



DIRECTIVE (DIR) 2018-03

Directives (DIRs) provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.

Effective Date: August 10, 2018

1. **SUBJECT:** Executive Order 11246 § 204(c), religious exemption.
2. **PURPOSE:** To incorporate recent developments in the law regarding religion-exercising organizations and individuals.
3. **REFERENCES:**
 - A. Executive Orders 11246 (Sept. 24, 1965), as amended; 13798 (May 4, 2017); 13831 (May 3, 2018);
 - B. 41 C.F.R. §§ 60-1.5(a)(5), 60-50.1 to 60-50.5; and
 - C. 48 C.F.R. §§ 22.807(b)(7); 52.222-26(b)(2).
4. **AFFECTED POLICY:** Described below.
5. **BACKGROUND:** The Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order (E.O.) 11246, as amended, Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended. Collectively, these laws prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. In addition, contractors and subcontractors are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations. These laws also require federal contractors and subcontractors to take affirmative steps to ensure equal employment opportunity in their employment processes. In addition, these laws require that federal contracting agencies include in all covered contracts, and that contractors include in their subcontracts, an equal opportunity clause. For definitions of the terms "government contract," "subcontract," "prime contractor," and "subcontractor," see 41 C.F.R. § 60-1.3 (E.O. 11246), 41 C.F.R. § 60-300.2 (VEVRAA), and 41 C.F.R. § 60-741.2 (Section 503). The authority to administer these laws, and to promulgate these regulations, rests solely with the Secretary of Labor.

Section 202 of E.O. 11246 does not apply to "a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." E.O. 11246 § 204(c). This exemption is codified in OFCCP's regulations, *see*

41 C.F.R. § 60-1.5(a)(5), and is part of the equal opportunity clause, *see* 48 C.F.R. §§ 22.807(b)(7), 52.222-26(b)(2).

OFCCP’s regulations at 41 C.F.R. §§ 60-50.1 to 50.5 “set forth the interpretations and guidelines of [OFCCP] regarding the implementation of Executive Order 11246 . . . for promoting and insuring equal employment opportunities for all persons employed or seeking employment with Government contractors and subcontractors or with contractors and subcontractors performing under federally assisting construction contracts, without regard to religion or national origin.” 41 C.F.R. § 60-50.1(a). These regulations also “clarify the obligations of employers with respect to accommodating to the religious observances and practices of employees and prospective employees.” *Id.* § 60-50.1(c).

Recent court decisions have addressed the broad freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the United States Constitution and federal law. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (government violates the Free Exercise clause when its decisions are based on hostility to religion or a religious viewpoint); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (government violates the Free Exercise clause when it conditions a generally available public benefit on an entity’s giving up its religious character, unless that condition withstands the strictest scrutiny); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations).

Recent Executive Orders have similarly reminded the federal government of its duty to protect religious exercise—and not to impede it. *See* E.O. 13831 § 1 (“The executive branch wants faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for grants, contracts, programs, and other Federal funding opportunities.”); E.O. 13798 § 1 (“It shall be the policy of the executive branch to vigorously enforce Federal law’s robust protections for religious freedom. The Founders envisioned a Nation in which religious voices and views were integral to a vibrant public square, and in which religious people and institutions were free to practice their faith without fear of discrimination or retaliation by the Federal Government. . . . Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government.”).

OFCCP has not yet addressed these legal developments in its regulations or formal guidance.¹

6. **POLICY**: In line with the longstanding constitutional requirement that government must permit individuals and organizations, in all but the most narrow circumstances, to participate in a government program “without having to disavow [their] religious character,”² OFCCP staff are instructed to take these legal developments into account in all their relevant activities, including when providing compliance assistance, processing

¹ This Directive supersedes any previous guidance that does not reflect these legal developments, for example, the section in OFCCP’s *Frequently Asked Questions: Sexual Orientation and Gender Identity* regarding “Religious Employers and Religious Exemption.” *See* https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html.

² *Trinity Lutheran*, 137 S. Ct. at 2022.

complaints, and enforcing the requirements of E.O. 11246. OFCCP staff should bear in mind that:

- They “cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices” and must “proceed in a manner neutral toward and tolerant of . . . religious beliefs.”³
- They cannot “condition the availability of [opportunities] upon a recipient’s willingness to surrender his [or her] religiously impelled status.”⁴
- “[A] federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act].”⁵
- They must permit “faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . [Federal] contracts.”⁶
- They must respect the right of “religious people and institutions . . . to practice their faith without fear of discrimination or retaliation by the Federal Government.”⁷

These instructions will remain in force in anticipation of an addition to the Department’s regulatory agenda followed by rulemaking informed by public comment.

7. **ATTACHMENTS:** None.



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³ *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

⁴ *Trinity Lutheran*, 137 S. Ct. at 2022 (brackets and ellipses omitted) (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (alterations omitted) (plurality opinion)); *see id.* at 2024 (requiring an entity “to renounce its religious character in order to participate in an otherwise generally available public benefit program . . . imposes a penalty on the free exercise of religion that must be subjected to the ‘most rigorous’ scrutiny” (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993))).

⁵ *Hobby Lobby*, 134 S. Ct. at 2775; *see* 42 U.S.C. §§ 2000bb *et seq.*

⁶ E.O. 13831 § 1.

⁷ E.O. 13798 § 1.