

**DEPARTMENT OF LABOR****Office of Federal Contract Compliance Programs****41 CFR Part 60-1**

RIN 1215-AB39

**Affirmative Action and Nondiscrimination Obligations of Government Contractors, Executive Order 11246, as amended; Exemption for Religious Entities**

**AGENCY:** Office of Federal Contract Compliance Programs, Employment Standards Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** The Office of Federal Contract Compliance Programs (OFCCP) is amending the regulations implementing Executive Order 11246, as amended, to incorporate the exemption for religious entities prescribed by Executive Order 13279. Executive Order 11246, as amended, prohibits Government contractors and subcontractors, and federally assisted construction contractors and subcontractors from discriminating in employment, and requires these contractors to take affirmative action to ensure that employees and applicants are treated without regard to race, color, religion, sex, or national origin. Section 4 of Executive Order 13279 amends Section 204 of Executive Order 11246, as amended, to exempt religious corporations, associations, educational institutions and societies from certain nondiscrimination requirements.

**EFFECTIVE DATES:** These regulations are effective October 30, 2003.

**FOR FURTHER INFORMATION CONTACT:** James I. Melvin, Director, Division of Policy, Planning and Program Development, OFCCP, Room C-3325, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone (202) 693-0102 (voice), (202) 693-1308 (TTY). Copies of this rule in alternative formats may be obtained by calling (202) 693-0102 (voice) or (202) 693-1308 (TTY). The alternative formats available are large print, electronic file on computer disk, and audiotape. The rule also is available on the Internet at <http://www.dol.gov/dol/esa>.

**SUPPLEMENTARY INFORMATION:****Background**

Executive Order 11246, as amended, prohibits employment discrimination and establishes affirmative action requirements for nonexempt Government contractors and subcontractors, and federally assisted

construction contractors and subcontractors. Section 202 of Executive Order 11246, as amended, requires that every non-exempt contract and subcontract include an equal opportunity clause, which specifies the nondiscrimination and affirmative action obligations each contractor or subcontractor assumes as a condition of its Government contract or subcontract. Each non-exempt contractor and subcontractor agrees, as a condition of its Government contract, not to discriminate on the basis of race, color, religion, sex, or national origin and to take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

On December 12, 2002, President George W. Bush issued Executive Order 13279, "Equal Protection of the Laws for Faith-Based and Community Organizations," reprinted at 67 FR 77141 (December 16, 2002). Section 4 of Executive Order 13279 amends Section 204 of Executive Order 11246, as amended, by adding an exemption for religious corporations, associations, educational institutions and societies. The amendment to Section 204 of Executive Order 11246, as amended, in pertinent part, reads:

(c) Section 202 of this Order shall 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. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

The exemption for religious entities added to Executive Order 11246, as amended, is modeled on the exemption for religious institutions and organizations under Title VII of the Civil Rights Act of 1964. Section 702 of the Civil Rights Act provides that:

This subchapter shall not apply to \* \* \* 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. 42 U.S.C. 2000e-1(a).

**Revised Section***Section 60-1.5 Exemptions*

Today's final rule amends the regulation at 41 CFR 60-1.5(a) by

adding a new paragraph (5) that sets forth the text of the amendment to Section 204 of Executive Order 11246, as amended, which provides the exemption for religious corporations, associations, educational institutions and societies. In the final rule, the text of the amendment to Section 204 has been modified slightly; for purposes of clarity "Executive Order 11246, as amended" has been substituted for "this Order." The existing paragraphs (5) and (6) in § 60-1.5(a) have been redesignated as paragraphs (6) and (7) respectively, in the final rule.

**Regulatory Procedures***Publication in Final*

The Department of Labor has determined that this rulemaking need not be published as a proposed rule, as generally required by the Administrative Procedure Act (APA), 5 U.S.C. 553. Rulemaking is not required to implement the new exemption for religious entities. The exemption for religious corporations, associations, educational institutions, and societies was effected by the President's amendment to Section 204 of Executive Order 11246, as amended, which was published in the **Federal Register**. This rule simply incorporates the amendment to Section 204 in the regulation at 41 CFR 60-1.5(a) so as to provide additional notice of this change in coverage under Executive Order 11246, as amended. The amendment to the rule directly tracks the President's amendment to that Order, and the Department of Labor may not, in response to public comment, change or decline to implement this amendment. Consequently, there is good cause for finding that the notice and public comment procedure is unnecessary and contrary to the public interest, pursuant to Section 553(b)(B) of the APA.

*Executive Order 12866*

The Office of Management and Budget (OMB) has reviewed this rule under Executive Order 12866, *Regulatory Planning and Review*. OMB has determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order. However, this rule is not an economically significant regulatory action under the Order, and therefore, no regulatory impact analysis is has been prepared.

*Regulatory Flexibility Act*

Because no notice of proposed rulemaking is required for the rule under 5 U.S.C. 553(b)(B), the requirements of the Regulatory

Flexibility Act, pertaining to regulatory flexibility analysis, do not apply to this rule. In any event, the rule will not have a significant economic impact on a substantial number of small business entities.

#### *Unfunded Mandates Reform*

For purposes of the Unfunded Mandates Reform Act of 1995, as well as Executive Order 12875, this rule does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, or by the private sector.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act does not apply because this rule does not contain any information collection requirements that require the approval of the Office of Management and Budget.

#### *Executive Order 13132 (Federalism)*

This final rule has been reviewed in accordance with Executive Order 13132 regarding Federalism. This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the

requirements of Section 6 of Executive Order 13132 do not apply to this rule.

#### *Congressional Review Act*

This final rule is not a major rule for purposes of the Congressional Review Act.

#### **List of Subjects in 41 CFR Part 60-1**

Administrative practice and procedure, Equal employment opportunity, Government contracts, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 41 CFR Part 60-1 is amended as set forth below:

Signed at Washington, DC, this 22 day of September 2003.

**Elaine L. Chao,**

*Secretary of Labor.*

**Victoria A. Lipnic,**

*Assistant Secretary for Employment Standards.*

**Charles E. James, Sr.,**

*Deputy Assistant Secretary for Federal Contract Compliance.*

#### **PART 60-1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS**

■ 1. The authority citation for part 60-1 is revised to read as follows:

**Authority:** Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964-1965 Comp., p. 339, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966-1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230 and E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258.

■ 2. In § 60-1.5(a), paragraphs (a)(5) and (a)(6) are redesignated as paragraphs (a)(6) and (a)(7) respectively, and a new paragraph (a)(5) is added to read as follows:

#### **§ 60-1.5 Exemptions**

(a) \* \* \*

(5) *Contracts with religious entities.* Section 202 of Executive Order 11246, as amended, shall 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. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

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