law confirms consistently with the views of the EEOC and also the Department of Justice that qualifying religious employers generally may make decisions about whether to employ individuals based on acceptance of and adherence to religious tenets. But they may not insist on compliance with such tenants to the extent that it would result in violation of the other nondiscrimination provisions, such as the prohibitions on discrimination on the basis of race, sex, and sexual orientation, and also the prohibition on retaliating against employees because they have asserted their legal rights.

With the rescission of the 2020 religious exemption rule, OFCCP returns to an approach to Executive Order 11246 religious exemption that is consistent with this Title VII case law.

Next, we'll discuss requests for religious exemption. There's no specific process for a contractor to request an Executive Order 11246 religious exemption from OFCCP. Whether the religious exemption applies is a highly fact-specific inquiry that depends on the particular employment scenario at issue.

If a contractor is presently under review, the contractor may notify the OFCCP Compliance officer that it requests a religious exemption.

For contractors with questions about their obligations outside the context of a compliance evaluation or a complaint investigation, OFCCP is committed to providing compliance assistance. OFCCP offers a variety of ways to contact the agency to seek that assistance. Additionally, the OFCCP website contains a frequently asked question asked questions page dedicated to the religious exemption.

It should be noted that if OFCCP determines that a contractor is entitled to the religious exemption, the contractor is not completely exempt from following Executive Order 11246. As we explained in the previous slide, the Executive Order 11246 religious exemption does not

permit contractors to discriminate against applicants or employees based on race, color, sex, sexual orientation, gender identity, or national origin, even if due to a sincere religious belief.

So next, we're going to provide you with some additional information on this topic. And you'll see on the slide that we have OFCCP's web page that's dedicated to the religious exemption rule rescission there.

There's a link on the page to a blog post written by Director Yang. There's also a link to the rescission of the 2020 rule in the Federal Register. There are also some frequently asked questions there, as well as the notice of rescission of Directive 2018-03.

And with that, I'm going to turn it back over to our moderator to answer some questions that we've received.

SUMIT DASGUPTA:

Thank you, Marla. Uh, before we get those questions, I believe we may have, uh, Michelle Hodge on. Uh. Our deputy director on she may have some remarks.

MICHELLE HODGE:

Yes, thank you. I'm sorry for some of those technical difficulties I was having, but thank you, everyone, for attending today's webinar on the rescission of the 2020 religious exemption rule. As we discussed today, the rescission of the 2020 rule serves the Executive Order 11246 religious exemption and returns OFCCP to its long standing approach of aligning the application of the Executive Order 11246 religious exemption with Title VII case law as applied to the facts and circumstances of each situation.

OFCCP remains committed to protecting religious freedom in accordance with applicable law and will continue to provide compliance assistance on the religion, including issuing frequently asked questions, conducting webinars, and providing other compliance assistance requested by stakeholders. I now I think we are ready to take some questions from the chat.

SUMIT DASGUPTA:

So, at this time, we will turn it over to Jonide Corbin, Branch Chief of Regulatory and Legislative Development, and Anna Laura Bennett, Senior Attorney with the Civil Rights and

Labor Management Division of the Office of Solicitor to answer some questions that have come in through chat.

JONIDE CORBIN:

Thank you, Sumit, and thank you, Marla and Sarah, and thank you, everyone, for joining today. So some of the questions we received, one question is what steps has OFCCP taken to educate the public on the rescission of the 2020 religious exemption rule? So as we noted earlier in the webinar, OFCCP has a web page dedicated to educating contractors, stakeholders, and the general public about the rescission of the 2020 rule, and we circulated information in the chat.

We will continue to provide any needed compliance assistance on the related exemption, including issuing frequently asked questions, conducting webinars such as this one, and providing other compliance assistance requested by stakeholders. OFCCP will also announce any additional materials or webinars in the near future through our OFCCP e-mail alerts.

Another question we received is how can I sign up to participate in these educational events and opportunities. You may sign up for OFCCP e-mail alerts or upcoming events, and you may also submit questions or call our help desk and information on how to reach our help desk is available on the 'Contact Us tab of our home page, and we've just circulated that in the chat.

We've also received some questions about will these slides be available? Yes, we will be making these slides available on the webinars page of our website.

We had another question about our some of the more detailed information that we covered during the webinar, particularly in Marla's section. Is that available somewhere? And all of that information is largely available in the FAQs that are available on the website that we circulated earlier, the home page for the 2020 religious exemption rule decision.

So yes, you'll have this slide, and you'll also have that information if you read through the FAQ's. So thank you for those questions. And to kind of transition and give you some more information on this topic, I'm going to pass it over to Anna Laura Bennett from our solicitor's office.

ANNA LAURA BENNETT:

Great. Thank you very much, Jonide, and good afternoon everyone. As Jonide said, I'm Anna Laura Bennett from the Civil Rights and Labor Management Division of the Office of the Solicitor here at DOL. And I'll just address a couple of questions that have come in.

The first is, does rescinding the 2020 religious exemption rule affect OFCCP's guidelines on discrimination because of religion or national origin? And the answer is no. The rescission of the 2020 religious exemption rule effectively restores OCP's longstanding policy and practice, and it does not affect the implementation of the guidelines on discrimination because of religion or national origin.

And I see one more question. Uh, if OFCCP determines that a contractor is entitled to the religious exemption, is it completely exempt from following Executive Order 11246? The answer is no. Executive Order 11246 provides nondiscrimination protections for employees of federal contractors by clarifying that the religious exemption does not permit contractors to discriminate against applicants or employees based on race, color, sex, sexual orientation, gender identity, or national origin, even if due to a sincere religious belief.

SUMIT DASGUPTA:

And I don't see any other questions that have come in. OK. Well, uh, as always, uh, if you have questions after this session, feel free to contact us on our help desk toll-free, 1-800-397-6251. That should be on your screen. Now, as I said, if questions, you know, come to you next week or, you know, next month, you may also submit questions as we mentioned through the 'Contact Us' link that was also put into the chat, uh, on our website.

And with that, that concludes today's sessions. Thank you, and have a nice day.