Annual Review
Labor & Employment
Supplementary Materials

Table of Contents

U.S. Equal Employment Opportunity Commission

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on Dec. 16, 2020

INTRODUCTION

- *All EEOC materials related to COVID-19 are collected at www.eeoc.gov/coronavirus.*
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. Note: Other federal laws, as well as state or local laws, may provide employees with additional protections.
- Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act. Basic background information about the ADA and the Rehabilitation Act is available on EEOC's disability page.
- The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers

from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.** Many common workplace inquiries about the COVID-19 pandemic are addressed in the CDC publication "General Business Frequently Asked Questions."

- The EEOC has provided guidance (a publication entitled Pandemic Preparedness in the Workplace and the Americans With Disabilities Act [PDF version]) ("Pandemic Preparedness"), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, which was written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic. It has been updated as of March 19, 2020 to address examples and information regarding COVID-19; **the new 2020 information appears in bold and is marked with an asterisk**.
- On March 27, 2020 the EEOC provided a webinar ("3/27/20 Webinar") which was recorded and transcribed and is available at www.eeoc.gov/coronavirus. The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic publication includes a separate section that answers common employer questions about what to do after a pandemic has been declared. Applying these principles to the COVID-19 pandemic, the following may be useful:

A. Disability-Related Inquiries and Medical Exams

The ADA has restrictions on when and how much medical information an employer may obtain from any applicant or employee. Prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category. Once an employee begins work, any disability-related inquiries or medical exams must be job related and consistent with business necessity.

A.1. How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic? *(3/17/20)*

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

A.2. When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples, or may it ask about any symptoms identified by public health authorities as associated with COVID-19? *(4/9/20)*

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

A.3. When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic? *(3/17/20)*

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

A.4. Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19? *(3/17/20)*

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

A.5. When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? *(3/17/20)*

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace? *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review information from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to

transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent possible–that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

Note: Question A.6 and A.8 address screening of employees generally. See Question A.9 regarding decisions to screen individual employees.

A.7. CDC said in its Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? *(6/17/20)*

No. An antibody test constitutes a medical examination under the ADA. In light of CDC's Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are permissible under the ADA.

The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations.

A.8. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 1)*

Yes. Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a current list of symptoms.

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions.

A.9. May a manager ask only one employee—as opposed to asking all employees—questions designed to determine if she has COVID-19, or require that this employee alone have her temperature taken or undergo other screening or testing? *(9/8/20; adapted from 3/27/20 Webinar Question 3)*

If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee, such as a display of COVID-19 symptoms. In addition, the ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate.

A.10. May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 4)*

No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19.

A.11. What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 2)*

Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace, and that these steps are consistent with health screening recommendations from CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. The ADA prohibits such broad disclosures. Alternatively, if an employee requests reasonable accommodation with respect to screening, the usual accommodation process should be followed; this is discussed in Question G.7.

A.12. During the COVID-19 pandemic, may an employer request information from employees who work on-site, whether regularly or occasionally, who report feeling ill or who call in sick? *(9/8/20; adapted from Pandemic Preparedness Question 6)*

Due to the COVID-19 pandemic, at this time employers may ask employees who work on-site, whether regularly or occasionally, and report feeling ill or who call in sick, questions about their symptoms as part of workplace screening for COVID-19.

A.13. May an employer ask an employee why he or she has been absent from work? *(9/8/20; adapted from Pandemic Preparedness Question 15)*

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

A.14. When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled? *(9/8/20; adapted from Pandemic Preparedness Question 8)*

No. Questions about where a person traveled would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.

B. Confidentiality of Medical Information

With limited exceptions, the ADA requires employers to keep confidential any medical information they learn about any applicant or employee. Medical information includes not only a diagnosis or treatments, but also the fact that an individual has requested or is receiving a reasonable accommodation.

B.1. May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? *(4/9/20)*

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

B.2. If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? *(4/9/20)*

Yes. The employer needs to maintain the confidentiality of this information.

B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? *(4/9/20)*

Yes.

B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? *(4/9/20)*

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

B.5. Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do? *(9/8/20; adapted from 3/27/20 Webinar Question 5)*

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. For example, using a generic descriptor, such as telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee's identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

B.6. An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA

confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor? *(9/8/20; adapted from 3/27/20 Webinar Question 6)*

No. ADA confidentiality does not prevent this employee from communicating to his supervisor about a coworker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a coworker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

B.7. An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? *(9/8/20; adapted from 3/27/20 Webinar Question 7)*

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure that the employee is teleworking without saying why is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

B.8. Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? *(9/8/20; adapted from 3/27/20 Webinar Question 9)*

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

C. Hiring and Onboarding

Under the ADA, prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category.

C.1. If an employer is hiring, may it screen applicants for symptoms of COVID-19? *(3/18/20)*

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

C.2. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam? *(3/18/20)*

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

C.3. May an employer delay the start date of an applicantwho has COVID-19 or symptoms associated with it? *(3/18/20)*

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

C.4. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it? *(3/18/20)*

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

C.5. May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? *(4/9/20)*

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a

job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

D. Reasonable Accommodation

Under the ADA, reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship, meaning significant difficulty or expense. An employer has the discretion to choose among effective accommodations. Where a requested accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship. In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) website for types of accommodations, www.askjan.org. JAN's materials specific to COVID-19 are at https://askjan.org/topics/COVID-19.cfm.

D.1. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? *(4/9/20)*

There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

D.2. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? *(4/9/20)*

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

D.3. In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends? *(4/9/20)*

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

D.4. What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation? *(4/9/20)*

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue

hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

D.5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

D.6. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. Possible questions for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties).

D.7. If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation? *(4/17/20)*

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" (discussed in D.5 and D.6., above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process—and devise end

dates for the accommodation—to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This could also apply to employees who have disabilities exacerbated by the pandemic.

Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

D.8. May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace? *(4/17/20; updated 9/8/20 to address stakeholder questions)*

Yes. Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. This is discussed in greater detail in Question G.6. If advance requests are received, employers may begin the "interactive process" – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? *(4/17/20)*

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense." As described in the two questions that follow, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? *(4/17/20)*

An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

D.11. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? *(4/17/20)*

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time—when considering other expenses—and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

D.12. Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as "critical infrastructure workers" or "essential critical workers" by the CDC? *(4/23/20)*

Yes. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

D.13. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? *(6/11/20)*

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

D.14. When an employer requires some or all of its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA or the Rehabilitation Act that it provides to this individual in the workplace? *(9/8/20; adapted from 3/27/20 Webinar Question 20)*

If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting. For example, an employee may already have certain things in their home to

enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

Also, the undue hardship considerations might be different when evaluating a request for accommodation when teleworking rather than working in the workplace. A reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering circumstances, such as the place where it is needed and the reason for telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment.

As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative and flexible about what can be done when an employee needs a reasonable accommodation for telework at home. If possible, providing interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.

D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? *(9/8/20; adapted from 3/27/20 Webinar Question 21)*

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the

employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

D.16. Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request? *(9/8/20; adapted from 3/27/20 Webinar Question 22)*

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.

D.17. Might the pandemic result in excusable delays during the interactive process? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Yes. The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although

employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

D.18. Federal agencies are required to have timelines in their written reasonable accommodation procedures governing how quickly they will process requests and provide reasonable accommodations. What happens if circumstances created by the pandemic prevent an agency from meeting this timeline? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Situations created by the current COVID-19 crisis may constitute an "extenuating circumstance"—something beyond a Federal agency's control—that may justify exceeding the normal timeline that an agency has adopted in its internal reasonable accommodation procedures.

E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

E.1. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic? *(4/9/20)*

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment policy tips for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies;

developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):

- report;
- checklists for employers who want to reduce and address harassment in the workplace; and
- chart of risk factors that lead to harassment and appropriate responses.

E.2. Are there steps an employer should take to address possible harassment and discrimination against coworkers when it re-opens the workplace? *(4/17/20)*

Yes. An employer may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

E.3. How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian? *(6/11/20)*

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools—regardless of whether employees are in the workplace, teleworking, or on leave—and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be instructed to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated,

and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

E.4. An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take? *(6/11/20)*

The employer should take the same actions it would take if the employee was in the workplace. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

F. Furloughs and Layoffs

F.1. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? *(4/9/20)*

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's technical assistance document on severance agreements.

F.2. What are additional EEO considerations in planning furloughs or layoffs? *(9/8/20; adapted from 3/27/20 Webinar Question 13)*

The laws enforced by the EEOC prohibit covered employers from selecting people for furlough or layoff because of that individual's race, color, religion, national origin, sex, age, disability, protected genetic information, or in retaliation for protected EEO activity.

G. Return to Work

G.1. As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace? *(4/17/20)*

The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety.

Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) **of all those entering the workplace**. Similarly, the CDC recently posted information on return by certain types of critical workers.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

G.2. An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests? *(4/17/20)*

An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).

However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

G.3. What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions that CDC says may put her at higher risk for severe illness from COVID-19? *(5/5/20)*

An employee—or a third party, such as an employee's doctor—must let the employer know that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, she may do so.

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.

G.4. The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? *(5/7/20)*

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee—or take any other adverse action—*solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under 29 C.F.R. section 1630.2(r) (regulation addressing direct threat to health or safety of self or others). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability—not the disability in general—using the most current medical knowledge and/or on the best available objective evidence. The ADA

regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

G.5. What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? *(5/5/20)*

Accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition,

accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

G.6. As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements? *(6/11/20)*

Yes. The ADA and the Rehabilitation Act permit employers to make information available in advance to **all** employees about who to contact—if they wish—to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the interactive process. An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and the May 29, 2020 CDC guidance that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

G.7. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? *(6/11/20)*

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under Title VII.

H. Age

H.1. The CDC has explained that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws? *(6/11/20)*

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.

H.2. If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age? *(9/8/20; adapted from 3/27/20 Webinar Question 12)*

No. If an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

I. Caregivers/Family Responsibilities

I.1. If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations? *(6/11/20)*

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

J. Pregnancy

J.1. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy? *(6/11/20)*

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to

single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

J.2. Is there a right to accommodation based on pregnancy during the pandemic? *(6/11/20)*

There are two federal employment discrimination laws that may trigger accommodation for employees based on pregnancy.

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

K. Vaccinations

The availability of COVID-19 vaccinations may raise questions about the applicablilty of various equal employment opportunity (EEO) laws, including the ADA and the Rehabilitation Act, GINA, and Title VII, including the Pregnancy Discrimination Act (see Section J, EEO rights relating to pregnancy). The EEO laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities' guidelines and suggestions.

ADA and Vaccinations

K.1. For any COVID-19 vaccine that has been approved or authorized by the Food and Drug Administration (FDA), is the administration of a COVID-19 vaccine to an employee

by an employer (or by a third party with whom the employer contracts to administer a vaccine) a "medical examination" for purposes of the ADA? *(12/16/20)*

No. The vaccination itself is not a medical examination. As the Commission explained in guidance on disability-related inquiries and medical examinations, a medical examination is "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health." Examples include "vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs." If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination.

Although the administration of a vaccination is not a medical examination, pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions it asks employees are "job-related and consistent with business necessity." See Question K.2.

K.2. According to the CDC, health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination. If the employer requires an employee to receive the vaccination from the employer (or a third party with whom the employer contracts to administer a vaccine) and asks these screening questions, are these questions subject to the ADA standards for disability-related inquiries? *(12/16/20)*

Yes. Pre-vaccination medical screening questions are likely to elicit information about a disability. This means that such questions, if asked by the employer or a contractor on the employer's behalf, are "disability-related" under the ADA. Thus, if the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others. See Question K.5. below for a discussion of direct threat.

By contrast, there are two circumstances in which disability-related screening questions can be asked without needing to satisfy the "job-related and consistent with business necessity" requirement. First, if an employer has offered a vaccination to employees on a voluntary basis (i.e. employees choose whether to be vaccinated), the ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary. 42 U.S.C. 12112(d)(4)(B); 29 C.F.R. 1630.14(d). If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions. Second, if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions.

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.

K.3. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry? *(12/16/20)*

No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity." If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

ADA and Title VII Issues Regarding Mandatory Vaccinations

K.4. Where can employers learn more about Emergency Use Authorizations (EUA) of COVID-19 vaccines? *(12/16/20)*

Some COVID-19 vaccines may only be available to the public for the foreseeable future under EUA granted by the FDA, which is different than approval under FDA vaccine licensure. The FDA has an obligation to:

> [E]nsure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product.

The FDA says that this information is typically conveyed in a patient fact sheet that is provided at the time of the vaccine administration and that it posts the fact sheets on its website. More information about EUA vaccines is available on the FDA's EUA page.

K.5. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability? *(12/16/20)*

The ADA allows an employer to have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r). Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer's policies. *See also* *Section J, EEO rights relating to pregnancy*.

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. In discussing accommodation requests, employers and employees also may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, www.askjan.org. JAN's materials specific to COVID-19 are at https://askjan.org/topics/COVID-19.cfm.

Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but as explained further in Question K.7., there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable Occupational Safety and Health Administration standards and guidance. Employers can find OSHA COVID-specific resources at: www.osha.gov/SLTC/covid-19/.

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for requesting an accommodation.

K.6. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief? *(12/16/20)*

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined "undue hardship" under Title VII as having more than a *de minimis* cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief? *(12/16/20)*

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

Title II of the Genetic Information Nondiscrimination Act (GINA) and Vaccinations

K.8. Is Title II of GINA implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination? *(12/16/20)*

No. Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of "genetic information" as defined by the statute. This includes vaccinations that use messenger RNA (mRNA) technology, which will be discussed more below. As noted in Question K.9. however, if administration of the vaccine requires pre-screening questions that ask about genetic information, the inquiries seeking genetic information, such as family members' medical histories, may violate GINA.

Under Title II of GINA, employers may not (1) use genetic information to make decisions related to the terms, conditions, and privileges of employment, (2) acquire genetic information except in six narrow circumstances, or (3) disclose genetic information except in six narrow circumstances.

Certain COVID-19 vaccines use mRNA technology. This raises questions about genetics and, specifically, about whether such vaccines modify a recipient's genetic makeup and, therefore, whether requiring an employee to get the vaccine as a condition of employment is an unlawful use of genetic information. The CDC has explained that the mRNA COVID-19 vaccines "do not interact with our DNA in any way" and "mRNA never enters the nucleus of the cell, which is where our DNA (genetic material) is kept." (See https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html for a detailed discussion about how mRNA vaccines work). Thus, requiring employees to get the vaccine, whether it uses mRNA technology or not, does not violate GINA's prohibitions on using, acquiring, or disclosing genetic information.

K.9. Does asking an employee the pre-vaccination screening questions before administering a COVID-19 vaccine implicate Title II of GINA? *(12/16/20)*

Pre-vaccination medical screening questions are likely to elicit information about disability, as discussed in Question K.2., and may elicit information about genetic information, such as questions regarding the immune systems of family members. It is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations.

GINA defines "genetic information" to mean:

- Information about an individual's genetic tests;
- Information about the genetic tests of a family member;
- Information about the manifestation of disease or disorder in a family member (i.e., family medical history);
- Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by the an individual or a family member of the individual; and
- Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

29 C.F.R. § 1635.3(c). If the pre-vaccination questions do *not* include any questions about genetic information (including family medical history), then asking them does not implicate GINA. However, if the pre-vaccination questions *do* include questions about genetic information, then employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves.

GINA does not prohibit an individual employee's own health care provider from asking questions about genetic information, but it does prohibit an employer or a doctor working for the employer from asking questions about genetic information. If an employer requires employees to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA. *See* 29 CFR 1635.8(b)(1)(i) for model language that can be used for this warning.

Families First Coronavirus Response Act: Questions and Answers

As provided under the legislation, the U.S. Department of Labor will be issuing implementing regulations. Additionally, as warranted, the Department will continue to provide compliance assistance to employers and employees on their responsibilities and rights under the FFCRA.

Definitions

"Paid sick leave" – means paid leave under the Emergency Paid Sick Leave Act.

"Expanded family and medical leave" – means paid leave under the Emergency Family and Medical Leave Expansion Act.

Questions & Answers By Category

Expand All | Collapse All

Definitions

- Eligibility
- Coverage
- Application
- Enforcement
- Return to School

Questions & Answers By Number

1. **What is the effective date of the Families First Coronavirus Response Act (FFCRA), which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act?**
   The FFCRA's paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020.

2. **As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave?**
   You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

   Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

   In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of paid sick leave under the Emergency Paid Sick Leave Act and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

3. **If I am a private sector employer and have 500 or more employees, do the Acts apply to me?**

No. Private sector employers are only required to comply with the Acts if they have fewer than 500 employees.[1]

4. **If providing child care-related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?**
   To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

   You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.

5. **How do I count hours worked by a part-time employee for purposes of paid sick leave or expanded family and medical leave?**A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.
   If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

6. **When calculating pay due to employees, must overtime hours be included?**
   Yes. The Emergency Family and Medical Leave Expansion Act requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.

   However, the Emergency Paid Sick Leave Act requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

   If the employee's schedule varies from week to week, please see the answer to Question 5, because the calculation of hours for a full-time employee with a varying schedule is the same as that for a part-time employee.

   Please keep in mind the daily and aggregate caps placed on any pay for paid sick leave and expanded family and medical leave as described in the answer to Question 7.

   Please note that pay does not need to include a premium for overtime hours under either the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act.

7. **As an employee, how much will I be paid while taking paid sick leave or expanded family and medical leave under the FFCRA?**
   It depends on your normal schedule as well as why you are taking leave.

If you are taking paid sick leave because you are unable to work or telework due to a need for leave because you (1) are subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and are seeking medical diagnosis, you will receive for each applicable hour the greater of:

- your regular rate of pay,
- the federal minimum wage in effect under the FLSA, or
- the applicable State or local minimum wage.

In these circumstances, you are entitled to a maximum of $511 per day, or $5,110 total over the entire paid sick leave period.

If you are taking paid sick leave because you are: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services, you are entitled to compensation at 2/3 of the greater of the amounts above.

Under these circumstances, you are subject to a maximum of $200 per day, or $2,000 over the entire two week period.

If you are taking expanded family and medical leave, you may take paid sick leave for the first two weeks of that leave period, or you may substitute any accrued vacation leave, personal leave, or medical or sick leave you have under your employer's policy. For the following ten weeks, you will be paid for your leave at an amount no less than 2/3 of your regular rate of pay for the hours you would be normally scheduled to work. If you take paid sick leave during the first two weeks of unpaid expanded family and medical leave, you will not receive more than $200 per day or $12,000 for the twelve weeks that include both paid sick leave and expanded family and medical leave when you are on leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. If you take employer-provided accrued leave during those first two weeks, you are entitled to the full amount for such accrued leave, even if that is greater than $200 per day.

To calculate the number of hours for which you are entitled to paid leave, please see the answers to Questions 5-6 that are provided in this guidance.

8. **What is my regular rate of pay for purposes of the FFCRA?**
   For purposes of the FFCRA, the regular rate of pay used to calculate your paid leave is the average of your regular rate over a period of up to six months prior to the date on which you take leave.[2] If you have not worked for your current employer for six months, the regular rate used to calculate your paid leave is the average of your regular rate of pay for each week you have worked for your current employer.

   If you are paid with commissions, tips, or piece rates, these amounts will be incorporated into the above calculation to the same extent they are included in the calculation of the regular rate under the FLSA.

   You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

9. **May I take 80 hours of paid sick leave for my self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act?**
   No. You may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which you receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

10. **If I am home with my child because his or her school or place of care is closed, or child care provider is unavailable, do I get paid sick leave, expanded family and medical leave, or both—how do they interact?**
    You may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. You may take both paid sick leave and expanded family and medical leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless you elect to use existing vacation, personal, or medical or sick leave under your employer's policy. After the first ten workdays have elapsed, you will receive 2/3 of your regular rate of pay for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

    Please note that you can only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

11. **Can my employer deny me paid sick leave if my employer gave me paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect?**
    No. The Emergency Paid Sick Leave Act imposes a new leave requirement on employers that is effective beginning on April 1, 2020.

12. **Is all leave under the FMLA now paid leave?**
    No. The only type of family and medical leave that is paid leave is expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act when such leave exceeds ten days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

13. **Are the paid sick leave and expanded family and medical leave requirements retroactive?**
    No.

14. **How do I know whether I have "been employed for at least 30 calendar days by the employer" for purposes of expanded family and medical leave?**
    You are considered to have been employed by your employer for at least 30 calendar days if your employer had you on its payroll for the 30 calendar days immediately prior to the day your leave would begin. For example, if you want to take leave on April 1, 2020, you would need to have been on your employer's payroll as of March 2, 2020.

    If you have been working for a company as a temporary employee, and the company subsequently hires you on a full-time basis, you may count any days you previously worked as a temporary employee toward this 30-day eligibility period.

15. **What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?**
Regardless of whether you grant or deny a request for paid sick leave or expanded family and medical leave, you must document the following:

- The name of your employee requesting leave;
- The date(s) for which leave is requested;
- The reason for leave; and
- A statement from the employee that he or she is unable to work because of the reason.

If your employee requests leave because he or she is subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally document the name of the government entity that issued the order. If your employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally document the name of the health care provider who gave advice.

If your employee requests leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, you must also document:

- The name of the child being cared for;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement from the employee that no other suitable person is available to care for the child.

Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

16. **What documents do I need to give my employer to get paid sick leave or expanded family and medical leave?** ***[Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]***

When requesting paid sick leave or expanded family and medical leave, you must provide your employer either orally or in writing the following information as soon as practicable:

- Your name;
- The date(s) for which you request leave;
- The reason for leave; and
- A statement that you are unable to work because of the above reason.

If you request leave because you are subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally provide the name of the government entity that issued the order. If you request

leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally provide the name of the health care provider who gave advice.

If you request leave to care for your child whose school or place of care is closed, or child care provider is unavailable, you must also provide:

- The name of your child;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement that no other suitable person is available to care for your child.

In addition to the above information, you must also provide to your employer written documentation in support of your paid sick leave as specified in applicable IRS forms, instructions, and information.

Please also note that all existing certification requirements under the FMLA remain in effect if you are taking leave for one of the existing qualifying reasons under the FMLA. For example, if you are taking leave beyond the two weeks of emergency paid sick leave because your medical condition for COVID-19-related reasons rises to the level of a serious health condition, you must continue to provide medical certifications under the FMLA if required by your employer.

17. **When am I able to telework under the FFCRA?**
    You may telework when your employer permits or allows you to perform work while you are at home or at a location other than your normal workplace. Telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA.

18. **What does it mean to be unable to work, including telework for COVID-19 related reasons?**
    You are unable to work if your employer has work for you and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents you from being able to perform that work, either under normal circumstances at your normal worksite or by means of telework.

    If you and your employer agree that you will work your normal number of hours, but outside of your normally scheduled hours (for instance early in the morning or late at night), then you are able to work and leave is not necessary unless a COVID-19 qualifying reason prevents you from working that schedule.

19. **If I am or become unable to telework, am I entitled to paid sick leave or expanded family and medical leave?**
    If your employer permits teleworking—for example, allows you to perform certain tasks or work a certain number of hours from home or at a location other than your normal workplace—and you are unable to perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, then you are entitled to take paid sick leave.

    Similarly, if you are unable to perform those teleworking tasks or work the required teleworking hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, then you are entitled to take expanded family and medical leave. Of course, to the extent you are able to telework while caring for your child, paid sick leave and expanded family and medical leave is not available.

20. **May I take my paid sick leave or expanded family and medical leave intermittently while teleworking?**

Yes, if your employer allows it and if you are unable to telework your normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, you and your employer may agree that you may take paid sick leave intermittently while teleworking. Similarly, if you are prevented from teleworking your normal schedule of hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, you and your employer may agree that you can take expanded family medical leave intermittently while teleworking.

You may take intermittent leave in any increment, provided that you and your employer agree. For example, if you agree on a 90-minute increment, you could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

The Department encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.

21. **May I take my paid sick leave intermittently while working at my usual worksite (as opposed to teleworking)?** ***[Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]***

It depends on why you are taking paid sick leave and whether your employer agrees. Unless you are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because:

- You are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless you are teleworking, once you begin taking paid sick leave for one or more of these qualifying reasons, you must continue to take paid sick leave each day until you either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because if you are sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others.

If you no longer have a qualifying reason for taking paid sick leave before you exhaust your paid sick leave, you may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

In contrast, if you and your employer agree, you may take paid sick leave intermittently if you are taking paid sick leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. For example, if your child's school or place of care is closed, or child care provider is unavailable, for an entire week due to COVID-19 related reasons and your employer and you agree, you may

take expanded family and medical leave intermittently on Monday, Wednesday, and Friday, but work Tuesday and Thursday, while another family member watches your child.

The Department notes that if your child's school, place of care, or child care provider were closed or unavailable on only Monday, Wednesday, and Friday, as opposed to the entire week, then you would not need to take intermittent leave if working on the schedule in the example above. This is because each day of closure or unavailability is a separate reason for leave, and thus you would not need to take leave for a single reason intermittently. As such, you would not need employer permission to take leave on just the days of closure or unavailability. See FAQ 98 and 99. However, you would still need to provide your employer with notice and documentation as soon as practicable. See FAQ 16.

The Department encourages employers and employees to collaborate to achieve maximum flexibility. Therefore, if employers and employees agree to intermittent leave on less than a full work day for employees taking paid sick leave to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons, the Department is supportive of such voluntary arrangements.

22. **May I take my expanded family and medical leave intermittently while my child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, if I am not teleworking?** ***[Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]***
    Yes, but only with your employer's permission. Intermittent expanded family and medical leave should be permitted only when you and your employer agree upon such a schedule. For example, if your child's school or place of care is closed, or child care provider is unavailable, for an entire week due to COVID-19 related reasons and your employer and you agree, you may take expanded family and medical leave intermittently on Monday, Wednesday, and Friday, but work Tuesday and Thursday, while another family member watches your child.

    The Department notes that if your child's school, place of care, or child care provider were closed or unavailable on only Monday, Wednesday, and Friday, as opposed to the entire week, then you would not need to take intermittent leave if working on the schedule in the example above. This is because each day of closure or unavailability is a separate reason for leave, and thus you would not need to take leave for a single reason intermittently. As such, you would not need employer permission to take paid leave on just the days of closure or unavailability. See FAQ 98 and 99. However, you would still need to provide your employer with notice and documentation as soon as practicable. See FAQ 16. The Department encourages employers and employees to collaborate to achieve flexibility. Therefore, if employers and employees agree to intermittent leave on a day-by-day basis, the Department supports such voluntary arrangements.

23. **If my employer closed my worksite before April 1, 2020 (the effective date of the FFCRA), can I still get paid sick leave or expanded family and medical leave?**
    No. If, prior to the FFCRA's effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive. You should contact your State

workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, please refer to https://www.careeronestop.org/LocalHelp/service-locator.aspx.

It should be noted, however, that if your employer is paying you pursuant to a paid leave policy or State or local requirements, you are not eligible for unemployment insurance.

24. **If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but before I go out on leave, can I still get paid sick leave and/or expanded family and medical leave?**
No. If your employer closes after the FFCRA's effective date (even if you requested leave prior to the closure), you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, please refer to https://www.careeronestop.org/LocalHelp/service-locator.aspx.

25. **If my employer closes my worksite while I am on paid sick leave or expanded family and medical leave, what happens?**
If your employer closes while you are on paid sick leave or expanded family and medical leave, your employer must pay for any paid sick leave or expanded family and medical leave you used before the employer closed. As of the date your employer closes your worksite, you are no longer entitled to paid sick leave or expanded family and medical leave, but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because the employer was required to close pursuant to a Federal, State or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, please refer to https://www.careeronestop.org/LocalHelp/service-locator.aspx.

26. **If my employer is open, but furloughs me on or after April 1, 2020 (the effective date of the FFCRA), can I receive paid sick leave or expanded family and medical leave?**
No. If your employer furloughs you because it does not have enough work or business for you, you are not entitled to then take paid sick leave or expanded family and medical leave. However, you may be eligible for unemployment insurance benefits. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, please refer to https://www.careeronestop.org/LocalHelp/service-locator.aspx.

27. **If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but tells me that it will reopen at some time in the future, can I receive paid sick leave or expanded family and medical leave?**
No, not while your worksite is closed. If your employer closes your worksite, even for a short period of time, you are not entitled to take paid sick leave or expanded family and medical leave. However, you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State, or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, please refer to

https://www.careeronestop.org/LocalHelp/service-locator.aspx. If your employer reopens and you resume work, you would then be eligible for paid sick leave or expanded family and medical leave as warranted.

28. **If my employer reduces my scheduled work hours, can I use paid sick leave or expanded family and medical leave for the hours that I am no longer scheduled to work?**
No. If your employer reduces your work hours because it does not have work for you to perform, you may not use paid sick leave or expanded family and medical leave for the hours that you are no longer scheduled to work. This is because you are not prevented from working those hours due to a COVID-19 qualifying reason, even if your reduction in hours was somehow related to COVID-19.

    You may, however, take paid sick leave or expanded family and medical leave if a COVID-19 qualifying reason prevents you from working your full schedule. If you do, the amount of leave to which you are entitled is computed based on your work schedule before it was reduced (see Question 5).

29. **May I collect unemployment insurance benefits for time in which I receive pay for paid sick leave and/or expanded family and medical leave?**
No. If your employer provides you paid sick leave or expanded family and medical leave, you are not eligible for unemployment insurance. However, each State has its own unique set of rules; and DOL recently clarified additional flexibility to the States (UIPL 20-10) to extend partial unemployment benefits to workers whose hours or pay have been reduced. Therefore, individuals should contact their State workforce agency or State unemployment insurance office for specific questions about eligibility. For additional information, please refer to https://www.careeronestop.org/LocalHelp/service-locator.aspx.

30. **If I elect to take paid sick leave or expanded family and medical leave, must my employer continue my health coverage? If I remain on leave beyond the maximum period of expanded family and medical leave, do I have a right to keep my health coverage?**
If your employer provides group health coverage that you've elected, you are entitled to continued group health coverage during your expanded family and medical leave on the same terms as if you continued to work. If you are enrolled in family coverage, your employer must maintain coverage during your expanded family and medical leave. You generally must continue to make any normal contributions to the cost of your health coverage. See WHD Fact Sheet 28A: https://www.dol.gov/agencies/whd/fact-sheets/28a-fmla-employee-protections.

    If you do not return to work at the end of your expanded family and medical leave, check with your employer to determine whether you are eligible to keep your health coverage on the same terms (including contribution rates). If you are no longer eligible, you may be able to continue your coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). COBRA, which generally applies to employers with 20 or more employees, allows you and your family to continue the same group health coverage at group rates. Your share of that cost may be higher than what you were paying before but may be lower than what you would pay for private individual health insurance coverage. (If your employer has fewer than 20 employees, you may be eligible to continue your health insurance under State laws that are similar to COBRA. These laws are sometimes referred to as "mini COBRA" and vary from State to State.) Contact the Employee Benefits Security Administration at

https://www.dol.gov/agencies/ebsa/workers-and-families/changing-jobs-and-job-loss to learn about health and retirement benefit protections for dislocated workers.

If you elect to take paid sick leave, your employer must continue your health coverage. Under the Health Insurance Portability and Accountability Act (HIPAA), an employer cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work (including whether an individual is continuously employed), unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work.

31. **As an employee, may I use my employer's preexisting leave entitlements and my FFCRA paid sick leave and expanded family and medical leave concurrently for the same hours?**
    During the first two weeks of unpaid expanded family and medical leave, you may not simultaneously take paid sick leave under the EPSLA and preexisting paid leave, unless your employer agrees to allow you to supplement the amount you receive from paid sick leave with your preexisting paid leave, up to your normal earnings. After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLEA, however, you may elect —or be required by your employer—to take your remaining expanded family and medical leave at the same time as any existing paid leave that, under your employer's policies, would be available to you in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if you are not ill.

    If you are required to take your existing leave concurrently with your remaining expanded family and medical leave, your employer must pay you the full amount to which you are entitled under your existing paid leave policy for the period of leave taken. If you exhaust your preexisting paid leave and still are entitled to additional expanded family and medical leave, your employer must pay you at least 2/3 of your pay for subsequent periods of expanded family and medical leave taken, up to $200 per workday and $10,000 in the aggregate, for expanded family and medical leave.

32. **If I am an employer, may I use the paid sick leave mandated under the EPSLA to satisfy paid leave entitlements that an employee may have under my paid leave policy?**
    No, unless your employee agrees. Paid sick leave under the EPSLA is in addition to your employee's (including Federal Employees') other leave entitlements. You may not require your employee to use provided or accrued paid vacation, personal, medical, or sick leave before the paid sick leave. You also may not require your employee to use such existing leave concurrently with the paid sick leave under the EPSLA. But if you and your employee agree, your employee may use preexisting leave entitlements to supplement the amount he or she receives from paid sick leave, up to the employee's normal earnings. Note, however, that you are not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the EPSLA. You are free to amend your own policies to the extent consistent with applicable law.

33. **If I am an employer, may I require my employee to take paid leave he or she may have under my existing paid leave policy concurrently with expanded family and medical leave under the EFMLEA?**
    Yes. After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLEA, you may require that your employee take concurrently for the same hours expanded family and medical leave and existing leave that, under your policies, would be available to the employee in

that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if your employee (or a covered family member) is not ill.

If you do so, you must pay your employee the full amount to which he or she is entitled under your existing paid leave policy for the period of leave taken. You must pay your employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to $200 per workday and $10,000 in the aggregate, for expanded family and medical leave. If your employee exhausts all preexisting paid vacation, personal, medical, or sick leave, you would need to pay your employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to $200 per day and $10,000 in the aggregate. You are free to amend your own policies to the extent consistent with applicable law.

34. **If I want to pay my employees more than they are entitled to receive for paid sick leave or expanded family and medical leave, can I do so and claim a tax credit for the entire amount paid to them?**
You may pay your employees in excess of FFCRA requirements. But you cannot claim, and will not receive tax credit for, those amounts in excess of the FFCRA's statutory limits.

35. **I am an employer that is part of a multiemployer collective bargaining agreement, may I satisfy my obligations under the Emergency Family and Medical Leave Expansion Act through contributions to a multiemployer fund, plan, or program?**
You may satisfy your obligations under the Emergency Family and Medical Leave Expansion Act by making contributions to a multiemployer fund, plan, or other program in accordance with your existing collective bargaining obligations. These contributions must be based on the amount of paid family and medical leave to which each of your employees is entitled under the Act based on each employee's work under the multiemployer collective bargaining agreement. Such a fund, plan, or other program must allow employees to secure or obtain their pay for the related leave they take under the Act. Alternatively, you may also choose to satisfy your obligations under the Act by other means, provided they are consistent with your bargaining obligations and collective bargaining agreement.

36. **I am an employer that is part of a multiemployer collective bargaining agreement, may I satisfy my obligations under the Emergency Paid Sick Leave Act through contributions to a multiemployer fund, plan, or program?**
You may satisfy your obligations under the Emergency Paid Sick Leave Act by making contributions to a multiemployer fund, plan, or other program in accordance with your existing collective bargaining obligations. These contributions must be based on the hours of paid sick leave to which each of your employees is entitled under the Act based on each employee's work under the multiemployer collective bargaining agreement. Such a fund, plan, or other program must allow employees to secure or obtain their pay for the related leave they take under the Act. Alternatively, you may also choose to satisfy your obligations under the Act by other means, provided they are consistent with your bargaining obligations and collective bargaining agreement.

37. **Are contributions to a multiemployer fund, plan, or other program the only way an employer that is part of a multiemployer collective bargaining agreement may comply with the paid leave requirements of the FFCRA?**
No. Both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act provide that, consistent with its bargaining obligations and collective bargaining agreement, an employer may satisfy its

legal obligations under both Acts by making appropriate contributions to such a fund, plan, or other program based on the paid leave owed to each employee. However, the employer may satisfy its obligations under both Acts by other means, provided they are consistent with its bargaining obligations and collective bargaining agreement.

38. **Assuming I am a covered employer, which of my employees are eligible for paid sick leave and expanded family and medical leave?**
Both of these new provisions use the employee definition as provided by the Fair Labor Standards Act, thus all of your U.S. (including Territorial) employees who meet this definition are eligible including full-time and part-time employees, and "joint employees" working on your site temporarily and/or through a temp agency. However, if you employ a health care provider or an emergency responder you are not required to pay such employee paid sick leave or expanded family and medical leave on a case-by-case basis. And certain small businesses may exempt employees if the leave would jeopardize the company's viability as a going concern. See Question 58 below.

    There is one difference regarding an employee's eligibility for paid sick leave versus expanded family and medical leave. While your employee is eligible for paid sick leave regardless of length of employment, your employee must have been employed for 30 calendar days in order to qualify for expanded family and medical leave. For example, if your employee requests expanded family and medical leave on April 10, 2020, he or she must have been your employee since March 11, 2020.

39. **Who is a covered employer that must provide paid sick leave and expanded family and medical leave under the FFCRA?**
Generally, if you employ fewer than 500 employees you are a covered employer that must provide paid sick leave and expanded family and medical leave. For additional information on the 500 employee threshold, see Question 2. Certain employers with fewer than 50 employees may be exempt from the Act's requirements to provide certain paid sick leave and expanded family and medical leave. For additional information regarding this small business exemption, see Question 4 and Questions 58 and 59 below.

    Certain public employers are also covered under the Act and must provide paid sick leave and expanded family and medical leave. For additional information regarding coverage of public employers, see Questions 52-54 below.

40. **Who is a son or daughter?**
Under the FFCRA, a "son or daughter" is your own child, which includes your biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child. For additional information about in loco parentis, see Fact Sheet #28B: Family and Medical Leave Act (FMLA) leave for birth, placement, bonding or to care for a child with a serious health condition on the basis of an "in loco parentis" relationship.

    In light of Congressional direction to interpret definitions consistently, WHD clarifies that under the FFCRA a "son or daughter" is also an adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability. For additional information on requirements relating to an adult son or daughter, see Fact Sheet #28K and/or call our toll free information and help line available 8 am–5 pm in your time zone, 1-866-4US-WAGE (1-866-487-9243).

41. **What do I do if my employer, who I believe to be covered, refuses to provide me paid sick leave?**

If you believe that your employer is covered and is improperly refusing you paid sick leave under the Emergency Paid Sick Leave Act, the Department encourages you to raise and try to resolve your concerns with your employer. Regardless of whether you discuss your concerns with your employer, if you believe your employer is improperly refusing you paid sick leave, you may call 1-866-4US-WAGE (1-866-487-9243). WHD is responsible for administering and enforcing these provisions. If you have questions or concerns, you can contact WHD by phone or visit www.dol.gov/agencies/whd. Your call will be directed to the nearest WHD office for assistance to have your questions answered or to file a complaint. In most cases, you can also file a lawsuit against your employer directly without contacting WHD. If you are a public sector employee, please see the answer to Question 54.

42. **What do I do if my employer, who I believe to be covered, refuses to provide me expanded family and medical leave to care for my own son or daughter whose school or place of care has closed, or whose child care provider is unavailable, for COVID-19 related reasons?**
If you believe that your employer is covered and is improperly refusing you expanded family and medical leave or otherwise violating your rights under the Emergency Family and Medical Leave Expansion Act, the Department encourages you to raise and try to resolve your concerns with your employer. Regardless whether you discuss your concerns with your employer, if you believe your employer is improperly refusing you expanded family and medical leave, you may call WHD at 1-866-4US-WAGE (1-866-487-9243) or visit www.dol.gov/agencies/whd. Your call will be directed to the nearest WHD office for assistance to have your questions answered or to file a complaint. If your employer employs 50 or more employees, you also may file a lawsuit against your employer directly without contacting WHD. If you are a public sector employee, please see the answer to Question 54.

43. **Do I have a right to return to work if I am taking paid sick leave or expanded family and medical leave under the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act?**
Generally, yes. In light of Congressional direction to interpret requirements among the Acts consistently, WHD clarifies that the Acts require employers to provide the same (or a nearly equivalent) job to an employee who returns to work following leave.

    In most instances, you are entitled to be restored to the same or an equivalent position upon return from paid sick leave or expanded family and medical leave. Thus, your employer is prohibited from firing, disciplining, or otherwise discriminating against you because you take paid sick leave or expanded family and medical leave. Nor can your employer fire, discipline, or otherwise discriminate against you because you filed any type of complaint or proceeding relating to these Acts, or have or intend to testify in any such proceeding.

    However, you are not protected from employment actions, such as layoffs, that would have affected you regardless of whether you took leave. This means your employer can lay you off for legitimate business reasons, such as the closure of your worksite. Your employer must be able to demonstrate that you would have been laid off even if you had not taken leave.

    Your employer may also refuse to return you to work in your same position if you are a highly compensated "key" employee as defined under the FMLA, or if your employer has fewer than 25 employees, and you took leave to care for your own son or daughter whose school or place of care was closed, or whose child care provider was unavailable, and all four of the following hardship conditions exist:

- your position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of your leave;
- your employer made reasonable efforts to restore you to the same or an equivalent position;
- your employer makes reasonable efforts to contact you if an equivalent position becomes available; and
- your employer continues to make reasonable efforts to contact you for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after your leave began, whichever is earlier.

44. **Do I qualify for leave for a COVID-19 related reason even if I have already used some or all of my leave under the Family and Medical Leave Act (FMLA)?**
    If you are an eligible employee, you are entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave you have taken under the FMLA.

    However, if your employer was covered by the FMLA prior to April 1, 2020, your eligibility for expanded family and medical leave depends on how much leave you have already taken during the 12-month period that your employer uses for FMLA leave. You may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period. If you have taken some, but not all, 12 workweeks of your leave under FMLA during the current 12-month period determined by your employer, you may take the remaining portion of leave available. If you have already taken 12 workweeks of FMLA leave during this 12-month period, you may not take additional expanded family and medical leave.

    For example, assume you are eligible for preexisting FMLA leave and took two weeks of such leave in January 2020 to undergo and recover from a surgical procedure. You therefore have 10 weeks of FMLA leave remaining. Because expanded family and medical leave is a type of FMLA leave, you would be entitled to take up to 10 weeks of expanded family and medical leave, rather than 12 weeks. And any expanded family and medical leave you take would count against your entitlement to preexisting FMLA leave.

    If your employer only becomes covered under the FMLA on April 1, 2020, this analysis does not apply.

45. **May I take leave under the Family and Medical Leave Act over the next 12 months if I used some or all of my expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act?**
    It depends. You may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the Emergency Family and Medical Leave Expansion Act. If you take some, but not all 12, workweeks of your expanded family and medical leave by December 31, 2020, you may take the remaining portion of FMLA leave for a serious medical condition, as long as the total time taken does not exceed 12 workweeks in the 12-month period. Please note that expanded family and medical leave is available only until December 31, 2020; after that, you may only take FMLA leave.

    For example, assume you take four weeks of Expanded Family and Medical Leave in April 2020 to care for your child whose school is closed due to a COVID-19 related reason. These four weeks count against your entitlement to 12 weeks of FMLA leave in a 12-month period. If you are eligible for preexisting FMLA leave and need to take such leave in August 2020 because you need surgery, you would be entitled to take up to eight weeks of FMLA leave.

However, you are entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave you have taken under the FMLA. Paid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap. But please note that if you take paid sick leave concurrently with the first two weeks of expanded family and medical leave, which may otherwise be unpaid, then those two weeks do count towards the 12 workweeks in the 12-month period.

46. **If I take paid sick leave under the Emergency Paid Sick Leave Act, does that count against other types of paid sick leave to which I am entitled under State or local law, or my employer's policy?**
No. Paid sick leave under the Emergency Paid Sick Leave Act is in addition to other leave provided under Federal, State, or local law; an applicable collective bargaining agreement; or your employer's existing company policy.

47. **May I use paid sick leave and expanded family and medical leave together for any COVID-19 related reasons?**
No. The Emergency Family and Medical Leave Expansion Act applies only when you are on leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons. However, you can take paid sick leave under the Emergency Paid Sick Leave Act for numerous other reasons.

48. **What is a full-time employee under the Emergency Paid Sick Leave Act?**
For purposes of the Emergency Paid Sick Leave Act, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week.

    In contrast, the Emergency Family and Medical Leave Expansion Act does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week will affect the amount of pay the employee is eligible to receive.

49. **What is a part-time employee under the Emergency Paid Sick Leave Act?**
For purposes of the Emergency Paid Sick Leave Act, a part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week.

    In contrast, the Emergency Family and Medical Leave Expansion Act does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week affects the amount of pay the employee is eligible to receive.

50. **How does the "for each working day during each of the 20 or more calendar workweeks in the current or preceding calendar" language in the FMLA definition of "employer" work under the Emergency Family and Medical Leave Expansion Act?**
The language about counting employees over calendar workweeks is only in the FMLA's definition for employer. This language does not apply to the Emergency Family and Medical Leave Expansion Act for purposes of expanded family and medical leave. Employers should use the number of employees on the day the employee's leave would start to determine whether the employer has fewer than 500 employees for purposes of providing expanded family and medical leave and paid sick leave. See Question 2 for more information.

51. **I've elected to take paid sick leave and I am currently in a waiting period for my employer's health coverage. If I am absent from work on paid sick leave during the waiting period, will my health coverage still take effect after I complete the waiting period on the same day that the coverage would otherwise take effect?**

Yes. If you are on employer-provided group health coverage, you are entitled to group health coverage during your paid sick leave on the same terms as if you continued to work. Therefore, the requirements for eligibility, including any requirement to complete a waiting period, would apply in the same way as if you continued to work, including that the days you are on paid sick leave count towards completion of the waiting period. If, under the terms of the plan, an individual can elect coverage that becomes effective after completing the waiting period, the health coverage must take effect once the waiting period is complete.

52. **I am a public sector employee. May I take paid sick leave under the Emergency Paid Sick Leave Act?**
Generally, yes. You are entitled to paid sick leave if you work for a public agency or other unit of government, with the exceptions below. Therefore, you are probably entitled to paid sick leave if, for example, you work for the government of the United States, a State, the District of Columbia, a Territory or possession of the United States, a city, a municipality, a township, a county, a parish, or a similar government entity subject to the exceptions below. The Office of Management and Budget (OMB) has the authority to exclude some categories of U.S. Government Executive Branch employees from taking certain kinds of paid sick leave. If you are a Federal employee, the Department encourages you to seek guidance from your respective employers as to your eligibility to take paid sick leave.

    Further, health care providers and emergency responders may be excluded by their employer from being able to take paid sick leave under the Act. See Questions 56-57 below. These coverage limits also apply to public-sector health care providers and emergency responders.

    For more information related to federal employers and employees, please consult the Office of Personnel Management's COVID-19 guidance portal, linked here.

53. **I am a public sector employee. May I take paid family and medical leave under the Emergency Family and Medical Leave Expansion Act?**
It depends. In general, you are entitled to expanded family and medical leave if you are an employee of a non-federal public agency. Therefore, you are probably entitled to paid sick leave if, for example, you work for the government of a State, the District of Columbia, a Territory or possession of the United States, a city, a municipality, a township, a county, a parish, or a similar entity.

    But if you are a Federal employee, you likely are not entitled to expanded family and medical leave. The Act only amended Title I of the FMLA; most Federal employees are covered instead by Title II of the FMLA. As a result, only some Federal employees are covered, and the vast majority are not. In addition, the Office of Management and Budget (OMB) has the authority to exclude some categories of U.S. Government Executive Branch employees with respect to expanded and family medical leave. If you are a Federal employee, the Department encourages you to seek guidance from your respective employers as to your eligibility to take expanded family and medical leave.

    Further, health care providers and emergency responders may be excluded by their employer from being able to take expanded family and medical leave under the Act. See Questions 56-57 below. These coverage limits also apply to public-sector health care providers and emergency responders.

    For more information related to federal employers and employees, please consult the Office of Personnel Management's COVID-19 guidance portal, linked here.

54. **What do I do if my public sector employer, who I believe to be covered, refuses to provide me paid sick leave or expanded family and medical leave?**
If you believe that your public sector employer is covered and is improperly refusing you paid sick leave under the Emergency Paid Sick Leave Act or expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act, the Department encourages you to raise your concerns with your employer in an attempt to resolve them. Regardless whether you discuss your concerns with your employer, if you believe your employer is improperly refusing you paid sick leave or expanded family and medical leave, you may call WHD at 1-866-4US-WAGE (1-866-487-9243) or visit www.dol.gov/agencies/whd. Your call will be directed to the nearest WHD office for assistance to have your questions answered or to file a complaint.

In some cases, you may also be able to file a lawsuit against your employer directly without contacting WHD. Some State and local employees may not be able to pursue direct lawsuits because their employers are immune from such lawsuits. For additional information, see the WHD website at: https://www.wagehour.dol.gov and/or call WHD's toll free information and help line available 8am–5pm in your time zone, 1-866-4-US-WAGE (1-866-487-9243).

For more information related to federal employers and employees, please consult the Office of Personnel Management's COVID-19 guidance portal, linked here.

55. **Who is a "health care provider" for purposes of determining individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave?**
The term "health care provider," as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

56. **Who is a "health care provider" who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?** ***[Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]***
For the purposes of defining the set of employees who may be excluded from taking paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider includes two groups.

This first group is anyone who is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

The second group is any other person who is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care. This group includes employees who provide direct diagnostic, preventive, treatment, or other patient care services, such as nurses, nurse assistants, and medical technicians. It also includes employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment, or other patient care services. Finally, employees who do not provide direct heath care services to a patient but are otherwise integrated into and necessary to the provision those services—for example, a laboratory technician who processes medical test results to aid in the diagnosis and treatment of a health condition—are health care providers.

A person is not a health care provider merely because his or her employer provides health care services or because he or she provides a service that affects the provision of health care services. For example, IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers are not health care providers, even if they work at a hospital of a similar health care facility.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA. For example, an employer may decide to exempt these employees from leave for caring for a family member, but choose to provide them paid sick leave in the case of their own COVID-19 illness.

57. **Who is an emergency responder?**
For the purposes of Employees who may be excluded from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, an emergency responder is anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State's or territory's or the District of Columbia's response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA. For example, an employer may decide to exempt these employees from leave for caring for a family member, but choose to provide them paid sick leave in the case of their own COVID-19 illness.

58. **When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?**
An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the

financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

59. **If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?**
A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

60. **How do I know if I can receive paid sick leave for a Federal, State, or local quarantine or isolation order related to COVID-19?**
For purposes of the FFCRA, a Federal, State, or local quarantine or isolation order includes quarantine or isolation orders, as well as shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority that cause you to be unable to work (or to telework) even though your employer has work that you could perform but for the order. You may not take paid sick leave for this qualifying reason if your employer does not have work for you as a result of a shelter-in-place or a stay-at-home order. In the instance where your employer does not have work for you as a result of a shelter-in-place or a stay-at-home order, please see Questions 23-27.

61. **When am I eligible for paid sick leave to self-quarantine?**
You are eligible for paid sick leave if a health care provider directs or advises you to stay home or otherwise quarantine yourself because the health care provider believes that you may have COVID-19 or are particularly vulnerable to COVID-19, and quarantining yourself based upon that advice prevents you from working (or teleworking).

62. **I am an employee. I become ill with COVID-19 symptoms, decide to quarantine myself for two weeks, and then return to work. I do not seek a medical diagnosis or the advice of a health care provider. Can I get paid for those two weeks under the FFCRA?**
Generally no. If you become ill with COVID-19 symptoms, you may take paid sick leave under the FFCRA only to seek a medical diagnosis or if a health care provider otherwise advises you to self-quarantine. If you test positive for the virus associated with COVID-19 or are advised by a health care provider to self-quarantine, you may continue to take paid sick leave. You may not take paid sick leave under the FFCRA if you unilaterally decide to self-quarantine for an illness without medical advice, even if you have COVID-19 symptoms. Note that you may not take paid sick leave under the FFCRA if you become ill with an

illness not related to COVID-19. Depending on your employer's expectations and your condition, however, you may be able to telework during your period of quarantine.

63. **When am I eligible for paid sick leave to care for someone who is subject to a quarantine or isolation order?**
You may take paid sick leave to care for an individual who, as a result of being subject to a quarantine or isolation order (see Question 53), is unable to care for him or herself and depends on you for care and if providing care prevents you from working and from teleworking.

    Furthermore, you may only take paid sick leave to care for an individual who genuinely needs your care. Such an individual includes an immediate family member or someone who regularly resides in your home. You may also take paid sick leave to care for someone if your relationship creates an expectation that you would care for the person in a quarantine or self-quarantine situation, and that individual depends on you for care during the quarantine or self-quarantine.

    You may not take paid sick leave to care for someone with whom you have no relationship. Nor can you take paid sick leave to care for someone who does not expect or depend on your care during his or her quarantine or self-quarantine.

64. **Can I take paid sick leave to care for any individual who is subject to a quarantine or isolation order or who has been advised to self-quarantine?**
No. You may take paid sick leave under the FFCRA to care for an immediate family member or someone who regularly resides in your home. You may also take paid sick leave under the FFCRA to care for someone where your relationship creates an expectation that you care for the person in a quarantine or self-quarantine situation, and that individual depends on you for care during the quarantine or self-quarantine.

    However, you may not take paid sick leave under the FFCRA to care for someone with whom you have no relationship. Nor can you take paid sick leave under the FFCRA to care for someone who does not expect or depend on your care during his or her quarantine or self-quarantine due to COVID-19.

65. **When am I eligible for paid sick leave to care for someone who is self-quarantining?**
You may take paid sick leave to care for a self-quarantining individual if a health care provider has advised that individual to stay home or otherwise quarantine him or herself because he or she may have COVID-19 or is particularly vulnerable to COVID-19 and provision of care to that individual prevents you from working (or teleworking).

66. **May I take paid sick leave or expanded family and medical leave to care for my child who is 18 years old or older?**
It depends. Under the FFCRA, paid sick leave and expanded family and medical leave include leave to care for one (or more) of your children when his or her school or place of care is closed or child care provider is unavailable, due to COVID-19 related reasons. This leave may only be taken to care for your non-disabled child if he or she is under the age of 18. If your child is 18 years of age or older with a disability and cannot care for him or herself due to that disability, you may take paid sick leave and expanded family and medical leave to care for him or her if his or her school or place of care is closed or his or her child care provider is unavailable, due to COVID-19 related reasons, and you are unable to work or telework as a result.

In addition, paid sick leave is available to care for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. If you have a need to care for your child age 18 or older who needs care for these circumstances, you may take paid sick leave if you are unable to work or telework as a result of providing care. But in no event may your total paid sick leave exceed two weeks.

67. **What is a "place of care"?**
A "place of care" is a physical location in which care is provided for your child. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

68. **Who is my "child care provider"?**
A "child care provider" is someone who cares for your child. This includes individuals paid to provide child care, like nannies, au pairs, and babysitters. It also includes individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

69. **Can more than one guardian take paid sick leave or expanded family and medical leave simultaneously to care for my child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons?**
You may take paid sick leave or expanded family and medical leave to care for your child only when you need to, and actually are, caring for your child if you are unable to work or telework as a result of providing care. Generally, you do not need to take such leave if a co-parent, co-guardian, or your usual child care provider is available to provide the care your child needs. See Question 20 for more details.

70. **My child's school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it "closed"?**
Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is "closed" for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," your child is still expected or required to complete assignments.

71. **May I take paid sick leave to care for a child other than my child?**
It depends. The paid sick leave that is provided under the FFCRA to care for one (or more) of your children when their place of care is closed (or child care provider is unavailable), due to COVID-19 related reasons, may only be taken to care for your own "son or daughter." For an explanation of the definition of "son or daughter" for purposes of the FFCRA, please refer to Question 40.

However, paid sick leave is also available to care for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. If you have a need to care for a child who meets these criteria, you may take paid sick leave if you are unable to work or telework as a result of providing care. But in no event may your total paid sick leave exceed two weeks.

72. **May I take expanded family and medical leave to care for a child other than my child?**

No. Expanded family and medical leave is only available to care for your own "son or daughter." For an explanation of the definition of "son or daughter" for purposes of the FFCRA, please refer to Question 40.

73. **When am I eligible for paid sick leave based on a "substantially similar condition" specified by the U.S. Department of Health and Human Services?**
The U.S. Department of Health and Human Services (HHS) has not yet identified any "substantially similar condition" that would allow an employee to take paid sick leave. If HHS does identify any such condition, the Department of Labor will issue guidance explaining when you may take paid sick leave on the basis of a "substantially similar condition."

74. **If I am a staffing company, how do I count internal workers and staffed workers under the FFCRA?**
Regardless of how you classify or count internal or staffed workers, you must provide paid sick leave and expanded family and medical leave to workers who are your "employees" for purposes of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, as described in Question 2. As Question 2 explains, you may be a joint employer, and if so, you must include in your count all employees on your payroll, even if you provide or refer such employees to other employers.

75. **As an employer, how much do I pay a seasonal employee with an irregular schedule for each day of paid sick leave or expanded family and medical leave that he or she takes?**
You may calculate the daily amount you must pay a seasonal employee with an irregular schedule by taking the following steps.

First, you should calculate how many hours of leave your seasonal employee is entitled to take each day. Because your employee works an irregular schedule, this is equal to the average number of hours each day that he or she was scheduled to work over the period of employment, up to the last six months. Please note that you should exclude from this calculation off-season periods during which the employee did not work.

Second, you should calculate the seasonal employee's regular hourly rate of pay. This is calculated by adding up all wages paid over the period of employment, up to the last six months, and then dividing that sum by the number of hours actually worked over the same period. Again, you should exclude off-season periods during which the employee did not work.

Third, you multiply the daily hours of leave (first calculation) by your employee's regular hourly rate of pay (second calculation) to compute the base daily paid leave amount.

Fourth, you should determine the actual daily paid leave amount, which depends on the type of paid leave taken and the reason for such paid leave.

You must pay your seasonal employee the full base daily paid leave amount, up to $511 per day and $5,110 in total, if the employee is taking paid sick leave for any of the following reasons:

- Your employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- Your employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Your employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

You must pay your seasonal employee 2/3 of the base daily paid leave amount, up to $200 per day and $2,000 in total, if your employee is taking paid sick leave for any of the following reasons:

- Your employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Your employee is caring for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or
- Your employee is experiencing any other substantially similar condition, as determined by the Secretary of Health and Human Services.

You must pay your seasonal employee 2/3 of the base daily paid leave amount, up to $200 per day and $10,000 in total, if the employee is taking expanded family and medical leave to care for the employee's child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. Please note that if your seasonal employees are not scheduled to work, for example, because it is the off-season, then you do not have to provide paid sick leave or expanded family and medical leave.

76. **May I take paid sick leave or expanded family and medical leave if I am receiving workers' compensation or temporary disability benefits through an employer or state-provided plan?**
In general, no, unless you were able to return to light duty before taking leave. If you receive workers' compensation or temporary disability benefits because you are unable to work, you may not take paid sick leave or expanded family and medical leave. However, if you were able to return to light duty and a qualifying reason prevents you from working, you may take paid sick leave or expanded family and medical leave, as the situation warrants.

77. **May I take paid sick leave or expanded family and medical leave under the FFCRA if I am on an employer-approved leave of absence?**
It depends on whether your leave of absence is voluntary or mandatory. If your leave of absence is voluntary, you may end your leave of absence and begin taking paid sick leave or expanded family and medical leave under the FFCRA if a qualifying reason prevents you from being able to work (or telework). However, you may not take paid sick leave or expanded family and medical leave under the FFCRA if your leave of absence is mandatory. This is because it is the mandatory leave of absence—and not a qualifying reason for leave—that prevents you from being able to work (or telework).

    In the instance of a mandatory leave of absence, you may be eligible for unemployment insurance benefits. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, please refer to https://www.careeronestop.org/LocalHelp/service-locator.aspx.

78. **Will DOL begin enforcing FFCRA immediately?**
The Department will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e., March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. If the employer violates the Act willfully, fails to provide a written commitment to future compliance with the Act, or fails to remedy a violation upon notification by the Department, the Department reserves its right to exercise its

enforcement authority during this period. After April 17, 2020, this limited stay of enforcement will be lifted, and the Department will fully enforce violations of the Act, as appropriate and consistent with the law.

79. **Does the non-enforcement position mean businesses do not need to comply with the FFCRA from the effective date of April 1, 2020 through April 17, 2020?**
No, the FFCRA's paid leave provisions are effective April 1, 2020. Private sector and public employers must comply with the provisions on the effective date even though the Department has a limited stay of enforcement until April 17, 2020. Once the Department fully enforces the Act, it will retroactively enforce violations back until the effective date of April 1, 2020, if employers have not remedied the violations.

80. **How do I compute the number of hours of paid sick leave for my employee who has irregular hours?**
Generally, under the FFCRA, you are required to provide an employee with paid sick leave equal to the number of hours that employee is scheduled to work, on average, over a two-week period, up to a maximum of 80 hours.
If your employee works an irregular schedule such that it is not possible to determine what hours he or she would normally work over a two-week period, you must estimate the number of hours. The estimate must be based on the average number of hours your employee was scheduled to work per calendar day (not workday) over the six-month period ending on the first day of paid sick leave. This average must include all scheduled hours, including both hours actually worked and hours for which the employee took leave.

Consider the examples below involving two employees with irregular schedules who take leave on April 13, 2020. For both employees, the six-month period used for estimating average hours consists of 183 calendar days from October 14, 2019, to April 13, 2020.

During that six-month period, the first employee worked 1,150 hours over 130 workdays, and took a total of 50 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 1,200 hours. The number of hours per calendar day is computed by dividing 1,200 hours by the 183 calendar days, which results in 6.557 hours per calendar day. The two-week average is computed by multiplying the per calendar day average by 14, which results in 91.8 hours. Since this is greater than the statutory maximum of 80 hours, the first employee, who works full-time, is therefore entitled to 80 hours of paid sick leave.

The second employee, in contrast, worked 550 hours over 100 workdays, and took a total of 100 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 650 hours. The number of hours per calendar day is computed by dividing 650 hours by the 183 calendar days, which is 3.55 hours per calendar day. The two-week average is computed by multiplying the per calendar day average by 14, which results in 49.7 hours. The second employee, who works part-time, is therefore entitled to 49.7 hours of paid sick leave.

For each hour of paid sick leave taken, you are required to pay the employee an amount equal to at least that employee's regular rate (see Question 82).

81. **How do I compute the number of hours I must pay my employee who has irregular hours for each day of expanded family and medical leave taken?**
Generally, under the FFCRA, you are required to pay your employee for each day of expanded family and medical leave taken based on the number of hours the employee was normally scheduled to work that day. If your employee

works an irregular schedule such that it is not possible to determine the number of hours he or she would normally work on that day, and the employee has been employed for at least six months, you must determine the employee's average workday hours, including any leave hours. The average must be based on the number of hours your employee was scheduled to work per workday (not calendar day) divided by the number of workdays over the six-month period ending on the first day of your employee's paid expanded family and medical leave. This average must include all scheduled hours, including both hours actually worked and hours for which the employee took leave.

Consider the examples below involving two employees with irregular schedules who take leave on April 13, 2020. For both employees, the six-month period would consist of 183 calendar days from October 14, 2019, to April 13, 2020.

The first employee worked 1,150 hours over 130 workdays, and took a total of 50 hours of personal and medical leave. The total number of hours the employee was scheduled to work (including all leave taken) was 1,200 hours. The number of hours per workday is computed by dividing 1,200 hours by the 130 workdays, which is 9.2 hours per workday. You must therefore pay the first employee for 9.2 hours per workday times 2/3 his or her regular rate for each day of expanded family and medical leave taken, subject to a $200 per day cap and $10,000 maximum (see Question 7).

The second employee, in contrast, worked 550 hours over 100 workdays, and took a total of 100 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 650 hours. The number of hours per workday is computed by dividing 650 hours by the 100 workdays, which is 6.5 hours per workday. You must therefore pay the second employee for 6.5 hours per workday times 2/3 his or her regular rate for each day of expanded family and medical leave taken, subject to a $200 per day cap and $10,000 maximum (see Question 7).

82. **How do I compute my employee's average regular rate for the purpose of the FFCRA?**
As an employer, you are required to pay your employee based on his or her average regular rate for each hour of paid sick leave or expanded family and medical leave taken. The average regular rate must be computed over all full workweeks during the six-month period ending on the first day that paid sick leave or expanded family and medical leave is taken.

If during the past six months, you paid your employee exclusively through a fixed hourly wage or a salary equivalent, the average regular rate would simply equal the hourly wage or the hourly-equivalent of their salary. But if your employee were paid through a different compensation arrangement (such as piece rate) or received other types of payments (such as commissions or tips), his or her regular rate may fluctuate week to week, and you may compute the average regular rate using these steps:

- First, you must compute the employee's non-excludable remuneration for each full workweek during the six-month period. Notably, commissions and piece-rate pay counts towards this amount. See 29 CFR part 778. Tips, however, count only to the extent that you apply them towards minimum wage obligations (i.e., you take a tip credit). See 29 CFR part 531.60. Overtime premiums do not count towards your employee's regular rate. Please note that, unlike when computing average hours (see Questions 5 and 8), you should not count payments your employee received for taking leave as part of the regular rate.
- Second, you must compute the number of hours the employee actually worked for each full workweek during the six-month period. Please note

that, unlike when computing average hours (see Questions 5 and 8), you do not count hours when the employee took leave.

- Third, you then divide the sum of all non-excludable remuneration received over the six-month period by the sum of all countable hours worked in that same time period. The result is the average regular rate.

Consider the examples below involving an employee who takes leave on April 13, 2020. The six-month period would run from Monday, October 14, 2019, to Monday, April 13, 2020. Assuming you use a Monday to Sunday workweek, there are twenty-six full workweeks in that period, which includes 182 calendar days. Please note this is one day fewer than the 183 calendar days falling between October 14, 2019, and April 13, 2020, because the date the leave is taken, April 13, 2020, is a Monday that does not fall in any of the twenty-six full workweeks.

Suppose your employee's non-excludable remuneration and hours worked are as follows:

Week	Non-Excludable Remuneration	Hours Worked
1	$1,100	50
2	$1,300	60
3	$700	35
4	$700	35
5	$1,100	50
6	$700	50
7	$600	30
8	$700	50
9	$1,100	50
10	$700	50
11	$700	35
12	$1,300	60
13	$700	35
14	$1,300	60

Week	Non-Excludable Remuneration	Hours Worked
15	$1,100	50
16	$1,300	60
17	$1,100	50
18	$600	30
19	$700	35
20	$700	50
21	$1,100	50
22	$700	30
23	$700	30
24	$700	30
25	$800	35
26	$800	50
TOTAL	$23,000	1,150

In total, the employee worked 1,150 hours and received $23,000 in non-excludable remuneration. The average regular rate is therefore $20.00 ($23,000 divided by 1,150 hours).

83. **How do I compute the average regular rate of my employee who is paid a fixed salary each workweek?**
    It depends. If you pay your employee exclusively through a fixed salary that is understood to be compensation for a specific number of hours of work in each workweek, the employee's average regular rate would simply be the hourly equivalent of that salary.

    However, if the fixed salary is understood to compensate the employee regardless of the number of hours of work in each workweek, then the regular rate may vary alongside the number of hours worked for each workweek. In this case, you would have to add up the salary you paid your employee over all full workweeks in the past six months and divide that sum by the total number of hours worked in those workweeks, as described in Question 82. If you lack records for the number of hours your employee worked, you should use a reasonable estimate.

84. **May I round when computing the number of hours of paid sick leave I must provide an employee with an irregular schedule or the number of hours I**

must pay such an employee for each day of expanded family and medical leave taken?

As an employer, generally, yes. It is common and acceptable for employers to round to the nearest tenth, quarter, or half hour when determining an employee's hours worked. But if you choose to round, you must use a consistent rounding principle. You may not, for instance, round for some employees who request leave but not others. For the purposes of computing hours under the FFCRA, you may round to the nearest time increment that you customarily use to track the employee's hours worked. For instance, if you typically track work time in quarter-hour increments, you may round to the nearest quarter hour. But you may not round to the nearest quarter hour if you typically track time in tenth-of-an-hour increments.

As an example, the number of hours of paid sick leave for the first employee discussed in Question 81 is computed as 14 days times 1,200 hours divided by 183 calendar days, which is 91.803 hours. If you typically track time in half-hour increments, you would round to 92 hours. If you typically track time in quarter-hour increments, you would round to 91.75 hours. And if you typically track time in tenth-hour increments, you would to round to 91.8 hours.

85. **What six-month period is used to calculate the regular rate under the FFCRA when, for example, my employee takes paid sick leave, gets better, and then one week (or one month or three months) later, takes expanded family and medical leave? Or perhaps the employee takes intermittent leave throughout several months in 2020? In other words, do I have to determine and review a new six-month period every time my employee takes leave?**

    No. As an employer, you should identify the six-month period to calculate each employee's regular rate under the FFCRA based on the first day the employee takes paid sick leave or expanded family and medical leave. That six-month period will be used to calculate all paid sick leave and expanded family and medical leave the employee takes under the FFCRA. If your employee has been employed for less than six months, you may compute the average regular rate over the entire period during which the employee was employed.

86. **Under what circumstances may an employer require an employee to use his or her existing leave under a company policy and when does the choice belong to the employee under the Department's regulations, specifically 29 CFR 826.23(c), 826.24(d), 826.60(b) and 826.160(c)?**

    Paid sick leave under the Emergency Paid Sick Leave Act is in addition to any form of paid or unpaid leave provided by an employer, law, or an applicable collective bargaining agreement. An employer may not require employer-provided paid leave to run concurrently with—that is, cover the same hours as—paid sick leave under the Emergency Paid Sick Leave Act. (See also Question 32.)

    In contrast, an employer may require that any paid leave available to an employee under the employer's policies to allow an employee to care for his or her child or children because their school or place of care is closed (or child care provider is unavailable) due to a COVID-19 related reason run concurrently with paid expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. In this situation, the employer must pay the employee's full pay during the leave until the employee has exhausted available paid leave under the employer's plan—including vacation and/or personal leave (typically not sick or medical leave). However, the employer may only obtain tax credits for wages paid at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits in the Emergency Family and Medical Leave Expansion Act ($200 per day or $10,000 in total). If the employee exhausts available paid leave under the employer's plan, but has more paid expanded

and medical family leave available, the employee will receive any remaining paid expanded and medical family in the amounts and subject to the daily and aggregate limits in the Emergency Family and Medical Leave Expansion Act. Additionally, provided both an employer and employee agree, and subject to federal or state law, paid leave provided by an employer may supplement 2/3 pay under the Emergency Family and Medical Leave Expansion Act so that the employee may receive the full amount of the employee's normal compensation.

Finally, an employee may elect—but may not be required by the employer—to take paid sick leave under the Emergency Paid Sick Leave Act or paid leave under the employer's plan for the first two weeks of unpaid expanded family and medical leave, but not both. If, however, an employee has used some or all paid sick leave under the Emergency Paid Sick Leave Act, any remaining portion of that employee's first two weeks of expanded family and medical leave may be unpaid. During this period of unpaid leave under the Emergency Family and Medical Leave Expansion Act, the employee may choose—but the employer may not require the employee—to use paid leave under the employer's policies that would be available to the employee to take in order to care for the employee's child or children because their school or place of care is closed or the child care provider is unavailable due to a COVID-19 related reason concurrently with the unpaid leave.

87. **Are stay-at-home and shelter-in-place orders the same as quarantine or isolation orders? If so, when can I take leave under the FFCRA for reasons relating to one of those orders?**
Yes, as explained in Question 60, for purposes of the FFCRA, a Federal, State, or local quarantine or isolation order includes shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority. However, in order for such an order to qualify you for leave, being subject to the order must be the reason you are unable to perform work (or telework) that your employer has for you. You may not take paid leave due to such an order if your employer does not have work for you to perform as a result of the order or for other reasons.

    For example, if you are prohibited from leaving a containment zone and your employer remains open outside the containment zone and has work you cannot perform because you cannot leave the containment zone, you may take paid leave under the FFCRA. Similarly, if you are ordered to stay at home by a government official for fourteen days because you were on a cruise ship where other passengers tested positive for COVID-19, and your employer has work for you to do, you are also entitled to paid sick leave if you cannot work (or telework) because of the order. If, however, your employer closed one or more locations because of a quarantine or isolation order and, as a result of that closure, there was no work for you to perform, you are not entitled to leave under the FFCRA and should seek unemployment compensation through your State Unemployment Insurance Office.

88. **If my employer refuses to provide paid sick leave or refuses to compensate me for taking paid sick leave, and the Department brings an enforcement action on my behalf, am I entitled to recover just the federal minimum wage of $7.25 per hour of leave, or can I recover the entire amount due under the FFCRA?**
If the Department brings an enforcement action on your behalf, you are entitled to recover the full amount due under the FFCRA (see Question 7), which is the greater of your regular rate (see Question 8) or the applicable minimum wage (federal, state, or local) for each hour of uncompensated paid sick leave taken, in each case, subject to the applicable FFCRA maximums (see Question 7). The FFCRA and the Department's regulations state that an employer who does not

compensate you for taking paid sick leave is "considered to have failed to pay the minimum wage … and shall be subject to the enforcement provisions" of the Fair Labor Standards Act. Those enforcement provisions state that the employer "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages." For the purposes of the FFCRA, the "amount of unpaid minimum wages" does not refer to the federal minimum wage of $7.25 per hour, but rather to the hourly wage at which the employer must compensate you for taking paid sick leave, which is, generally, the greater of your regular rate or the applicable minimum wage (federal, state, or local).

Thus, if the Department brings an enforcement action on your behalf, your recovery against an employer that refuses to compensate you for taking paid sick leave would not be limited to the federal minimum wage of $7.25 per hour if your regular rate or an applicable state or local minimum wage were higher. For example, if your regular rate were $30 per hour and you lawfully took 20 hours of paid sick leave to self-quarantine based on the advice of a health care provider, you may recover $600 ($30 per hour times 20 hours) from your employer. As another example, if you were entitled to a state or local minimum wage of $15 and lawfully took 20 hours of paid sick leave for the same reason, you may recover $300 ($15 per hour times 20 hours). However, you may not recover more than the amount due under the FFCRA. For instance, if your employer initially agreed to pay your full hourly rate of $30 per hour to allow you to take paid sick leave to care for your child whose school is closed, but then pays you only 2/3 of your hourly rate, as required by the FFCRA, you may not recover the unpaid portion of the initially agreed amount because your employer was not required by the FFCRA to pay that portion.

89. **I hire workers to perform certain domestic tasks, such as landscaping, cleaning, and child care, at my home. Do I have to provide my domestic service workers paid sick leave or expanded family and medical leave?**
It depends on the relationship you have with the domestic service workers you hire. Under the FFCRA, you are required to provide paid sick leave or expanded family and medical leave if you are an employer under the Fair Labor Standards Act (FLSA), regardless of whether you are an employer for federal tax purposes. If the domestic service workers are economically dependent on you for the opportunity to work, then you are likely their employer under the FLSA and generally must provide paid sick leave and expanded family and medical leave to eligible workers. An example of a domestic service worker who may be economically dependent on you is a nanny who cares for your children as a full-time job, follows your precise directions while working, and has no other clients.

If, on the other hand, the domestic service workers are not economically dependent on you and instead are essentially in business for themselves, you are their customer rather than their employer for FLSA purposes. Accordingly, you are not required to provide such domestic service workers with paid sick leave or expanded family and medical leave. An example of a domestic service worker who is not economically dependent on you is a handyman who works for you sporadically on a project-by-project basis, controls the manner in which he or she performs work, uses his or her own equipment, sets his or her own hours and fees, and has several customers. Likewise, a day care provider who works out of his or her house and has several clients is not economically dependent upon you.

Of course, you are not required to provide paid sick leave or expanded family and medical leave for workers who are employed by a third party service provider with which you have contracted to provide you with specific domestic services.

Ultimately, the question of economic dependence can be complicated and fact-specific. As a rule of thumb, but not ultimately determinative, if you are not required to file Schedule H, Household Employment Taxes, along with your Form 1040, U.S. Individual Income Tax Return, for the amount you pay a domestic service worker because the worker is not your employee for federal tax purposes, then the worker is likely not economically dependent upon you and you are likely not the worker's employer under the FLSA. In this case, you likely would not be required to provide paid sick leave and expanded family and medical leave. If the worker is your employee for federal tax purposes, so that you are required to file Schedule H for the worker with your Form 1040, you will need to determine whether the worker is economically dependent on you for the opportunity to work. If you determine that the worker is economically dependent upon you for the opportunity to work, then you are likely required to provide that worker with paid sick leave and expanded family and medical leave.

90. **If I am employed by a temporary placement agency that has over 500 employees and am placed at a second business that has fewer than 500 employees, how does the leave requirement work? Are one or both entities required to provide me leave?**

The temporary staffing agency is not required by the FFRCA to provide you (or any of its other employees) with paid sick leave or expanded family and medical leave because it has more than 500 employees. In contrast, the second business where you are placed will generally be required to provide its employees with paid sick leave or expanded family and medical leave because it has fewer than 500 employees (see Question 39).

Whether that second business must provide *you* with paid sick leave or expanded family and medical leave depends on whether it is your joint employer. If the second business directly or indirectly exercises significant control over the terms and conditions of your work, then it is your joint employer and must provide you with paid sick leave or expanded family and medical leave. If the second business does not directly or indirectly exercise such control, then it is not your employer and so is not required to provide you with such leave. To determine whether the second employer exercises such control, the Department of Labor would consider whether it exercises the power to hire or fire you, supervises and controls your schedule or conditions of employment, determines your rate and method of pay, and maintains your employment records. The weight given to each factor depends on how it does or does not suggest control in a particular case.

If the second business provides you with paid sick leave as your joint employer, the temporary staffing agency is prohibited from discharging, disciplining, or discriminating against you for taking such leave, even though it is not required to provide you with paid sick leave. Similarly, if the second business provides you with expanded family and medical leave as your joint employer, the temporary staffing agency is prohibited from interfering with your ability to take leave and from retaliating against you for taking such leave, even though it is not required to provide you with expanded family and medical leave.

91. **My employees have been teleworking productively since mid-March without any issues. Now, several employees claim they need to take paid sick leave and expanded family and medical leave to care for their children, whose school is closed because of COVID-19, even though these employees have been teleworking with their children at home for four weeks. Can I ask my employees why they are now unable to work or if they have pursued alternative child care arrangements?**

You may require that the employee provide the qualifying reason he or she is taking leave, and submit an oral or written statement that the employee is unable to work because of this reason, and provide other documentation outlined in section 826.100 of the Department's rule applying the FFCRA. While you may ask the employee to note any changed circumstances in his or her statement as part of explaining why the employee is unable to work, you should exercise caution in doing so, lest it increase the likelihood that any decision denying leave based on that information is a prohibited act. The fact that your employee has been teleworking despite having his or her children at home does not mean that the employee cannot now take leave to care for his or her children whose schools are closed for a COVID-19 related reason. For example, your employee may not have been able to care effectively for the children while teleworking or, perhaps, your employee may have made the decision to take paid sick leave or expanded family and medical leave to care for the children so that the employee's spouse, who is not eligible for any type of paid leave, could work or telework. These (and other) reasons are legitimate and do not afford a basis for denying paid sick leave or expanded family and medical leave to care for a child whose school is closed for a COVID-19 related reason.

This does not prohibit you from disciplining an employee who unlawfully takes paid sick leave or expanded family and medical leave based on misrepresentations, including, for example, to care for the employee's children when the employee, in fact, has no children and is not taking care of a child.

92. **My employee claims to have tiredness or other symptoms of COVID-19 and is taking leave to seek a medical diagnosis. What documentation may I require from the employee to document efforts to obtain a diagnosis? When can it be required?**
In order for your employee to take leave under the FFCRA, you may require the employee to identify his or her symptoms and a date for a test or doctor's appointment. You may not, however, require the employee to provide further documentation or similar certification that he or she sought a diagnosis or treatment from a health care provider in order for the employee to use paid sick leave for COVID-19 related symptoms. The minimal documentation required to take this leave is intentional so that employees with COVID-19 symptoms may take leave and slow the spread of COVID-19.

Please note, however, that if an employee were to take unpaid leave under the FMLA, the FMLA's documentation requirements are different and apply. Further, if the employee is concurrently taking another type of paid leave, any documentation requirements relevant to that leave still apply.

93. **I took paid sick leave and am now taking expanded family and medical leave to care for my children whose school is closed for a COVID-19 related reason. After completing distance learning, the children's school closed for summer vacation. May I take paid sick leave or expanded family and medical leave to care for my children because their school is closed for summer vacation?**
No. Paid sick leave and emergency family and medical leave are not available for this qualifying reason if the school or child care provider is closed for summer vacation, or any other reason that is not related to COVID-19. However, the employee may be able to take leave if his or her child's care provider during the summer—a camp or other programs in which the employee's child is enrolled—is closed or unavailable for a COVID-19 related reason.

94. **My employee used two weeks of paid sick leave under the FFCRA to care for his parent who was advised by a health care provider to self-quarantine because of symptoms of COVID-19. I am concerned about his returning to**

work too soon and potentially exposing my other staff to COVID-19. May I require him to telework or take leave until he has tested negative for COVID-19? (added 07/20/2020)
It depends. In general, an employee returning from paid sick leave under FFCRA has a right to be restored to the same or an equivalent position, although exceptions apply as described in Question 43. However, due to the public health emergency and your employee's potential exposure to an individual with COVID-19, you may temporarily reinstate him to an equivalent position requiring less interaction with co-workers or require that he telework. In addition, the employee must comply with job requirements that are unrelated to having been out on paid sick leave. For instance, a company may require any employee who knows he has interacted with a COVID-infected person to telework or take leave until he has personally tested negative for COVID-19 infection, regardless of whether he has taken any kind of leave. Such a policy would apply equally to an employee returning from paid sick leave. However, you may not require the employee to telework or be tested for COVID-19 simply because the employee took leave under the FFCRA.

95. **I was working full time for my employer and used two weeks (80 hours) of paid sick leave under the FFCRA before I was furloughed. My employer said I could go back to work next week. Can I use paid sick leave under the FFCRA again after I go back to work?** (added 07/20/2020)
No. Employees are limited to a total of 80 hours of paid sick leave under the FFCRA. If you had taken fewer than 80 hours of paid sick leave before the furlough, you would be entitled to use the remaining hours after the furlough if you had a qualifying reason to do so.

96. **I have an employee who used four weeks of expanded family and medical leave before she was furloughed. Now I am re-opening my business. When my employee comes back to work, if she still needs to care for her child because her child care provider is unavailable for COVID-related reasons, how much expanded family and medical leave does she have available?** (added 07/20/2020)
Under the FFCRA, your employee is entitled to up to 12 weeks of expanded family and medical leave. She used four weeks of that leave before she was furloughed, and the weeks that she was furloughed do not count as time on leave. When she returns from furlough, she will be eligible for eight additional weeks of leave if she has a qualifying reason to take it.

Because the reason your employee needs leave may have changed during the furlough, you should treat a post-furlough request for expanded family and medical leave as a new leave request and have her give you the appropriate documentation related to the reason she currently needs leave. For example, before the furlough, she may have needed leave because her child's school was closed, but she might need it now because her child's summer camp is closed due to COVID-19-related reasons.

97. **My business was closed due to my state's COVID-19 quarantine order. I furloughed all my employees. The quarantine order was lifted and I am returning employees to work. Can I extend my former employee's furlough because he would need to take FFCRA leave to care for his child if he is called back to work?** (added 07/20/2020)
No. Employers may not discriminate or retaliate against employees (or prospective employees) for exercising or attempting to exercise their right to take leave under the FFCRA. If your employee's need to care for his child qualifies for FFCRA leave, whether paid sick leave or expanded family and medical leave, he has a right to take that leave until he has used all of it. You

may not use his request for leave (or your assumption that he would make such a request) as a negative factor in an employment decision, such as a decision as to which employees to recall from furlough.

98. **My child's school is operating on an alternate day (or other hybrid-attendance) basis. The school is open each day, but students alternate between days attending school in person and days participating in remote learning. They are permitted to attend school only on their allotted in-person attendance days. May I take paid leave under the FFCRA in these circumstances?** (added 08/27/2020) ***[Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]***
Yes, you are eligible to take paid leave under the FFCRA on days when your child is not permitted to attend school in person and must instead engage in remote learning, as long as you need the leave to actually care for your child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA and its implementing regulations, the school is effectively "closed" to your child on days that he or she cannot attend in person. You may take paid leave under the FFCRA on each of your child's remote-learning days. FAQs 20–22 further address this scenario.

99. **My child's school is giving me a choice between having my child attend in person or participate in a remote learning program for the fall. I signed up for the remote learning alternative because, for example, I worry that my child might contract COVID-19 and bring it home to the family. Since my child will be at home, may I take paid leave under the FFCRA in these circumstances?** (added 08/27/2020) ***[Updated to reflect the Department's revised regulations which are effective as of the date of publication in the Federal Register.]***
No, you are not eligible to take paid leave under the FFCRA because your child's school is not "closed" due to COVID–19 related reasons; it is open for your child to attend. FFCRA leave is not available to take care of a child whose school is open for in-person attendance. If your child is home not because his or her school is closed, but because you have chosen for the child to remain home, you are not entitled to FFCRA paid leave. However, if, because of COVID-19, your child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, you may be eligible to take paid leave to care for him or her. See FAQ 63.

Also, as explained more fully in FAQ 98, if your child's school is operating on an alternate day (or other hybrid-attendance) basis, you may be eligible to take paid leave under the FFCRA on each of your child's remote-learning days because the school is effectively "closed" to your child on those days. FAQs 20–22 further address this scenario.

100. **My child's school is beginning the school year under a remote learning program out of concern for COVID-19, but has announced it will continue to evaluate local circumstances and make a decision about reopening for in-person attendance later in the school year. May I take paid leave under the FFCRA in these circumstances?** (added 08/27/2020)
Yes, you are eligible to take paid leave under the FFCRA while your child's school remains closed. If your child's school reopens, the availability of paid leave under the FFCRA will depend on the particulars of the school's operations. See FAQ 98 and 99.

101. **When were the invalidated provisions of the Department's FFCRA paid leave regulations vacated?** (added 09/11/2020)

August 3, 2020. The Department first issued its FFCRA paid leave regulations on April 1, 2020. Only certain provisions of those regulations were at issue in the lawsuit New York v. Scalia, Civ. No. 20-3020-JPO (S.D.N.Y.). The challenged provisions were vacated when the District Court issued its opinion and order on August 3, 2020. As of August 3, 2020, the work availability requirement provisions, the provision requiring an employee to obtain his or her employer's approval before taking FFCRA leave intermittently, the provision defining "health care provider" for purposes of employees whose employer may exclude them from FFCRA leave, and the provision requiring documentation of a need for leave prior to taking leave were vacated. The remainder of the FFCRA paid leave regulations were unaffected.

102. **Where did the District Court's order vacating certain provisions of the FFCRA paid leave regulations apply?**(added 09/11/2020)
Nationwide. Based on the specific circumstances in the case and language of the District Court's order, the Department considers the invalidated provisions of the FFCRA paid leave regulations vacated nationwide, not just as to the parties in the case.

103. **When do the revisions to the Department's FFCRA paid leave regulations become effective?** (added 09/11/2020)
September 16, 2020. The revised explanations and regulatory text become effective immediately upon publication in the Federal Register on September 16, 2020. This means they are effective from September 16, 2020 through the expiration of the FFCRA's paid leave provisions on December 31, 2020.

104. **I was eligible for leave under the FFCRA in 2020 but I did not use any leave. Am I still entitled to take paid sick or expanded family and medical leave after December 31, 2020?** (added 12/31/2020)

Your employer is not required to provide you with FFCRA leave after December 31, 2020, but your employer may voluntarily decide to provide you such leave. The obligation to provide FFCRA leave applies from the law's effective date of April 1, 2020, through December 31, 2020. Any change to extend the requirement to provide leave under the FFCRA would require an amendment to the statute by Congress. The Consolidated Appropriations Act, 2021, extended employer tax credits for paid sick leave and expanded family and medical leave voluntarily provided to employees until March 31, 2021. However, this Act did not extend an eligible employee's entitlement to FFCRA leave beyond December 31, 2020.

Employers with questions about claiming the refundable tax credits for qualified leave wages should consult with the IRS. Information can be found on the IRS website (http://www.irs.gov/coronavirus/new-employer-tax-credits).

105. **I used 6 weeks of FFCRA leave between April 1, 2020, and December 31, 2020, because my childcare provider was unavailable due to COVID-19. My employer allowed me to take time off, but did not pay me for my last two weeks of FFCRA leave. Is my employer required to pay me for my last two weeks if the FFCRA has expired?** (added 12/31/2020)

Yes. WHD will enforce the FFCRA for leave taken or requested during the effective period of April 1, 2020, through December 31, 2020, for complaints made within the statute of limitations. The statute of limitations for both the paid sick leave and expanded family and medical leave provisions of the FFCRA is two years from the date of the alleged violation (or three years in cases involving alleged willful violations). Therefore, if your employer failed to pay you as required by the FFCRA for your leave that occurred before December 31,

2020, you may contact the WHD about filing a complaint as long as you do so within two years of the last action you believe to be in violation of the FFCRA. You may also have a private right of action for alleged violations.

[1] If you are a Federal employee, you are eligible to take paid sick leave under the Emergency Paid Sick Leave Act. But only some Federal employees are eligible to take expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. Your eligibility will depend on whether you are covered under Title I or Title II of the Family Medical Leave Act. Federal employees should consult with their agency regarding their eligibility for expanded family and medical leave. For more information related to federal employers and employees, please consult the Office of Personnel Management's COVID-19 guidance portal, linked here.

[2] If you are a Federal employee, the State or local minimum wage would be used to calculate the wages owed to you only if the Federal agency that employs you has broad authority to set your compensation and has decided to use the State or local minimum wage. For more information related to federal employers and employees, please consult the Office of Personnel Management's COVID-19 guidance portal, linked here.

Wage and Hour Division

An agency within the U.S. Department of Labor

200 Constitution Ave NW
Washington, DC 20210
1-866-4-US-WAGE
1-866-487-9243
www.dol.gov

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–1

RIN 1250–AA09

Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (OFCCP) publishes this final rule to clarify the scope and application of the religious exemption. These clarifications to the religious exemption will help organizations with federal government contracts and subcontracts and federally assisted construction contracts and subcontracts better understand their obligations.

DATES: *Effective Date:* These regulations are effective January 8, 2021.

FOR FURTHER INFORMATION CONTACT: Tina Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C–3325, Washington, DC 20210. Telephone: (202) 693–0104 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

On August 15, 2019, OFCCP issued a notice of proposed rulemaking (NPRM) to clarify the scope and application of Executive Order 11246's (E.O. 11246) religious exemption consistent with recent legal developments. 84 FR 41677. During the 30-day public comment period, OFCCP received 109,726 comments on the proposed rule.[1] This total included over 90,000 comments generated by organized comment-writing efforts. Comments came from individuals and from a wide variety of organizations, including religious organizations, universities, civil rights and advocacy organizations, contractor associations, legal organizations, labor organizations, and members of Congress. Comments addressed all aspects of the NPRM. OFCCP appreciates the public's robust participation in this rulemaking, and the agency has revised certain aspects of this regulation in response to commenters' concerns.

As stated in the NPRM, on July 2, 1964, President Lyndon B. Johnson signed the landmark Civil Rights Act of 1964. *See* Public Law 88–352, 78 Stat. 241. This legislation prohibited discrimination on various grounds in many of the most important aspects of civic life. Its Title VII extended these protections to employment opportunity, prohibiting discrimination on the basis of race, color, religion, sex, or national origin. In Title VII, Congress also provided a critical accommodation for religious employers. Congress permitted religious employers to take religion into account for employees performing religious activities: "This title shall not apply . . . to a religious corporation, association, 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, or society of its religious activities . . . ." Public Law 88–352, 702(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. 2000e–1(a)). Congress provided a similar exemption for religious educational institutions. *See id.* § 703(e)(2), 78 Stat. at 256 (codified at 42 U.S.C. 2000e–2(e)(2)).

Title VII's protections for religious organizations were expanded by Congress in 1972 into their current form. Congress added a broad definition of "religion": "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Equal Employment Opportunity Act of 1972, Public Law 92–261, 2(7), 86 Stat. 103 (codified at 42 U.S.C. 2000e(j)). Congress also added educational institutions to the list of those eligible for section 702's exemption. In addition, Congress broadened the scope of the section 702 exemption to cover not just religious activities, but all activities of a religious organization: "This title [VII] 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." *Id.* § 3, 86 Stat. at 104 (codified at 42 U.S.C. § 2000e–1(a)). The Supreme Court unanimously upheld this expansion of the religious exemption to all activities of religious organizations against an Establishment Clause challenge. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 330 (1987).[2]

One year after President Johnson signed the Civil Rights Act, he signed E.O. 11246, requiring equal employment opportunity in federal government contracting. The order mandated that all government contracts include a provision stating that "[t]he contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin." Exec. Order No. 11246, § 202, 30 FR 12319, 12320 (Sept. 28, 1965). Two years later, President Johnson expressly acknowledged Title VII of the Civil Rights Act when expanding E.O. 11246 to prohibit, as does Title VII, discrimination on the bases of sex and religion. *See* Exec. Order No. 11375, § 3, 32 FR 14303–04 (Oct. 17, 1967). In 1978, the responsibilities for enforcing E.O. 11246 were consolidated in DOL. *See* Exec. Order No. 12086, 43 FR 46501 (Oct. 5, 1978). In its implementing regulations, DOL imported Title VII's exemption for religious educational institutions. *See* 43 FR 49240, 49243 (Oct. 20, 1978) (now codified at 41 CFR 60–1.5(a)(6)); *cf.* 42 U.S.C. 2000e–2(e)(2). In 2002, President George W. Bush amended E.O. 11246 by expressly importing Title VII's exemption for religious organizations, which likewise has since been implemented by DOL's regulations. *See* Exec. Order No. 13279, § 4, 67 FR 77143 (Dec. 16, 2002) (adding E.O. 11246 § 202(c)); 68 FR 56392 (Sept. 30, 2003) (codified at 41 CFR 60–1.5(a)(5)); *cf.* 42 U.S.C. 2000e–1(a).

Because the exemption administered by OFCCP springs directly from the Title VII exemption, it should be given a parallel interpretation, consistent with the Supreme Court's repeated counsel that the decision to borrow statutory text in a new statute is a "strong indication that the two statutes should be interpreted pari passu." *Northcross* v. *Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam). OFCCP thus generally interprets the nondiscrimination provisions of E.O. 11246 consistent with the principles of Title VII. Because OFCCP regulates federal contractors rather than private employers generally, OFCCP must apply Title VII principles in a manner that

[1] Of the 109,726 comments, 35 comments were inadvertently posted on *Regulations.gov* before redactions were made. The posted comments were withdrawn, redacted, and then reposted. When the comments were reposted, the number of comments on *Regulations.gov* increased to 109,761.

[2] Justice White wrote the majority opinion for five justices. Justices O'Connor, Blackmun, and Brennan (with Justice Marshall joining) wrote opinions concurring in the judgment.

best fit its unique field of regulation, including when applying the religious exemption.

With that said, there has been some variation among federal courts of appeals in interpreting the scope and application of the Title VII religious exemption, and many of the relevant Title VII court opinions predate Supreme Court decisions and executive orders that shed light on the proper interpretation. The purpose of this final rule is to clarify the contours of the E.O. 11246 religious exemption and the related obligations of federal contractors and subcontractors to ensure that OFCCP respects religious employers' free exercise rights, protects workers from prohibited discrimination, and defends the values of a pluralistic society. *See, e.g., Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) ("[T]he promise of the free exercise of religion . . . lies at the heart of our pluralistic society."). This rule is intended to correct any misperception that religious organizations are disfavored in government contracting by setting forth appropriate protections for their autonomy to hire employees who will further their religious missions, thereby providing clarity that may expand the eligible pool of federal contractors and subcontractors.

Recent Supreme Court decisions have addressed the freedoms and antidiscrimination protections that must be afforded religion-exercising organizations and individuals under the U.S. Constitution and federal law. *See, e.g., Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (holding the government violates the Free Exercise Clause of the First Amendment 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) (holding the government violates the Free Exercise Clause of the First Amendment when it decides to exclude an entity from a generally available public benefit because of its religious character, unless that decision withstands the strictest scrutiny); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014) (holding the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 196 (2012) (holding the ministerial exception, grounded in the Establishment and Free Exercise clauses of the First Amendment, bars an employment-discrimination suit brought on behalf of a minister against the religious school for which she worked). Recent executive orders have done the same. *See* Exec. Order No. 13831, 83 FR 20 715 (May 8, 2018); Exec. Order No. 13798, 82 FR 21 675 (May 9, 2017). Additional decisions from the Supreme Court, issued after the NPRM, have likewise extended Title VII's protections while affirming the importance of religious freedom. *See Bostock*, 140 S. Ct. at 1754 (holding Title VII's prohibition on discrimination because of sex prohibits "fir[ing] an individual merely for being gay or transgender"); *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2379–84 (2020) (holding the Departments of Labor, Health and Human Services, and the Treasury had authority to promulgate religious and conscience exemptions from the Affordable Care Act's contraceptive mandate); *Espinoza* v. *Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020) (a state "cannot disqualify some private schools [from a subsidy program] solely because they are religious" without violating the Free Exercise clause); and *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020) (holding the ministerial exception applies "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith"). These decisions are discussed in the final rule's analysis as appropriate and applicable.

In this final rule, OFCCP has sought to follow the principles articulated by these recent decisions and orders, and has interpreted older federal appellate-level case law in light of them as applicable. OFCCP has chosen a path consistent with the Supreme Court's religion and Title VII jurisprudence as well as what OFCCP views to be the more persuasive reasoning of the federal courts of appeals in these areas of the law.

A. Title VII and the EEOC Generally

Some commenters on the NPRM agreed that OFCCP's proposal was appropriately consistent with Title VII principles. For example, a faith-based advocacy organization commented that the religious employer exemption in federal contracting regulations is modeled on Title VII, and should therefore be understood "in the strong way" the Title VII exemptions have traditionally been understood.

Other commenters asserted that OFCCP's proposal was inconsistent with Title VII overall. Some of these commenters stated that the proposal's interpretation of the exemption was contrary to congressional intent. For example, an affirmative action professionals association commented that Congress has repeatedly declined to extend the Title VII exemption to government-funded entities. A lesbian, gay, bisexual, and transgender (LGBT) rights advocacy organization commented that, at the time Title VII was enacted, Congress could not have envisioned that religious organizations that would qualify for the Title VII exemption would also seek to contract with the federal government, "let alone be given a broad right to discriminate based on religion while accepting federal funding."

In a related vein, OFCCP also received comments objecting generally to the provision of a religious exemption for federal contractors or specifically to OFCCP's proposal. Most of these commenters characterized the religious exemption as taxpayer- or government-funded discrimination that was contrary to the purpose of E.O. 11246. For example, an affirmative action professionals association commented that "[t]he Federal Government should not be in the business of funding employment discrimination" and emphasized that religious organizations should not expect to maintain autonomy and independence from the government when they solicit and accept government contracts. An international labor organization submitted a similar comment, stating that organizations that choose to accept government funding through government contracts should not be allowed to conduct what it described as discrimination against qualified job applicants and employees.

Relatedly, a public policy research and advocacy organization commented that no one should be disqualified from a taxpayer-funded job because they are the "wrong" religion or do not adhere to any religion. A technology company commented that the proposal conflicted with the spirit of nondiscrimination law. A group of U.S. Senators commented: "The government cannot use religious exemptions as a pretext to permit discrimination against or harm others."

Some religious organizations were among the commenters that opposed the provision of a religious exemption for federal contractors. One religious organization commented that, in line with its commitment to religious freedom, it opposed granting government contracts to organizations that, in its words, discriminate against qualified individuals based on their practices and beliefs. One religious organization commented that barring people from taxpayer-funded jobs based on their faith violates principles of equality and meritocracy. Another faith-

based organization cited First Amendment separation of church and state principles, and commented that, while some religious organizations hire staff based on religion, accommodations for religious hiring should not be applied broadly in the federal contracts context, as federal contracts are not provided to advance religious ends. Other commenters stated that the proposal's expansion of the exemption was contrary to Title VII case law or principles. For example, an international labor organization commented that, in its view, the proposed rule mischaracterized federal case law in order to transform provisions designed to protect workers from religious discrimination into exemptions that would allow federally funded employers to discriminate against workers for religious reasons.

Some commenters stated that the proposal was inconsistent with the interpretation of Title VII by the EEOC, the agency primarily responsible for enforcing Title VII. A group of state attorneys general commented that OFCCP should not undermine the EEOC's efforts, "as would occur under the Proposed Rule, which takes positions contrary to the EEOC." The state attorneys general asserted that the proposal would not increase clarity because it would create two separate legal standards for federal contractors and OFCCP staff—one under Title VII and one under E.O. 11246. A contractor association asserted that "federal contractors could face the Hobson's choice of determining whether compliance with an OFCCP regulation will result in liability under Title VII." Other commenters stated that the overall proposal departed from OFCCP's prior interpretation, which they asserted had been consistent with the EEOC's interpretation of Title VII prior to August 2018, when OFCCP issued Directive 2018–03, concerning the religious exemption in section 204(c) of E.O. 11246. For example, a public policy research and advocacy organization asserted that, until August 2018, the Department consistently interpreted the E.O. 11246 religious exemption narrowly to permit preferences for coreligionists by certain religious organizations, and applied the "motivating factor" test to evaluate claims of discrimination.

OFCCP agrees with the comments stating that the rule will provide necessary clarity for contractors and potential contractors about the scope of the E.O. 11246 religious exemption. Regarding comments that a religious exemption protecting government contractors is contrary to congressional intent or that such an exemption is misplaced in the government contracting context, that question is not at issue in this rulemaking. The religious exemption was added to E.O. 11246 almost twenty years ago, and OFCCP's implementing regulations are nearly as old. The existence of the exemption itself is not at issue in this rulemaking.

Regarding comments that the rule deviates from the EEOC's interpretation of the Title VII religious exemption or creates two separate standards, OFCCP believes these concerns are unfounded. This rule is restricted to the application of the religious exemption. The vast majority of contractors and their employees, as well as OFCCP's enforcement program, will be unaffected by this rule. As for the religious exemption specifically, OFCCP has followed the Title VII case law it finds most persuasive, especially in light of the principles of religious equality and autonomy reinforced by recent executive orders and Supreme Court decisions. OFCCP has also adapted Title VII principles to ensure a proper fit in the government contracting context. OFCCP's specific choices in this regard and how they compare to the EEOC's stated views are explained more fully in the section-by-section discussion and a section at the end of this preamble. OFCCP has also made some revisions to align this rule even more closely with Title VII. But even assuming any variation with the EEOC as to the exemption, this rule does not create a "Hobson's choice" for government contractors. The exemption, to describe it most broadly, is an optional accommodation for religious organizations, not a requirement mandating compliance. In the rare, hypothetical instance where a contractor would be entitled to the E.O. 11246 exemption but not the Title VII exemption, the contractor would not face conflicting liability regardless of its choice: Rather, it would face potential liability under one enforcement scheme rather than two. OFCCP acknowledges that it is often helpful to regulated parties for regulators to try to harmonize their approaches when enforcing related legal requirements. OFCCP believes its approach here is consistent with Title VII and religious-accommodation principles, adapted appropriately to its own regulatory context and the government contracting community.

OFCCP also is not concerned about this rule purportedly decreasing clarity by creating two standards for additional reasons. For one, it was not a concern primarily raised by commenters who may qualify for the E.O. 11246 religious exemption. Those commenters—the ones who would actually need to negotiate the purportedly two different standards—were by and large supportive of the rule and did not raise this concern. For another, OFCCP believes that this rule, which incorporates many recent Supreme Court decisions and other case law and is in accord with recent Executive Orders and guidance from the Department of Justice, offers clarity as compared to less recent guidance from EEOC that does not incorporate these more recent developments.

B. The Relevance of Recent Supreme Court Cases

Commenters both supported and opposed OFCCP's acknowledgement of recent Supreme Court cases granting antidiscrimination protections for persons bringing religious claims in a variety of contexts. These cases included *Hobby Lobby, Trinity Lutheran,* and *Masterpiece Cakeshop.* Supreme Court decisions in employment and religion cases issued after the proposed rule's publication are addressed elsewhere in the preamble as appropriate.

Some commenters expressed support for OFCCP's interpretations of these Supreme Court cases and their application to the proposal in general. For example, a group of members of the U.S. House of Representatives noted approvingly that the proposed rule was consistent with these cases, each of which "came with the cost" of religious Americans shouldering the material, emotional, and spiritual burdens associated with litigating issues related to their faith. Discussing *Masterpiece Cakeshop,* a religious public policy women's organization commented that the Supreme Court in that case acknowledged "the blatant, systematic government bias" against the owner of Masterpiece Cakeshop for refusing to participate in a same-sex wedding ceremony, noting that the owner continues to be harassed for his faith "to this day." The commenter stated that this and other such cases prove that further clarification regarding existing First Amendment protections are necessary. Addressing *Trinity Lutheran,* a religious public policy advocacy organization asserted that the Supreme Court in that case made clear that Trinity Lutheran Church's status as a church did not prevent it from participating on an equal playing field with secular organizations in seeking government grants. The commenter continued that OFCCP's proposed rule simply reaffirmed a principle the

Supreme Court had held to be consistent with the First Amendment.

Other commenters criticized OFCCP's reliance on these Supreme Court cases. Many of these commenters stated that the cases were inapplicable because they did not involve federal contractors. For example, a secular humanist advocacy organization criticized the proposed rule for its reliance on case law unrelated to employment discrimination laws or the text of E.O. 11246. Many of the commenters stated that the cases cited, if interpreted properly, did not provide support for OFCCP's proposal. For example, a labor union commented that the decisions cited did not authorize "the expansive view that the Proposed Rule seeks to support." A group of U.S. Senators commented: "The Court has long held federally-funded employers cannot use religion to discriminate. Each of the cases cited in the proposed rule are consistent with that approach."

Many of the commenters who criticized OFCCP's discussion of *Masterpiece Cakeshop* pointed to this sentence from the Court's opinion: "While . . . religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." 138 S. Ct. at 1727. A labor union asserted that *Masterpiece Cakeshop* was irrelevant in the "entirely secular" context of federal contracting, and argued that the Establishment Clause dictates that federal contracting must be entirely secular. A transgender civil rights organization commented that, in the proposed rule, OFCCP did not suggest that its existing requirements or prior conduct reflect the sort of hostility to religious beliefs that the Court was concerned with in *Masterpiece Cakeshop*, and noted that, on the contrary, "EEO requirements for federal contractors fall squarely within the 'general rule' stated by the Court." A group of state attorneys general commented that, if anything, *Masterpiece Cakeshop* stands for the proposition that overly broad religious objections to civil rights laws of general applicability are inappropriate.

Commenters also criticized OFCCP's discussion of *Trinity Lutheran.* Many of these commenters read the decision narrowly—as holding that "the state violated the First Amendment by denying a public benefit to an otherwise eligible recipient solely on account of its religious status," as one contractor association described it—and asserted that the decision was therefore inapplicable to OFCCP's proposal. Some of these commenters pointed to a footnote in the Court's opinion limiting it to "express discrimination based on religious identity with respect to playground resurfacing." *Trinity Lutheran*, 137 S. Ct. at 2024 n.3. Many commenters stated that there are legally significant distinctions between government grant programs and government contracts. A labor union argued, regarding the Supreme Court's decision, that it would have been perfectly lawful for the government to deny grants to religious applicants who restricted access to their playgrounds on the basis of sexual orientation, for example. The union also asserted that "Federal contracting is not a generally available public benefit, but a reticulated system for the funding and delivery of governmental functions and services by private parties." A religious organization commented that *Trinity Lutheran* did not address whether a religious institution can discriminate with public funds, and stressed that the government's interest in prohibiting discrimination in taxpayer-funded jobs is "of the highest order." A group of state attorneys general commented that the Court's decision drew a careful distinction between situations where a benefit is denied to an entity based solely that entity's religious identity and situations involving neutral and generally applicable laws that restrict an entity's actions. The group asserted that E.O. 11246's anti-discrimination provisions are directed toward the latter. An LGBT rights advocacy organization commented that, because the decision involved a religious grant applicant that had agreed to abide by certain nondiscrimination provisions, its holding was inapplicable in the federal contracting context where funding is awarded on a competitive basis, as well as in situations where the contractor has no intention of complying with governing nondiscrimination rules.

Some commenters similarly criticized OFCCP's discussion of *Hobby Lobby.* Many of these commenters quoted or paraphrased the following paragraph from the Supreme Court's decision:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

Hobby Lobby, 573 U.S. at 733. For example, a city public advocate argued that the *Hobby Lobby* decision affirmed that securing equal access to workplace participation is a compelling interest. A civil liberties and human rights legal advocacy organization commented that the Court in *Hobby Lobby* expressly declined to promulgate a rule authorizing for-profit corporations that willingly enter into contracts with the federal government to discriminate against workers "because of who they are." A contractor organization commented that it is "not at all clear" that *Hobby Lobby* supports the idea that religious rights override any other legal rights, given that the decision concerns only the availability of government programs.

Finally, some commenters criticized OFCCP's discussion of *Hosanna-Tabor.* Many of these commenters pointed out that this case applied the (constitutionally grounded) ministerial exception developed by courts and not the (statutory) Title VII religious exemption enacted by Congress. Some commenters expressed doubt that the ministerial exception was applicable to federal contractors. For example, a transgender legal professional organization commented that, though the ministerial exception bars ministers from pursuing employment discrimination cases, most federal contractors are unlikely to employ ministers or others who "preach or teach the faith." Other commenters expressed concern that OFCCP intended to broaden the scope of the religious exemption to mimic the ministerial exception and asserted that *Hosanna-Tabor* did not support such an expansion. For example, a labor union commented that the decision could not be read to extend the ministerial exception to lay people employed by religious institutions, or to private for-profit businesses whose owners may also hold religious beliefs.

OFCCP believes the critical comments here are misplaced because OFCCP did not acknowledge these Supreme Court cases for the propositions that commenters said the agency did. OFCCP acknowledged in the NPRM that these Supreme Court cases did not specifically address government contracting. And indeed, with the exception of *Hosanna-Tabor,* they did not specifically address employment law, Title VII, or E.O. 11246. Rather, OFCCP noted the recent Supreme Court cases for the general and commonsense propositions that the government must

be careful when its actions may infringe private persons' religious beliefs and that it certainly cannot target religious persons for disfavor. These principles are not new, but these recent cases show that those principles remain vital. That is especially important when government at times has been callous in its treatment of religious persons.[3] Those general themes of caution, permissible accommodation, and equality for religious persons have informed the policy approach in this rule. Where specific holdings or language in these Supreme Court decisions—and additional Supreme Court decisions issued since—suggest answers to specific aspects of this rule, they are noted in the section-by-section analysis. Comments on those more specific issues are addressed there as well.

C. Clarity and Need for the Rule

The NPRM noted that prior to its publication, some religious organizations provided feedback to OFCCP that they were reluctant to participate as federal contractors because of uncertainty regarding the scope of the religious exemption contained in section 204(c) of E.O. 11246 and codified in OFCCP's regulations. The NPRM also noted that while "only a subset of contractors and would-be contractors may wish to seek this exemption, the Supreme Court, Congress, and the President have each affirmed the importance of protecting religious liberty for those organizations who wish to exercise it." 84 FR at 41679. The NPRM also noted throughout OFCCP's desire to provide clarity in this area of regulation.

OFCCP received numerous comments addressing the need for the proposed rule. Some commenters stated that the proposal was necessary to ensure that religious entities could contract with the federal government without compromising their religious identities or missions. Many of these commenters noted the important services provided by religious organizations. For example, a religious school association encouraged the federal government to protect religious staffing "in all forms of federal funding," asserting that doing so would enable religious organizations to expand the critical services they provide. A religious liberties legal organization likewise commented that religious organizations are often uniquely equipped to respond to the needs of the communities they serve and predicted that the proposal would allow religious contractors to better "order[] their affairs." A religious convention commission approved of the rule on the basis that the government should not be in the business of judging theology or privileging certain religious beliefs over others.

A few commenters expressed support for the proposal specifically because they believed it would exempt religious organizations from the prohibitions on discrimination based on sexual orientation and gender identity that were added when E.O. 11246 was amended by Executive Order 13672 (E.O. 13672). 79 FR 42971 (July 23, 2014). For example, a faith-based advocacy organization praised OFCCP for "the important positive precedent that will be set by the proposed strong protection of the religious staffing freedom in the context of the requirement of no sexual-orientation or gender-identity employment discrimination in federal contracting." An evangelical chaplains' advocacy organization commented that "E.O. 13672 . . . prohibited military chaplains from selecting religious support contractors who did not affirm sexual orientation, same-sex marriage and gender identity" in violation of these chaplains' free exercise rights.

Some commenters agreed with OFCCP's observation that religious organizations have been reluctant to provide the government with goods or services as federal contractors because of the lack of clarity or perceived narrowness of the E.O. 11246 religious exemption. One individual commenter who identified himself as a legal adviser to federal contractors noted that imposing "pass through" contracting obligations on subcontractors can be challenging, as religious subcontractors often fear that complying with federal anti-discrimination laws will require them to compromise their religious integrity. Two other commenters offered examples or evidence of religious organizations' reluctance to participate in other contexts, such as federal grants. A religious medical organization cited a survey suggesting that many individuals working in faith-based organizations (FBOs) overseas feel that the government is not inclined to work with FBOs, and called for outreach programs to correct this perception.

A religious legal organization referenced an audit of the Department of Justice's Office of Justice Programs (OJP) which revealed that, though religious organizations were interested in participating in many programs, "the percentage of OJP funds distributed to religious organizations to help the public through these programs was abysmally small—0.0025%." The organization cited the concern of religious organizations that their right to hire members of their faith would be eroded as one of the reasons for this discrepancy.

Many commenters expressed skepticism that religious organizations have been reluctant to participate as federal contractors because of the lack of clarity or perceived narrowness of the religious exemption. Most of these commenters stated that OFCCP had provided no evidence to support its claim. For example, a legal think tank commented that the proposal was "a regulation in search of a problem," and criticized OFCCP for failing to provide data regarding the number of religious organizations reluctant to enter into federal contracts, the number of contractors that have invoked the Section 204(c) exemption in the past, and the number of contractors expected to avail themselves of the "expanded exemption" in the proposed rule. A labor union commented: "[T]here is no evidence that the current, settled interpretation of the E.O. 11246 religious exemption has deterred organizations from submitting competitive bids for federal contracts or prevented them from obtaining such contracts. At best, the Proposed Rule is an unjustified rulemaking solution in search of a problem."

A few commenters stated that the proposal was unnecessary given the applicability of Title VII case law. For example, a contractor association commented that the extent to which religious employers can condition employment on religion has been addressed by a long line of Title VII cases, rendering an executive rulemaking on this topic unnecessary. Some commenters cited evidence that federal contracts are being awarded to faith-based organizations. For example, a group of state attorneys general cited the 2016 congressional testimony of Oklahoma Representative Steve Russell, who explained that more than 2,000 federal government contracts were being awarded to religious organizations and contractors per year. As examples of faith-based organizations that were awarded contracts in the previous year, the state attorneys general listed the following:

Army World Service Office ($27.5 million), Mercy Hospital Springfield ($14.4 million), Young Women's Christian Association of Greater Los Angeles California ($10.2 million), City of Faith Prison Ministries ($5.2 million), Riverside Christian Ministries, Inc. ($2.7 million), Jewish Child and Family

[3] *See, e.g., Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2368 (2018); *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30; *Holt v. Hobbs*, 574 U.S. 352, 359 (2015).

Services ($2.1 million), Catholic Charities, various affiliates (over $1 million in sum total), to name a few.[4]

In addition, several commenters cited a report from a progressive policy institute noting that some religious organizations continue to be federal contractors despite their objections to a lack of an expanded religious exemption in E.O. 13672.

Some commenters expressed skepticism that the proposal would encourage participation in federal contracting because, they asserted, the rule as proposed would increase rather than reduce confusion. For example, a contractor association commented that OFCCP's proposal would create more confusion than clarity for federal contractors. An atheist civil liberties organization echoed this concern, commenting that the proposal would increase confusion because, in its view, the proposed rule deviated from decades of Title VII law. Other commenters stated that the proposal would have negative effects because of increased uncertainty about or expansion of the exemption. These commenters stated that the proposal would undercut other entities' enforcement of nondiscrimination obligations, increase EEOC enforcement actions, increase contractors' noncompliance, and strain OFCCP's resources. For example, a group of state attorneys general commented that, given the prevalence of workplace discrimination, expanding E.O. 11246's religious organization exemption to lessen OFCCP's oversight could result in employers claiming the exemption in bad faith when faced with charges of discrimination. The state attorneys general commented that the proposed rule had the potential to strain OFCCP's limited resources due to employers requesting determinations of whether they are exempt, and challenging the applicability of OFCCP enforcement actions already underway.

OFCCP appreciates the comments supporting its view that clarity regarding the exemption would be useful, and notes their accounts of religious organizations that are hesitant to participate as government contractors, as well as their evidence of a perception among faith-based organizations that the federal government could do more to demonstrate that it will select the best organizations for its partners, whether faith-based or not. Given certain statements by these commenters regarding discrimination on the basis of sexual orientation or gender identity, OFCCP repeats here as it did many times in the NPRM that the religious exemption does not permit discrimination on the basis of other protected categories. The section-by-section analysis of *Particular religion* addresses the application of the religious exemption and other legal requirements to E.O. 11246's other protections including those pertaining to sexual orientation and gender identity, and the application of the Religious Freedom Restoration Act (RFRA) in certain situations.

Regarding comments that the rule is unnecessary because religious organizations are not presently deterred from contracting with the government, OFCCP believes that clarifying the law for current contractors is a valuable goal in itself, regardless of whether more religious organizations would participate as federal contractors or subcontractors. The disputes among commenters over the proper interpretation of the Title VII case law suggests as well that the guidance provided by this rule would be valuable to the contracting community. And in fact, as just noted, other commenters offered evidence that faith-based organizations have indeed been reluctant to contract with the federal government because of the lack of certainty about the religious exemption. The fact that some faith-based organizations have been willing to enter into federal contracts or subcontracts does not mean that other faith-based organizations have not been reluctant to do so. Admittedly, OFCCP cannot perfectly ascertain how many religious organizations are government contractors, or would like to become such, and how those numbers compare to the whole of the contracting pool. But neither does OFCCP find persuasive commenters' assertions that faith-based organizations are already well-represented among government contractors, when those assertions are based on examples showing contracting awards to them totaling only tens of millions, when the federal government expended $926.5 billion on contractual services in fiscal year 2019[5] and, according to one estimate, faith-based organizations account for hundreds of billions of dollars of economic activity annually in the United States.[6] OFCCP disagrees that the rule will introduce confusion. OFCCP anticipates this rule will have no effect on the vast majority of contractors or the agency's regulation of them, since they do not and would not claim the religious exemption. As commenters noted, religious organizations do not appear to be a large portion of federal contractors. While this rule may add clarity that encourages more religious organizations to seek to become federal contractors and subcontractors, OFCCP does not believe the increase will greatly influence the composition or behavior of the contractor pool that it regulates. The exemption is a helpful accommodation for this small minority of religious organizations that may seek its protection. For them specifically, the rule is intended to bring clarity. For instance, as explained below, this rule provides a clear three-part test for determining whether an entity can qualify for the exemption. Contrary to the assertions of some commenters, and as described more fully below, Title VII case law offers differing tests on a jurisdiction-by-jurisdiction basis, and some of those tests provide little guidance at all. As another example, this rule provides a clear approach to determining when a religious employer is appropriately taking action on the basis of an employee's particular religion, another area where the case law is not uniform.

OFCCP also disagrees that this rule will impede the agency's enforcement efforts. OFCCP promulgates this rule from a position of familiarity with its own enforcement resources, priorities, and budget. For the reasons just stated above, OFCCP does not see this rule as significantly affecting the vast majority of its work. OFCCP also does not anticipate a flood of employers claiming the exemption in bad faith when faced with discrimination claims. That has not been the experience under the Title VII exemption thus far: The number of reported cases involving the exemption since 1964 are in the dozens, not the thousands. And in those cases, the employer may or may not have succeeded in claiming the exemption or defending against a discrimination claim, but in nearly all the employer did not appear to invoke the exemption nefariously, in bad faith. OFCCP is also optimistic given the federal government's experience under the RFRA. This law provides generous accommodation for religious claims and

[4] The commenter cited *USASPENDING.GOV*, *https://www.usaspending.gov/#/recipient*.

[5] *See* USA Spending, Spending Explorer (select Object Class, Fiscal Year 2019), *https://www.usaspending.gov/#/explorer/object_class*.

[6] *See* Brian J. Grim and Melissa E. Grim, "The Socio-economic Contribution of Religion to American Society: An Empirical Analysis," *Interdisciplinary Journal of Research on Religion*, vol. 12 (2016), article 3, p. 10, 25, (describing revenues of faith-based charities, congregations, healthcare networks, educational institutions, and other organizations), *www.religjournal.com/pdf/ijrr12003.pdf*.

strict boundaries for the federal government, yet neither the courts nor OFCCP have been inundated with claims.[7]

OFCCP appreciates all comments received, and for the reasons stated believes that proceeding with a final rule clarifying the religious exemption is warranted. For the small minority of current and potential federal contractors and subcontractors interested in the exemption, this will help them understand its scope and requirements and may encourage a broader pool of organizations to compete for government contracts, which will inure to the government's benefit. For the vast majority of contractors, OFCCP does not expect this rule to affect their operations or OFCCP's monitoring and enforcement.

This final rule is an Executive Order 13771 (E.O. 13771) deregulatory action because it is expected to reduce compliance costs and potentially the cost of litigation for regulated entities. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA determined that this rule is not a "major rule," as defined by 5 U.S.C. 804(2). Details on the estimated costs of this rule can be found in the economic analysis below.

II. Section-by-Section Analysis

The NPRM proposed five new definitions to clarify key terms used in OFCCP's religious exemption: *Exercise of religion; Particular religion; Religion; Religious corporation, association, educational institution, or society;* and *Sincere.* The regulatory codification of the underlying exemption itself—which is not at issue in this rulemaking—is found at 41 CFR 60–1.5(a)(5). The new definitions were proposed to be placed with the rest of the regulations' generally applicable definitions at 41 CFR 60–1.3. The NPRM also proposed adding a rule of construction to § 60–1.5 to provide the maximum legally permissible protection of religious exercise.

This final rule retains the same basic structure as the NPRM, with a few changes. First, there have been some modifications to some of the definitions, and one proposed definition, for *Exercise of religion,* is not included in the final rule, as explained below. Second, this final rule adds several illustrative examples within the definition of *Religious corporation, association, educational institution, or society* to better illustrate which organizations qualify for the religious exemption. Third, this final rule adds a severability clause.

A. Section 60–1.3 Definitions

The definitions added to § 60–1.3 are interrelated, so they are discussed below in a particular order. This order is different from that presented in the NPRM. The change in order is not substantive. The change is intended only to make the rule as a whole easier to understand.

1. Definition of Religion

OFCCP's proposed definition of *Religion* provided that the term is not limited to religious belief but also includes all aspects of religious observance and practice. The proposed definition was identical to the first part of the definition of "religion" in Title VII: "The term 'religion' includes all aspects of religious observance and practice, as well as belief . . . ." 42 U.S.C. 2000e(j). The proposed definition omitted the second portion of the Title VII definition, which refers to an employer's accommodation of an employee's religious observance or practice, because that would have been redundant with OFCCP's existing regulations. OFCCP's regulations at 41 CFR part 60–50, Guidelines on Discrimination Because of Religion or National Origin, contain robust religious protections for employees, including accommodation language substantially the same as that in the portion of the Title VII definition omitted here. *Compare* 42 U.S.C. 2000e(j), *with* 41 CFR 60–50.3. Those provisions continue to govern contractors' obligations to accommodate employees' and potential employees' religious observance and practice.

The proposed definition of *Religion* is used by other agencies. It is identical to the definition used by the Department of Justice in grant regulations implementing section 815(c) of the Justice System Improvement Act of 1979. *See* 28 CFR 42.202(m). The Small Business Administration has used the same definition as well in its grant regulations. *See* 13 CFR 113.2(c).

Some commenters generally supported the proposed definition, noting that it is legally sound, as it tracks the Title VII definition and provides broad protection for religious entities. Commenters also noted that the definition is sensible and will aid contractors in understanding the exemption.

Other commenters argued that importing the definition from Title VII is inappropriate because the context of Title VII is protection of an employee's individual religious beliefs in the workplace, not those of the employer. A legal professional organization raised the concern that this definition is overbroad as applied to the employer, particularly where it could allow a government-funded employer to make faith-based employment decisions beyond those currently allowed under Title VII and E.O. 11246. Commenters also objected to the omission of the second part of the Title VII definition, arguing that the weighing of the burden that an employee's request for religious accommodations places on an employer is an important limitation on Congress's intent to accommodate religion in the workplace. Commenters stated that, in their view, an employee's requested accommodations may impose no more than a *de minimis* burden on the employer. Commenters argued that OFCCP's proposed definition is broader than Congress intended in that it does not consider the burden the employer's assertion of the religious exemption would impose on employees, thus allowing religious employers to take adverse actions against employees based on religious belief no matter the hardship it causes them. Some commenters argued that partially importing the Title VII definition would "muddy the waters" rather than provide clarity.

Other commenters requested clarification on the proposed definition of *Religion.* Specifically, some commenters proposed that the final rule clarify that "observance and practice" includes refraining from certain activities. Another commenter noted that the proposed rule did not explain the extent to which it might displace employees' right to reasonable accommodation of their religious beliefs and practices if such accommodation conflicts with the contractor's religion.

For the reasons described above and in the NPRM, and considering the comments received, OFCCP is finalizing the proposed definition of *Religion* without modification. No change is needed to make clear that inaction or omission can be a form of "observance and practice." *See, e.g., Emp't Div., Dep't of Human Res. of Or.* v. *Smith,* 494 U.S. 872, 877 (1990) (holding the "exercise" of religion protected by the First Amendment "involves not only belief and profession but the performance of (or abstention from) physical acts"); *see also Espinoza,* 140

[7] *See* 42 U.S.C. 2000bb(a)(5) ("[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior government interests."); *Holt,* 574 U.S. at 368 (rejecting the argument that the only workable rule is one of no exceptions); *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal,* 546 U.S. 418, 436 (2006) (rejecting "slippery-slope argument" that RFRA-mandated exceptions would become unworkable).

S. Ct. at 2277 (Gorsuch, J., concurring) ("The right to be religious without the right to do religious things would hardly amount to a right at all.").

OFCCP disagrees with commenters who argued that the definition of *Religion* is overbroad and would permit contractors to make faith-based employment decisions beyond those permitted by law. The definition is the same as that used in other federal regulations and the same as that used in Title VII when read in conjunction with the rest of OFCCP's regulations. The definition must also be construed in harmony with those regulations, the requirements of which remain in force just as strongly as before this regulation's promulgation.

OFCCP also disagrees that it should import the second half of Title VII's definition of *religion* into its general list of definitions in § 60–1.3. OFCCP's regulations in part 60–50 governing protection of employees' religion and national origin already contain this language and remain in force, and employers must continue to comply with them. The definition of *Religion* added to § 60–1.3 is intended to apply generally, to both employers and employees.

Regarding comments about burden on employees' exercise of religion, OFCCP looks to the functioning of the religious exemption. E.O. 11246, like Title VII, requires employers to accommodate employees' religious practices to a prescribed extent. But the religious exemption is precisely that: An exemption that relieves "religious organizations from Title VII's [or E.O. 11246's] prohibition against discrimination in employment on the basis of religion." *Amos*, 483 U.S. at 329. That logically includes a lesser exemption from the duty to accommodate religious practice. While religious organizations can accommodate employees' religious practices, and in many instances may find that desirable, under the exemption, they are not required to do so. *See Kennedy* v. *St. Joseph's Ministries, Inc.*, 657 F.3d 189, 194 (4th Cir. 2011).

2. Definition of Religious Corporation, Association, Educational Institution, or Society

One of the primary objectives of this rulemaking is to clarify the conditions of eligibility for the religious exemption. Thus the NRPM proposed a definition of *Religious corporation, association, educational institution, or society.* This term is used in E.O. 11246 section 204(c) and 41 CFR 60–1.5(a)(5), and it is the same term used in the Title VII religious exemption at 42 U.S.C. 2000e–1(a). The definition as proposed would apply to a corporation, association, educational institution, society, school, college, university, or institution of learning.[8]

As explained in the NPRM, clarity on this topic is essential because federal courts of appeals have used a confusing variety of tests, and the tests themselves often involve unclear or constitutionally suspect criteria. The NPRM favored, with some modifications, the test used by the U.S. Court of Appeals for the Ninth Circuit in *Spencer* v. *World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam). This was for several reasons, including because the *World Vision* test generally prevents invasive inquiries into matters of faith, the uncertainty and subjectivity of a multifactor balancing test, and the inherently difficult and constitutionally suspect exercise of measuring the quantum of an organization's religiosity. *See* 84 FR 41681–84.

The controlling per curiam opinion in *World Vision* offered a four-pronged test for determining an entity's qualification for the religious exemption:

> an entity is eligible for the . . . exemption, at least, if it is [1] organized for a religious purpose, [2] is engaged primarily in carrying out that religious purpose, [3] holds itself out to the public as an entity for carrying out that religious purpose, and [4] does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.

World Vision, 633 F.3d at 724 (per curiam).

This four-pronged test reflects the overlap of agreement between the two judges in the majority, Judges O'Scannlain and Kleinfeld, who also each wrote separate concurrences that laid out their own preferred tests. Both judges agreed on the first two prongs, that the entity be organized for a religious purpose[9] and hold itself out to the public as carrying out that religious purpose. The third and fourth prongs reflect Judge Kleinfeld's view. *See id.* at 748 (Kleinfeld, J., concurring). Regarding the third prong, Judge O'Scannlain would have employed a broader formulation, requiring that the employer engage "in activity consistent with, and in furtherance of, those [founding] religious purposes." *Id.* at 734 (O'Scannlain, J., concurring). As to the fourth prong, Judge Kleinfeld restricted the exemption to organizations that charge little or nothing for their goods or services, regardless of their formal incorporation as a nonprofit organization. *See id.* at 745–47 (Kleinfeld, J., concurring). Judge O'Scannlain would have broadened the fourth prong (in most instances) by requiring nonprofit status, including nonprofit organizations that charge market rates for their goods or services. *See id.* at 734 (O'Scannlain, J., concurring).

The NPRM proposed to follow a modified *World Vision* test. The NPRM proposed adopting the first two prongs of the per curiam opinion. The NPRM favored Judge O'Scannlain's formulation of the second prong given the significant constitutional difficulties that accompany determining whether an organization is "primarily" religious. The NPRM also proposed to revise Judge O'Scannlain's phraseology, that the entity be engaged "in activity" consistent with those religious purposes, with the requirement that the entity be engaged "in exercise of religion" consistent with a religious purpose. No material change was intended by this adjustment; it was meant to capture in succinct regulatory text Judge O'Scannlain's lengthy discussion that the kind of activity contemplated under this prong is religious exercise. *See* 84 FR at 41683; *see also World Vision*, 633 F.3d at 737–38 (O'Scannlain, J., concurring). Finally, the NPRM proposed not to adopt the fourth prong of the test, on grounds that a no-charging rule would exclude many bona fide religious organizations, especially in the government contracting context, and that an absolute bar on for-profit organizations was tenuous given other court decisions and the Supreme Court's more recent decision in *Hobby Lobby*. *See* 84 FR at

[8] The words "school, college, university, or institution of learning" also appear in 41 CFR 60–1.5(a)(6), the exemption for religious educational organizations. They were included in the definition to make clear that the definition's listing of "educational institution" includes schools, colleges, universities, and institutions of learning. Depending on the facts, an educational organization may qualify under the § 60–1.5(a)(5) exemption, the § 60–1.5(a)(6) exemption, both, or neither. The inclusion of educational organizations is maintained in the final rule.

[9] To be precise, Judge O'Scannlain's formulation was that the entity be "organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents)." *World Vision*, 633 F.3d at 734 (O'Scannlain, J., concurring). Judge Kleinfeld noted that some people organize in religious bodies "with no corporate apparatus" and expressed concerns about the exemption being defeated by an "[a]bsence of corporate papers." *Id.* at 745 (Kleinfeld, J., concurring). Judge Kleinfeld wrote that this "narrowness problem may be repairable by a tweak in the test," *id.*, which may be why the per curiam opinion does not include Judge O'Scannlain's parenthetical referring to Articles of Incorporation. The difference is slight—a "tweak." OFCCP's approach to this first factor, including the necessary evidence to satisfy it, is discussed below in this preamble.

41684. The proposed rule could also be viewed as essentially following Judge O'Scannlain's concurrence save for his requirement that the entity be nonprofit to qualify for the exemption.

In response to comments and a subsequent reevaluation of *World Vision* and other case law, OFCCP is revising the proposed regulatory text in this final rule. The final rule's test can be viewed as generally adopting Judge O'Scannlain's concurrence in *World Vision,* including by adopting a fourth prong. Satisfaction of this test will be sufficient to qualify for the exemption, and OFCCP believes that this is the means by which most organizations interested in the exemption will qualify. However, OFCCP acknowledges that in certain rare circumstances, an organization might not satisfy the non-profit prong of the *World Vision* test yet still present strong evidence that it possesses a substantial religious purpose. Thus the regulatory text includes an alternative means of satisfying the fourth prong: When an organization does not operate on a not-for-profit basis, it must present "other strong evidence that it possesses a substantial religious purpose." The final rule also adds several examples to illustrate how the test will be applied. The final rule also adds a clarifying provision regarding the meaning of "consistent with and in furtherance of" a religious purpose, a phrase used in one of the test's prongs. The Department does not anticipate many for-profit organizations claiming the exemption, and as explained through the examples and their accompanying discussion, it may be quite difficult for such organizations to do so.

This section of the preamble addresses this topic as well as other comments regarding OFCCP's proposed definition of *Religious corporation, association, educational institution, or society.* OFCCP believes its definition is reasonable in light of Title VII and Supreme Court case law and that it will contribute to one of OFCCP's primary goals in this rulemaking, which is to increase economy and efficiency in government contracting by providing for a broader pool of government contractors and subcontractors. Issues specific to the EEOC's view on this matter are also discussed below and later in a separate part of this preamble.

a. The Selection of *World Vision* as the Basis for the Religious Organization Test

OFCCP received numerous public comments on its proposed definition, including comments on OFCCP's discussion of the shortcomings in some Title VII case law. Some commenters agreed that OFCCP should reject non-*World Vision* tests based on these shortcomings. For example, a religious legal organization commented that the proposed test "eliminates the subjectivity inherent in the *LeBoon* tests. It further eliminates the Establishment Clause violation present when a court determines whether an organization is 'religious enough,' and it also prevents inter-religion discrimination."

Some commenters who supported OFCCP's proposed definition commented that it provided important clarification that would be helpful to religious organizations in meeting their missions. For example, a religious school association commented that the proposal is especially important considering that local control and leadership are central to many of its participating schools' beliefs. A religious charities organization commented that the proposed definition would help it advance its mission of providing essential services to people in need—a mission rooted in its religious convictions.

Other commenters disagreed with OFCCP's characterization of the existing religious employer tests in Title VII case law. For example, a legal professional organization noted that courts have generally agreed that the following factors are relevant in deciding whether an organization qualifies for the religious exemption: (1) The purpose or mission of the organization; (2) the ownership, affiliation, or source of financial support of the organization; (3) requirements placed upon staff and members of the organization; and (4) the extent of religious practices in or the religious nature of products and services offered by the organization.

Other commenters opposed the proposed definition because they viewed it as too broad and unsupported by Title VII case law. For example, an organization that advocates separation of church and state asserted that the definition in the proposed rule has not been proposed or used by any federal court and represents an attempt by OFCCP to vastly expand the scope of the existing narrow exemption. A labor organization likewise commented that, in its view, the definition in the proposed rule is contrary to law and does not reflect the Title VII definition.

Some commenters objected generally to OFCCP's selection or modification of the *World Vision* test. For example, one contractor association commented that the proposed rule removes critical limits on the standard set forth by Judge O'Scannlain. Another contractor association emphasized that *World Vision* involved the removal of two employees by a religious organization based on the employees' failure to adhere to the organization's religious views. Therefore, according to the association, the *World Vision* test should not apply to for-profit organizations holding themselves out as religiously motivated. A group of U.S. Senators criticized the proposal not only for adopting the test set forth in the concurrence, but also for modifying part of that test.

A legal think tank asserted that OFCCP appeared to have created its own test, designed to qualify more types of contractors for the exemption. This commenter went on to say that the "exceedingly more expansive criteria" proposed by OFCCP are untethered to Title VII case law and not in line with the "measured" exemption required by the Establishment Clause, quoting *Cutter* v. *Wilkinson,* 544 U.S. 709, 722 (2005) ("Our decisions indicate that an accommodation [of religious observances] must be measured so that it does not override other significant interests.").

As explained in the NPRM, OFCCP believes that a *LeBoon*-type test invites subjectivity and uncertainty. *See LeBoon* v. *Lancaster Jewish Cmty. Ctr. Ass'n,* 503 F.3d 217 (3d Cir. 2007). That is problematic in any circumstance, but especially so in the context of government contracting, where parties' obligations should be as clear as possible. OFCCP also declines to attempt to write a definition that purports to synthesize all the Title VII case law on this subject. OFCCP is doubtful that such a task could be done, especially given Judge O'Scannlain's observation (with which Judge Kleinfeld agreed) that several factors used by other courts are constitutionally suspect, including, contrary to the commenter's suggestion above, an assessment of the religious nature of an organization's products and services. *See World Vision,* 633 F.3d at 730–32 (O'Scannlain, J., concurring); *id.* at 741 (Kleinfeld, J., concurring). OFCCP's approach in the final rule, like *World Vision,* instead requires consideration of a discrete set of factors that can be reliably ascertained in each case.

OFCCP acknowledges that the definition it is promulgating here modifies the *World Vision* test in some respects, or alternatively can be viewed as following Judge O'Scannlain's concurrence with one addition. OFCCP describes those modifications in more detail below along with its reasons for making them, including the need to provide clarity to contractors and enforcement staff. OFCCP disputes the

relevance of commenters' assertions that these modifications are being made for the purpose of qualifying more organizations for the exemption. OFCCP acknowledges that the modifications may allow marginally more organizations to qualify for the exemption and that the final rule is intended to increase the pool of federal contractors. But, as described herein, OFCCP believes the test adopted by this final rule is appropriately measured and serves the purpose of qualifying only genuinely religious organizations for the exemption.

b. OFCCP's Application of the Definition Generally

The NPRM proposed how OFCCP would apply the factors in its proposed test for religious organizations. The NPRM stated "that it would be inappropriate and constitutionally suspect for OFCCP to contradict a claim, found to be sincere, that a particular activity or purpose has religious meaning"; that "all the factors . . . are determined with reference to the contractor's own sincerely held view of its religious purposes and the religious meaning (or not) of its practices"; and that the proposed three-factor test would be exclusive "stand-alone components and not factors guiding an ultimate inquiry into whether an organizations is 'primarily religious' or secular as a whole." 84 FR at 41682–83.

The NPRM proposed this approach for several reasons. The NPRM relied on *World Vision*'s concerns about courts' substituting their own judgment for what has religious meaning when the question is disputed: "The very act of making that determination . . . runs counter to the 'core of the constitutional guarantee against religious establishment.' " *World Vision,* 633 F.3d at 731 (O'Scannlain, J., concurring) (quoting *New York* v. *Cathedral Acad.,* 434 U.S. 125, 133 (1977)). "[I]nquiry into . . . religious views . . . is not only unnecessary but also offensive. It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Id.* (alterations in original) (quoting *Mitchell* v. *Helms,* 530 U.S. 793, 828 (2000) (plurality opinion) (internal quotation marks omitted)). Further, such inquiries could lead to discrimination among religions. *See id.* at 732 & n.8. The NPRM also drew on Supreme Court and Title VII case law showing the constitutional and practical difficulties of determining whether a particular religious belief is "central" to one's faith or whether an organization is "primarily" religious. *See* 84 FR at 41682–83.

Commenters expressed a variety of views on the NPRM's proposed approach. Some were supportive. For instance, a religious legal organization commented that Judge O'Scannlain's test requires little judicial "'trolling' through" an organization's religious beliefs, because it is based exclusively on information the organization makes public. Relatedly, the same commenter observed that OFCCP staff can easily and consistently apply the test, with positive implications for the rule of law. Other commenters objected generally to OFCCP's description of how it would determine whether a contractor had met the test. For example, a civil liberties organization expressed concern that OFCCP would not enforce baseline evidentiary standards in determining whether an entity meets the test's factors. A contractor association commented that the modified *World Vision* test "is unclear on its face and problematic in application." A transgender civil rights organization commented that the test relies on ill-defined criteria that must be measured from the perspective of the employer.

Many of the commenters who opposed the proposed definition expressed concern that it would have negative consequences. For example, a legal professional association asserted that the proposal would allow even nominally religious entities to discriminate on the basis of religion in hiring, potentially exposing them to legal liability under federal and state law despite their ability to retain their status as federal contractors. A group of state attorneys general stated that OFCCP's proposed test represents a sharp departure from precedent and thus would be difficult for OFCCP staff and adjudicators to apply. The attorneys general also commented that the test would likely cause non-compliance by increasing legal uncertainty about which organizations qualify.

Other commenters requested clarity. Regarding the NPRM's statement that the three factors would be standalone provisions rather than factors guiding an ultimate "primarily religious" inquiry, a contractor association commented that, in its view, the statement was unclear and did not lend credence to OFCCP's assertion that the test would be easy to apply or likely to be consistent in application. The commenter asked for clarification as to how OFCCP would apply the factors of the test as standalone factors, rather than as factors leading to the ultimate determination whether the contractor is primarily religious or secular. The commenter sought explanation from OFCCP as to how it could easily conduct the required analysis when even the courts struggle to do so. The commenter requested more specific examples of how the proposed test will apply and asked that the contractor community be consulted before a test is adopted.

OFCCP appreciates these comments and has re-reviewed *World Vision* and other relevant case law in light of them. *World Vision* and its antecedent cases in the Ninth Circuit, as well as *LeBoon* in the Third Circuit, begin from the premise that the religious exemption should cover only organizations that are, in fact, primarily religious. But courts have labored over how to operationalize that requirement into a set of factors that can be applied neutrally, objectively, and with minimal constitutional entanglement. *See World Vision,* 633 F.3d at 729 (O'Scannlain, J., concurring) ("Though our precedent provides us with the fundamental question—whether the general picture of World Vision is primarily religious—we must assess the manner in which we are to answer that question in the case at hand."); *LeBoon,* 503 F.3d at 226. That does not mean that courts have dispensed with an organization's need to present evidence in order to claim the exemption. Rather, it means that the evidence required must be of a kind that courts are competent to evaluate and that avoids entanglement. *See World Vision,* 633 F.3d at 730–33 (O'Scannlain, J., concurring); *cf. NLRB* v. *Catholic Bishop of Chi.,* 440 U.S. 490, 502 & n.10 (1979); *id.* at 507–08 (appendix). Indeed, one of the purposes of Congress's expansion of the Title VII religious exemption to cover all of an employer's activities, rather than simply its religious activities, was to avoid difficult line-drawing between religious and secular activities and the interference with religious organizations that could result. *See Amos,* 483 U.S. at 336. In OFCCP's view, *World Vision* generally, and Judge O'Scannlain's concurrence in particular, has done the best job of formulating a test that meets the competing and delicately balanced goals of giving the exemption only its proper reach while employing useable and constitutionally proper inquiries.

With that in mind, OFCCP clarifies here its general approach to applying the exemption, addresses the particular evidence needed for each factor, and adds to the regulatory text examples with accompanying explanation to further illustrate its approach. First, OFCCP acknowledges the need to clarify and revise its statement that the factors are "stand-alone components and not factors guiding an ultimate inquiry" in order to make clear the agency's intent. 84 FR at 41683. OFCCP agrees with

commenters that the aim of any test in this context is to determine whether the organization qualifies as a religious organization, and that any components are intended to guide or define that ultimate inquiry. The NPRM's statement was intended to mean that OFCCP would apply the proposed three factors as the exclusive elements for ascertaining whether an organization qualifies for the religious exemption, rather than as mere considerations to be weighed along with other facts and circumstances.

OFCCP affirms that approach here as the predominant path by which organizations are anticipated to qualify for the exemption. This approach is consistent with *World Vision.* The per curiam opinion and both concurrences provided slightly different factors, but in each instance the factors were presented as sufficient to determine an organization's entitlement to the exemption. *See World Vision,* 633 F.3d at 724 (per curiam) (holding "an entity is eligible for the . . . exemption, *at least,* if it" meets four factors (emphasis added)); *id.* at 734 (O'Scannlain, J., concurring) (holding "a nonprofit entity qualifies for the . . . exemption if it establishes that it" satisfies three factors (footnote omitted)); *id.* at 748 (Kleinfeld, J., concurring) ("To determine whether an entity is a 'religious corporation, association, or society,' determine whether it [satisfies the four factors].").

Second, the *World Vision*-derived test promulgated here is not a subjective one. OFCCP shares commenters' concern about contractors attempting to claim the exemption with little evidence other than their own testimony that theirs is a religious organization. (Though OFCCP is also skeptical that many contractors would attempt to do so. As noted above, bad-faith claims to the Title VII exemption have been rare.) The *World Vision* factors have been selected because they provide objective criteria for determining an organization's religious status without the need for intrusive religious inquiries. *See id.* at 733 (O'Scannlain, J., concurring) (holding where religious activities or purposes are "hotly contested, . . . we should stay our hand and rely on considerations that do not require us to engage in constitutionally precarious inquiries"). The *World Vision* factors are similar to a test used in the National Labor Relations Act context, which similarly "avoids . . . constitutional infirmities" while providing "some assurance that the institutions availing themselves of the *Catholic Bishop* exemption are *bona fide* religious institutions." *Univ. of Great Falls* v. *NLRB,* 278 F.3d 1335, 1344 (D.C. Cir. 2002); *see also Duquesne Univ. of the Holy Spirit* v. *NLRB,* 947 F.3d 824, 831 (D.C. Cir. 2020).

It is true that in applying the *World Vision* factors, OFCCP will not substitute its own judgment for a contractor's view—found to be sincere—that a particular activity, purpose, or belief has religious meaning. For instance, OFCCP would not contradict a drug-rehabilitation center's view, found to be sincere, that its work is a religious healing ministry by stating that its work is merely secular healthcare delivery. *See Amos,* 483 U.S. at 344 (Brennan, J., concurring) (finding religious organizations "often regard the provision of [community] services as a means of fulfilling religious duty"); *cf. World Vision,* 633 F.3d at 745 (Kleinfeld, J., concurring) ("Religious missionaries and Peace Corps volunteers both perform humanitarian work, but only the latter is secular."). Any other course would risk severe constitutional difficulties. "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . . ." *New York* v. *Cathedral Acad.,* 434 U.S. 125, 133 (1977). But a contractor must prove its sincerity, which is a question of fact to be proved or disproved in the same manner as any other question of fact. And questions about religious characterization apply to only some aspects of the test. For instance, whether an organization operates on a nonprofit basis is a factual determination to which religious characterizations have little if any relevance. Similarly, as clarified in this final rule, an organization's holding itself out as religious requires an objective evidentiary showing. Finally, OFCCP does not defer to any contractor's assessment that it is entitled to the exemption itself. Whether an organization is a religious corporation, association, educational institution, or society under E.O. 11246 is a legal determination based on whether the organization satisfies the relevant factors.

OFCCP next addresses specific issues related to each factor, including the evidence necessary to satisfy each factor.

c. The First Factor: The Organization's Religious Purpose

As stated in the NPRM, to qualify for the religious exemption, a contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor's only purpose. *Cf. Universidad Cent. de Bayamon* v. *NLRB,* 793 F.2d 383, 401 (1st Cir. 1985) (finding no NLRB jurisdiction when, among other things, an educational institution's mission had "admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular education"). A religious purpose can be shown by articles of incorporation or other founding documents, but that is not the only type of evidence that can be used. *See World Vision,* 633 F.3d at 736 (O'Scannlain, J., concurring); *id.* at 745 (Kleinfeld, J., concurring) (noting that some religious entities have "no corporate apparatus"). And finally, "the decision whether an organization is 'religious' for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization." *Id.* at 735–36 (O'Scannlain, J., concurring) (quoting *LeBoon,* 503 F.3d at 226–27).

Some commenters objected that this factor, as described in the NPRM and summarized above, was too relaxed or that OFCCP was proposing to accept insufficient evidence. Many of these commenters stated that the proposal was inconsistent with Judge O'Scannlain's requirement of demonstrating religious purpose through "Articles of Incorporation or similar foundational documents." *Id.* at 734. For example, a labor union asserted that OFCCP's implementation of this factor would be "more lax than Judge O'Scannlain's concurrence." A contractor association stated that the test was vague and overly simple. An individual commenter requested more guidance as to what types of evidence OFCCP would accept to prove a contractor's organization for a religious purpose. An organization that advocates separation of church and state commented that an organization that fails to document a religious purpose in any of its foundational documents was likely not organized for a religious purpose.

OFCCP appreciates these comments and is revising its approach in response. OFCCP agrees that additional clarity is needed here and that this factor should require documentary evidence of an organization's religious purpose in its foundational documents. Judge O'Scannlain's concurrence examined World Vision's Articles of Incorporation, bylaws, core values, and mission statement. *See id.* at 736. An organization may have other foundational documents, such as a statement of faith, company code of conduct, business policies, or other

governance documents demonstrating a religious purpose. No one particular document is necessary. For instance, some federal contractors may be unincorporated proprietorships or partnerships and thus not have formal corporate-formation documents. But the organization must be able to show a religious purpose in documents that are central to the organization's identity and purpose. OFCCP believes this requirement for documentary evidence will reduce uncertainty, provide objective means for the agency to confirm an organization's satisfaction of this factor of the test, and help contractors better understand the kind of showing they will need to make to satisfy this factor.

OFCCP emphasizes that it will not challenge a sincere claim characterizing a document's statements as religious in the contractor's view. *See id.* at 735–36. But OFCCP will rarely be able to find a claim of religious purpose to be sincere where the documents themselves are no different from standard corporate documents or where an organization adds a religious purpose to its documents after it becomes aware of potential discrimination liability or government scrutiny, including through an OFCCP compliance review. Sincerity is a factual determination, so each case where sincerity is at issue will turn on its own particular circumstances.[10]

d. The Second Factor: Engages in Activity Consistent With, and in Furtherance of, Its Religious Purpose

Second, the contractor must engage in activity consistent with, and in furtherance of, its religious purpose. Here too, "religious purpose" means religious as "measured with reference to the particular religion identified by the contractor." *Id.* This factor is adopted from Judge O'Scannlain's *World Vision* concurrence rather than the per curiam opinion. *Cf. id.* at 734. The regulatory text of the final rule has been slightly revised from the proposed language to more closely reflect Judge O'Scannlain's formulation. This factor is now the second factor in the test rather than the third. No material change is intended. This factor also now states that the organization must exercise religion consistent with, and in furtherance of, "its" religious purpose, rather than "a" religious purpose. OFCCP does not view this change as significant, since a religious organization is quite unlikely to further a religious purpose other than its own.

As explained in the NPRM, OFCCP proposed not to follow the *World Vision* per curiam opinion's formulation of this factor for both practical and legal reasons. The per curiam opinion would require a contractor to be "engaged *primarily* in carrying out [its] religious purpose." *Id.* at 724 (per curiam) (emphasis added). But such a formulation would invite OFCCP to balance things that cannot be balanced consistently and leave contractors without the kind of clarity that ought to prevail in contractual relations. Further, the Supreme Court and lower courts have cautioned against drawing lines between religious activity or belief that is "central" or "primary" and religious activity or belief that is not. *See* 84 FR at 41682, 41683.

Also as explained in the NPRM, OFCCP proposed to use the phrase "engages in exercise of religion" rather than Judge O'Scannlain's phrase, "engages in activity." *See World Vision,* 633 F.3d at 734 (O'Scannlain, J., concurring) ("engaged in activity consistent with, and in furtherance of, those religious purposes"). No material change was intended by this adjustment; it was meant to capture in succinct regulatory text Judge O'Scannlain's lengthy discussion that the kind of activity contemplated under this prong is religious exercise. *See* 84 FR at 41683; *see also World Vision,* 633 F.3d at 737–38.

OFCCP received many comments on this aspect of the NPRM. A religious organization asked OFCCP to clarify that "consistent" as used in the third factor does not mean that OFCCP will be assessing "the coherence or consistency of the contractor's religious beliefs, *see Thomas* v. *Review Bd.,* 450 U.S. 707 (1981) (forbidding such an inquiry), but only [making] a determination that the contractor is engaged in activity reflecting a religious, as opposed to a secular, purpose." OFCCP confirms that its intent in including this element is to determine whether the contractor's exercise of religion is consistent with its religious purpose, not to test the internal consistency of a contractor's religious beliefs. To make this point as clear as possible, OFCCP has added regulatory text explaining that "[w]hether an organization's engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization's own sincere understanding of its religious tenets."

As with other factors, some commenters asserted that this factor, as described in the NPRM and summarized above, was too relaxed or that OFCCP was proposing to accept insufficient evidence. Many of these commenters stated that the incorporation of "exercise of religion" as defined in RFRA into this factor further loosened the standard. For example, a group of state attorneys general asserted that incorporation of the RFRA standard revealed confusion on the part of OFCCP as to the fundamental difference between the religious organization exemption and RFRA. The state attorneys general stated that the religious organization exemption is triggered only when an organization's exercise of religion is so significant that the organization's overall identity becomes religious and criticized the proposed rule for focusing instead on whether an organization engages in exercises of religion generally. A civil liberties organization characterized the preamble as mistakenly stating that inquiry into the religious nature of entities' actions is impermissible. A labor union commented that this aspect of OFCCP's proposal could lead businesses to feign religiosity solely for the purpose of cloaking discriminatory activity.

Some commenters also criticized the exclusion from OFCCP's proposed test of the requirement that a contractor be "primarily religious," or "engaged primarily in carrying out that religious purpose." Some of these comments stated that OFCCP did not persuasively explain why it was excluding this element from the definition. A contractor association commented that Title VII's religious organization exception has traditionally been limited to institutions whose "purpose and character are primarily religious," and that OFCCP has no basis to depart from this principle. An anti-bigotry religious organization commented that OFCCP should consider all relevant circumstances in determining whether a contractor is indeed religious, as OFCCP proposed to do for *Sincere* (that is, taking into account all relevant facts). The organization commented that the Supreme Court in *Hosanna-Tabor* reviewed the employee's religious and secular functions, undermining OFCCP's claim that it cannot engage in a similar type of balancing.

OFCCP disagrees with the idea that this factor, either as proposed or as adopted in the final rule, confuses the religious exemption with RFRA. An organization that exercises religion under RFRA may not satisfy this factor of the test, yet even if it did, that alone would not satisfy the other factors of the test necessary to claim the E.O. 11246 religious exemption. Further, as will be discussed shortly, OFCCP has revised this prong to adhere to Judge

[10] As noted in the proposed rule, *see* 84 FR at 41685, sincerity is often not at issue.

O'Scannlain's formulation, which should alleviate any confusion regarding RFRA.[11]

OFCCP agrees with commenters that activity consistent with the contractor's religious purpose must be a substantial aspect of the contractor's operations. Insofar as the NPRM could be read to suggest that a one-time or de minimis amount of religious activity would be sufficient, OFCCP clarifies that understanding here. The need for a material amount of religious activity flows from the text used in the regulation, that the entity "*engage in* religious activity." To engage is "[t]o employ or involve oneself; to take part in; to embark on," Black's Law Dictionary (11th ed. 2019), or to "involve oneself or become occupied; participate," American Heritage Dictionary (5th ed. 2020). It suggests more than occasional or half-hearted efforts. The case law further illustrates that there must be a significant level of religious activity. For instance, World Vision easily satisfied that requirement since activity consistent with its religious purpose was "essentially all World Vision appears to do." *World Vision,* 633 F.3d at 737–38 (O'Scannlain, J., concurring). The examples added to the final regulatory text also help illustrate the religious activity needed to qualify for the exemption.

OFCCP disagrees with commenters to the extent they argue that an organization must engage solely in religious activity (and explains below that such an inquiry would be difficult and constitutionally imprudent). When an organization engages in other, secular, activities, that alone does not diminish its ability to satisfy this factor of the test. *See LeBoon,* 503 F.3d at 229; *cf. Univ. of Great Falls,* 278 F.3d at 1342. This is made clear by the text of the religious exemption. The Title VII exemption was expanded in 1972 (and that expanded language is used in E.O. 11246) to cover religious organizations' employees engaged in any of the organization's activities, rather than only employees engaged in the organization's religious activities. Thus the exemption contemplates that religious organizations will engage in activities that are not religious, and it makes clear that religious organizations do not forfeit the exemption simply because they do.

OFCCP also disagrees with commenters who argued that the organization's religious activity under this factor must be shown to "constitute a comprehensive religious identity." That is simply a rephrasing of the ultimate inquiry underlying the *World Vision* test. This factor has a crucial role to play in that inquiry, but it should not be mistaken for the whole of it. One of the most useful aspects of the *World Vision* test is that it provides a step-by-step framework for assessing an organization's religious nature, including this factor, rather than leaving the inquiry an open-ended assessment in which a religious organization is simply known when it is seen. *Cf. Jacobellis* v. *State of Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Regarding comments that applying Judge O'Scannlain's concurrence rather than a "primarily engaged" factor is an unjustified departure from Title VII jurisprudence or reflects an overly prophylactic view of religious inquiry, OFCCP respectfully disagrees. OFCCP's position requires being mindful of the distinction between the test's underlying inquiry and the factors used to ascertain the answer to that inquiry. The test's underlying inquiry is whether an organization's "purpose and character are primarily religious." *See, e.g., World Vision,* 633 F.3d at 726 (O'Scannlain, J., concurring). But *World Vision* operationalized that inquiry into four factors. Thus any constitutional or practical problems regarding the inquiry's "primarily religious" formulation are academic because OFCCP will be answering the inquiry by means of applying the factors. That is one of the reasons why OFCCP prefers the *World Vision* test to other formulations.

When it comes to those four factors, however, the *World Vision* per curiam opinion carried forward a "primarily" inquiry in two of the factors: The organization must be "engaged primarily in carrying out [its] religious purpose" and must "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Id.* at 724 (per curiam). Judge O'Scannlain's well-reasoned concurrence used an alternative formulation that avoids the "primarily" questions. OFCCP believes the better choice is to adopt the concurrence. The main problem with determining whether an organization is "primarily" engaged in its religious purpose—as opposed to substantially or materially or genuinely engaged in its religious purpose—is not that it requires a determination that the organization is engaged in significant religious activity, something that can be ascertained easily enough, but rather that it requires *comparison* between the amount of religious and secular activity at an organization. In essence, the organization must engage in a greater quantum of religious activity than secular activity, though without specifying whether the ratio must be 51:49, 70:30, or 99:1. However, any attempt to so compare religious and secular activity leads to additional problems: Some activities do not clearly fall on one side of the line or the other, and a court's or an agency's attempts to determine on which side of the line those activities fall can lead to constitutionally intrusive inquiries. *See, e.g., Cathedral Acad.,* 434 U.S. at 133 (observing the "excessive state involvement in religious affairs" that may result from litigation over "what does or does not have religious meaning"). Moreover, even when all activities are properly categorized, it is unclear what weight each should have. *See, e.g., Univ. of Great Falls,* 278 F.3d at 1343 (observing that a test that requires ascertaining an entity's "substantial religious character" or lack thereof "boils down to 'is it *sufficiently* religious?'"). OFCCP avoids these problems by adopting Judge O'Scannlain's formulation of this prong.

OFCCP agrees with commenters that some courts have nonetheless undertaken the task of comparing secular and religious activity when examining the religious exemption. *See LeBoon,* 503 F.3d 217; *Kamehameha Sch.,* 990 F.2d 458; *Boydston* v. *Mercy Hosp. Ardmore, Inc.,* No. CIV–18–444–G, 2020 WL 1448112 (W.D. Okla. Mar. 25, 2020). OFCCP disagrees that it also must do so when Judge O'Scannlain's concurrence provides a viable alternative. That alternative is especially attractive to OFCCP as an enforcement agency and as a regulator of government contractors. In both instances a factor that offers more clarity than another gives better notice to contractors, better guidance to field staff, and crisper lines to the bargain between the two parties.

e. The Third Factor: Holding Itself Out as Religious

Third, the contractor must hold itself out to the public as carrying out a religious purpose. Again here, and as explained in the NPRM, "religious purpose" "must be measured with reference to the particular religion identified by the contractor." *World Vision,* 633 F.3d at 736 (O'Scannlain, J., concurring). The NPRM proposed that a contractor could satisfy this requirement in a variety of ways, including by evidence of a religious purpose on its website, publications, advertisements, letterhead, or other public-facing

[11] Because of this change, the phrase "exercises religion" no longer appears in this prong. Thus, as explained later in this preamble, the definition for *Exercise of religion* is no longer needed and has been removed from the final rule.

materials, or by affirming a religious purpose in response to inquiries from a member of the public or a government entity. *See* 84 FR at 41683.

Again, some commenters stated that this factor, as described in the NRPM and summarized above, was too relaxed or that OFCCP was proposing to accept insufficient evidence. Many of these commenters criticized OFCCP's proposal for allowing a contractor to meet this requirement by declaring its religious purpose in response to an inquiry from a government entity such as OFCCP itself. Commenters asserted that, as a result, almost any employer could designate itself a religious organization. Commenters also stated that taxpayers, employees, and applicants therefore would not necessarily have notice that the religious exemption could be applied. Commenters stated that this factor would thus not serve as the "market check" that Judge O'Scannlain envisioned. *World Vision,* 633 F.3d at 735 (O'Scannlain, J., concurring) (quoting *Univ. of Great Falls,* 278 F.3d at 1344). A group of state attorneys general, for example, criticized OFCCP's proposal for purportedly relaxing Judge O'Scannlain's "'market check' that would come from requiring an organization to hold itself out to the public as religious," which "could come at a cost in terms of broader public support." One contractor association remarked that, under the proposed rule, a federal contractor could satisfy this factor simply by responding to an OFCCP inquiry, whereas World Vision had always identified itself as a Christian organization, requiring its descriptor statement on all its communications. Another contractor association commented: "Making such a showing [for example, in response to an inquiry] is very easy and may or may not actually align with actual corporate purpose."

OFCCP appreciates these comments and, here too, is clarifying its approach in response. OFCCP agrees that a contractor could not satisfy this factor simply by affirming a religious purpose in response to one public or government inquiry, if that was all the contractor could put forward as evidence. More would be needed to show that the public was on notice of the organization's religious nature.

How much more is a factual question that cannot be defined with complete specificity, but the case law provides some guideposts. World Vision easily satisfied this requirement: Its logo was a stylized cross; religious artwork and texts were displayed throughout its campus; its communications guidelines required references to its Christian identity in all external communications; and its employment guidelines expressly required subscription to particular Christian beliefs. *See id.* at 738–40. Very recently, a district court held that a Catholic hospital and its affiliates satisfied the requirement when they held "themselves out to the public as sectarian through their display of religious symbols in their facilities and through their sectarian mission statement and values statements displayed on [their] public website." *Boydston,* 2020 WL 1448112, at *5. In the analogous NLRA context, a university satisfied the test when, "in its course catalogue, mission statement, student bulletin, and other public documents, it unquestionably holds itself out to students, faculty, and the broader community as providing an education that, although primarily secular, is presented in an overtly religious, Catholic environment." *Univ. of Great Falls,* 278 F.3d at 1345. The university also filled its campus, classrooms, and offices "with Catholic icons, not merely as art, but it claims as an expression of faith." *Id.*

In short, a contractor satisfies this requirement when the contractor makes it reasonably clear to the public that it has a religious purpose. As noted in the NPRM, evidence of a religious purpose can come from the contractor's website, publications, advertisements, letterhead, or other public-facing materials, and in statements to members of the public. Evidence can also include religiously inspired logos, mottos, or the like; and religious art, texts, music, or other displays of religion in the workplace. Statements to the government in the ordinary course of business, such as corporate documents or tax filings, can also be probative. Such statements should be distinguished from statements to the government made in the course of an investigation or litigation in which the contractor's religious purpose is at issue. No one piece of evidence is required or, most likely, sufficient. But together the evidence must show that the contractor is presenting itself to the outside world as religious.

f. The Fourth Factor: Operating on a Not-for-Profit Basis

OFCCP proposed not to adopt the fourth factor set out in *World Vision:* That the entity seeking exemption "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." 633 F.3d at 724 (per curiam). The NPRM proposed this course for several reasons: Many religious entities may operate discount retail stores or otherwise engage in the marketplace; [12] religiously oriented hospitals, senior-living facilities, and hospices may engage in substantial and frequent financial exchanges; [13] the religious exemption in E.O. 11246 pertains to government contracting, an economic activity in which most participants are for-profit entities; [14] other courts have not considered dispositive an organization's for-profit or nonprofit status, or the volume or amount of its financial transactions; *Amos* left open the question of whether for-profit organizations could qualify for the exemption; and the Supreme Court's more recent decision in *Hobby Lobby,* which held that for-profit organizations can exercise religion, counseled against an absolute prohibition on allowing for-profit organizations to qualify for the exemption.

OFCCP received a wide variety of comments on this aspect of the NPRM. Some commenters agreed with OFCCP's reasons for declining to require that a contractor "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." For example, a religious liberties organization commented that federal contractors typically engage in substantial exchanges of goods and services, and therefore religious organizations would be categorically denied the section 204(c) exemption if they became federal contractors. Other commenters opposed the exclusion of the requirement that a contractor "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." A group of U.S. Senators commented that the existence of a financial motive constitutes strong evidence that the exercise of religion is not the objective of the entity. Some of these commenters stated that OFCCP did not persuasively explain why it was excluding this element from the definition.

OFCCP declines to restrict the exemption to those religious entities that charge little or nothing for their services. *Contra World Vision,* 633 F.3d at 724 (per curiam); *id.* at 747 (Kleinfeld, J., concurring). First, E.O. 11246 governs federal contractors, not grantees. Contractors by definition charge for

[12] *See* Brian J. Grim and Melissa E. Grim, "The Socio-economic Contribution of Religion to American Society: An Empirical Analysis," Interdisciplinary Journal of Research on Religion, vol. 12 (2016), article 3, pp. 10, 24, *http://www.religjournal.com/pdf/ijrr12003.pdf.*

[13] *See id.* at 7.

[14] *See* General Service Administration, System for Award Management, Advanced Search—Entity (listing 410,021 active for-profit entities and 99,781 nonprofit and/or other-not-for-profit entities), *sam.gov/SAM/pages/public/searchRecords/advancedEMRSearch.jsf* (last accessed Oct. 2, 2020).

their goods and services, even if they are nonprofits. E.O. 11246's religious exemption would be a virtual nullity were it restricted to contractors that do not charge. Second, OFCCP agrees with Judge O'Scannlain that nonprofit status is a sufficiently reliable proxy for religious identity,[15] without the need to restrict this factor further to only those organizations that do not charge. Judge O'Scannlain explained that nonprofit status, and its restrictions on monetary gain, is reliable evidence that the organization has religious aims rather than purely pecuniary ones, *see id.* at 734–35 (O'Scannlain, J., concurring), and OFCCP agrees. Plus, the narrower formulation would exclude many bona fide religious organizations, like certain hospitals and care facilities, that engage in substantial and frequent market transactions, including by charging sums to beneficiaries of their goods and services. And while religious educational institutions have their own particular exemption, it would seem odd to think that their charging for books, tuitions, and dormitories would call into question their religious status. Third, one of the reasons OFCCP is promulgating this rule is to encourage broader participation in government contracting and subcontracting. Restrictions that would unduly restrict the exemption's availability could affect the size of the pool, to the detriment of the government's interests in a competitive and diverse field of potential contractors.

OFCCP also received many comments on its proposal to remove the requirement that organizations be nonprofit to qualify for the exemption. As mentioned above, OFCCP has substantially revised this aspect of the rule in response to commenters' concerns. Some commenters agreed with the proposal that it was not necessary for a contractor to "be nonprofit." For example, a religious civil rights organization commended the proposal for affirming that the owners of for-profit entities do not have to forfeit their religious convictions. Those commenters agreed with OFCCP's explanation that *Hobby Lobby* counsels against a stark distinction between nonprofit and for-profit corporations. For example, a religious legal organization commented: "[A]s the Supreme Court noted in *Hobby Lobby*, a for-profit corporation substantially engaged in an exchange of goods and services can exercise religion."

[15] In the next few paragraphs, this preamble explains further why and how OFCCP is limiting the exemption to nonprofit organizations in most circumstances.

Other commenters opposed the proposal not to make nonprofit status a determinative factor. For example, an anti-bigotry religious organization emphasized that Judge O'Scannlain's concurrence in *World Vision* focused on whether the employer's purpose is non-pecuniary, while Judge Kleinfeld's analysis focused on whether the employer provided services at no cost or for a nominal fee. The organization criticized the proposed rule for rejecting both factors. Commenters asserted that OFCCP's proposal not to make nonprofit status a determinative factor would unacceptably broaden the exemption. A religious organization asserted that the proposed rule would allow for-profit corporations to exploit faith in order to justify discrimination, and that the spirit of religious institutions would be diminished if houses of worship were placed in the same category as for-profit institutions.

Some commenters stated that the proposal would allow discrimination by contractors that should not be entitled to the religious exemption. A labor organization commented that even for-profit companies, whose primary purpose is, by definition, to make a profit, could protect themselves from discrimination claims by claiming to have a religious purpose.

Some commenters stated that the proposed removal of the nonprofit requirement was inconsistent with Title VII case law interpreting the same term, including Judge O'Scannlain's own test. Many of these commenters stated that OFCCP had not cited any Title VII cases in which a court had found a for-profit entity to qualify for the religious exemption. For example, a contractor association commented that Judge O'Scannlain considered non-profit status to be an "especially significant" consideration, which was consistent with the reasoning in numerous Title VII cases. Some commenters stated that the proposed removal of the nonprofit requirement was inconsistent with guidance from the EEOC or was a reversal of OFCCP's previous position. Many of these commenters stated that OFCCP gave inadequate reasons for the deviation. For example, a group of state attorneys general commented that the proposed reversal was not justified by the executive branch's contracting authority, which "must be exercised within the boundaries of Title VII's prohibitions." A contractor association commented that omitting a legal requirement because it could be difficult to apply does not align with OFCCP's stated commitment to follow the rule of law and to apply Title VII principles.

Some commenters specifically objected to OFCCP's reliance on *Hobby Lobby* as justifying or requiring the proposed removal of the nonprofit status factor. Most of these commenters stated that *Hobby Lobby* was inapplicable because it centered not on the Title VII religious exemption but on RFRA, specifically on that statute's definition of "person." For example, a civil liberties organization commented that the Supreme Court in *Hobby Lobby* focused its analysis on the definition of the word "person" in RFRA and offered no insight into the definition or scope of the phrase "religious corporation" in the religious exemption context. A gender equality advocacy organization commented that RFRA goes far beyond what is constitutionally required by subjecting any laws burdening religious exercise to strict scrutiny and, thus, the question of RFRA's application should not dictate a company's eligibility for a Title VII religious exemption.

Some commenters also stated that *Hobby Lobby* has not been applied in subsequent Title VII religious exemption cases. These commenters typically cited *Garcia* v. *Salvation Army*, 918 F.3d 997 (9th Cir. 2019). In that case, the Ninth Circuit found that the Salvation Army satisfied the requirement that it "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts" both because it is a nonprofit (Judge O'Scannlain's approach) and because it gives away or charges only nominal fees for its services (Judge Kleinfeld's approach). *Id.* at 1004.

In addition to distinguishing *Hobby Lobby* on the ground that it addressed RFRA and not the Title VII religious exemption, commenters also stated that key limitations present in *Hobby Lobby* were not reflected in OFCCP's proposal. In particular, they stated, *Hobby Lobby* held that only *closely held* for-profit corporations could invoke RFRA, but OFCCP's proposal included no such limitation, and the Court in *Hobby Lobby* considered harms an exemption would impose on third parties, but OFCCP did not consider third-party harms the commenters believed the proposal would cause. Commenters also stated that *Hobby Lobby* did not address government contractors. For example, a women's rights advocacy organization commented that, while *Hobby Lobby* dealt with a general requirement on all non-grandfathered insurance plans, the proposed rule deals with businesses that willingly enter contracts with the federal government. According to the organization, "[a]n entity does not have

a right to a contract that it is unwilling to perform."

In consideration of these comments, OFCCP is revising the definition of *Religious corporation, association, educational institution, or society* in the final rule. OFCCP recognizes that, as Judge O'Scannlain observed, nonprofit status is "strong evidence" that an organization has a nonpecuniary purpose. *World Vision,* 633 F.3d at 734–35 (O'Scannlain, J., concurring); *see also Amos,* 483 U.S. at 344 (1987) (Brennan, J., concurring). Nonprofit status also allows a determination of religious purpose to be made objectively and without engaging in a more searching inquiry. With that said, OFCCP recognizes that, in certain rare circumstances, an organization might be for-profit yet still be fairly considered a religious rather than secular organization.

Thus the final rule adds a fourth requirement: That the contractor either "(A) operates on a not-for-profit basis; or (B) presents other strong evidence that it possesses a substantial religious purpose." Paragraph (A) has been written in a manner that covers federal contractors that do not have formal tax-exempt status under 26 U.S.C. 501(c)(3) but operate in substantial compliance with 501(c)(3)'s requirements. *See World Vision,* 633 F.3d at 745 (Kleinfeld, J., concurring) (noting the need for a small adjustment to the test to cover small groups that do not formally incorporate). Paragraph (A) meets the goals of certainty and clarity in contracting for what OFCCP believes will be the vast majority of contractors interested in the exemption. Paragraph (B) is a helpful contingency for situations where a contractor may not satisfy this prong of the test but in all fairness should be considered a qualifying religious organization. This alternative test is consistent with *World Vision* and the more recent Ninth Circuit case highlighted by commenters, *Salvation Army,* 918 F.3d 997. *World Vision's* brief per curiam opinion stated that an organization is eligible for the exemption "*at least*" when it meets the four factors. 633 F.3d at 724 (per curiam) (emphasis added). Judge O'Scannlain's opinion stated that other factors may be relevant in other cases. *See id.* at 729–30 (O'Scannlain, J., concurring). In *Salvation Army,* the court applied an "all significant religious and secular characteristics" standard as well as noted that the Salvation Army satisfied the *World Vision* test. *See Salvation Army,* 918 F.3d at 1003–04.

In his *World Vision* concurrence, Judge O'Scannlain described nonprofit status as "especially significant" because of its evidentiary value. He wrote that nonprofit status "bolsters a claim that [an organization's] purpose is nonpecuniary," "provides strong evidence that its purpose is purely nonpecuniary," "makes colorable a claim that it is not purely secular in orientation," and "bolster[s] a 'contention that an entity is not operated simply in order to generate revenues . . . , but that the activities themselves are infused with a religious purpose.'" *World Vision,* 633 F.3d at 734–35 (O'Scannlain, J., concurring) (quoting *Amos,* 483 U.S. at 344 (Brennan, J., concurring)).[16] OFCCP agrees with these observations, which is why it has adopted nonprofit status as a sufficient means for satisfying this factor of the test.

There may be rare situations, however, where an organization is legally constituted as a for-profit enterprise yet infused with religious purpose. In those situations, the organization would need to come forward with strong evidence that its goals are religious rather than pecuniary—evidence comparable in probative weight to nonprofit status. OFCCP has added examples within the regulatory definition of *Religious corporation, association, educational institution, or society* to illustrate some of these rare instances, including a contractor that provides chaplaincy services to the military and a kosher caterer that supplies meals for federal events. OFCCP doubts that an entity that is not closely held could ever satisfy this requirement, especially since such an entity would have multiple and disparate shareholders. *See Hobby Lobby,* 573 U.S. at 717 ("[T]he idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable."). OFCCP likewise doubts that an entity could qualify if it predominantly provides undifferentiated marketplace goods or services that are not associated with an expressly religious purpose or a charitable, educational, humanitarian, or other eleemosynary purpose.

OFCCP has also modified the NPRM's definition of *Religious corporation, association, educational institution, or society* to reflect these considerations. Unlike the proposed rule, which stated only that a religious organization need not be nonprofit, the final rule now requires that the organization, if for-profit, present "other strong evidence that it possesses a substantial religious purpose." This formulation attempts to synthesize the various statements in *World Vision* and *Amos* as to the quantum of religious purpose an organization must have, and recognizes their reasoning that nonprofit status serves as a valuable evidentiary proxy for religious purpose. Thus the final rule requires a for-profit organization to put forward strong evidence to demonstrate that it does indeed have a substantial religious commitment rather than serve solely as a vehicle to facilitate profit-making or other secular ends. This formulation recognizes that an organization may have more than one purpose, but its religious one must be substantial. It would not be enough, for instance, that an organization feature a scriptural quote in marketing materials or make a brief reference to religious values on its "About Us" web page. The examples in the regulatory text may be instructive to readers on this point.

This new regulatory text is also consistent with *Hobby Lobby's* observation that a corporation need not choose absolutely between financial objectives and other objectives:

> While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. . . . If for-profit corporations may pursue such worthy objectives [as supporting charitable causes, environmental measures, or working conditions beyond those required by law], there is no apparent reason why they may not further religious objectives as well.

Hobby Lobby Stores, 573 U.S. at 711. OFCCP believes that the approach promulgated here, which has been modified from that in the NPRM, is consistent with Title VII case law. Again, *World Vision* set out a four-factor test that, if satisfied, is sufficient for organizations to qualify for the exemption. But as *Salvation Army* and other cases show, there are other ways to qualify for the exemption. *See Salvation Army,* 918 F.3d 997; *EEOC* v. *Townley Eng'g & Mfg. Co.,* 859 F.2d 610 (9th Cir. 1988). In these other cases, nonprofit or for-profit status has been treated as an important factor, but not as dispositive. That is similar to this final rule's approach.

For the same reason, OFCCP disagrees that its approach is an unjustified change in agency position. Until this rulemaking, OFCCP had not set forth the specific factors it would use to decide which organizations qualify for E.O. 11246's religious exemption; rather, in

[16] These varying statements span the range from "not purely secular" to "purely nonpecuniary." OFCCP's regulatory text attempts to strike a balance down the middle, using the phrase "possesses a substantial religious purpose."

withdrawn subregulatory guidance OFCCP stated that it would follow EEOC and court interpretations of Title VII and apply an all-facts-and-circumstances test. To the extent that withdrawn statement could be considered the position of the agency, for the reasons stated in this preamble, OFCCP now believes such a test is too indeterminate and involves potential legal infirmities, and that a more-defined test will give better clarity to contractors and foster a broader pool of potential contractors and subcontractors. It is certainly true, as commenters asserted, that OFCCP's general position is to follow Title VII principles when interpreting E.O. 11246. For the reasons stated in this preamble OFCCP believes its approach is consistent with Title VII principles and Supreme Court case law, and better furthers the goals of this rulemaking. The minor differences between the EEOC's approach to determining which organizations can claim the exemption and OFCCP's definition of *Religious corporation, association, educational institution, or society* are addressed later in this preamble.

OFCCP also disagrees with commenters who argued that *Hobby Lobby* is irrelevant to this issue. Certainly *Hobby Lobby* was not a Title VII case. But *Hobby Lobby's* holding that for-profit corporations qualify as "persons" who can exercise religion under RFRA is hard to square with a rule that a for-profit entity can never be a religious organization eligible for E.O. 11246's religious exemption. And much of its reasoning has broader implications. The Supreme Court observed that furthering the religious freedom of corporations, whether for-profit or nonprofit, furthers individual religious freedom. *See Hobby Lobby,* 573 U.S. at 707. The Supreme Court found no reason to distinguish between for-profit sole proprietorships—which had brought Free Exercise claims before the Supreme Court in earlier cases—and for-profit closely held corporations. *See id.* at 709–10. And as just stated, the Supreme Court noted that every U.S. jurisdiction permits corporations to be formed "for *any lawful purpose* or business," *id.* at 711 (internal quotation marks omitted), including a religious one, *see id.* at 710–11.

OFCCP is required to give some consideration to that language in formulating its own test here. If for-profit corporations can exercise religion and further religious objectives as well as pecuniary ones, then OFCCP should consider carefully whether they should be categorically excluded from qualification as religious organizations under the religious exemption. *Hobby Lobby* does not demand a result one way or the other on that issue, but OFCCP has found the case to be an important data point in support of its approach here.

Regarding commenters' concerns that a removal of the nonprofit requirement would unacceptably broaden the exemption, OFCCP has revised the regulatory text as described above. OFCCP does not anticipate many for-profit organizations seeking to qualify for the exemption, and those that do will need to satisfy the other three prongs—which themselves contain significant evidentiary requirements—plus provide strong evidence of their religious nature. OFCCP believes this test will ensure that only bona fide religious organizations will qualify.

Finally, regarding comments about so-called third-party harms, OFCCP recognizes that *Cutter* v. *Wilkinson* stated that government must adequately account for accommodations' burdens on others. 544 U.S. 709, 720 (2005). OFCCP believes it has adequately accounted for any burdens on others that this rule may cause, and on balance believes that the vindication of the law's religious protections, the need for clarity in this area of contracting, and the potential expansion of the government's contracting pool justify any burdens on third parties. *See infra* section III.B.5.

Further, under controlling Supreme Court precedent, the Establishment Clause allows accommodations that remove a burden of government rules from religious organizations, reduce the chilling on religious conduct, or reduce government entanglement. *See Amos,* 483 U.S. at 334–39. Any third party burdens that might result from such accommodations are attributable to the organization that benefits from the accommodation, not to the government, and, as a result, do not violate the Establishment Clause. *Id.* at 337 n.15. In the *Sherbert* line of Free Exercise Clause cases that later became the basis of RFRA, dissents and concurrences routinely pointed to such burdens on third parties but did not persuade the majorities of any Establishment Clause violation.[17]

The Supreme Court has applied this principle to allow accommodations that litigants claimed caused significant third-party harms. For example, the Supreme Court upheld the Title VII exemption for religious employers—discussed in Section 8—despite the alleged significant harms of expressly permitting discrimination against employees on the basis of religion. *See Tex. Monthly,* 489 U.S. 1, 18 n.8 (1989) (citing *Amos*). This is consistent with *Hobby Lobby,* which expressly held that a burden lawfully may be removed from a religious organization even if it allows such a religious objector to withhold a benefit from third parties. *Hobby Lobby,* 573 U.S. at 729 n.37 ("Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals."). Ultimately, government action that removes such a benefit merely leaves the third party in the same position in which it would have been had government not regulated the religious objector in the first place. Otherwise, any accommodation could be framed as burdening a third party. That would "render[ ] RFRA meaningless." *Hobby Lobby,* 573 U.S. at 729 n.37. "[F]or example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants)." *Id.; see also* Attorney General's Memorandum, Principle 15, 82 FR at 49670.

Finally, OFCCP views these comments as addressed more to the religious exemption itself, which is not at issue here, than to this rule. Congress decided in enacting Title VII, and the President decided in amending E.O. 11246, that preserving the integrity of religious organizations merited an exemption from the religious-neutrality requirements that would otherwise apply to their employees. OFCCP does not and could not question those judgments. Further, insofar as commenters argued that the test expands the number of contractors that might qualify for the exemption, that fact alone does not show any third-party harm. Indeed, among the rule's intended purposes is expanding the pool of

[17] *See, e.g., Thomas,* 450 U.S. at 723 n.1 (Rehnquist, J., dissenting) (citing several burdens on the system and other beneficiaries, including that "[w]e could surely expect the State's limited funds allotted for unemployment insurance to be quickly depleted"); *Wisconsin* v. *Yoder,* 406 U.S. 205, 240 (1972 (White, J., concurring) (outlining the state's legitimate interest in educating Amish children, especially ones that leave their community but finding the evidence of harm insufficient); *Yoder,* 406 U.S. at 245 (Douglas, J., dissenting) (arguing that the decision "imperiled" the "future" of the Amish children, not their parents).

contractors while avoiding religious entanglement. No contractor is compelled to seek the exemption, and no contractor so exempted is compelled by receipt of the exemption to take any particular employment action. *See Amos,* 337 n.15. To the contrary, the Title VII case law confirms that religious employers have flexibility to accommodate employees' religious preferences if they so choose. *See Kennedy,* 657 F.3d at 194. Additionally, OFCCP discusses below, regarding the scope of the exemption, how this rule interacts with other protected classes and the proper balance between employers' and employees' freedoms and rights. OFCCP believes it has provided an accommodation that reasonably addresses these interests.

g. Other Features

The final rule retains two proposed non-determinative features in the definition of *Religious corporation, association, educational institution, or society.* Those are the statements that the organization "may or may not" "have a mosque, church, synagogue, temple, or other house of worship" or "be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition." With regard to these features, some commenters expressed support, and other commenters expressed opposition. For example, one religious education association commented, in support of the absence of a requirement that the contractor "[h]ave a mosque, church, synagogue, temple, or other house of worship" that religious schools that are controlled by a body of religious leaders directly connected to the school are no less "controlled by a religious organization" than are schools controlled by hierarchical religious denominations. OFCCP continues to believe that requiring these features could lead the agency to discriminate among religions, which could violate the First Amendment's Establishment Clause. *See World Vision,* 633 F.3d at 732 & n.9 (O'Scannlain, J., concurring). For these reasons and the reasons described in the preamble to the proposed rule, *see* 84 FR at 41684, OFCCP agrees with the commenters who stated that it is appropriate not to require that contractors have these features to be deemed religious.

3. Definition of Exercise of Religion

OFCCP proposed to define *Exercise of religion* as the term is defined for purposes of RFRA. RFRA, in 42 U.S.C. 2000bb–2(4), defines "exercise of religion" to mean "religious exercise" as defined in the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc–5(7). RLUIPA, in turn, defines "religious exercise" as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." This definition is well-established and prevents problematic inquiries into the "centrality" of a religious practice, which are discussed later in this preamble. However, the phrase "exercise of religion" in the proposed rule appeared only as part of the proposed definition of *Religious corporation, association, educational institution, or society.* That definition has been changed to adhere more closely to Judge O'Scannlain's concurrence in *World Vision,* and the words "exercise of religion" no longer appear in that prong of the definition. Thus there is no need for regulatory text to define them. With that said, OFCCP will look to general principles of First Amendment law and the RFRA–RLUIPA definition of "exercise of religion" when assessing whether an organization is engaging "in activity consistent with, and in furtherance of," its religious purpose, and when assessing whether its employment action has a religious basis. Therefore, OFCCP addresses below the comments received on the proposed definition of *Exercise of religion.*

Several commenters generally approved of the definition for the reasons stated in the NPRM, while others generally opposed the proposed definition. Those generally opposed asserted that RFRA was not a relevant authority given that it is a different statute, that the borrowed provision was vague and did not provide clarity but rather represented an attempt to "create new law," and that the breadth of the definition did not provide "guardrails for the manner in which employers can require their employees to adhere to certain principles." Others commenters raised more specific issues. A group of state attorneys' general noted that the broad definition of religious exercise in RFRA is moderated by its substantial burden requirement, which the proposed definition did not include. Others noted issues with the term in the context of the "engages in" language directly preceding it; some believed the two in tandem were vague and overbroad, while one commenter sought specific guidance in the final rule that "religious speech" could be an exercise of religion.

OFCCP has considered these comments and continues to believe that the RFRA–RLUIPA definition of "exercise of religion" is relevant in this context, although, for the reasons stated above, there is no need for the final rule to define the term. RFRA and RLUIPA are well-established laws regarding religious freedom that are broadly applicable, and they provide a familiar framework that will assist OFCCP in assessing both whether a contractor is engaging "in activity consistent with, and in furtherance of," its religious purpose and whether its employment action has a religious basis.

4. Definition of Sincere

The principles discussed above with regard to the definition of *Exercise of religion* are incorporated in the definition of *Sincere* that OFCCP proposed. In line with court precedent and OFCCP's principles, the critical inquiry for OFCCP is whether a particular employment decision was in fact a sincere exercise of religion. Consistent with that inquiry, and for the reasons explained above, the final rule's definition of *Particular religion* specifies that the religious tenets the contractor applies to its employees must be "sincere." OFCCP, like courts, "merely asks whether a sincerely held religious belief actually motivated the institution's actions." *Geary* v. *Visitation of Blessed Virgin Mary Parish Sch.,* 7 F.3d 324, 330 (3d Cir. 1993). The religious organization's burden "to explain is considerably lighter than in a non-religious employer case," since the organization, "at most, is called upon to explain the application of its own doctrines." *Id.* "Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim." *Id.; see United States* v. *Seeger,* 380 U.S. 163, 185 (1965) (holding whether a belief is "truly held" is "a question of fact"). The sincerity of religious exercise is often undisputed or stipulated. *See, e.g., Hobby Lobby,* 573 U.S. at 717 ("The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs."); *Holt,* 574 U.S. at 361 ("Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.").

Further, as the Supreme Court has repeatedly counseled, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 531 (1993) (quoting *Thomas,*

450 U.S. at 714) (internal quotation marks omitted); *see also, e.g., United States* v. *Ballard*, 322 U.S. 78, 86 (1944) ("[People] may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."). To merit protection, religious beliefs must simply be "sincerely held." *E.g., Frazee* v. *Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989); *Seeger*, 380 U.S. at 185. Courts have appropriately relied on the "sincerely held" standard when evaluating religious discrimination claims in the Title VII context. *See, e.g., Davis* v. *Fort Bend Cnty.*, 765 F.3d 480, 485 (5th Cir. 2014); *Philbrook* v. *Ansonia Bd. of Educ.*, 757 F.2d 476, 481–82 (2d Cir. 1985); *Redmond* v. *GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978). In such cases, a court must "vigilantly separate the issue of sincerity from the factfinder's perception of the religious nature of the [employee's] beliefs." *EEOC* v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados*, 279 F.3d 49, 57 (1st Cir. 2002) (alteration in original) (quoting *Patrick* v. *LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984)) (internal quotation marks omitted).

Some commenters opposed requiring only that exercise of religion be "sincere," which they characterized as broadening the exemption. They warned that this expands exercise of religion beyond its current meaning and that sincerity cannot be reasonably applied. For example, a labor union stated that "sincerity" is not a concept that can sensibly be applied to organizations, much less to for-profit businesses that would be included in the scope of the religious exemption under the Proposed Rule. A group of state attorneys general commented that, by requiring only sincerity, OFCCP "seeks to expand RFRA's already broad definition of 'exercise of religion.'" An individual commenter wrote that the proposal would grant large for-profit government contractors a hiring exemption as long as they could articulate any strongly held belief.

Other commenters expressed support for a sincerity test. For example, a religious liberties legal organization wrote: "Attempts to use religion to hide discriminatory intent are generally not successful." OFCCP agrees with these commenters. Other commenters also expressed general support for the proposed definition, stating that it will help ensure that important protections against discrimination remain in place while at the same time preventing government overreach and protecting religious practice. For instance, the same religious liberties legal organization commented that legal precedent regarding sincerity and the compelling government interest in preventing discrimination will survive without excessive government involvement.

Many other commenters opposed the proposed, arguing that it would not require entities to be internally consistent in applying their self-proclaimed religious tenets to various groups. For instance, a group of U.S. Senators asserted that the proposed definition "does not require consistency in the application of policy based upon religious tenets" such that an entity opposed to body modification, for instance, could ignore tenets regarding tattoos but fire a transgender worker for seeking health care without triggering scrutiny. An LGBT rights advocacy organization echoed this concern. Some commenters also opposed OFCCP's statement that "the sincerity of religious exercise is often undisputed or stipulated" because, they stated, it raised concerns regarding the depth of OFCCP's inquiry under the proposed definition. A state civil rights organization commented, for instance, that this portion of the preamble seemed to signal that OFCCP will not inquire about sincerity, despite the fact that whether a belief is sincerely held can only be determined by weighing the strength of evidence. Likewise, an organization that advocates separation of church and state commented that the preamble's discussion, particularly its "equivocal views" on policies aimed at determining the sincerity of an adverse employment action, creates uncertainty as to whether OFCCP will actually weigh factors intended to determine sincerity. An LGBT rights advocacy organization expressed substantially identical concerns.

As noted in the NPRM, in assessing sincerity, OFCCP will take into account all relevant facts, including whether the contractor had a preexisting basis for its employment policy and whether the policy has been applied consistently to comparable persons, although absolute uniformity is not required. *See Kennedy*, 657 F.3d at 194 (noting that the Title VII religious exemption permits religious organizations to "consider some attempt at compromise"); *LeBoon*, 503 F.3d at 229 ("[R]eligious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection."); *see also Killinger* v. *Samford Univ.*, 113 F.3d 196, 199–200 (11th Cir. 1997). But despite commenters' focus on the need for "internal consistency" in religious organizations' doctrine—such as a rule that if tattoos are permitted, transgender medical procedures must be as well—rather than consistency across similarly situated employees, OFCCP cannot assess the "relative severity of [religious] offenses" or otherwise weigh doctrinal matters, for that would "violate the First Amendment." *Curay-Cramer* v. *Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 139 (3d Cir. 2006).

OFCCP will also evaluate any evidence that indicates an insincere sham, such as acting "in a manner inconsistent with that belief" or "evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine." *Philbrook*, 757 F.2d at 482 (quoting *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Barber*, 650 F.2d 430, 441 (2d Cir. 1981)) (internal quotation marks omitted); *cf., e.g., Hobby Lobby*, 573 U.S. at 717 n.28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail."); *United States* v. *Quaintance*, 608 F.3d 717, 724 (10th Cir. 2010) (Gorsuch, J.) ("[T]he record contains additional, overwhelming contrary evidence that the [defendants] were running a commercial marijuana business with a religious front . . . ."). OFCCP's application of the religious exemption is described in more detail below.

Despite these assurances, several commenters who opposed the proposed definition said that it is vague or unworkable in practice. For instance, a group of state attorneys general expressed concern that the definition may increase confusion among contractors seeking to claim religious exemptions because the question of how a for-profit organization can demonstrate the sincerity of its religious beliefs is largely untested. Thus, according to the attorneys general, contractors will have to contend with a high level of uncertainty in addition to their obligations under Title VII. A religious legal organization that otherwise supported the proposed rule highlighted the fact that the proposed definition of *sincere* is "simply what courts determine 'when ascertaining the sincerity of a party's religious exercise or belief.'" The commenter expressed skepticism that courts could arrive at a concise and uniform test for the meaning of the term without more specific guidance from OFCCP.

OFCCP disagrees that ascertaining the sincerity of an organization's religious exercise, even a for-profit one, will foster confusion or that it presents insurmountable practical difficulties. Religious sincerity is a familiar and

well-developed legal principle. It has been applied in regards to a religious organization's decisions under the Title VII religious exemption. *See, e.g., Little* v. *Wuerl,* 929 F.2d 944, 946 (3d Cir. 1991) ("Little does not challenge the sincerity of the Parish's asserted religious doctrine."). And the Supreme Court rejected a similar argument "that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere 'beliefs' of a corporation." *Hobby Lobby,* 573 U.S. at 717. Here, as there, questions of corporate religious beliefs are likely to arise only for closely held corporations, and "[s]tate corporate law provides a ready means for resolving any conflicts . . . ." *Id.* at 718.

OFCCP also acknowledges the constitutional and prudential limitations on its inquiry that may come into play when religious matters are involved. OFCCP will not compare religious doctrines or practices in evaluating sincerity. *See, e.g., Curay-Cramer,* 450 F.3d at 139 ("[A]ssess[ing] the relative severity of [religious] offenses . . . would violate the First Amendment."); *Hall* v. *Baptist Mem'l Health Care Corp.,* 215 F.3d 618, 626 (6th Cir. 2000) ("[T]he First Amendment does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices."). Nor will OFCCP require contractors to adhere to strict, uniform procedures to demonstrate sincerity. *See Kennedy,* 657 F.3d at 194; *LeBoon,* 503 F.3d at 229. And where "it is impossible to avoid inquiry into a religious employer's religious mission or the plausibility of its religious justification for an employment decision," then OFCCP will apply the E.O. 11246 religious exemption. *Curay-Cramer,* 450 F.3d at 141.

Some commenters objected to OFCCP's stated commitment to applying the ministerial exception. For instance, a city public advocate observed that OFCCP's claim that it will evaluate any factors that indicate insincerity is undermined by the proposed rule's commitment to the ministerial exception. Nevertheless, OFCCP respects and must apply the ministerial exception. The ministerial exception is an application of the Establishment and Free Exercise clauses of the First Amendment. *See Our Lady of Guadalupe,* 140 S. Ct. at 2060; *Hosanna-Tabor,* 565 U.S. at 189–90 (finding that the ministerial exception bars "an employment discrimination suit brought on behalf of a minister" and observing that the exception "is not limited to the head of a religious congregation," nor subject to "a rigid formula for deciding when an employee qualifies as a minister").

For the reasons described above and in the NPRM, and considering the comments received, OFCCP finalizes the proposed definition without modification.

5. Definition of Particular Religion

In the NPRM, OFCCP proposed to define *Particular religion* to clarify that the religious exemption allows religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor. The NPRM explained that this definition flows directly from the broad definition of *Religion,* discussed above, to include all aspects of religious belief, observance, and practice as understood by the employer, which would clarify past statements from OFCCP suggesting that the exemption was restricted solely to hiring coreligionists. The NPRM stated that the proposed definition was consistent with Title VII case law as well as Supreme Court case law holding that the government burdens religious exercise when it conditions benefits on the surrender of religious identity.

The NPRM noted that the religious exemption does not permit religious employers to discriminate on other protected bases. The NPRM described how courts have used a variety of approaches and doctrines to distinguish claims of religious discrimination from other claims of discrimination while avoiding entangling inquiries under the First Amendment, and that OFCCP proposed to do the same. *See* 84 FR at 41679–81.

In a later part of the NPRM describing the proposed terms *Exercise of religion* and *Sincere,* OFCCP gave additional detail on its proposed approach for applying the religious exemption. The NPRM noted that sincerity is the "touchstone" of religious exercise and that OFCCP would take into account all relevant facts when determining whether a sincere religious belief actually motivated an employment decision. The NRPM also proposed applying a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion. *See* 84 FR at 41684–85.

OFCCP received comments on all these aspects of its proposal. In response to the comments, the agency has made some adjustments in its explanation regarding how it views and will apply this definition. These include changing to a motivating factor standard of causation and providing additional clarification, particularly on the interaction of the religious exemption with other protected categories, including the importance of RFRA. As to the regulatory text, the word "sincere" has been inserted into the phrase "acceptance of or adherence to *sincere* religious tenets as understood by the employer as a condition of employment," to make clear both the requirement of sincerity and, by reference to the definition of *Sincere,* how sincerity is tested. Otherwise the definition is being finalized as proposed.

Insofar as OFCCP's view expressed here and in the proposed rule is a change from its prior position as to the definition of *Particular religion* under the exemption and the permissible practices of contractors and subcontractors who qualify as religious organizations, OFCCP believes the change is justified for all the reasons stated in the proposed rule and directly below. A broader view of the religious exemption is also consistent with one of OFCCP's primary goals in this rulemaking, which is to increase economy and efficiency in government contracting by providing for a broader pool of government contractors and subcontractors. Issues specific to the EEOC's view on this matter are discussed further in a separate part of this preamble.

a. Burdens on Religious Organizations in Contracting

As described in the NPRM, OFCCP's approach here is consistent with Supreme Court decisions emphasizing that "condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." *Trinity Lutheran,* 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel* v. *Paty,* 435 U.S. 618, 626 (1978) (plurality opinion)). These decisions naturally extend to include the right to compete on a level playing field for federal government contracts. *See id.* (holding the government burdens religious exercise when it so conditions "a benefit or privilege," "eligibility for office," "a gratuitous benefit," or the ability "to compete with secular organizations for a grant" (quoted sources omitted)); *accord* 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 . . . contracts . . . and other Federal funding opportunities.").

A few commenters praised OFCCP's reliance on *Trinity Lutheran* to establish the principle that benefits cannot be conditioned on surrendering religious status. For example, a religious public policy women's organization stated that no one should be forced to abandon their faith when operating their business or participating in government programs. Similarly, a religious liberty legal organization commented that religious contractors should be allowed to serve on equal terms as all other contractors, without having to compromise their faith-based identities.

A few commenters stated that *Trinity Lutheran* and other Supreme Court cases discussed in the preamble to the NPRM do not support or require the proposed definition. For example, an organization that advocates separation of church and state commented that religious organizations are already eligible to compete for government contracts, which is all that is required by *Trinity Lutheran.* In addition, a religious organization commented that "the rule violates the Establishment Clause of the First Amendment by funding positions which require specific religious beliefs and customs." OFCCP believes, however, that its interpretation of the scope of the religious exemption is consistent with the principles of religious freedom articulated in *Trinity Lutheran* and other Supreme Court cases.

First, restricting religious organizations' ability to employ those aligned with their mission burdens their religious exercise, even when those employees do not engage in expressly religious activity. As the Supreme Court recognized in *Amos,* the religious exemption's protection for all activities of religious organizations alleviates the burden of government interference with those religious organizations' missions. *See Amos,* 483 U.S. at 336. And as the Department of Justice's Office of Legal Counsel has concluded:

> [T]he Court's opinion in *Amos,* together with Justice Brennan's concurring opinion in the case, indicates that prohibiting religious organizations from hiring only coreligionists can '"impose a significant burden on their exercise of religion, even as applied to employees in programs that must, by law, refrain from specifically religious activities.'" The ." Mem. for Brett Kavanaugh, Assoc. Counsel to the Pres., from Sheldon T. Bradshaw, Deputy Ass't Att'y Gen., Office of Legal Counsel further explained:, *Re: Section 1994A (Charitable Choice) of H.R. 7, The Community Solutions Act* at 4 (June 25, 2001) . . . . Many religious organizations and associations engage in extensive social welfare and charitable activities, such as operating soup kitchens and day care centers or providing aid to the poor and the homeless. Even where the content of such activities is secular—in the sense that it does not include religious teaching, proselytizing, prayer or ritual—the religious organization's performance of such functions is likely to be "infused with a religious purpose." *Amos,* 483 U.S. at 342 (Brennan, J., concurring). And churches and other religious entities "often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster." *Id.* at 344 (footnote omitted). In other words, the provision of "secular" social services and charitable works that do not involve "explicitly religious content" and are not "designed to inculcate the views of a particular religious faith," *Bowen* v. *Kendrick,* 487 U.S. 589, 621 (1988), nevertheless may well be "religiously inspired," *id.,* and play an important part in the "furtherance of an organization's religious mission." *Amos,* 483 U.S. at 342 (Brennan, J., concurring).
>
> 31 O.L.C. 162, 172 172–73 (2007)

Second, this burden exists even when not imposed directly. The Office of Legal Counsel, in the same opinion, further recognized that a burden on religious organizations' free exercise of religion can occur not only through direct imposition of requirements but through conditions on grants or other benefits, citing many of the same cases cited in *Trinity Lutheran* for that proposition. *See* 31 O.L.C. at 174–75; *Trinity Lutheran,* 137 S. Ct. at 2022. Those concerns about burdening religious exercise through conditions naturally extend to conditions on contracts as well. *See* Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty at 2, 6, 8, 14a–16a (Oct. 6, 2017), *available at www.justice.gov/opa/press-release/file/1001891/download.* Third, the definition of *Particular religion* promulgated here attempts to alleviate that burden by permissibly accommodating religious organizations. "[T]he government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause. . . . There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Amos,* 483 U.S. at 344 (quoting *Walz* v. *Tax Comm'n,* 397 U.S. 664, 673 (1970)). *See also* E.O. 13279 § 4; 68 FR at 56393 (codified at 41 CFR 60–1.5(a)(5)). This rule relieves religious organizations of government interference by permitting them to take into account their employees' particular religion—including acceptance of or adherence to religious tenets—to ensure their employees are committed to the religious organization. In some instances, as described below, RFRA may also come into play to require accommodations.

Regarding the comment that the rule violates the Establishment Clause by funding positions that require specific religious beliefs or customs, that is a criticism of the E.O. 11246 religious exemption itself, which has been part of federal law for nearly twenty years and is not at issue in this rulemaking. This is addressed more below.

b. The Exemption's Scope: Coreligionists

As explained in the NPRM, the religious exemption is not restricted to a purely denominational preference. The religious exemption allows religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor. This definition flows directly from the broad definition of *Religion,* discussed above, to include all aspects of religious belief, observance, and practice as understood by the employer. It is also consistent with Title VII case law holding that "the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *Little,* 929 F.2d at 951; *see also, e.g., Kennedy,* 657 F.3d at 194 ("Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'" (quoting *Little,* 929 F.2d at 951)); *Hall,* 215 F.3d at 624 ("The decision to employ individuals 'of a particular religion' under [42 U.S.C.] § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer." (citing, *inter alia, Little,* 929 F.2d at 951)); *Killinger,* 113 F.3d at 200 ("[T]he exemption [in 42 U.S.C. 2000e–1(a)] allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities.").

This approach is also consistent with Supreme Court decisions emphasizing that "condition[ing] the availability of benefits upon a recipient's willingness

to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." *Trinity Lutheran,* 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel,* 435 U.S. at 626 (plurality opinion)). These decisions naturally extend to include the right to compete on a level playing field for federal government contracts. *See id.* (holding the government burdens religious exercise when it so conditions "a benefit or privilege," "eligibility for office," "a gratuitous benefit," or the ability "to compete with secular organizations for a grant" (quoted sources omitted)); *accord* 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 . . . contracts . . . and other Federal funding opportunities.").

OFCCP believes this clarification will assist contractors that have looked for guidance on the religious exemption in OFCCP's past statements. These past statements may have suggested that the exemption permits qualifying organizations only to prefer members of their own faith in their employment practices. *See, e.g.,* OFCCP, Compliance Webinar (Mar. 25, 2015), *available at https://www.dol.gov/ofccp/LGBT/FTS_TranscriptEO13672_PublicWebinar_ES_QA_508c.pdf* ("This exemption allows religious organizations to hire only members of their own faith."). OFCCP based such statements on guidance from the EEOC, the agency primarily responsible for enforcing Title VII. *See, e.g.,* EEOC, EEOC Compliance Manual § 12–I.C.1 (July 22, 2008) ("Under Title VII, religious organizations are permitted to give employment preference to members of their own religion."). However, with this final rule, OFCCP is clarifying that it applies the principles discussed above, permitting qualifying employers to take religion—defined more broadly than simply preferring coreligionists—into account in their employment decisions. The case law makes clear that qualifying employers "need not enforce an across-the-board policy of hiring only coreligionists." *LeBoon,* 503 F.3d at 230; *Killinger,* 113 F.3d at 199–200 ("We are also aware of no requirement that a religious educational institution engage in a strict policy of religious discrimination—such as always preferring Baptists in employment decisions—to be entitled to the exemption.").

Some commenters expressed support for OFCCP's proposal to extend the definition beyond preferring coreligionists, which they viewed as overly narrow, to include acceptance of or adherence to religious tenets as a condition of employment. Many of these commenters agreed with OFCCP that the definition as proposed was necessary to ensure that religious organizations could carry out their missions without losing their identities. For example, a religious school association commented that being able to ensure that applicants and employees concur with its schools' religion-based conduct expectations is essential to fulfilling the schools' religious mission. Similarly, a religious civil rights organization commented that the entire "raison d'être" of religious non-profits would be undermined if employees could subvert their religious missions. Other commenters, including a religious medical organization, a religious liberty coalition, and a state religious public policy organization, echoed these sentiments in support of the proposal. A private religious university further asserted that the proposed definition would increase religious diversity, because its protections are not limited to hiring decisions based on co-religiosity but also allow organizations to hire based on applicants' support for their religious missions.

Many commenters asserted that the proposed definition conflicts with the EEOC's interpretation, OFCCP's previous interpretation, or both. For example, a civil liberties organization commented that the EEOC interprets the text of the Title VII religious exemption to mean that religious organizations may give employment preference to members of their own religion. Several commenters referred to OFCCP's previous interpretation as reflected in its 2015 answers to FAQs regarding the E.O. 13672 Final Rule.[18] For example, a legal think tank noted that in 2015, OFCCP issued guidance mirroring the EEOC's interpretation of the Title VII religious exemption and confirming that the plain text of section 204(c) is limited to religious organizations with hiring preferences for coreligionists and to the ministerial exemption. Other commenters, including an LGBT legal services organization, a reproductive rights organization, and a public policy research and advocacy organization, made similar points.

OFCCP appreciates the various comments received on this topic. After careful consideration, OFCCP disagrees with the comments arguing that the religious exemption should extend no further than a coreligionist preference for several reasons.

First, a coreligionist preference could be construed narrowly, as some commenters seemed to urge, as allowing religious organizations to prefer those who share a religious identity in name but nothing more. OFCCP disagrees that the exemption should be construed to permit religious employers to prefer fellow members of their faith—or people who profess to be members of their faith—but forbid requiring their adherence to that faith's tenets in word and deed. Religious employers can require more than nominal membership from their employees, as shown by *Amos,* where the plaintiffs were discharged for failing to qualify for a certificate showing that they were members of the employer's church and met certain standards of religious conduct. *See* 483 U.S. at 330 n.4; *Amos* v. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints,* 594 F. Supp. 791, 796 (D. Utah 1984) (describing plaintiffs' failure to meet church worthiness requirements), *rev'd,* 483 U.S. 327; *see also Killinger,* 113 F.3d at 198–200 (holding despite plaintiff's claim that he subscribed to university's "legitimate religious requirements," including the requirement to "subscribe to the 1963 Baptist Statement of Faith and Message," he was permissibly removed from a teaching post in the divinity school "because he did not adhere to and sometime[s] questioned the fundamentalist theology advanced by the [school's] leadership" (first alteration in original)). Any other course would entangle OFCCP in deciding between competing views of a religion's requirements—in essence, deciding for example, "who is and who is not a good Catholic." *Maguire* v. *Marquette Univ.,* 627 F. Supp. 1499, 1500 (E.D. Wis. 1986) (holding despite plaintiff's claim to be Catholic, a Catholic religious university permissibly declined to hire her "because of her perceived hostility to the institutional church and its teachings"), *aff'd in part, vacated in part,* 814 F.2d 1213 (7th Cir. 1987). OFCCP is not permitted to make such determinations. *See Our Lady of Guadalupe,* 140 S. Ct. at 2068–69 ("[D]etermining whether a person is a 'co-religionist' will not always be easy. See Reply Brief 14 ('Are Orthodox Jews and non-Orthodox Jews coreligionists? . . . Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?'). Deciding such questions would risk judicial entanglement in religious issues."); *Hall,* 215 F.3d at 626–27 ("If a particular

[18] These 2015 FAQs are archived at *https://web.archive.org/web/20150709220056/http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html.*

religious community wishes to differentiate between the severity of violating two tenets of its faith, it is not the province of the federal courts to say that such differentiation is discriminatory and therefore warrants Title VII liability." (quoted source omitted)]; *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449–50 (1969) ("Plainly, the First Amendment forbids civil courts from playing such a role [in interpreting particular church doctrines and their importance to the religion].").

In addition, some commenters argued that the religious exemption might allow religious employers to require faithfulness of a coreligionist employee, but the exemption does not permit them to impose religious requirements on their other employees. OFCCP declines to so narrow its interpretation of the exemption. The exemption was expanded decades ago to include employees engaged not just in the organization's religious activities, but in any of its activities. And the purpose of the religious exemption is to preserve "the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335. As other commenters stated, some religious organizations hire employees outside their faith tradition yet require those employees to follow at least some religious standards in order to preserve the organization's integrity Courts have recognized the legitimacy of that view. *See Kennedy*, 657 F.3d at 190–91 (holding a religious nursing-care facility affiliated with the Roman Catholic Church was protected by the religious exemption when it took action against an employee of a different faith who refused to change her own religiously inspired garb); *Little*, 929 F.2d at 951 ("[I]t does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic *or a non-Catholic* teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles." (emphasis added)). This view is also consistent with guidance from the U.S. Department of Justice. *See* Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty (Oct. 6, 2017), *www.justice.gov/opa/press-release/file/1001891/download* (stating that, under the Title VII religious exemption, "a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or only those willing to adhere to a code of conduct consistent with the precepts of the Lutheran community sponsoring the school").

Beyond compromising the integrity of religious organizations, OFCCP would be wary of drawing a line here between coreligionist employees and other employees for other reasons. As illustrated by the cases declining to decide "who is and who is not a good Catholic," OFCCP does not believe it should or could in disputed cases decide who is a coreligionist. This would be especially difficult when the employer has no particular denomination, as there would be no simple denominational match between the employer and employee. Cases like *World Vision* and *Little* v. *Wuerl* show that a religious organization may require that its employees subscribe to certain precepts regardless of their particular religious affiliation, if they have any affiliation at all. OFCCP must, and should, treat these religious organizations equally with those that have a defined denominational membership. *See World Vision*, 633 F.3d at 731 (O'Scannlain, J., concurring).

OFCCP also views an artificial line between coreligionists and non-coreligionists as presenting an unwelcome either-or dilemma for religious organizations. By declining to draw such a line, a religious organization would be permitted to require certain religious practices or conduct from its coreligionist employees, but not from its non-coreligionist employees; yet the religious organization would also be permitted to, for instance, decline to hire or promote that same non-coreligionist altogether. In other words, a religious organization could discriminate against a non-coreligionist altogether in hiring or promotion, but could not instead offer a job or promotion contingent on adherence to certain mission-oriented religious criteria. Religious organizations should be, and under this rule continue to be, permitted to use this middle ground. *See Kennedy*, 657 F.3d at 194.

c. The Exemption's Scope: Employment Practices

In a related vein, commenters also shared their views on not only which employees should be covered by the exemption, but also which employment practices of religious organizations should be protected by the exemption. Some of these commenters asserted that the proposed definition was too broad. For example, a transgender civil rights organization commented that, because the proposed definition encompasses "all aspects of religious belief, observance and practice as understood by the employer," it would permit the subjective viewpoint of the employer to determine what constitutes religion. Similarly, a reproductive rights organization claimed that the proposed rule would expand the scope of the exemption in violation of federal law.

As explained above in the discussion of the definition of *Religion*, OFCCP has chosen a definition that is well-established in federal law, including in the text of Title VII. *See* 42 U.S.C. 2000e(j). And as explained above in the discussion of the definition of *Religious corporation, association, educational institution, or society*, OFCCP has significant constitutional and practical concerns about substituting its own judgment for a contractor's view—found to be sincere—that a particular activity, purpose, or belief has religious meaning. It bears repeating: Any other course would risk "[t]he prospect of church and state litigating in court about what does or does not have religious meaning [, which] touches the very core of the constitutional guarantee against religious establishment." *Cathedral Acad.*, 434 U.S. at 133. OFCCP will refrain from resolving disputes between employers and employees as to what has religious meaning or not, when the employer proves its sincere belief that something does have religious meaning. However, as explained in more detail below, just because an employment practice is religiously motivated does not mean that it is always protected by the exemption.

This leads to a separate set of issues raised by commenters. Many commenters who opposed the proposed definition stated that it is inconsistent with Title VII in one or more respects. For example, a group of state attorneys general stated that the proposed definition is contrary to the text of Title VII and congressional intent. Specifically, the group pointed out that the plain language of the exemption covers only employer preferences based on a "particular religion," meaning that religious employers cannot broadly discriminate on the basis of religion by, for instance, adopting policies such as "Jews and Muslims Need Not Apply." Some commenters stated that the proposed definition is unsupported by Title VII case law. For example, a civil liberties organization criticized OFCCP for not citing to court decisions holding that the Title VII exemption is intended to shield employers from all religiously motivated discrimination, as opposed to discrimination that is "on the basis of

religion alone." [19] A city commented that OFCCP's reliance on *Little,* 929 F.2d 944; *Kennedy,* 657 F.3d 189; *Hall,* 215 F.3d 618; and *Killinger,* 113 F.3d 196, is misplaced and misleading because, in each of those cases, the courts found that a religious institution with a substantiated religious purpose could discriminate against an employee performing work connected in some manner to the institution's religious mission.

The NPRM did not suggest that the religious exemption would permit religious organizations to single out other religions for disfavor. No employer OFCCP is aware of holds such an exclusionary policy; no commenter identified such an employer; and such a policy would run contrary to the country's experience under the Title VII religious exemption, where no litigant to OFCCP's knowledge has asserted such a policy. Instead, the mine run of cases have involved a church, religious educational institution, or religious nonprofit raising the defense that it is only requiring employees or applicants—whether strictly defined as coreligionists or not [20]—to follow its own religiously inspired standards of belief or conduct. The exemption historically has been a shield, not a sword, and it remains so under this rule.

OFCCP also believes it has relied properly on cases like *Little* and *Kennedy.* As stated in the NPRM, these cases hold that the religious exemption "includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *Little,* 929 F.2d at 951; *see also, e.g., Kennedy,* 657 F.3d at 194 ("Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'") (quoting *Little,* 929 F.2d at 951); *Hall,* 215 F.3d at 624 ("The decision to employ individuals 'of a particular religion' under [42 U.S.C.] § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer." (citing, inter alia, *Little,* 929 F.2d at 951)); *Killinger,* 113 F.3d at 200 ("[T]he exemption [in 42 U.S.C. 2000e–1(a)] allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities."); *accord* Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty (Oct. 6, 2017), *www.justice.gov/opa/press-release/file/1001891/download* ("[R]eligious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations' religious precepts.").

These cases were grounded in the basic principle that these religious employment criteria are permitted because they are necessary for the religious organization's integrity. *See Little,* 929 F.2d at 950 ("[T]he legislative history . . . suggests that the sponsors of the broadened exception were solicitous of religious organizations' desire to create communities faithful to their religious principles."); *Kennedy,* 657 F.3d at 193 (finding the religious organization exemption " 'reflect[s] a decision by Congress that the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention.' " (alteration in original) (quoting *Little,* 929 F.2d at 951)); *Killinger,* 113 F.3d at 201 ("[F]ederal court[s] must give disputes about what particulars should or should not be taught in theology schools a wide-berth. Congress, as we understand it, has told us to do so for purposes of Title VII."); *Hall,* 215 F.3d at 623 ("In recognition of the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions . . . Title VII has expressly exempted religious organizations from the prohibition against discrimination on the basis of religion . . . ."). That means that the religious employer must explain how its sincere religious beliefs translate into particular religious requirements for its employees and applicants. *Cf. Geary,* 7 F.3d at 330 ("The institution, at most, is called upon to explain the application of its own doctrines."). But the exemption does not require the religious employer to further prove that a particular employee or applicant's adherence to those religious requirements is necessary, in any contested instance, to further the religious organization's mission. That added burden would be contrary to the 1972 amendment of the Title VII religious exemption, which expanded the exemption from employees who perform work connected to the organization's religious activities to employees who perform work connected to any of the organization's activities. As the Supreme Court observed, this expansion was aimed toward relieving religious organizations of the kind of burden sought by the commenters:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.

Amos, 483 U.S. at 336

OFCCP shares the same concerns about requiring contractors to justify otherwise-protected employment decisions as additionally furthering the organization's mission. Difficulties could arise were OFCCP to draw distinctions between religiously motivated employment decisions that further an employer's religious mission and those that do not. *Amos* observed that difficulty, in which the district court had drawn an at-least questionable distinction between the termination of a truck driver at a church-affiliated workshop (protected) with the termination of a building engineer at a church-affiliated gymnasium (not protected). *See id.* at 330, 333 n.13, 336 n.14. The exemption does not require such hair-splitting—indeed, it appears to forbid it—and OFCCP sees no useful reason to attempt drawing such distinctions. *See also Little,* 929 F.2d at 951 ("Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.' ").

d. The Exemption's Scope: Other Protected Bases

i. Comments

As is made clear by the text of section 204(c) of E.O. 11246 and the corresponding regulation at 41 CFR 60–1.5(a)(5), the religious exemption itself does not exempt or excuse a contractor from complying with other applicable requirements. *See* E.O. 11246 § 204(c) ("Such [religious] contractors and subcontractors are not exempted or excused from complying with other requirements contained in this Order."); 41 CFR 60–1.5(a)(5) (same). Thus, religious employers are not exempted from E.O. 11246's requirements regarding antidiscrimination and affirmative action, generally speaking;

[19] This point is addressed more fulsomely in the next section regarding E.O. 11246's other protected bases.

[20] For the reasons discussed earlier, OFCCP does not believe restricting the exemption to a purely coreligionist preference is required or the most reasonable approach.

notices to applicants, employees, and labor unions; compliance with OFCCP's implementing regulations; the furnishing of reports and records to the government; and flow-down clauses to subcontractors. *See* E.O. 11246 §§ 202–203.

Although Title VII does not contain a corresponding proviso, courts have generally interpreted the Title VII religious exemption to be similarly precise, so that religious employers are not exempted from Title VII's other provisions protecting employees. *See, e.g., Kennedy*, 657 F.3d at 192; *Rayburn* v. *Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985); *cf. Hobby Lobby*, 573 U.S. at 733 (rejecting "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction"); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . .").

Many commenters nevertheless assumed that OFCCP would apply the proposed definition to allow religious contractors to discriminate on bases other than religion. Most of these commenters stated that doing so would be contrary to E.O. 11246, and they argued that OFCCP lacks authority to expand the existing exemption or grant any new exemption. For example, a civil liberties organization commented that the preamble indicates that OFCCP intends to authorize discrimination based even on other protected bases like sex or race, contrary to the text of E.O. 11246. Similarly, a group of U.S. Senators commented that the proposed rule would allow employers to discriminate against employees on bases other than religion by, for instance, permitting employers to justify sex discrimination based on their religious tenets.

These commenters pointed to the second sentence of section 204(c) of E.O. 11246 as supporting their criticism. For example, a legal think tank commented that it was unclear how the proposed rule's "expansive definition of 'particular religion'" could be reconciled with its insistence that "an employer may not . . . invoke religion to discriminate on other bases protected by law."

Other commenters also stated that it would be inconsistent with Title VII case law to allow religious contractors to discriminate on bases other than religion. These commenters, including a legal think tank, a group of state attorneys general, a labor union, a civil liberties organization, and a reproductive rights organization, cited cases in which, they asserted, courts prohibited religious employers from discriminating on bases other than religion. For example, the civil liberties organization commented that courts have consistently prohibited religious organizations from discriminating on other bases, including sex, even where that discrimination is motivated by the organization's sincere religious beliefs (citing *Rayburn*, 772 F.2d at 1166; *Kennedy*, 657 F.3d at 192; *EEOC* v. *Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982), *abrogated on other grounds by Alcazar* v. *Corp. of Catholic Archbishop of Seattle*, 598 F.3d 668 (9th Cir. 2010); *Elbaz* v. *Congregation Beth Judea, Inc.*, 812 F. Supp. 802, 807 (N.D. Ill. 1992); *Dolter* v. *Wahlert High Sch.*, 483 F. Supp. 266, 269 (N.D. Iowa 1980); *accord McClure* v. *Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972)).

Some commenters argued that religion has long been used as a way to justify discrimination. For example, an affirmative action professionals association asserted that religious freedom has historically been invoked to defend slavery, the denial of women's suffrage, Jim Crow laws, and segregation. That commenter cited a recent news story in which a mixed-race couple was allegedly denied the use of a hall for a wedding because of the owner's religious beliefs.

Several commenters expressed concern specifically about the effect of the proposal on E.O. 11246's protections from discrimination based on sexual orientation and gender identity. For example, an LGBT rights advocacy organization commented that it was troubled by the fact that OFCCP failed to cite sexual orientation and gender identity in the proposed rule as the protected characteristics most likely to be impacted by the rule. And a legal professional organization expressed concern that OFCCP may interpret E.O. 11246 to allow federal contractors to discriminate based on sexual orientation as long as they cite sincere religious reasons for doing so.

On the other hand, as noted above, other commenters expressed support for the proposal because they believed it would exempt religious organizations from the prohibitions on discrimination based on sexual orientation and gender identify, which would provide them protection to staff their organizations consistent with their sincere religious beliefs.

Some commenters requested guidance to resolve the perceived conflict. For example, an individual commenter asked whether protection for a client's religion or protection for an applicant or employee's sexual orientation and/or gender identity would prevail under the proposed regulations. A pastoral membership organization stated that if the terms "sexual orientation" and "gender identity" include conduct, it is difficult to determine whether the prohibition on discrimination based on sexual orientation and gender identity or the protection for religiously-motivated conduct applies.

Many of these commenters criticized the proposal for not clearly stating how OFCCP would resolve the perceived contradiction between its assertion that religious contractors would not be permitted to discriminate on other protected bases and its inclusion in the proposed definition of "acceptance of or adherence to religious tenets as understood by the employer as a condition of employment." For example, the legal think tank asserted that OFCCP does not explain how it will apply these two provisions in cases in which they appear to conflict, and observed that the proposed regulatory text does not limit its definition of "religious tenets" to tenets defined without reference to race, color, sex, sexual orientation, gender identity, or national origin. A state's attorney general asserted that, because the proposed rule fails to define or limit the type of "conduct" that can form the basis of permissible discrimination by religious entities, it allows contractors to discriminate based on any arbitrary characteristic.

Many supportive commenters recommended that OFCCP resolve the perceived conflict by clarifying that the non-discrimination requirements of Title VII and E.O. 11246 do not apply under the corresponding religious exemptions. For example, an anonymous commenter suggested that OFCCP clarify that religious organizations are permitted to discriminate on the bases of sexual orientation and gender identity because, in the commenter's view, an action that falls within the religious exemption would be outside the bounds of Title VII and E.O. 11246, "regardless of whether it would otherwise be prohibited by other provisions." Other supportive commenters offered a similar view, stating that the proposed definition provided helpful clarification. For example, a religious liberties legal organization criticized "the suggestion from the Obama administration" that the exemption should be limited to "religious people cannot be discriminatory for hiring only members of their own religion" rather than "non-discrimination law does not apply in religious contexts" as provided under

the Civil Rights Act, and praised the proposed rule for affirming that requiring adherence to an employer's religious tenets does not constitute discrimination. Similarly, a U.S. Senator commented that the proposed helpfully clarifies that religious employers that contract with the federal government retain the right to hire employees that support their religious mission, consistent with Title VII. Some supportive commenters also noted that the proposed definition was consistent with the First Amendment and Title VII case law. For example, a religious legal association and an association of evangelical churches and schools commented that the principle that religious employers should be allowed to require their employees to conduct themselves in accordance with the employers' code of moral conduct has been "almost universally" accepted by courts, who have relied alternatively on Section 702(a) of Title VII, the First Amendment's Religion Clauses, and other considerations recognizing that "religious organizations may have legitimate, nondiscriminatory reasons" for practicing their religious beliefs through employment decisions.

In a joint comment, a religious legal association and an association of evangelical churches and schools commented that Section 204(c) of E.O. 11246 should be construed to exempt religious organizations from the nondiscrimination mandates of Section 202, except to the extent that a religious organization's employment decision is based on race.

To address these comments, OFCCP here first discusses the applicable Title VII principles established by case law, including how those principles may apply where religious organizations maintain sincerely held beliefs regarding matters such as marriage and intimacy, which may implicate protected classes under E.O. 11246. OFCCP then discusses its recognition that religious organizations in appropriate circumstances will be entitled to relief under the Religious Freedom Restoration Act.

The public should bear in mind that this discussion is restricted solely to these difficult and sensitive questions raised by commenters. This rule does not affect the overwhelming majority of federal contractors and subcontractors, which are not religious, and OFCCP remains fully committed to enforcing all E.O. 11246 nondiscrimination requirements, including those protecting employees from discrimination on the bases of sexual orientation and gender identity. Even for religious organizations that serve as government contractors or subcontractors, they too must comply with all of E.O. 11246's nondiscrimination requirements except in some narrow respects under some reasonable circumstances recognized by law. This rule provides clarity on those circumstances, consistent with OFCCP's obligations and desire to also respect and accommodate the free exercise of religion.

ii. Legal Principles

OFCCP acknowledges first and foremost the United States' deeply rooted tradition of respect for religion and religious institutions. Religious individuals and organizations operate within and contribute to civil society and do not relinquish their religious freedom protections when they participate in the public square.[21]

With respect to commenters' concerns and questions here, many relate to the interaction of two well-established Title VII principles: First, that religious organizations can take religion into account when making employment decisions; and second, that religious organizations cannot discriminate on other protected bases. Each of those two principles taken by itself has clear answers. Where an employment decision made on the basis of religion also implicates another protected basis, however, the law is less clear.

As to the first principle, virtually all commenters agreed with what the plain text of the exemption provides: That religious organizations can consider an employee's particular religion when taking employment action. As discussed elsewhere in this rule's preamble, commenters disagreed as to the scope of that exemption—which employees it applies to, and which employer actions—but the basic principle was not disputed.

As to the second principle, as many commenters recognized, E.O. 11246's other employment protections apply to religious organizations. Protections on the basis of race, color, sex, sexual orientation, gender identity, and national origin do not categorically disappear when the employer is a religious organization. Thus the religious exemption does not permit religious organizations to engage in prohibited discrimination when there is no religious basis for the action. For instance, a religious organization that declined to promote a non-ministerial employee not for religious reasons, but because of animus borne of the employee's country of birth or skin color, would violate E.O. 11246. Courts in the Title VII context have engaged in careful, fact-bound inquiries to determine whether a religious organization's action was based on religion *or* instead on a prohibited basis.[22] For instance, courts may inquire whether a plaintiff was subjected to adverse employment action because of his or her sex or because of a violation of religious tenets. *See, e.g., Cline* v. *Catholic Diocese of Toledo,* 206 F.3d 651, 655–56, 658 (6th Cir. 2000); *cf. EEOC* v. *Miss. Coll.,* 626 F.2d 477, 485–86 (5th Cir. 1980) (holding if religious organization shows that its decision was based on religion, the religious exemption prohibits a further inquiry into pretext). To that extent, courts are virtually uniform in the view that the religious exemption does not permit discrimination on bases other than religion.[23]

The question posed here, however, is the interaction of those two principles: Specifically, the outcome when a religion organization's action is based on and motivated by the employee's adherence to religious tenets yet implicates another category protected by E.O. 11246. OFCCP concludes, as explained in detail below, that the religious exemption itself, as interpreted by the courts, has left the question open, but that such activity would also give rise to an inquiry under RFRA, which must be assessed based on applicable case law and the specific facts presented.

At the federal appellate court level, the question of the religious exemption's interaction with other protected bases was left open in, for instance, *EEOC* v. *Mississippi College,* where an EEOC subpoena did "not clearly implicate any religious practices of the College." 626 F.2d at 487. The court noted that the college had a scripturally rooted policy of hiring only men to teach courses in religion, but stated that "[b]efore the EEOC could require the College to alter that practice, the College would have an opportunity to litigate in a federal forum whether [the religious exemption] exempts or the first amendment protects that particular

[21] *See* Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty 1–2 (Oct. 6, 2017).

[22] *See* below for a more fulsome discussion of how courts have determined the applicability of the religious exemption.

[23] This is separate from the question of whether application of Title VII in any particular instance is tolerable under the First Amendment or other law, such as where the employee is a minister, *see Our Lady of Guadalupe,* 140 S. Ct. 2049, or where the employment relationship is otherwise "so pervasively religious" that it raises First Amendment concerns, *see DeMarco* v. *Holy Cross High Sch.,* 4 F.3d 166, 172 (2d Cir. 1993).

practice." *Id.* The Seventh Circuit has similarly characterized the question of whether "the religious-employer exemptions in Title VII [are] applicable only to claims of *religious* discrimination" as "a question of first impression in this circuit." *Herx* v. *Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085, 1087 (7th Cir. 2014). Other courts have indicated that the religious exemption may be preeminent in such a situation. *See Little*, 929 F.2d at 951 ("[T]he permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."); *see also Kennedy*, 657 F.3d at 194 ("Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices." (quoting *Little*, 929 F.2d at 951)).

The only two federal appellate-level cases with fact patterns involving the precise issue are a pair of Ninth Circuit cases from the 1980s. The first, *EEOC* v. *Pacific Press Publishing Association*, held as a statutory matter that Title VII's prohibitions on sex discrimination and on retaliation applied to a religious organization. *See* 676 F.2d 1272, 1277 (9th Cir. 1982). But the court determined that the practice at issue that resulted in sex discrimination "does not and could not conflict with [the employer's] religious doctrines, nor does it prohibit an activity rooted in religious belief." *Id.* at 1279. Regarding retaliation, the court held as a constitutional matter that Title VII's anti-retaliation provision should apply to the religious organization even when the employee was dismissed for violating church doctrine that prohibited members from bringing lawsuits against the church. *See id.* at 1280.

The second decision, *EEOC* v. *Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), is less instructive. It held in relevant part that Title VII could be applied to prohibit a religiously grounded health benefits program that benefited one sex more than the other. However, as a statutory matter, the court held that the religious exemption was not implicated because the employment practice did not concern the selection of employees based on their religion—the text of the exemption refers to "employment of individuals *of a particular religion*" [24]—and as a constitutional matter noted that "[e]liminating the employment policy involved here would not interfere with religious belief and only minimally, if at all, with the practice of religion." *Id.* at 1366, 1368.

The Supreme Court also has not answered whether an employment action motivated by religion but implicating a protected classification violates Title VII. The Court's cases offer no clear conclusion whether the religious exemption should be read so narrowly that its protections are overcome by the rest of E.O. 11246's (or Title VII's) protections when they are both at issue. For example, in *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020), the Court held that Title VII's prohibition on discrimination because of sex includes discrimination on the basis of sexual orientation and transgender status. That holding itself is not particularly germane to OFCCP's enforcement of E.O. 11246, which has expressly protected sexual orientation and gender identity since 2015. What is certainly germane is the Court's recognition of the "fear that complying with Title VII's requirement in cases like [*Bostock*] may require some employers to violate their religious convictions" and its assurance that it, too, was "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society." *Id.* at 1753–54. The Court then noted that Title VII contains "an express statutory exception for religious organizations," but did not explain whether an employment action motivated by religion that implicates a protected classification violates Title VII. *Id.* at 1754.

Regardless, OFCCP ultimately does not need to answer this open question on the proper interpretation of the religious exemption in E.O. 11246, and declines to do so, because RFRA can guide the agency's determination if and when a particular case presents a situation where a religiously motivated employment action implicates a classification protected under the Executive Order. As noted in *Bostock*, RFRA "prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. [42 U.S.C.] § 2000bb–1." *Id.* Moreover, "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. [42 U.S.C.] § 2000bb–3." *Id.*[25] Concerns raised by supportive commenters in this rulemaking have alerted the agency that application of E.O. 11246 may substantially burden their religious exercise, especially if the religious exemption does not clearly protect their ability to maintain employees faithful to their practices and beliefs. The ministerial exception offers religious organizations broad freedom in the selection of ministers, but that is only a subset of their employees. *See generally Our Lady of Guadalupe*, 140 S. Ct. 2049. In contrast, the religious exemption applies to all of a religious organization's employees, but the scope of its protections is not settled when religious tenets implicate other protected classes. Thus, the Department should consider RFRA, since in some circumstances neither the ministerial exception nor the religious exemption may alleviate E.O. 11246's burden on religious exercise. *See Little Sisters of the Poor*, 140 S. Ct. at 2383–84 (holding agencies should consider RFRA when it is an important aspect of the problem involved in the rulemaking).

The discussion below addresses in general terms how OFCCP views its obligations under RFRA in the specific situation raised by commenters and addressed here: Where the religious organization takes employment action regarding an applicant or an employee, the employment action is motivated solely on the employee's adherence to a sincere religious tenet, yet that tenet also implicates an E.O. 11246 protected category other than race (which is discussed separately). RFRA requires a fact-specific analysis, so the discussion here of necessity can speak only to OFCCP's general approach; specific situations involving specific parties will require consideration of any additional, unique facts. And of course the contractor or subcontractor involved will need to demonstrate its religious sincerity and burden so that it falls within this rubric. Nonetheless, OFCCP believes its RFRA analysis here will provide clarity for religious contractors and subcontractors, regardless of how future cases may interpret the interplay of the religious exemption in and of itself with other protected classes under Title VII or E.O. 11246.

[24] As explained elsewhere in this preamble, the religious exemption is more than a mere hiring preference for coreligionists. OFCCP nonetheless agrees that the policy in *Fremont* would not be covered by the religious exemption because it did not pertain to the *employee's* particular religion. Nothing about the employee's religious beliefs or conduct would affect the policy—only his or her sex.

[25] RFRA was not raised before the Court in *Bostock*. Thus, the Court left that "question[ ] for future cases." 140 S. Ct. at 1754.

iii. Application of the Religious Freedom Restoration Act

"Congress enacted RFRA in 1993 in order to provide very broad protection of religious liberty." *Hobby Lobby,* 573 U.S. at 693. RFRA responded to "*Employment Division* v. *Smith,* 494 U.S. 872 (1990) [in which] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" under the First Amendment, and restored by statute "the compelling interest test as set forth in *Sherbert* v. *Verner,* 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972)." 42 U.S.C. 2000bb(a)(4), (b)(1); *see Hobby Lobby,* 573 U.S. at 693–95.

Under RFRA, the federal government may not "substantially burden a person's exercise of religion." 42 U.S.C. 2000bb–1(a). Government is excepted from this requirement only if it "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id.* 2000bb–1(b).

RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993," *Id.* 2000bb–3(a), including agency regulations, *see Little Sisters of the Poor,* 140 S. Ct. at 2383. As "Federal law, and the implementation of that law," E.O. 11246 fits within that scope as well.

(1) Substantial Burden

The question of whether government action substantially burdens an employer's exercise of religion can be separated into two parts. *See Hobby Lobby,* 573 U.S. at 720–26; *Little Sisters of the Poor,* 140 S. Ct. at 2389 (Alito, J., concurring). First, the government must ask whether the consequences of noncompliance put substantial pressure on the objecting party to comply. *See Hobby Lobby,* 573 U.S. at 720–23. Second, the government must ask whether compliance with the regulation would violate or modify the objecting party's sincerely-held religious exercise (as the objecting party understands that exercise and any underlying beliefs), including the party's "ability . . . to conduct business in accordance with [its] religious beliefs." *Hobby Lobby,* 573 U.S. at 724; *see also Sherbert,* 374 U.S. at 405–06.[26] If the answer to both questions is yes, then the regulation substantially burdens the exercise of religion.

On the first question, noncompliance with the nondiscrimination requirements of E.O. 11246 could have substantial adverse consequences on religious organizations that participate in government contracting. One private religious university supportive of the proposed rule stated that it is "a large research university with dozens of active federal contracts at any given time," while another stated that "religious organizations have long been significant participants in federal procurement programs." Noncompliance with E.O. 11246 can result in awards of back pay and other make-whole relief to affected employees and applicants, cancellation or suspension of the contract, and even suspension or debarment. *See* E.O. 11246 § 202(7); 41 CFR 60–1.26. That is substantial pressure. Indeed, it is a substantial burden for the government to compel someone "to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas,* 450 U.S. at 716; *Sherbert,* 374 U.S. at 404 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."). "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed" for engaging in religious action. *Sherbert,* 374 U.S. at 404. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."). *Thomas,* 450 U.S. at 717–18.

On the second question, the Supreme Court emphasized in *Hobby Lobby* that, in determining whether compliance with a particular mandate would substantially burden the objecting party's ability to operate in accordance with its religious beliefs, the federal government must "not presume to determine the plausibility of a religious claim." *Hobby Lobby,* 573 U.S. at 724 (quoting *Smith,* 494 U.S. at 887). It is not for a court, or for OFCCP, to say whether a particular set of religious beliefs is "mistaken or insubstantial." *Hobby Lobby,* 573 U.S. at 725. Furthermore, religious exercise means more than being able to express particular views—a right to freedom of religion requires the right to act in conformance with that religion. *See Espinoza,* 140 S. Ct. at 2277 (Gorsuch, J., concurring) ("The right to be religious without the right to do religious things would hardly amount to a right at all."). It is this right to engage in conduct consistent with sincerely held belief—and a right to be free of demands to engage in conduct conflicting with those sincerely held beliefs—that RFRA protects. *See Little Sisters of the Poor,* 140 S. Ct. at 2390.

Compliance with the nondiscrimination provisions in E.O. 11246, if interpreted to apply when an employment action is motivated by religion yet also implicates a protected classification, could force religious organizations to violate their sincerely held religious beliefs or to compromise their religious integrity or mission by placing substantial pressure on them to violate or modify their religious tenets related to their employees and their religious communities. The comments on the proposed rule made this clear. For example, a private religious university noted the importance for religious employers to be able to "employ[ ] persons whose beliefs and conduct are consistent with [their] religious precepts." Similarly, a nationwide ecclesiastical organization stated in its comment that faith-based organizations should be able to "lawfully prefer for employment those who, by word and conduct, accept and adhere to that faith as the organization understands it, regardless of the applicant's or employee's religious affiliation." An association of religious universities echoed these sentiments, stating that "[o]ur schools are committed to upholding their religion-based standards by aligning

[26] Case law is clear that RFRA's substantial burden test does not insist that a challenged government action require an objecting party to *violate* its religious beliefs. Instead, substantial pressure on a party to modify its religiously motivated practice is also sufficient to establish a substantial burden. *See, e.g., Archdiocese of Wash.* v. *Wash. Metro. Area Transit Auth.,* 897 F.3d 314, 333 (D.C. Cir. 2018) (defining "substantial burden" under RFRA as "substantial pressure on an adherent to modify his behavior and to violate his beliefs") (quoting *Thomas* v. *Review Bd.,* 450 U.S. 707, 718 (1981)); *EEOC* v. *Catholic Univ. of Am.,* 83 F.3d 455, 467 (D.C. Cir. 1996) (finding that government's interest in eliminating employment discrimination at Catholic university was outweighed by university's right of autonomy in its own domain); *Jolly* v. *Coughlin,* 76 F.3d 468, 477 (2d Cir. 1996) (finding that right to free exercise of religion is "substantially burdened" within meaning of RFRA where state puts substantial pressure on adherent to modify his behavior and to violate his beliefs); *In re Young,* 82 F.3d 1407, 1418 (8th Cir. 1996) ("[D]efining substantial burden broadly to include religiously motivated as well as religiously compelled conduct is consistent with the RFRA's purpose to restore pre-*Smith* free exercise case law.").

employment expectations exclusively with applicants and employees who concur with these expectations. These expectations are essential to fulfilling our religious mission." While the commenter explained that generally its associated "schools do not accept direct government funding," it highlighted the importance for its members that "no organization should be excluded by the government from competing for contracts or other funds simply because the religious organization is serious about maintaining its religious identity and religious practices."

The case law also indicates that certain E.O. 11246 obligations may impose a burden on religious organizations. *Bostock* expressly acknowledged that enforcing certain nondiscrimination provisions could pose challenges for religious employers under RFRA. *See* 140 S. Ct. at 1754. And many cases show instances of religious employers seeking to apply religiously inspired codes of conduct that pertain to matters of marriage and sexual intimacy. *See Little*, 929 F.2d at 946 (upholding termination of employee for violations of "Cardinal's Clause," which included "*entry by the teacher into a marriage which is not recognized by the Catholic Church*" (emphasis in original)); *Cline*, 206 F.3d at 666 (holding fact issue remained as to whether plaintiff was terminated for pregnancy or for whether she had "violated her clear duties as a teacher by engaging in premarital sex"); *Boyd* v. *Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 414 (6th Cir. 1996) (upholding district court's determination that the defendant "articulated a legitimate, non-discriminatory reason for plaintiff's termination when it stated that plaintiff was fired not for being pregnant, but for having sex outside of marriage in violation of Harding's code of conduct" and rejecting claim of pretext when school's president "had terminated at least four individuals, both male and female, who had engaged in extramarital sexual relationships that did not result in pregnancy"); *Gosche* v. *Calvert High Sch.*, 997 F. Supp. 867, 872 (N.D. Ohio 1998) (dismissing Title VII claim of plaintiff fired for having affair and concluding that "[w]hatever Plaintiff's own *post-hoc* claims may be regarding the relevance of her sexual conduct to her employment at a Catholic school, it is clear that the Diocese and Parish considered her sexual conduct to be relevant to her employment"); *Ganzy* v. *Allen Christian Sch.*, 995 F. Supp. 340, 359–60 (E.D.N.Y. 1998) (noting in case with similar facts and holding as *Cline* that "[r]eligious institutions . . . are provided leeway under federal constitutional and statutory law in regulating the sexual conduct of those in their employ in keeping with their religious views"); *Dolter* v. *Wahlert High Sch.*, 483 F. Supp. 266, 270 (N.D. Iowa 1980) ("Nor does the court quarrel with defendant's contention that it can define moral precepts and prescribe a code of moral conduct that its teachers . . . must follow.").[27]

Of particular concern here as well is that "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Amos*, 483 U.S. at 336; *cf. Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) ("[U]ncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding."). Here, out of fear of violating E.O. 11246's requirements, a religious organization might simply choose to forsake certain of its religious tenets related to employment. That is a religious burden in itself. And that change could in turn result in the organization hiring and retaining employees who, by word or deed, undermine the religious organization's character and purpose—but which the organization would feel compelled to accept rather than risk liability. That is a second religious burden, which in particular may pose a risk to smaller or nontraditional religious groups. *Cf. Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) (noting that a bright-line test or multifactor analysis for the definition of "minister" "risk[s] disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some," including by "caus[ing] a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding").

Alternatively, to avoid this problem, the religious organization might consider drawing stricter lines around those it considers "coreligionists," for even the narrowest reading of the religious exemption permits religious organizations to prefer "coreligionists" in employment decisions. In that case, religious organizations would draw strict lines by stating that certain behaviors, beliefs, or statements are anathema to the religion and take one outside the religious community. That way, employment action would be more readily identified as resting solely on religious grounds as a preference against a non-coreligionist. *See Mississippi College*, 626 F.2d at 484–85; *cf. Amos*, 483 U.S. at 343 (Brennan, J., concurring) ("A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believe that religious commitment was important in performing other tasks as well."). Here, the religious burden would be government pressure on how the religious organization defines who is and who is not a member of its religious community.

Demonstrating burden is necessarily fact-dependent. There may be instances where the organization sincerely believes as a religious matter that it can tolerate some kinds of religious noncompliance from some of its employees without seriously compromising its religious mission or identity. That may be the case especially for employees in less prominent roles or who have little interaction with students or the public. But there may be other instances where, in the sincere view of the organization, a non-ministerial employee must adhere to the organization's religious tenets as an important part of furthering the organization's religious mission and maintaining its religious identity, and where strict enforcement of certain E.O. 11246 requirements would substantially burden those aims.

(2) Compelling Interest

Many courts have recognized the importance of the government's interest in enforcing Title VII's nondiscrimination provisions. *See, e.g., Rayburn*, 772 F.2d at 1169; *Pacific Press*, 676 F.2d at 1280. The following RFRA analysis does not address OFCCP's enforcement program broadly, including the context of a religious organization's discriminating on the basis of a protected characteristic other than religion for non-religious reasons. OFCCP will continue to fully enforce E.O. 11246's requirements in those contexts. Rather, the compelling-interest analysis here focuses solely on the questions raised by commenters regarding a situation in which a religious organization takes employment

[27] *Amos* also implicated such facts. The appellee had been discharged for failing to "qualify for a temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples," which "are issued only to individuals who observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *Amos*, 483 U.S. at 330 & n.4. The plaintiffs below had alleged that those standards necessitated employer inquiries into their "sexual activities" and "moral cleanliness and purity." *Amos*, 594 F. Supp. at 830.

action based solely on sincerely held religious tenets that also implicate a protected classification.

To satisfy RFRA, OFCCP must do more than assert a generalized compelling interest on a "categorical" basis. *O Centro*, 546 U.S. at 431. Instead, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430–31 (quoting 42 U.S.C. 2000bb–1(b)). This requires "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431.

Thus OFCCP must demonstrate that it has a compelling governmental interest in enforcing a nondiscrimination requirement against "particular religious claimants" (*e.g.*, particular contractors who qualify for the religious exemption) when doing so places a substantial burden on the ability of those particular contractors to freely exercise their religion. *Id.* This statutory requirement is reflected in OFCCP's current RFRA policy, under which "OFCCP will consider" a contractor's request for "an exemption to E.O. 11246 pursuant to RFRA . . . based on the facts of the particular case." OFCCP, *Religious Employers and Religious Exemption, www.dol.gov/agencies/ofccp/faqs/religious-employers-exemption*. As explained below, OFCCP has determined on the basis of several independent reasons that it has less than a compelling interest in enforcing nondiscrimination requirements—except for protections on the basis of race—when enforcement would seriously infringe the religious mission or identity of a religious organization.

Exceptions provided other contractors. OFCCP's general interest in enforcing E.O. 11246 is less than compelling in the religious context addressed here, given the numerous exceptions from its nondiscrimination requirements it has authority to grant, and has granted, in nonreligious contexts. Granting accommodations in nonreligious contexts strongly suggests that OFCCP does not have a compelling interest in disfavoring religious contractors by refusing to grant accommodations in religious contexts. *See O Centro*, 546 U.S. at 436 ("RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" (quoting 42 U.S.C. 2000bb–1(a))). When "[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct," those exceptions suggest that "those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Holt*, 574 U.S. at 367.

The President has granted OFCCP broad authority and discretion to exempt contracts from the requirements of E.O. 11246. Most prominent is section 204(a) of E.O. 11246, which authorizes the Secretary of Labor to grant exemptions from any or all of the equal opportunity clause's requirements "when the Secretary deems that special circumstances in the national interest so require." This is not the kind of language government typically uses when it seeks a policy of absolute enforcement. Rather, it is the kind of language government uses when granting highly discretionary power. *Cf. Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (removing an employee "whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States'" is a standard that "fairly exudes deference to the Director" (quoting National Security Act § 102(c)). The Executive Order contains many other exceptions as well. Section 204(b) authorizes the Secretary to exempt contracts that are to be performed outside the United States, contracts that are for standard commercial supplies or raw materials, contracts that do not meet certain thresholds (dollar amounts or numbers of employees), and subcontracts below a specified tier. Section 204(d) authorizes the Secretary to exempt a contractor's facilities that are separate and distinct from activities related to the performance of the contract, as long as "such an exemption will not interfere with or impede the effectuation of the purposes of this Order." OFCCP's implementing regulations contain exemptions as well. OFCCP has implemented section 204(b) to the maximum extent possible by exempting all contracts and subcontracts for work performed outside the United States by employees not recruited in the United States. *See* 41 CFR 60–1.5(3). OFCCP's regulations also contain a religious exemption for religious educational institutions and permit a preference for "Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation." 41 CFR 60–1.5(6)–(7).

On several occasions OFCCP has used its power to exempt contracts "in the national interest." "Prior administrations granted [national interest exemptions] for Hurricanes Sandy and Katrina," [28] and OFCCP has granted temporary exemptions from some E.O. 11246 requirements in response to more recent national disasters. OFCCP has similarly granted an exemption during the COVID–19 pandemic. *See* OFCCP, National Interest Exemptions, *https://www.dol.gov/agencies/ofccp/national-interest-exemption*. And the National Interest Exemptions that OFCCP has granted can be quite broad, applying, for example, to *all* new contracts providing coronavirus relief during the applicable time period. *See* OFCCP, Coronavirus National Interest Exemption Frequently Asked Questions, *https://www.dol.gov/agencies/ofccp/faqs/covid-19#Q1*.

OFCCP has also issued a final rule effecting a permanent exemption from all OFCCP authority for healthcare providers that participate in the TRICARE program and have no otherwise covered contracts. The final rule expressed OFCCP's view that a 2011 statute removed whatever authority OFCCP may have had over TRICARE providers and did not replace it with a separate nondiscrimination provision; Congress' action indicates that OFCCP's interest is less than compelling interest. *See* 85 FR 39834, 39837–39 (July 2, 2020). Additionally, the final rule exempted TRICARE providers on the alternative ground of a national interest exemption, citing its concern that "the prospect of exercising authority over TRICARE providers is affecting or will affect the government's ability to provide health care to uniformed service members, veterans, and their families," a determination that "pursuing enforcement efforts against TRICARE providers is not the best use of its resources" given a history of litigation and legal uncertainty in the area, and the need to "provide uniformity and certainty in the health care community with regard to legal obligations concerning participation in TRICARE." *Id.* at 39839.

The various exemptions that OFCCP can and does provide in secular settings show that its interest in enforcing E.O. 11246's requirements can give way to other considerations. Many of those same considerations exist here, so OFCCP's enforcement interest should similarly give way to religious accommodation. For example, many of the same reasons underlying OFCCP's exemption for TRICARE providers apply here as well: Conservation of resources in an area that could lead to protracted

[28] OFCCP, "Coronavirus National Interest Exemption Frequently Asked Questions," Question #12, *https://www.dol.gov/agencies/ofccp/faqs/covid-19#Q12*.

litigation; the need to bring clarity to a group of potential contractors under a cloud of legal uncertainty; and a goal of improving the government's access to certain services. In the TRICARE rule, the goal was to foster access to care for veterans and their families. In this rule, it is the goal of fostering the equal participation of religious organizations in government contracting and subcontracting in order to increase the contracting pool's competition and diversity and thus improve economy and efficiency in procurement. Likewise OFCCP's limited exemptions during emergencies and the pandemic demonstrate the agency's judgment that securing services for the government can override aspects of E.O. 11246's obligations. Here, too, a limited religious accommodation may encourage religious organizations to begin or continue participating in government contracting and subcontracting. And like those other exemptions, a religious accommodation here would be limited. It would be limited to employment action grounded in a sincere religious belief with respect to the employee's religion. It would not excuse religious organizations from their antidiscrimination obligations otherwise and never on the basis of race, nor from their affirmative-action obligations, reporting requirements, or other requirements under E.O. 11246.

E.O. 11246's many available exemptions, and OFCCP's history of recognizing exemptions, also undercuts the idea that individualized religious exemptions would undermine the agency's overall enforcement of E.O. 11246 or that their denial would be equitable to religious organizations. *See Holt,* 574 U.S. at 368 ("At bottom, this argument is but another formulation of the 'classic rejoinder . . . : If I make an exception for you, I'll have to make one for everybody, so no exceptions.' We have rejected a similar argument in analogous contexts, and we reject it again today.") (internal citations omitted) (quoting *O Centro,* 546 U.S. at 436); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359, 365 (3d Cir. 1999) ("[W]e conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny.").

Recognizing the value that religious contractors provide, OFCCP has determined that it has less than a compelling interest in enforcing E.O. 11246 when a religious organization takes employment action solely on the basis of sincerely held religious tenets that also implicate a protected classification, other than race. OFCCP has determined that, in these circumstances, it should instead appropriately accommodate religion, especially when doing so (as with national interest exemptions) would foster a more competitive pool of government contractors. *See Boyle v. United Techs. Corp.,* 487 U.S. 500, 506 (1988) (noting that "the Federal Government's interest in the procurement of equipment is implicated" where "[t]he imposition of liability on Government contractors" will cause the contractors to "decline to manufacture" a good or to "raise its price").

Establishment Clause concerns. OFCCP's interest in enforcing E.O. 11246 is attenuated when doing so seriously risks violating the Establishment Clause. But as noted earlier, strict application of all E.O. 11246 requirements to religious organizations could, in some instances, chill their protected religiously based requirements for employment out of fear of liability. It could also chill religious organizations from taking employment action despite an employee, by word or deed, undermining the religious organization's tenets and purposes.

Alternatively, it could incentivize religious organizations, because of the risk that the government might misunderstand the organization's motivations, to draw stricter lines around who it considers a coreligionist. In this situation, the religious organization would first take some form of purely religious action against an employee to designate the employee as no longer a part of the religious community, and then take employment action, so that employment action would be more readily identified as resting solely on grounds of religious preference. And it poses a risk to smaller or nontraditional religious groups, whose membership practices may not be as readily understood by the government. *Cf. Hosanna-Tabor,* 565 U.S. at 197 (Thomas, J., concurring).

Such government pressure on religious organizations' membership and doctrinal decisions would raise serious concerns under not only the Free Exercise Clause, but the Establishment Clause as well. "[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion. . . . [A]ny attempt by government to dictate or *even to influence* such matters would constitute one of the central attributes of an establishment of religion." *Our Lady of Guadalupe,* 140 S. Ct. at 2060 (emphasis added) (quoting *Hosanna-Tabor,* 565 U.S. at 186 (opinion for the court)); *see also Hosanna-Tabor,* 565 U.S. at 197 (Thomas, J., concurring) ("These are certainly dangers that the First Amendment was designed to guard against."). In essence, such an approach could have the unfortunate consequence of pushing religious organizations to extremes to avoid liability. Religious organizations could do so either by forsaking their religiously based requirements for employment, or by engaging in more definitive religious actions to demonstrate their religious disassociation from someone who breaches a religiously based requirement for employment. OFCCP also has concerns about inter-religious discrimination, since some bona fide religious organizations require adherence to a common set of beliefs or tenets but do not have a formal membership structure, *see World Vision,* 633 F.3d at 728 (O'Scannlain, J., concurring), so they may have more difficulty than traditional churches in showing that an employee or applicant is not (or is no longer) a coreligionist.

OFCCP cannot avoid this Establishment Clause problem by attempting to determine whether a religious organization's decision to deem someone a non-coreligionist was motivated by discriminatory animus rather than a sincere application of religious tenets. Unlike the fact-finding to determine the reason for an *employment* decision, which does not always raise Establishment Clause concerns, this would be fact-finding to determine the reason for a *religious* decision on community membership. Testing the basis of that decision would most likely violate the First Amendment. It would violate the religious organization's right to choose its membership free of government influence, and the process of inquiry alone into such a sensitive area "would risk judicial entanglement in religious issues." *Our Lady of Guadalupe,* 140 S. Ct. at 2069; *see Catholic Bishop,* 440 U.S. at 502.

The absence of a clear command. Finally, a compelling interest ought to be one that is clearly spelled out by the government. For instance, in his concurrence in *Little Sisters of the Poor,* Justice Alito observed that it was highly significant that Congress itself had not treated free access to contraception as a compelling government interest. *See Little Sisters of the Poor,* 140 S. Ct. at 2392–93 (Alito, J., concurring). Here, however, the scope of the religious exemption is unsettled. As discussed above, courts have consistently interpreted the religious exemption to

prohibit religious organizations from discriminating on bases other than religion. But *Bostock* left open the scope of the exemption's protection for religious discrimination, and only two federal court of appeal decisions have addressed a fact pattern in which a religious organization's religious tenets conflicted with a non-religious Title VII protection. *See Fremont,* 781 F.2d at 1368 (finding challenged religious practice outside the scope of the religious exemption and changing the practice would pose little interference with the organization's religious belief and practice); *Pacific Press,* 676 F.2d at 1279 (determining that the EEOC's action "does not and could not conflict with [the employer's] religious doctrines, nor does it prohibit an activity rooted in religious belief"). Without stronger legal evidence that the religious exemption's protections are cabined by E.O. 11246's other protections (and thus may seriously infringe religious freedom), OFCCP is hesitant to describe that theory as furthering a compelling government interest.

(3) Least Restrictive Means

In the third step of the RFRA analysis, OFCCP assesses whether its application of the religious burden to the person "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. 2000bb–1(b)(2). Because OFCCP believes that it has less than a compelling interest in enforcing E.O. 11246 in the circumstances contemplated for purposes of this general RFRA analysis it need not consider whether that foreclosed enforcement would be by the least restrictive means. When the Supreme Court has found a regulation violated RFRA, the Court has permitted the regulatory agency to determine the correct remedy. *See, e.g., Hobby Lobby,* 573 U.S. at 726, 731, 736; 79 FR 51118 (Aug. 27, 2014) (proposed modification in light of *Hobby Lobby*). As a result, OFCCP has discretion to determine an appropriate accommodation without having to also determine the least restrictive alternative. As Justice Alito recently explained, RFRA "does not require . . . that an accommodation of religious belief be narrowly tailored to further a compelling interest. . . . Nothing in RFRA requires that a violation be remedied by the narrowest permissible corrective." *Little Sisters of the Poor,* 140 S. Ct. at 2396 (Alito, J., concurring). OFCCP further believes the RFRA approach outlined here is an appropriate accommodation, which applies only to bona fide religious employers and which permits only employment actions based on sincere religious tenets; employees remain protected from discrimination motivated by animus or any other non-religious reason, and employment actions based on race always remain prohibited.

(4) The Harris Case

OFCCP does not view the Sixth Circuit's opinion in *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018), *aff'd, Bostock* v. *Clayton Cnty.,* 140 S. Ct. 1731 (2020), as requiring a different analysis here. In that case (one of three consolidated in *Bostock*), an employee of a funeral home informed the funeral home's owner of the employee's intention to present as a member of the opposite sex while at work. The owner stated that he would violate his religious beliefs were he to permit the employee to do so and terminated the employee. *See id.* at 568–69. In the ensuing litigation, the funeral home raised a RFRA defense. The Sixth Circuit held that Title VII discrimination claims "will necessarily defeat" RFRA defenses to such discrimination. *Id.* at 595. The court addressed each element of RFRA. Regarding substantial burden, the court held in relevant part that the employer's mere toleration of the employee's conduct to comply with Title VII is not an endorsement of it, so it was not a substantial burden. Regarding the furtherance of a compelling interest, the court held that failure to enforce Title VII would result in the employee suffering discrimination, "an outcome directly contrary to the EEOC's compelling interest in combating discrimination in the workforce." *Id.* at 592. Regarding least-restrictive means, the court held that enforcement of Title VII is itself the least-restrictive means for eradicating employment discrimination on the basis of sex. *See id.* at 593–97.

The defendant in *Harris* did not raise the RFRA issue to the Supreme Court, but the Court in *Bostock* nonetheless observed that, "[b]ecause RFRA operates as a kind of super statute . . . it might supersede Title VII's commands in appropriate cases." [29] *Bostock,* 140 S. Ct. at 1754. To the extent *Harris* remains good law, OFCCP does not view the Sixth Circuit's RFRA analysis as applicable here, as the facts of the case are readily distinguishable from this rule's protections for religious organizations. The funeral home at the center of the *Harris* case was not a religious organization. *See* 884 F.3d at 581. Unlike the religious employers that are OFCCP's focus here, the funeral home had "virtually no religious characteristics," *id.* at 582: No religiously inspired code of conduct, no doctrinal statement, and no other religious requirement for employees. Nor did the funeral home through its work seek to advance the values of a particular religion. *See id.* Indeed, the funeral home was clearly outside the scope of OFCCP's religious exemption—which exists to prevent E.O. 11246's nondiscrimination provisions from interfering with a religious organization's freedom to employ "individuals of a particular religion"—and furthermore the funeral home's own testimony indicated that its conduct was motivated by commercial rather than religious concerns. *See id.* at 576 n.5, 586, 589 n.10.

Bearing those key factual differences in mind, OFCCP disagrees that, at least as applied to religious organizations regulated by OFCCP, "tolerating" employee conduct that is contrary to the organization's sincerely held religious tenets can never constitute a substantial burden under RFRA, as the court held in *Harris. Id.* at 588. That holding is, at the very least, in tension with *Little Sisters of the Poor, Hobby Lobby,* and the Free Exercise Clause precedents they rested on. *See Hobby Lobby,* 573 U.S. at 723–25; *see also Little Sisters of the Poor,* 140 S. Ct. at 2383 ("[In *Hobby Lobby,*] we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities."); *id.* at 2390 (Alito, J., concurring) (observing that "federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable," including religious beliefs underlying complicity-based objections). When government requires conduct proscribed by religious faith on pain of substantial penalty, there is a burden upon religious exercise. *See Sherbert,* 374 U.S. at 404.

Additionally, the burden is even clearer for an objecting religious organization than it was for the funeral home in *Harris.* Unlike a secular employer, a religious organization has a religious foundation and purpose and may select its employees on the basis of their religious adherence. Requiring religious employers to maintain employees who disregard the organization's religious tenets thus more seriously threatens to undermine the organization's mission and integrity. This gives even more credence to a claim that forcing a religious employer

[29] The Court also observed that "other employers in other cases may raise free exercise arguments that merit careful consideration." *Bostock,* 140 S. Ct. at 1754.

to maintain such an employee would substantially burden its religious exercise.

OFCCP also does not view *Harris's* treatment of the compelling-interest prong of RFRA as persuasive when applied to religious organizations regulated by OFCCP. First, because the defendant was not a religious organization, the *Harris* court did not consider the antecedent question of whether the government has a compelling interest in applying nondiscrimination laws to a religious organization when doing so would threaten to compromise the organization's integrity or mission, with its attendant more-severe infringements on religious free exercise and establishment problems. As discussed above, there are instances where that could occur, so accordingly in that situation the RFRA analysis is different. Additionally, E.O. 11246 contains additional and discretionary exceptions that Title VII does not have, which further alter the compelling-interest balance.

(5) OFCCP's Compelling Interest in Prohibiting Racial Discrimination

In response to commenters who raised the issue, OFCCP reiterates here that it has a compelling interest in eradicating racial discrimination, even as against religious organizations. To be sure, OFCCP is currently unaware of any contractor contending that its religious beliefs required it to take employment actions that implicate race, and commenters supplied no evidence of that occurring. Nonetheless, in response to commenters' broader concerns, OFCCP makes clear here that its overwhelming interest in eradicating racial discrimination would defeat RFRA claims in the context addressed in this section of the rule's preamble. OFCCP will enforce E.O. 11246 against any contractor or subcontractor that takes employment actions on the basis of race, even if religiously motivated. At least one commenter that strongly supported the proposed rule likewise recognized that the religious exemption should not protect "a religious organization's employment decision . . . based on racial status."

OFCCP treats racial discrimination as unique because the Constitution does as well. The Supreme Court recognizes that "[r]acial bias is distinct." *Pena-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 868 (2017). Indeed, a long history of the Court's "decisions demonstrate that racial bias implicates *unique* historical, constitutional, and institutional concerns." *Id.* (emphasis added). Although this final rule recognizes that religious accommodations may be necessary in certain other contexts regarding considerations of sex, "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Id.* (quoting *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979)).

The Supreme Court has elsewhere recognized the government's unique interest in eradicating racial discrimination. In *Hobby Lobby*, the Court considered "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction," but explained that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." 573 U.S. at 733. In *Bob Jones University*, the Court similarly concluded that the government had a "compelling" interest—described as "a fundamental overriding interest"—"in eradicating racial discrimination," and further explained the "governmental interest" in eradicating racial discrimination "substantially outweighs whatever burden" the government action in that case "place[d] on petitioners' exercise of their religious beliefs." *Bob Jones*, 461 U.S. at 604; *see also Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (describing as "patently frivolous" the argument that a prohibition on racial discrimination "was invalid because it contravenes the will of God and constitutes an interference with the free exercise of the Defendant's religion") (internal quotation marks omitted).

The government's heightened interest in eradicating racial discrimination is further exhibited by the Supreme Court's jurisprudence regarding the Equal Protection Clause of the Fourteenth Amendment. In Equal Protection Clause cases, the Court applies "strict scrutiny" to instances of race-based classifications, meaning that "all racial classifications, imposed by whatever federal, state, or local governmental actor . . . are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995). Strict scrutiny presents a more pressing standard than the "intermediate scrutiny" that the Court applies in Equal Protection Clause cases to instances of sex-based classifications, *see, e.g.*, *Craig* v. *Boren*, 429 U.S. 190, 197 (1976)) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); *id.* at 218 (Rehnquist, J., dissenting) (referring to the majority approach as "intermediate" scrutiny), and the "rational-basis scrutiny" that the Court has sometimes applied to classifications based on sexual orientation, *see Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003); *Romer* v. *Evans*, 517 U.S. 620, 631–32 (1996). The Supreme Court has further recognized that traditional views on marriage do not suggest bigotry or invidious discrimination but instead are held "in good faith by reasonable and sincere people here and throughout the world." *Obergefell* v. *Hodges*, 576 U.S. 644, 657 (2015).[30] The Constitution, as interpreted by the Supreme Court, is more protective of race than other protected classifications. Thus, the Court's long-established Equal Protection jurisprudence supports the conclusion that although the government has an interest in eradicating discrimination on the bases of all protected classes, the governmental interest in eradicating racial discrimination is particularly strong. This final rule is consistent with that framework.

e. Application of the Religious Exemption

As explained in the proposed rule, when evaluating allegations of discrimination on bases other than religion against employers that are entitled to the Title VII religious exemption, courts carefully evaluate whether the employment action was permissibly based on the "particular religion" of the employee. The particulars vary. In the absence of direct evidence of discrimination on a protected basis other than religion, courts generally invoke the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), to determine whether a religious employer's invocation of religion (or a religiously motivated policy) in making an employment decision was genuine or, instead, was merely a pretext for discrimination prohibited under Title VII. *See Cline*, 206 F.3d 651; *Boyd*, 88 F.3d 410; *cf. Geary*, 7 F.3d 324 (applying *McDonnell Douglas* in assessing religious-exemption defense to claim under the Age Discrimination in Employment Act). At least one other

[30] *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1727 (stating that a clergy member's refusal to perform a gay marriage "would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth").

case has noted that "[o]ne way" to show discriminatory intent using circumstantial evidence "is through the burden-shifting framework set out in *McDonnell Douglas*," but another way is to "show enough non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination." *Hamilton* v. *Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012).

In undertaking this evaluation, OFCCP, like courts, "merely asks whether a sincerely held religious belief actually motivated the institution's actions." *Geary*, 7 F.3d at 330. The religious organization's burden "to explain is considerably lighter than in a non-religious employer case," since the organization, "at most, is called upon to explain the application of its own doctrines." *Id.* "Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim." *Id.; see Seeger*, 380 U.S. at 185 (holding whether a belief is "truly held" is "a question of fact"). The sincerity of religious exercise is often undisputed or stipulated. *See, e.g., Hobby Lobby*, 573 U.S. at 717 ("The companies in the case before us are closely held corporations, each owned and controlled by a single family, and no one has disputed the sincerity of their religious beliefs."); *Holt*, 574 U.S. at 361 ("Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief."). In assessing sincerity, OFCCP takes into account all relevant facts, including whether the contractor had a preexisting basis for its employment policy and whether the policy has been applied consistently to comparable persons, although absolute uniformity is not required. *See Kennedy*, 657 F.3d at 194 (noting that the Title VII religious exemption permits religious organizations to "consider some attempt at compromise"); *LeBoon*, 503 F.3d at 229 ("[R]eligious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection."); *see also Killinger*, 113 F.3d at 199–200. OFCCP will also evaluate any factors that indicate an insincere sham, such as acting "in a manner inconsistent with that belief" or "evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine." *Philbrook*, 757 F.2d at 482 (quoting *Barber*, 650 F.2d at 441) (internal quotation mark omitted); *cf., e.g., Hobby Lobby*, 573 U.S. at 117 n.28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail."); *Quaintance*, 608 F.3d at 724 (Gorsuch, J.) ("[T]he record contains additional, overwhelming contrary evidence that the [defendants] were running a commercial marijuana business with a religious front.").

Other decisions have not used the *McDonnell Douglas* framework, particularly when an inquiry into purported pretext would risk entangling the court in the internal affairs of a religious organization or require a court or jury to assess religious doctrine or the relative weight of religious considerations. *See Geary*, 7 F.3d at 330–31 (discussing cases). Depending on the circumstances, such an inquiry by a court or an agency could impermissibly infringe on the First Amendment rights of the employer. This arises most prominently in the context of the ministerial exception, a judicially recognized exemption grounded in the First Amendment from employment-discrimination laws for decisions regarding employees who "minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 189; *see also Our Lady of Guadalupe*, 140 S. Ct. at 2060. The exemption "is not limited to the head of a religious congregation," nor subject to "a rigid formula for deciding when an employee qualifies as a minister." *Hosanna-Tabor*, 565 U.S. at 190; *see also Our Lady of Guadalupe*, 140 S. Ct. at 2067. "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 189. The ministerial exception thus bars "an employment discrimination suit brought on behalf of a minister." *Id.; see also Our Lady of Guadalupe*, 140 S. Ct. at 2073. In such a situation, it is dispositive that the employee is a minister; there is no further inquiry into the employer's motive. *See Hosanna-Tabor*, 565 U.S. at 706 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause . . . and the Establishment Clause"); *see, e.g., Rayburn*, 772 F.2d at 1169 ("In 'quintessentially religious' matters, the free exercise clause of the First Amendment protects the act of decision rather than a motivation behind it." (quoting *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 720 (1976))).

Some commenters, such as a religious legal association and an association of evangelical churches and schools, agreed with OFCCP that governmental inquiry into religious employers' practices could violate the First Amendment. A religious legal organization commended OFCCP for deferring to religious organizations on matters of doctrine and religious observance, and commented that doing otherwise could lead to unconstitutional entanglement with religion. These are the constitutional concerns that likewise constrain courts' analyses when an employer makes an employment decision based on religious criteria, yet the employee disputes the religious criteria. In those situations, courts have stated that "if a religious institution . . . presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination." *Little*, 929 F.2d at 948 (quoting *Mississippi College*, 626 F.2d at 485). Courts have noted the constitutional dangers of "choos[ing] between parties' competing religious visions" and entangling themselves in deciding whether the employer or the employee has the better reading of doctrine, or which tenets an employee must follow or believe to remain in employment. *Geary*, 7 F.3d at 330; *see Curay-Cramer*, 450 F.3d at 141 ("While it is true that the plaintiff in *Little* styled her allegation as one of religious discrimination whereas [this plaintiff] alleges gender discrimination, we do not believe the difference is significant in terms of whether serious constitutional questions are raised by applying Title VII. Comparing [plaintiff] to other Ursuline employees who have committed 'offenses' against Catholic doctrine would require us to engage in just the type of analysis specifically foreclosed by *Little*."); *Little*, 929 F.2d at 949 ("In this case, the inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts."); *Maguire*, 627 F. Supp. at 1507 ("Despite [plaintiff's] protests that she is a Catholic, 'of a particular religion,' the determination of who fits into that category is for religious

authorities and not for the government to decide.").

Some commenters criticized OFCCP's description of the extent to which it would be permissible to inquire into whether a religious employer's adverse employment action was based on religion or on another protected characteristic. Many of these commenters believed OFCCP's proposed approach is inconsistent with courts' inquiry in Title VII cases. For example, a group of state attorneys general asserted that, unlike the definition in the proposed rule, Title VII jurisprudence and case law has required nuanced and fact-dependent inquiry into whether a religious employer discriminated against a worker based on his or her "particular religion" or on another protected basis. An LGBT rights advocacy organization criticized OFCCP for rejecting the traditional burden-shifting framework set forth in *McDonnell Douglas* and instead placing the burden on workers. Some of these commenters stated that OFCCP's proposed inquiry would not be adequately rigorous. For example, a civil liberties and human rights legal advocacy organization asserted that OFCCP's approach as described in the preamble "allows religion to serve as a pretext for discrimination, and creates roadblocks for individuals seeking to bring claims of discrimination against federal contractors." An organization that advocates separation of church and state asserted that a more rigorous inquiry would not violate the First Amendment and stated that OFCCP's concerns about impermissible entanglement are overblown and cannot justify its refusal to engage in any investigation of religious employers at all. An anti-bigotry religious organization similarly asserted that a more rigorous inquiry would not violate RFRA, citing *Hobby Lobby*, 573 U.S. at 733.

Some commenters believed the proposal did not clearly describe the inquiry that OFCCP would undertake to determine whether an adverse action was based on religion or another protected characteristic. For example, a legal think tank commented that OFCCP's failure to meaningfully address various cases discussing the issue of pretext on the basis that they "turn on their individual facts" contravenes OFCCP's stated goal of "bringing clarity and certainty to federal contractors." OFCCP disagrees with these commenters' characterization of the NPRM, but reiterates—and to the extent necessary, clarifies for their benefit—that OFCCP intends to apply the religious exemption as it has been applied in the mine run of Title VII cases. In line with those cases, there are indeed aspects of the discrimination inquiry that are necessarily and rightly nuanced and fact-dependent, and there are aspects where inquiry can infringe upon religious organizations' autonomy and are either prohibited or must be performed with care. The principles set out in those cases are reiterated below.

First, if a contractor raises the defense that an employee or applicant is covered by the ministerial exception, OFCCP can inquire whether that is in fact so. But if so, then that is the end of the inquiry. OFCCP will not apply the executive order in those circumstances. *See Our Lady of Guadalupe*, 140 S. Ct. at 2060–61; *Hosanna-Tabor*, 565 U.S. at 194–95.

Second, when the ministerial exception does not apply and the employee or applicant suffers adverse employment action by a contractor that is entitled to the religious exemption, OFCCP will apply traditional Title VII tools to ascertain whether the action was impermissible discrimination. In the absence of direct evidence of discrimination on a protected basis other than religion, this will typically involve application of the familiar *McDonnell Douglas* framework, in which (1) OFCCP must establish a prima facie case of discrimination on a protected basis other than religion; (2) the employer can respond with a nondiscriminatory reason, such as an explanation that its action was permitted under the religious exemption as pertaining to the individual's particular religion; and (3) OFCCP, to find a violation, must rebut that explanation as a mere pretext. *See McDonnell Douglas*, 411 U.S. 792.

Third, ascertaining whether unlawful discrimination motivated an employer's action requires consideration of all relevant facts and circumstances. OFCCP will consider all available evidence as to whether a religious organization's employment action was in fact sincerely motivated by the applicant's or employee's particular religion—such as, for instance, their adherence to the organization's religious tenets—or whether that was a mere pretext for impermissible discrimination.

Fourth, while OFCCP can inquire into the sincerity of the employer's religious belief, it is constitutionally prohibited from refereeing internal religious matters of contractors that are entitled to the religious exemption. Thus OFCCP cannot decide, when the matter is disputed, whether the employer or the employee has the better reading of religious doctrine; whether an employee should be considered a faithful member of a religious organization's community; whether some religious offenses or requirements are more important than others and should merit particular employment responses; whether the employer's sincerely held religious view is internally consistent or logically appealing; and similar issues.

Fifth, OFCCP believes these principles will cover the vast majority of scenarios, but there may be rare instances where an inquiry by a court or an agency into employment practices otherwise threatens First Amendment rights. *See DeMarco* v. *Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993) ("There may be cases involving lay employees in which the relationship between employee and employer is so pervasively religious that it is impossible to engage in an age-discrimination inquiry without serious risk of offending the Establishment Clause."). Commenters argued that this final caveat detracted from the clarity of the proposed rule. OFCCP disagrees. This observation merely notes, as have courts, that there may be instances outside the ministerial exception where a discrimination case might involve the kinds of questions prohibited by the First Amendment. *See id.* (finding employee's failed religious duties were "easily isolated and defined," so a trial could be conducted "without putting into issue the validity or truthfulness of Catholic religious teaching"). Instructive here are the sorts of questions found constitutionally offensive by the Supreme Court in *Catholic Bishop*, in which a hearing officer tested a witness's memory and knowledge of Catholic liturgies and masses. *See Catholic Bishop*, 440 U.S. at 502 & n.10; *id.* at 507–08 (appendix); *see also Great Falls*, 278 F.3d at 1343. OFCCP believes these cases provide sufficient principles for the agency to properly guide its inquiry if and when needful.

f. Causation

OFCCP proposed to apply a but-for standard of causation when evaluating claims of discrimination by religious organizations based on protected characteristics other than religion. Specifically, where a contractor that is entitled to the religious exemption claims that its challenged employment action was based on religion, OFCCP proposed finding a violation of E.O. 11246 only if it could prove by a preponderance of the evidence that a protected characteristic other than religion was a but-for cause of the adverse action. *See Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 362–63 (2013); *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009). OFCCP stated

that this approach was necessary in situations where a religious organization, acting on a sincerely held belief, took adverse action against an employee on the basis of the employee's religion. OFCCP believed that application of the motivating factor framework in such cases might result in inappropriate encroachment upon the organization's religious integrity. However, the NPRM recognized that in prior notice-and-comment rulemaking implementing Executive Order 13665, 79 FR 20749 (Apr. 11, 2014) (amending E.O. 11246 to include pay transparency nondiscrimination), OFCCP rejected comments stating that a but-for causation standard was required and instead adopted the motivating factor framework as expressed in the Title VII post-1991 Civil Rights Act for analyzing causation. *See* 80 FR 54934, 54944–46 (Sept. 11, 2015).

A few commenters encouraged OFCCP to adopt the proposed but-for causation standard because they felt it would reduce government encroachment on religious autonomy. For instance, a private religious university commented that the proposed but-for standard is in line with statutory and First Amendment jurisprudence requiring the use of the least restrictive means to achieve government objectives that impinge on the exercise of religion. Another private religious university echoed this sentiment and added that the proposed but-for standard would enable religious entities to make employment decisions consistent with their sincerely held religious beliefs while still participating fully in the marketplace.

However, the majority of commenters who addressed the proposed but-for standard opposed it, and many recommended that OFCCP instead continue to apply the motivating-factor standard of causation to all claims of discrimination under E.O. 11246. These commenters cited a wide variety of concerns related to the proposed but-for standard.

Several commenters stated that the proposed standard would be too deferential to employers and/or impose too heavy a burden on employees. For instance, a national interfaith organization commented that, as long as an employer can cite another plausible reason for its actions, an employee cannot prove that discrimination occurred. The organization noted that under this standard, employees are far less likely to prevail.

Other commenters expressed skepticism at OFCCP's proffered rationale for departing from its established policy and practice of interpreting the nondiscrimination requirements of E.O. 11246 in a manner consistent with Title VII principles. For instance, a national reproductive rights organization commented that, for decades, courts have resolved claims of employment discrimination by religious organizations without implicating the concerns OFCCP cites. The organization added that OFCCP's concerns about impermissible entanglement are overblown and unsupported by case law. A transgender legal professional organization expressed similar concerns.

Relatedly, a number of commenters opposed the proposed but-for standard on the basis that it conflicts with Title VII and related case law. Several of these commenters criticized OFCCP's reliance on *Nassar,* 570 U.S. at 362–63, and *Gross,* 557 U.S. at 180, and argued that these cases do not bridge the gap between the proposed but-for standard and Title VII principles. For instance, a contractor association commented: "The Supreme Court has adopted the 'but for' standard for retaliation claims under Title VII (*Nassar*) and for ADEA claims (*Gross*); it has not done so for discrimination claims under Title VII." Similarly, an LGBT rights advocacy organization commented the two cases cited by OFCCP did not adopt a but-for causation requirement for Title VII or E.O. 11246 cases.

Additionally, multiple commenters expressed concern that the proposed but-for standard would run contrary to E.O. 11246's prohibition on discrimination and/or OFCCP's core mission of enforcing the Executive Order. For instance, a group of state attorneys general commented that the proposed but-for standard is contrary to law and exceeds OFCCP's authority because it impermissibly interprets the Executive Order's anti-discrimination provisions. And a national health policy organization commented: "The new proposed rule threatens to jeopardize the very mission of OFCCP and the original intent of the E.O. 11246 to protect workers from discrimination . . . ."

Finally, several commenters raised practical objections to the proposed but-for standard. For instance, an atheist civil liberties organization commented that applying different causation standards to cases involving similarly situated employers would "make it challenging for contractors seeking to comply with federal law, resulting in extra expense and legal confusion for workers and employers." An organization that advocates separation of church and state expressed similar concerns, arguing that "status-based discrimination claims based on identical conduct would be evaluated according to different standards of proof."

Considering the comments received, OFCCP will apply the motivating-factor analysis to all claims of discrimination, including discrimination by religious organizations based on protected characteristics other than religion. OFCCP agrees that it can avoid impermissible entanglement while applying a motivating-factor standard of causation. *See, e.g., Curay-Cramer,* 450 F.3d at 139 ("[A]s long as the plaintiff did not challenge the validity or plausibility of the religious doctrine said to support her dismissal, but only questioned whether it was the actual motivation, excessive entanglement questions were not raised.") (citing *Geary,* 7 F.3d at 330); *DeMarco,* 4 F.3d at 170–71)). Where there is a dispute as to whether an employment action was motivated by the employee's adherence to religious tenets, or instead was motivated by impermissible discrimination—a "one or the other" scenario—OFCCP will apply the principles just discussed in subsection II.A.5.e, "Application of the Religious Exemption." Where instead an employment action is motivated by the employee's adherence or non-adherence to religious tenets that implicate another protected category, OFCCP will assess the action on a case-by-case basis in accordance with the general RFRA analysis discussed earlier. The approach adopted in this final rule is consistent with OFCCP's longstanding policy and practice as well as Title VII principles and case law.

f. Conclusion

For the reasons described above and in the NPRM, and considering the comments received, OFCCP finalizes the proposed definition of *Particular religion* without modification.

B. Section 60–1.5 Exemptions

This rule proposed to add paragraph (e) to 41 CFR 60–1.5 to establish a rule of construction for subpart A of 41 CFR part 60–1 that provides for the broadest protection of religious exercise permitted by the Constitution and laws, including RFRA. This rule of construction is adapted from RLUIPA, 42 U.S.C. 2000cc–3(g). Significantly, RFRA applies to all government conduct, not just to legislation or regulation. 42 U.S.C. 2000bb–1. Paragraph (e) is clarifying, since the Constitution and federal law, including RFRA, already bind OFCCP.

Some commenters expressed general support for the proposed rule of

construction based on the importance of protecting religious freedom, including constitutional protections. For example, a religious leadership and policy organization approved of the fact that the proposal gives religious freedom due deference by advocating for a broad and robust interpretation of its protections. In a joint comment, a religious legal association and an association of evangelical churches and schools commented that the proposed rule of construction reflects longstanding religious freedom principles recognized by Congress and protected by the First Amendment. A pastoral membership organization commented that the proposed rule of construction gives religious exercise the special protection required by the constitutional text and history. A religious professional education association commented that the proposed rule of construction provided clarity regarding the meaning, scope, and application of the religious exemption. Additional supportive commenters, including an evangelical chaplains' advocacy organization, stated that the rule of construction is consistent with executive orders and the Attorney General's memorandum on religious liberty.

Other commenters opposed the proposed rule of construction for a variety of reasons, including arguing that its application in this context would actually be inconsistent with the U.S. Constitution and federal laws. For example, a labor organization commented that the interpretation goes beyond the Constitution and law, including RFRA. An anti-bigotry religious organization further noted, with regard to RFRA, the Supreme Court's holding in *Hobby Lobby* that "anti-discrimination prohibitions are the least restrictive means of achieving the government's compelling interest in providing equality in the workplace," and commented that this principle applied with greater force to employment by federal contractors. Other commenters, including a group of state attorneys general and a transgender advocacy organization, cautioned that construing the religious exemption broadly would "exceed[ ] statutory and judicial limits" and conflict with the purpose and text of federal equal employment laws to provide maximum nondiscrimination protections for workers. A talent management assessment company commented that the "maximum extent permitted by law" standard was vague and left too much discretion to the agency charged with enforcement.

OFCCP did not intend, in proposing the rule of construction at § 60–1.5(e), to create any new legal obligation or proscription on the rights of workers, but rather sought only to reaffirm existing protections found in federal law that already apply to OFCCP. The parallel rule of construction in RLUIPA has been in place for nearly 20 years and has proved to be a workable legal standard. OFCCP emphasizes that this rule of construction provides for broad protection of both employers' and employees' religious exercise. Moreover, by its terms, the provision limits the agency's interpretation of this protection to what is permitted under the U.S. Constitution, RFRA, and other applicable laws. It thus reflects the Supreme Court's recognition that, within the religion clauses of the First Amendment, there is "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S. at 669. Accordingly, for the reasons described above and in the NPRM, considering the comments received, OFCCP finalizes the proposed rule of construction without modification.

C. Severability

The Department has decided to include severability provisions as part of this final rule. To the extent that any provision of this final rule is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect. Severability clauses have been added at the end of 41 CFR 60–1.3 and as a new paragraph, 41 CFR 60–1.5(f).

III. Other Comments

Numerous commenters raised a variety of other general points about the proposed rule.

A. Religious Liberty for Employees

Several commenters opposed the proposed rule as undermining or failing to promote religious liberty. For instance, a group of U.S. Senators commented that the proposed rule will allow employers to refuse to interview even highly qualified candidates simply because they do not regularly attend religious services in their employer's faith. According to the Senators, this could create a situation in which religious employers are allowed to discriminate against workers "who practice their faith differently—a fundamental right guaranteed by the Constitution." A religious women's organization echoed this concern and also stated that the proposed rule would promote one interpretation of one religion—namely, evangelical Christianity—at the expense of religious liberty more broadly. Some commenters stated that the proposal would allow contractors to compel employees to follow their religious practices, which they argued directly violates Title VII and even the Constitution. A group of state attorneys general commented that, under the proposed rule, employers' religious freedom would come at the cost of the loss of the religious freedom of employees forced to abide by their employers' religious beliefs. A legal professional organization commented that the proposed rule would protect for-profit or nominally religious employers' right to require employees to participate in prayer or other religious practices. A religious organization commented that employers could invoke the religious exemption to coerce their workers into participating in certain religious practices under the threat of termination. Several other commenters, including a legal professional association, an organization that advocates separation of church and state, an anti-bigotry religious organization, and a migrants' rights organization, expressed general concern that the proposed rule would weaken religious liberty.

OFCCP believes that the final rule's overall effect will be to promote religious liberty. *See, e.g., Hobby Lobby*, 573 U.S. at 707 ("[P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies."). The Supreme Court has described the expansion of the Title VII religious exemption as "lifting a regulation that burdens the exercise of religion." *Amos*, 483 U.S. 327, 338 (1987). As described above, the proposed definitions have been altered in the final rule to respond to commenters' concerns that nominally religious employers might qualify for the exemption, as well as to clarify the steps OFCCP will take in analyzing claims of discrimination by religious contractors. To the extent that commenters believe that the religious exemption itself increases employers' religious liberty at the expense of employees' religious liberty, OFCCP reiterates that it is required to administer the religious exemption as part of E.O. 11246. The President, following Congress's lead, has already decided how to balance the religious liberty of religious employers and their employees, and OFCCP cannot modify that. Additionally, claiming the

religious exemption and taking employment action under its protections is purely optional for employers; the government does not require any employment action that may be protected by the exemption.

B. Establishment Clause and Other Constitutional Questions

Several commenters stated that the proposal violates constitutional prohibitions on aiding private actors that discriminate. This concern was shared by an affirmative action professionals association, a civil liberties organization, a professional organization of educators, and an organization that advocates separation of church and state, among others. The civil liberties organization commented, for instance, that the proposed rule would permit contractors to discriminate with federal funds, thus putting the government's imprimatur on discrimination in violation of the Equal Protection and Establishment Clauses.

A variety of commenters opposed the proposed rule on the basis that it violates the Establishment Clause and/or general church-state separation principles. For instance, an atheist civil liberties organization commented that the proposed rule will violate the Constitution's religion clauses by involving the government in religious practice, promoting dominant religious practices, burdening unpopular religious practices, and harming third parties. Similarly, a labor union raised concerns that the rule crosses into territory proscribed by the Establishment Clause by authorizing federal contractors to advance their religious preferences and practices through the receipt of federal funds and the performance of public functions.

Other commenters stated that the proposed rule violates separation of powers. For instance, an LGBT rights advocacy organization stated that since 2001, Congress has repeatedly rejected efforts to extend the Title VII exemption to government-funded entities. Likewise, a consortium of federal contractors and subcontractors asserted that it would be inappropriate for OFCCP to regulate the religious exemption without direct and actual legislative or constitutional guidance.

Finally, several commenters, including an anti-bigotry religious organization and a civil liberties and human rights legal advocacy organization, raised concerns that the proposal violates a variety of other constitutional principles, including the no-religious-tests clause, the free speech clause, and the constitutional right of privacy.

Other commenters supported the proposed rule as consistent with constitutional principles. These commenters stated, among other things, that the proposal appropriately respects freedom of religion, helpfully clarifies that religious hiring protections apply even when federal funding is involved, and is consistent with the Establishment Clause. A religious liberties legal organization commented, for instance, that the proposed rule adheres to the traditional understanding that "the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any" (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 668 (1984)). A religious leadership and policy organization commented that the proposal reflects an accurate understanding of the free exercise of religion and "its place in our society."

OFCCP agrees with the commenters who stated that the proposal is consistent with constitutional principles. As noted in the NPRM and above, OFCCP believes that the final rule is supported by recent Supreme Court decisions that protect religion-exercising organizations and individuals under the U.S. Constitution and federal law. *See, e.g., Little Sisters of the Poor*, 140 S. Ct. 2367; *Espinoza*, 140 S. Ct. 2246; *Our Lady of Guadalupe*, 140 S. Ct. 2049; *Masterpiece Cakeshop*, 138 S. Ct. 1719; *Trinity Lutheran*, 137 S. Ct. 2012; *Hobby Lobby*, 573 U.S. 682; *Hosanna-Tabor*, 565 U.S. 171. These decisions make clear, among other constitutional principles, that "condition[ing] the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." *Trinity Lutheran*, 137 S. Ct. at 2022 (alterations omitted) (quoting *McDaniel*, 435 U.S. at 626 (plurality opinion)); *see also Espinoza*, 140 S. Ct. at 2256. OFCCP believes that the final rule achieves consistency with these landmark Supreme Court decisions and is constitutionally valid. Moreover, the definitions and rule of construction adopted in the final rule will help OFCCP avoid the "constitutional minefield" into which some courts have fallen when adjudicating Title VII claims against religious organizations. *World Vision*, 633 F.3d at 730 (O'Scannlain, J., concurring). The final rule will enable OFCCP to apply the religious exemption without engaging in an analysis that would be inherently subjective and indeterminate, outside its competence, susceptible to discrimination among religions, or prone to entanglement with religious activity. *See, e.g., Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1261–62 (10th Cir. 2008); *Great Falls*, 278 F.3d at 1342–43. We address these points in more detail next.

1. Neutrality Toward Religion

The rule does not impermissibly favor religion. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Supreme Court held that a religious organization is not disqualified from government programs that fund religious and nonreligious entities alike on a neutral basis. A "neutral basis" means that the criteria are neutral and secular, with no preference for religious institutions because of their religious character. *Id.; see also Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."); U.S. Dep't of Justice, Office of Legal Counsel, *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities*, 2019 WL 4565486 (Aug. 15, 2019) ("*Religious Restrictions*") ("The neutrality principle runs throughout the Court's decisions, and is broadly consistent with a tradition of federal support for religious institutions that dates from the time of the Founding.").

This rule is motivated by legitimate secular purposes: To expand the eligible pool of federal contractors to include religious organizations, so that the federal government may choose from among competing vendors the best combination of price, quality, reliability, and other purely secular criteria; to clarify the law for religious organizations and thus reduce compliance burdens; to correct any misperception that religious organizations are disfavored in government contracting; and "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions," *Amos*, 483 U.S. at 336, by appropriately protecting their autonomy to hire employees who will further their religious missions. The final rule also has a religion-neutral effect. Under the final rule, both religious and secular organizations will retain the ability to bid on government contracts. Proposed vendors will have to compete solely on the basis of secular criteria. The use of sectarian criteria remains forbidden; nothing in the

proposed rule sanctions the use of sectarian criteria for contract awards.

2. Secular and Sectarian Activities

Nothing in the final rule sanctions direct federal funding of religious activities. In *Kendrick*, the Court forbade such direct funding of religious activity but upheld a statute authorizing payments to religious organizations that sought to eliminate or reduce the social and economic problems caused by teenage sexuality because the services to be provided under the statute were "not religious in character." *Kendrick*, 487 U.S. at 605; *see also* U.S. Dep't of Justice, Office of Legal Counsel, *Department of Housing and Urban Development Restrictions on Grants to Religious Organizations that Provide Secular Social Services*, 12 Op. O.L.C. 190, 199 (1998) (concluding that the government can fund a religious organization's secular activities if they can be meaningfully and reasonably separated from the sectarian activities). Likewise here, in the relatively rare circumstances in which a proposed vendor both qualifies as a religious organization and receives a federal contract, the federal funds will pay the organization *to fulfill the terms of the secular contract*, not to pray or to proselytize.

Moreover, the Establishment Clause does not forbid the federal government from contracting with religious organizations for a secular purpose, even if the receipt of the contract incidentally helps the religious organization advance its sectarian purpose. As *Kendrick* explained, "Nothing in our previous cases prevents Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems. . . . To the extent that this congressional recognition has any effect of advancing religion, the effect is at most 'incidental and remote.'" 487 U.S. at 607; *see, e.g., Roemer* v. *Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976) ("[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all."); *Barnes-Wallace* v. *City of San Diego*, 704 F.3d 1067 (9th Cir. 2012) (finding no Establishment Clause violation where city leased land to both secular and sectarian organizations). Here, as in *Kendrick*, nothing in the final rule "indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions." *Kendrick*, 487 U.S. at 610. There are also no concerns that funds will be used for an "essentially religious endeavor"; rather, funds will be used to fulfill the government' secular contracting requirements. *Espinoza*, 140 S. Ct. at 225. The rule simply allows religious organizations to compete with secular organizations on the basis of secular criteria without being forced to compromise their religious purpose. Commenters objecting on this basis are dissatisfied with the existence of the exemption.

3. Respecting the First Amendment

Of great significance to OFCCP, the rule's clarifications and accommodations better comport with the Free Exercise Clause by affording religious organizations an appropriate level of autonomy in their hiring decisions while still permitting them to engage in federal contracting. As the Court explained in *Trinity Lutheran*, 137 S. Ct. at 2022, the 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. "[D]enying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order." *Id.; see also Locke* v. *Davey*, 540 U.S. 712 (2004) (holding government may not deny generally available funding to a sectarian institution because of its religious character); *Trinity Lutheran*, 137 S. Ct. at 2021 ("The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. . . . [S]uch a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." (citing *Lukumi*, 508 U.S. at 546)). When the government conditions a program in this way, the government "has punished the free exercise of religion. "To condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." *Id.* at 2022 (quoting *McDaniel*, 435 U.S. at 626 (plurality opinion)); *cf. Trinity Lutheran*, 137 S. Ct. at 2022 (citing *Ne. Fla. Chapter, Associated Gen. Contractors of Am.* v. *Jacksonville*, 508 U.S. 656, 666 (1993) ("[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract.")).

In a recent opinion, the Department of Justice's Office of Legal Counsel concluded that the government violates the Free Exercise Clause by denying sectarian organizations an opportunity to compete on equal footing for federal dollars. *See Religious Restrictions*, 2019 WL 4565486. As an initial matter, OLC explained that "[t]he Establishment Clause permits the government to include religious institutions, along with secular ones, in a generally available aid program that is secular in content. There is nothing inherently religious in character about loans for capital improvement projects; this is not a program in which the government is 'dol[ing] out crosses or Torahs to [its] citizens.'" *Id.* at *6 (citing *Am. Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 292 (6th Cir. 2009)). Because the capital-financing program at issue was a secular, neutral aid program, it did not violate the Establishment Clause. On the other hand, the government would violate the Free Exercise Clause by denying loans to an institution "in which a substantial portion of its functions is subsumed in a religious mission," because such a restriction "discriminates based on the religious character of an institution." OLC concluded that the appropriate balance was to deny loans under the program only for facilities that are predominantly used for devotional religious activity, or for facilities that offer only programs of instruction devoted to vocational religious education.

Here, some commenters made clear that the federal government's current practice presented religious organizations with a dubious choice: They may participate in the government contracting process or retain their religious integrity, but not both. As one commenter noted, "If the best service provider or subcontractor happens to be a religious entity, they are often unwilling to comply with the federal anti-discrimination laws for fear that they will no longer be able to preserve the integrity of their organizations. This is a direct result of the uncertainty in the applicability of the religious exemption under the current law." Similarly, another commenter, an association of medical professionals, recently surveyed health professional members working in faith-based organizations overseas and found that almost half, 49%, feel that the U.S. government is not inclined to work with faith-based organizations. The final rule thus removes any such concerns raised by contractors and instead provides appropriate religious accommodation.

4. Use of Federal Funds

Some commenters expressed concern that the rule would allow employers to use federal funds to discriminate against job applicants and employees on the

basis of religion. That is a critique of the E.O. 11246 religious exemption itself, not this rule. OFCCP cannot and does not by this rule reopen that determination by the President. Additionally, as noted earlier, claiming the religious exemption and taking employment action under its protections is purely optional for employers; the government does not require any employment action that may be protected by the exemption.

Regardless, as the Department of Justice's Office of Legal Counsel has pointed out, the federal government has repeatedly permitted religious organizations to receive federal funds while also maintaining autonomy over their hiring practices. *See* 31 O.L.C. 162, 185–86 (2007); *accord* Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty at 6 (Oct. 6, 2017), *available at www.justice.gov/opa/press-release/file/1001891/download*. Likewise, the proposed rule does not run afoul of the Establishment Clause merely because of the possibility that, in some rare instance, a court may determine that a particular contract award to a religious organization impermissibly endorses religion. "[W]hile religious discrimination in employment might be germane to the question whether an organization's secular and religious activities are separable in a government-funded program, that factor is not legally dispositive." U.S. Dep't of Justice, Office of Legal Counsel, Memorandum for William P. Marshall from Randolph D. Moss at 20 (Oct. 12, 2000), *available at justice.gov/olc/page/file/936211/download*. To the contrary, if the government "is generally indifferent to the criteria by which a private organization chooses its employees and to the identity and characteristics of those employees, there would be less likelihood that the government could reasonably be perceived to endorse the organization's use of religious criteria in employment decisions." *Id.* at 25. And in some situations, the religious exemption "might be a permissible religious accommodation that alleviates *special* burdens rather than an impermissible religious preference." *Id.* at 30. For instance, the Office of Legal Counsel concluded that RFRA in one instance *required* the Department's grant-making arm to exempt a religious organization from the religious nondiscrimination provisions of Title VII. *See id.; see also* 31 O.L.C. 162, 190 (2007). Here, several religious organizations commented that the current contracting rules erect a barrier to participation by eroding their ability to hire members of their particular faith. Generally speaking, then, OFCCP, in line with case law from *Amos* to *Trinity Lutheran*, views this rule as merely providing permissible accommodation rather than impermissibly establishing religion.

5. Effects on Applicants and Employees

Finally, several commenters opposed the proposed rule on the basis that it would increase discrimination against contractors' employees and applicants. Some cited historical discrimination against disadvantaged groups, warning that the proposal would cause a regression in civil rights protections, and stated that religion has often been used as a way to justify discrimination. For example, an affirmative action professionals association asserted that employment discrimination permitted by the proposed rule could eliminate the civil rights protections that minorities and women have enjoyed for decades.

Commenters also gave examples of how potential discrimination could play out. For example, an organization advocating for the separation of church and state commented that, for instance, an evangelical Christian might refuse to hire a gay man, but agree to hire a twice-divorced, thrice-married man, even though both homosexuality and divorce are prohibited by evangelical Christianity. An LGBT civil rights organization argued that even a construction company, janitorial service, or low-level healthcare provider could claim a religious mission and refuse to hire or provide services to single parents or individuals who become pregnant outside marriage or within a same-sex relationship.

Many commenters warned that adoption of the proposed rule would increase discrimination against lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals, specifically. Some commenters alleged that the proposed rule was part of a concerted effort to roll back the rights of LGBTQ individuals and other disadvantaged groups. Several commenters stated that transgender employees in particular already face high rates of discrimination and poverty, and that this proposal would leave them even more vulnerable. A transgender civil rights and advocacy organization commented specifically that transgender people are already far more likely to be unemployed, and that approximately 1 in 4 earn less than $24,000 per year. A women and family rights advocacy organization wrote that, currently, almost half of LGBTQ workers report actively concealing their identity out of fear of discrimination, and that the proposal would exacerbate this issue. Commenters wrote that effects might include LGBTQ individuals being less inclined to seek HIV care and services for the aging, as well as facing increased vulnerability to trafficking. Others stated that the proposal would permit contractors to discriminate against people in same-sex relationships, including refusing to hire applicants, terminating employees when they marry someone of the same sex, or denying spousal benefits. Several commenters stated that even LGBTQ people of faith would be discriminated against.

Commenters also asserted that the proposed rule could increase discrimination against women and pregnant people based on religious beliefs about work, family roles, and reproduction. This included the possibility of discrimination against women for becoming pregnant outside of marriage, using contraception, using in vitro fertilization, seeking abortions, or getting divorced. An organization combatting hunger wrote that even facially neutral practices may "disproportionately" harm women, because when an employer opposes "sexual practices out of wedlock, those who bear the physical evidence—pregnancy—are going to be the ones that get fired." Several commenters also stated that employers may discriminate against women based on religious beliefs that women should not work outside the home. For example, a women and family rights advocacy organization commented that some employers may refuse to hire women altogether, and that women may also be denied health insurance, professional growth opportunities, or other benefits because of an employer's belief that women are not the "head of the household" and therefore do not need such benefits. Additionally, an interfaith policy and advocacy organization commented that an employer could cite a belief that women should not be alone with men they are not married to in order to deny female employees access to mentorship, training opportunities, and senior leadership positions in the workplace.

Commenters also asserted that the proposal would increase discrimination against religious minorities and/or atheists. Many stated that federal contractors should not be permitted to categorically exclude applicants of a particular religion. A transgender civil rights and advocacy organization commented that the proposed rule would promote sectarianism by allowing people of different faiths to

discriminate against one another. A number of commenters, including a civil liberties advocacy group and an interfaith policy and advocacy organization, commented: "Federal contractors should not be allowed to hang a sign that says 'Jews, Sikhs, Catholics, Latter-day Saints need not apply.'"

Many commenters asserted that the proposal could allow racial discrimination as well. An organization combatting hunger claimed that discrimination would occur by citing a 2014 study in their comment which found that only 10% of Americans were comfortable permitting a small business to refuse service to African-Americans based on a religious reason. Commenters including an LGBTQ wellness organization also warned that, under the proposal, a religious contractor will be permitted to discriminate against interracial couples if it believes that marriage should be between a man and a woman of the same race. A legal think tank commented that employers could require employees to join a majority- or exclusively-white church, for instance, or to share particular religious beliefs that have racial implications and/or are more common among white Christians.

Some commenters argued that federal funds should not be used by contractors who may commit hiring discrimination. For example, a transgender advocacy organization commented that people should not be legally compelled to financially support entities that would refuse to employ them because of their identities, and noted that religious employers who seek to employ only "their own kind" should seek out non-federal funding. Other commenters stated that U.S. federal government contracting serves as a model for the private sector or foreign nations, which may emulate discriminatory practices permitted by this proposal.

As explained above, the religious exemption generally speaking does not excuse a contractor from complying with E.O. 11246's requirements regarding antidiscrimination and affirmative action; notices to applicants, employees, and labor unions; compliance with OFCCP's implementing regulations; the furnishing of reports and records to the government; and flow-down clauses to subcontractors. *See* E.O. 11246 §§ 202–203. Religious organizations that serve as government contractors must comply with all of E.O. 11246's nondiscrimination requirements except in some narrow respects, under some narrow and reasonable circumstances recognized under law, where religious organizations maintain, for instance, sincerely held religious tenets regarding matters such as marriage and intimacy which may implicate certain protected classes under E.O. 11246.

Some commenters argued that the proposed rule would violate the Establishment Clause specifically because of the increased discrimination they believed it would permit. Most of these commenters argued that potential discrimination will unconstitutionally burden third parties, including employees, applicants, and beneficiaries of contracting services. A labor union wrote that granting employers a broad religious exemption would harm employees and applicants based on their own religious beliefs and practices (or lack thereof), in violation of the Establishment Clause.

As noted above, the Supreme Court upheld Title VII's religious exemption, on which E.O. 11246's exemption is modeled, against an Establishment Clause challenge. *Amos,* 483 U.S. at 330. It did so in spite of the fact that the application of the exemption "had some adverse effect on those holding or seeking employment with those organizations." *Tex. Monthly, Inc.* v. *Bullock,* 489 U.S. 1, 18 n.8 (1989); *cf. Amos,* 483 U.S. at 338–39 (rejecting the claim that the religious exemption "offends equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers" in part because the exemption had "a permissible purpose of limiting governmental interference with the exercise of religion"). If the E.O. 11246 religious exemption similarly affects some third parties, it does so to "prevent[] potentially serious encroachments on protected religious freedoms." *Texas Monthly,* 489 U.S. at 18 n.8.

Some commenters stated that what they viewed as the proposal's failure to consider the effects of increased discrimination made the proposed rule inconsistent with OFCCP's previous rulemakings. Multiple commenters stated that previous rulemakings identified discrimination as wasteful of taxpayers' money, and that this proposal failed to address this issue. For example, a state civil liberties organization commented that, in prior rules, OFCCP has consistently stated that discrimination in government contracting wastes taxpayer funds by preventing the hiring of the best talent, increasing turnover, and decreasing productivity. In addition, several commenters, including a women and family rights advocacy organization, referred to the rule as an "abrupt departure" from OFCCP's previous EEO enforcement. A civil liberties organization commented that the "Department itself has previously acknowledged the harms of discrimination to the country as a whole, but ignores them entirely in the Proposed Rule." An LGBT legal services organization commented that the proposed rule indicates that OFCCP will not enforce the relevant protections sufficiently.

Some commenters noted more specifically that they believe the proposal is inconsistent with the agency's rule implementing E.O. 13672, which added sexual orientation and gender identity to the bases protected by E.O. 11246. For example, a legal think tank commented that, in its rule on sexual orientation and gender identity, OFCCP took into account the benefits of nondiscrimination—meaning that it would be arbitrary and capricious for OFCCP to ignore these benefits of non-discrimination "in the present rulemaking." A watchdog organization wrote that "undoing these protections could have adverse long-term effects on the federal contracting system, including lower-quality goods and services, and impaired federal programs and missions."

Commenters also criticized the proposal as purportedly inconsistent with OFCCP's 2016 sex discrimination rule. A civil liberties organization commented that, in that rule, the agency cited social science research supporting the need for effective nondiscrimination enforcement. Similarly, a legal think tank wrote that, in its sex discrimination rulemaking, OFCCP specifically cited research indicating that employment discrimination against transgender workers is pervasive. These commenters asserted that OFCCP ignored such statistics in proposing the current rule.

OFCCP continues to believe that discrimination by federal contractors generally has a negative impact on the economy and efficiency of government contracting. Indeed, that is one of the primary justifications for E.O. 11246. However, it has long been recognized that a religious exemption in the Executive Order is also warranted, Congress has determined that accommodations under RFRA are sometimes required, and OFCCP's policy is to respect the religious dignity of employers and employees to the maximum extent permissible by law. Further, OFCCP believes that this rule will have a net benefit to the economy and efficiency of government contracting. For those current and potential federal contractors and subcontractors interested in the

exemption, this rule will help them understand its scope and requirements and may encourage a broader pool of organizations to compete for government contracts and more of them, which will inure to the government's benefit.

Commenters' concerns here are also exaggerated. As explained above, OFCCP does not anticipate this rule will affect the vast majority of contractors or the agency's regulation of them, since they do not and would not seek to qualify for the religious exemption. As commenters noted, religious organizations do not appear to be a large portion of federal contractors. And even for them, adherence to E.O. 11246's nondiscrimination provisions is required except in those circumstances well-established under law, including the religious exemption, the ministerial exception, and RFRA. OFCCP also reemphasizes that the proposed definitions have been altered in the final rule to respond to commenters' concerns that nominally religious employers might qualify for the exemption, as well as to clarify the steps OFCCP will take in analyzing claims of discrimination by religious contractors. As explained in more detail in the Regulatory Procedures section below, OFCCP has considered the possible adverse effects of the rule and believes they will be minimal and will be outweighed by the benefits.

C. The Equal Employment Opportunity Commission

Some commenters raised concerns about this rule's compatibility with the positions of the EEOC. Different aspects of this concern have been described and addressed in earlier parts of this preamble. OFCCP consolidates those concerns and addresses them here as well. Those concerns included general concerns that the proposed rule would undermine the EEOC's efforts by taking positions contrary to the EEOC or that the proposed rule would introduce confusion by subjecting federal contractors to conflicting or at least different legal regimes. Commenters also objected to specific aspects of the rule on grounds that they differed from the EEOC's position, including the proposed rule's inclusion of for-profit entities as among those able to qualify for the religious exemption, the proposed rule's disagreement that the exemption's scope is limited to a coreligionist preference, and the proposed rule's but-for causation standard.

OFCCP has a decades-long partnership with the EEOC and works closely with it to ensure equal employment opportunity for American workers. OFCCP rejects the idea that this rule would undermine that longstanding and constructive partnership. The EEOC reviewed the proposed rule and this final rule. This final rule applies only to government contractors and subcontractors, not the broader swath of U.S. employers that the EEOC regulates. Within that smaller segment of employers, it applies only to that small minority of contractors and subcontractors that qualify or may seek to qualify for the religious exemption. Among that group, they would need to have 15 or more employees to be covered by the EEOC. And within that group, there would still need to be a situation in which any differences between the views of OFCCP and EEOC would cause a different result. In short, OFCCP doubts this rule will create any systemic disharmony between the agencies' enforcement programs.

For the small universe of employers remaining as defined above, the differences that may exist are minor. At the outset, OFCCP notes that EEOC does not have substantive rulemaking authority under Title VII, *see EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991), and the EEOC statements on this issue are in nonbinding subregulatory guidance. As to the specifics of that guidance, the differences that do exist are small. OFCCP has revised its approach in the final rule to adopt a motivating-factor standard of causation, so a difference there, assuming there was one, no longer exists. Regarding OFCCP's definition of *Religious corporation, association, educational institution, or society,* the EEOC's current subregulatory guidance on this topic has not been updated since 2008, before *World Vision* and *Hobby Lobby* were decided.[31] Contrary to some commenters' assertions, this guidance treats for-profit status as a significant factor, but not as dispositive; this final rule does the same. Notably, the EEOC very recently issued a proposal to update its compliance manual on religious discrimination.[32] This rule is not inconsistent with the proposal either, which notes that "[t]he religious organization exemption under Title VII does not mention nonprofit and for-profit status" and states that "[w]hether a for-profit corporation can constitution a religious corporation under Title VII is an open question."[33] The EEOC's 2008 guidance states that the exception is only for organizations that are primarily religious. Its recently proposed guidance describes the inquiry as one into "whether an entity is religious."[34] OFCCP's test also seeks to identify organizations that are primarily religious—through an appropriately guided, reliable, and objective inquiry. The EEOC's 2008 guidance (and its proposed guidance) suggests an open-ended set of non-dispositive factors, while this final rule uses a set of clearly defined factors that are sufficient for non-profit entities; regarding for-profit entities, additional evidence compatible with some of the additional factors listed by the EEOC's 2008 guidance may come into play. Insofar as any difference still remains between this final rule and EEOC's 2008 guidance, OFCCP believes that difference is tolerable when weighed against the subsequent developments in the case law, the reasoning of which OFCCP finds persuasive, and OFCCP's desire for a more structured test, especially given OFCCP's unique contract-based regulatory structure.

Regarding OFCCP's definition of *Particular religion,* the same EEOC guidance documents from 2008 state that the religious exemption "only allows religious organizations to prefer to employ individuals who share their religion." It then addresses two religiously based views that are not protected by the exemption: Racial discrimination and differences in fringe benefits between men and women. This final rule is fully compatible with both those examples. As discussed earlier in this preamble, OFCCP always has a compelling interest in enforcing prohibitions on racial discrimination, and OFCCP endorses the result in *Fremont,* 781 F.2d 1362. This final rule, however, does provide an exemption broader than a mere coreligionist hiring preference. OFCCP believes, for the reasons stated earlier in this preamble, that that view is sufficiently supported by the Title VII case law, and in fact is the more persuasive view of the law. OFCCP also believes that a broader view is more likely to encourage religious organizations to enter the pool of competitors for government contracts, which benefits the government. For

[31] *See* EEOC, Questions and Answers: Religious Discrimination in the Workplace (July 22, 2008), *www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace*; EEOC, EEOC Compliance Manual § 12–I.C.1 (July 22, 2008), *www.eeoc.gov/laws/guidance/section-12-religious-discrimination*. The EEOC's website states for both these documents that, "[a]s a result of the Supreme Court's decision in *Our Lady of Guadalupe School* v. *Morrissey-Berru,* we are currently working on updating this web page." *Id.*

[32] *See* EEOC, "PROPOSED Updated Compliance Manual on Religious Discrimination" (Nov. 17, 2020), *https://beta.regulations.gov/document/EEOC-2020-0007-0001* (last accessed November 18, 2020).

[33] *Id.* at 21.

[34] *Id.* at 20.

these reasons, OFCCP believes that any issues arising from any differences with the EEOC's views as stated in subregulatory guidance from 2008 are outweighed by the benefits of adopting a broader view of the exemption. Additionally, OFCCP believes any differences on this issue may be resolved in the near future. The EEOC's proposed guidance is even more consistent with OFCCP's final rule. The proposed guidance states that "the exemption allows religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs."[35] The guidance goes on to state that "[t]he prerogative of a religious organization to employ individuals " 'of a particular religion' . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."[36]

OFCCP also believes some commenters mischaracterize any differences between the OFCCP and EEOC in this area as presenting contractors with conflicting liability. OFCCP's final rule is at least as, or more, protective of religious organizations than the view stated in the EEOC's guidance. A contractor can choose to adhere to the view articulated by the EEOC in 2008 and be in full compliance under the view of both agencies.

Finally, OFCCP must balance its coordination with the EEOC with its need to follow directives from the President and the U.S. Department of Justice. Section 4 of Executive Order 13798 states that "[i]n order to guide all agencies in complying with relevant Federal law, the Attorney General shall, as appropriate, issue guidance interpreting religious liberty protections in Federal law." The Attorney General issued such guidance on October 6, 2017, "to guide all administrative agencies and executive departments in the executive branch." Office of the Att'y Gen., Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty at 1 (Oct. 6, 2017), *available at www.justice.gov/opa/press-release/file/1001891/download*. This rule is fully compatible with that guidance:

> Religious corporations, associations, educational institutions, and societies—that is, entities that are organized for religious purposes and engage in activity consistent with, and in furtherance of, such purposes—have an express statutory exemption from Title VII's prohibition on religious discrimination in employment. Under that exemption, religious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations' religious precepts. For example, a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or only those willing to adhere to a code of conduct consistent with the precepts of the Lutheran community sponsoring the school. Indeed, even in the absence of the Title VII exemption, religious employers might be able to claim a similar right under RFRA or the Religion Clauses of the Constitution.
>
> *Id.* at 6; *see also id.* at 12a–13a

[35] EEOC, "PROPOSED Updated Compliance Manual on Religious Discrimination" at 24.

[36] *Id.* (citing *Hall*, 215 F.3d at 625; *Little*, 929 F.3d at 951).

IV. Regulatory Procedures

A. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

Under Executive Order 12866 (E.O. 12866), OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of E.O. 12866 and OMB review. Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. This final rule has been designated a "significant regulatory action" although not economically significant, under section 3(f) of E.O. 12866. The Office of Management and Budget has reviewed this final rule. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated this rule as not a "major rule," as defined by 5 U.S.C. 804(2).

Executive Order 13563 (E.O. 13563) directs agencies to adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This final rule is an E.O. 13771 deregulatory action because it is expected to reduce compliance costs and potentially the cost of litigation for regulated entities.

1. The Need for the Regulation

As discussed in the preamble, OFCCP received numerous comments addressing the need for the regulation. Some commenters stated the proposal was necessary to ensure religious entities could contract with the federal government without compromising their religious identities or missions. Some commenters also agreed with OFCCP's observation that religious organizations have been reluctant to participate as federal contractors because of the lack of clarity or perceived narrowness of the E.O. 11246 religious exemption.

OFCCP also received comments objecting to the proposal because they claimed it would permit taxpayer- or government-funded discrimination. Commenters argued that the Government should not allow federal contractors to fire or refuse to hire qualified individuals because they do not regularly attend religious services or adhere to the "right" religion. Additionally, commenters expressed skepticism about religious organizations' reluctance to participate as federal contractors. Many of these commenters stated that OFCCP provided no evidence to support its claim or asserted that the proposed rule would increase rather than reduce confusion. In addition, several commenters cited a report from a progressive policy institute concluding that faith-based organizations that had objected to the lack of an expanded religious exemption in E.O. 13672 continued to be awarded government contracts.

OFCCP disagrees with commenters' characterization of the rule as discriminatory. OFCCP is committed to enforcing all of E.O. 11246's protections, including those protecting employees from discrimination on the basis of religion. OFCCP emphasizes again that

this rule will have no effect on the overwhelming majority of federal contractors. Even for religious organizations that serve as government contractors, they too must comply with all of E.O. 11246's nondiscrimination requirements except in some narrow respects under some narrow and reasonable circumstances recognized under law. This rule provides clarity on those circumstances, consistent with OFCCP's obligations to also respect and accommodate the free exercise of religion.

OFCCP agrees with the comments stating that the religious exemption contained in section 204(c) of E.O. 11246 is necessary to ensure religious organizations can contract with the federal government without compromising their religious identities or missions. The fact that some faith-based organizations have been willing to enter into federal contracts does not mean that other faith-based organizations have not been reluctant to do so. Indeed, a few commenters offered evidence that religious organizations have been reluctant to contract with or receive grants from the federal government because of the lack of clarity regarding religious exemptions in federal law. In addition, although some commenters objected to the provision of any religious exemption for federal contractors, the religious exemption is part of E.O. 11246 that OFCCP is obligated to administer and enforce and has been part of the Executive Order for nearly two decades.

OFCCP is publishing this final rule to clarify the scope and application of the religious exemption. The intent is to provide certainty and make clear that the exemption includes not only churches but employers that are organized for religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in activity consistent with and in furtherance of that religious purpose. OFCCP believes that the rule will promote consistency in OFCCP's administration and that it will be clearer for contractors to follow. Further, OFCCP believes it will help achieve consistency with the administration policy to enforce federal law's robust protections of religious freedom.

2. Discussion of Impacts

In this section, OFCCP presents a summary of the costs associated with the new definitions in § 60–1.3 and the new rule of construction in § 60–1.5. While this rule will only apply to federal contractors that are religious, OFCCP lacks data to determine the number of contractors that would fall within that definition and thus evaluates the impacts using data for the entire contractor universe despite the fact this number significantly overstates the number of religious contractors. Prior to publication of the NPRM, OFCCP surveyed the list of contractors in the General Service Administration's System for Award Management (SAM) to identify organizations whose North American Industry Classification System (NAICS) descriptions or names included the word "religious," "church," "mosque," etc. This survey was not a useful or appropriate proxy for the number of potentially affected entities for several reasons. First, not all organizations with "religious" NAICS codes or names would qualify for the exemption, given that any formulation of the religious-organization test is fact-intensive and requires much more than that the organization simply have (what is commonly understood to be) a religious term in its name. This holds true under any formulation of the test, whether that used in a case like *LeBoon* or the test set out in the NPRM and refined in the final rule. Second, and similarly, many religious organizations that could qualify for the religious employer exemption at issue here may not include one of those three specific descriptors in their NAICS description much like many religious organizations do not include one of those three words in their legal names. Third, the religious exemption is an optional accommodation. Organizations that qualify for it may choose to use it, or not, and OFCCP has no reliable way of determining which will do so. Fourth, OFCCP believes that, as a government agency, it would be a fraught matter for it to search for potentially religious organizations based on its own view of what sorts of terms are religious, assess the results in the abstract, and attempt to attribute religious characteristics to the organizations found. This rule elsewhere rejects that sort of approach. For all these reasons, OFCCP has chosen to use broader estimates of the contractor universe.

Further, OFCCP anticipates that many contractors would affirmatively disclaim any religious basis and thus OFCCP recognizes that the following analysis will be an overestimate, but uses it out of an abundance of caution. OFCCP determined that there are approximately 435,000 entities registered in the SAM database.[37] Entities registered in the SAM database consist of contractor firms and other entities (such as state and local governments and other organizations) that are interested in federal contracting opportunities and other forms of federal financial assistance. The total number of entities in the SAM database fluctuates and is posted on a monthly basis. The current database includes approximately 435,000 entities. Thus, OFCCP determines that 435,000 entities is a reasonable representation of the number of entities that may be affected by the final rule.[38] OFCCP recognizes that this SAM number likely results in an overestimation for two reasons: The system captures firms that do not meet the jurisdictional dollar thresholds for the three laws that OFCCP enforces, and it captures contractor firms for work performed outside the United States by individuals hired outside the United States, over which OFCCP does not have authority. Further, because this rule only applies to religious contractors, OFCCP is confident that this estimate overstates the true universe of contractors affected by the rule.

OFCCP anticipates three main groups that potentially will be impacted: Religious organizations that decide to become federal contractors because of this final rule's clarity on the scope and application of the religious exemption, religious organizations that are already federal contractors, and all current federal contractors. OFCCP is unable to reasonably quantify the costs, benefits, and transfers for these three groups of organizations, but provides the following qualitative analysis. Though religious organizations new to federal contracting will likely incur upfront costs and compliance costs associated with becoming a federal contractor, it is reasonable to assume they believe that becoming a federal contractor will further their goals, which will result in benefits to the organization (whether increased revenues, more financial stability, or better market access). In addition, if the new potential contractors are awarded government contracts, the government and the public will receive better quality or lower-cost services because most federal contracts are rewarded through competitive bidding which selects (generally speaking) either the lowest

[37] U.S. General Services Administration, System for Award Management, data released in monthly files, available at *https://sam.gov*. The SAM database is an estimate with the most recent download of data occurring November 2020.

[38] While the final rule may result in more religious corporations, associations, educational institutions or societies entering into federal contracting or subcontracting, there is no way to estimate the volume of increase. As noted above, OFCCP does not anticipate that the number of religious contractors will grow to be equal to non-religious contractors, but uses this estimate due to the lack of data.

cost per unit or highest quality unit at a specific price. As the number of potential federal contractors rises, the competitive process should result in better quality and prices for goods and services which will enhance the societal benefits of federal contracting. If total costs from contracting with the new organization are lower than the status quo, the result will be a transfer to taxpayers.

Religious organizations which are already federal contractors will see a minimal cost for rule familiarization and compliance and will continue to efficiently provide services to the U.S. government. The clear boundaries of the religious exemption may permit these contractors to more freely seek the religious exemption with assurance that they are complying with their legal obligations under Executive Order 11246, and they may revisit their employment practices accordingly. OFCCP cannot determine quantitatively the direction or magnitude of any changes in employment but believes the overall effects will be quite small at these organizations, as most employees at them were likely attracted to them because of a shared sense of religious mission, and extremely small when considering the entire contractor universe or the economy as a whole. On one hand, religious employers may feel more free to hire those that are not denominational coreligionists, given this final rule's explanation, consistent with law, that an organization does not forfeit the exemption when it hires outside strict denominational boundaries, and that an organization may require acceptance of or adherence to particular religious tenets as part of the employment relationship regardless of employees' denominational membership. On the other hand, given this clarity, religious employers may also feel more confident in their ability to hire and retain employees based on religious criteria. Additionally, OFCCP believes these assurances for religious organizations will result in reduced legal costs for both the religious contractors and OFCCP.

All current federal contractors may face additional competition as new potential competitors enter the market. Since the total amount of available government contracts is not anticipated to change, the increased competition may provide better prices for the government, but may also result in a reallocation of the contracts. Should this occur, it is possible that revenues will be transferred between various government contractors or from current contractors to new entrants.

3. Public Comments

In this section, OFCCP addresses the public comments specifically received on the Regulatory Impact Analysis.

One commenter, a public policy research and advocacy organization, asserted that OFCCP underestimated the wage rate of the employees who would likely review the rule. The commenter asserted that the employee would likely be an attorney rather than a human resource manager. The commenter suggested that most contractors would consult in-house or outside counsel to help with rule familiarization. The commenter also provided an alternate fully loaded hourly compensation rate for Lawyers (SOC 23–1011). OFCCP acknowledges that some contractors may have in-house counsel review the final rule. However, some contractors do not have in-house counsel, and their review will be conducted by human resource managers. Taking into consideration this comment, OFCCP has adjusted its wage rate to reflect review by either in-house counsel or human resource managers.

Several commenters addressed the time needed for a contractor to become familiar with the final rule. These commenters asserted that the estimate of one half-hour was too low. One commenter provided no additional information or alternative calculation. The remaining two provided alternative estimates ranging from 1.5 hours to 2.5 hours to become familiar with the final rule. OFCCP acknowledges that the precise amount of time each company will take to become familiar with understanding the new regulations is difficult to estimate. However, the elements that OFCCP uses in its calculation take into account the length and complexity of the final rule. The final rule adds definitions to the existing regulations implementing E.O. 11246 and clarifies the exemption contained in section 204(c) of E.O. 11246. As such, the final rule clarifies requirements and reduces burdens on contractors trying to understand their obligations and responsibilities of complying with E.O. 11246. Thus, OFCCP has decided to retain its initial estimate of one half-hour for rule familiarization. This estimate accounts for the time needed to read the final rule or participate in an OFCCP webinar about the final rule.

Many commenters asserted that OFCCP did not address the potential costs of the final rule on employees, taxpayers, and minority groups, including LGBT individuals, women, and religious minorities. The commenters asserted that OFCCP failed to address the economic and non-economic costs to employees in the form of lost wages and benefits, out of pocket medical expenses, job searches, and negative mental and physical health consequences of discrimination. Two commenters, a civil liberties organization and a labor union, mentioned that there are 25 states without explicit statutory protections barring employment discrimination based on gender identity and sexual orientation and asserted that workers in these states are not otherwise covered by statutory protections. The commenters who made these assertions provided no additional information or data to support their assertions. Additionally, given *Bostock*'s holding that Title VII's prohibition on sex discrimination includes discrimination on the basis of sexual orientation and transgender status, these concerns seem lessened.

OFCCP has reviewed these comments and notes that any attempt to project costs to employees would necessarily require OFCCP to speculate that certain workers will face discrimination only once this rule is finalized. Further, the commenters ignore the possibility that contractors may choose to hire individuals of greater religious diversity as a result of this rule because their incentive to only hire coreligionists will be diminished. Absent data regarding the number of individuals who are not discriminated against in the status quo but would be discriminated against when this rule is finalized, and non-coreligionist individuals who will be hired by a contractor as a result of this rule that OFCCP cannot assess the mere possibility that some workers could face different costs. Likewise, OFCCP lacks data for the number of new contractors that may enter the market and the number of employees that work for such companies. As such, OFCCP does not estimate the benefits to the employees of those new contractors.

Commenters also said that OFCCP failed to address the costs to taxpayers in the form of a restricted labor pool, decreased productivity, employee turnover, and increased health care costs related to employment discrimination and increased social stigma. In addition, some commenters mentioned that OFCCP did not account for intangible costs related to reductions in equity, fairness, and personal freedom that would result from allowing businesses and organizations receiving taxpayer dollars to opt out of critical nondiscrimination provisions that protect employees based on gender identity and sexual orientation. The commenters who made these assertions

provided no additional information or data to support their assertions. Further, the commenters provide no additional support for their assertion that the rule will increase costs to taxpayers and ignore the possibility that the rule will expand the pool of federal contractors, thereby saving taxpayers money.

Similarly, several commenters addressed the potential impact of the rule on state and local governments. Three commenters, a city attorney, a state's attorney, and a civil liberties and human rights legal advocacy organization, mentioned that state and local governments may lose important tax revenue if people relocate or choose to withdraw from the workforce because of the final rule. Another commenter mentioned that state and local governments that serve victims of discrimination will need to contribute to, provide, and administer more public benefits programs for vulnerable populations. These comments are assume that the rule will impose costs on workers and that those costs will in turn be imposed upon the communities in which those workers live. None of these commenters provided additional information or data to support their statements.

One individual commenter asserted that OFCCP did not properly determine the rule's economic significance. The commenter asserted that the Regulatory Impact Analysis in the NPRM did not take into account "the actual monetary impact of the regulation." Using all available information and data, OFCCP has addressed the quantifiable and qualitative costs and benefits of this final rule as required. It provides an assessment of the costs associated with rule familiarization and concludes that the addition of definitions and clarification of an exemption do not create additional burdens for the regulated community. As stated in the preamble, the intent of the final rule is to clarify the scope of the religious exemption and promote consistency in OFCCP's administration of it. The commenter also asserted that OFCCP did not account for the impact on larger contractors. The Regulatory Flexibility Act requires agencies to consider the impact of a regulation on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions. It does not address larger corporations. However, OFCCP's assessment reflects that it does not anticipate any costs beyond rule familiarization for contractors.

Taking the Regulatory Impact Analysis comments into consideration, OFCCP has assessed the costs and benefits of the final rule as follows.

OFCCP believes that either a Human Resource Manager (SOC 11–3121) or a Lawyer (SOC 23–1011) would review the final rule. OFCCP estimates that 50% of the reviewers would be human resource managers and 50% would be in-house counsel. Thus, the mean hourly wage rate reflects a 50/50 split between human resource managers and lawyers. The mean hourly wage of human resource managers is $62.29 and the mean hourly wage of lawyers is $69.86.[39] Therefore, the average hourly wage rate is $66.08 (($62.29 + $69.86)/2). OFCCP adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. OFCCP used a fringe benefits rate of 46%[40] and an overhead rate of 17%,[41] resulting in a fully loaded hourly compensation rate of $107.71 ($66.08 + ($66.08 × 46%) + ($66.08 × 17%)).

TABLE 1—LABOR COST

Major occupational groups	Average hourly wage rate	Fringe benefit rate (%)	Overhead rate (%)	Fully loaded hourly compensation
Human Resources Managers and Lawyers	$66.08	46	17	$107.71

4. Cost of Regulatory Familiarization

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis the estimated time it will take for contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish compliance assistance materials, such as fact sheets and answers to frequently asked questions. OFCCP may also host webinars for interested persons that describe the new regulations and conduct listening sessions to identify any specific challenges contractors believe they face, or may face, when complying with the new regulations. OFCCP notes that such informal compliance guidance is not binding.

OFCCP believes that human resource managers or lawyers at each contractor firm would be the employees responsible for understanding the new regulations. OFCCP further estimates that it will take a minimum of one half-hour for a human resource professional or lawyer at each contractor firm to read the rule, read the compliance assistance materials provided by OFCCP, or participate in an OFCCP webinar to learn the new requirements.[42] Consequently, the estimated burden for rule familiarization would be 217,500 hours (435,000 contractor firms × ½ hour). OFCCP calculates the total estimated cost of rule familiarization as $23,426,925 (217,500 hours × $107.71/hour) in the first year, which amounts to a 10-year annualized cost of $2,666,359 at a discount rate of 3% (which is $6.13 per contractor firm) or $3,117,259 at a discount rate of 7% (which is $7.17 per contractor firm).

TABLE 2—REGULATORY FAMILIARIZATION COSTS

Total number of contractors	435,000.
Time to review rule	30 minutes.

[39] BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2019, *https://www.bls.gov/oes/current/oes_nat.htm*.

[40] BLS, Employer Costs for Employee Compensation, *https://www.bls.gov/ncs/data.htm*. Wages and salaries averaged $24.26 per hour worked in 2017, while benefit costs averaged $11.26, which is a benefits rate of 46%.

[41] Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program" (June 10, 2002), *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005*.

[42] OFCCP believes that contractor firms that may be potentially affected by the rule may take more time to review the final rule, while contractor firms that may not be affected may take less time, so the one half-hour reflects an estimated average for all contractor firms.

TABLE 2—REGULATORY FAMILIARIZATION COSTS—Continued

Human resources manager and lawyer fully loaded hourly compensation	$107.71.
Regulatory familiarization cost	$23,426,925.
Annualized cost with 3% discounting	$2,666,359.
Annualized cost per contractor with 3% discounting	$6.13.
Annualized cost with 7% discounting	$3,117,259.
Annualized cost per contractor with 7% discounting	$7.17.

5. Cost Savings

OFCCP expects that contractors impacted by the rule will experience cost savings. Specifically, the clarity provided in the new definitions and the interpretation provided will reduce the risk of noncompliance to contractors and the potential legal costs that findings of noncompliance with OFCCP's requirements might impose. One mass mail campaign of commenters asserted that allowing religious organizations to continue to provide a variety of services, such as assisting victims of sexual abuse, the hungry, and the homeless, is effective because it saves taxpayer dollars through contracting instead of expanding government bureaucracy.

Some commenters argued that the rule will decrease clarity and will thus increase costs for contractors, especially if those contractors believe their obligations under the EEOC conflict with their obligations under the final rule. First, OFCCP believes that the E.O. 11246 nondiscrimination obligations it enforces remain in force and that the rule is sufficiently consistent with Title VII case law and principles and that it will promote consistency in administration. Second, even assuming for purposes of this analysis that contractors' obligations under EEOC and E.O. 11246 differ (*e.g.*, that the exemption in E.O. 11246 permits an action forbidden under the EEOC's view of Title VII), a contractor remains obligated to abide by Title VII and any exemption from E.O. 11246 simply prevents additional liability before OFCCP for the same action. Accordingly, only those contractors that wish to rely on the E.O. 11246 exemption need consider it, and we expect that the additional costs incurred by such organizations to understand the exemption beyond their existing compliance costs will be minimal.

6. Benefits

E.O. 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are important, and states that agencies may consider such benefits. This final rule improves equity and fairness by giving contractors clear guidance on the scope and application of the religious exemption to E.O. 11246. It also increases religious freedom for religious employers.

The final rule increases clarity for federal contractors. This impact most likely yields a benefit to taxpayers (if contractor fees decrease because they do not need to engage third-party representatives to interpret OFCCP's requirements). While some commenters expressed concern that the rule was not clear, OFCCP believes that the rule is sufficiently consistent with Title VII case law and principles and that it will promote consistency in administration. Furthermore, by increasing clarity for both contractors and for OFCCP enforcement, the final rule may reduce the number and costs of enforcement proceedings by making it clearer to both sides at the outset what is required under the regulations. This would also most likely represent a benefit to taxpayers (since fewer resources would be spent in OFCCP administrative litigation).

OFCCP notes that some commenters asserted that OFCCP did not provide evidence that faith-based organizations have been reluctant to contract with the federal government because of the lack of certainty about the religious exemption. The fact that some small number of faith-based organizations have been willing to enter into federal contracts does not mean that other faith-based organizations have not been reluctant to do so. OFCCP believes that providing clarity to the religious exemption currently included under E.O. 11246 will promote clarity and certainty for all contractors. Moreover, a few commenters confirmed OFCCP's observation that religious organizations have been reluctant to participate as federal contractors because of the lack of clarity or perceived narrowness of the E.O. 11246 religious exemption. One individual commenter described his experience with religious organizations' reluctance to contract or subcontract with the federal government, and two other commenters offered examples or evidence of religious organizations' reluctance to participate in other contexts, such as federal grants. Thus, OFCCP expects that the number of new contractors may increase because religious entities may be more willing to contract with the government after the religious exemption is clarified.

A further benefit of this rule would be that some religious contractors will increase the diversity of their workforce. Under some prior interpretations, the religious exemption was only provided to contractors who hired co-religionists (*e.g.*, a Catholic company hiring only Catholics; a Latter-day Saint contractor hiring only Latter-day Saints; etc.) and thus religious contractors were incentivized to limit their hiring to only co-religionists. Once this rule is finalized, such religious contractors will no longer be required to limit their hiring. The likely outcome of this change is that the workforces of religious employers will become more diverse.

B. Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The agency did not receive any public comments on the Regulatory Flexibility Analysis.

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation." Public Law 96–354, 2(b). The RFA requires agencies to consider the impact of a regulation on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions.

Agencies must review whether a final rule would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the rule would, then the agency must prepare a regulatory flexibility analysis as described in the RFA. *See id.* However, if the agency determines that the rule would not be expected to have a significant economic impact on a substantial number of small entities, then the head of the agency may so certify and the RFA does not require a regulatory flexibility analysis. *See* 5 U.S.C. 605. The certification must provide the factual basis for this determination.

OFCCP does not expect the final rule to have a significant economic impact on a substantial number of small entities and does not believe the final rule has any recurring costs. The regulatory familiarization cost discounted at a 7% rate of $50.33 per contractor or $7.17 annualized is a *de minimis* cost. Therefore, the first year and annualized burdens as a percentage of the smallest employer's revenue would be far less than 1%. Accordingly, OFCCP certifies that the final rule would not have a significant economic impact on a substantial number of small entities. That is consistent with the Department's analysis in the NPRM.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. *See* 44 U.S.C. 3507(d). An agency may not collect or sponsor the collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number. *See* 5 CFR 1320.5(b)(1).

OFCCP has determined that there is no new requirement for information collection associated with this final rule. The final rule provides definitions and a rule of construction to clarify the scope and application of current law. The information collections contained in the existing E.O. 11246 regulations are currently approved under OMB Control Number 1250–0001 (Construction Recordkeeping and Reporting Requirements) and OMB Control Number 1250–0003 (Recordkeeping and Reporting Requirements—Supply and Service). Consequently, this final rule does not require review by the Office of Management and Budget under the authority of the Paperwork Reduction Act.

D. Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this final rule does not include any federal mandate that may result in excess of $100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

E. Executive Order 13132 (Federalism)

OFCCP has reviewed this final rule in accordance with Executive Order 13132 regarding federalism. OFCCP recognizes that there may be some existing costs that may shift from the federal government to state or local governments; however, the agency believes that these effects will be neither direct nor substantial. Thus, OFCCP has determined that it does not have "federalism implications." 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."

F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The final rule will not "have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

List of Subjects in 41 CFR Part 60–1

Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Labor, and Reporting and recordkeeping requirements.

Craig E. Leen,

Director, OFCCP.

For the reasons set forth in the preamble, OFCCP revises 41 CFR part 60–1 as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

■ 1. The authority citation for part 60–1 continues 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, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

■ 2. Amend § 60–1.3 by
■ a. Adding in alphabetical order the definitions of "Particular religion," "Religion," "Religious corporation, association, educational institution, or society," and "Sincere," and
■ b. Adding paragraph (a) and adding and reserving paragraph (b).

The revisions read as follows:

§ 60–1.3 Definitions.

* * * * *

Particular religion means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to sincere religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.

* * * * *

Religion includes all aspects of religious observance and practice, as well as belief.

* * * * *

Religious corporation, association, educational institution, or society. (1) Religious corporation, association, educational institution, or society means a corporation, association, educational institution, society, school, college, university, or institution of learning that:

(i) Is organized for a religious purpose;

(ii) Holds itself out to the public as carrying out a religious purpose;

(iii) Engages in activity consistent with, and in furtherance of, that religious purpose; and

(iv)(A) Operates on a not-for-profit basis; or

(B) Presents other strong evidence that its purpose is substantially religious.

(2) Whether an organization's engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization's own sincere understanding of its religious tenets.

(3) To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: Have a mosque, church, synagogue, temple, or other house of worship; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.

(4) The following examples apply this definition to various scenarios. It is assumed in each example that the employer is a federal contractor subject to Executive Order 11246.

(i)(A) *Example.* A closely held for-profit manufacturer makes and sells metal candlesticks and other decorative items. The manufacturer's mission statement asserts that it is committed to providing high-quality candlesticks and similar items to all of its customers, a majority of which are churches and synagogues. Some of the manufacturer's items are also purchased by federal agencies for use during diplomatic events and presentations. The manufacturer regularly consults with

ministers and rabbis regarding new designs to ensure that they conform to any religious specifications. The manufacturer also advertises heavily in predominantly religious publications and donates a portion of each sale to charities run by churches and synagogues.

(B) *Application.* The manufacturer likely does not qualify as a religious organization. Although the manufacturer provides goods predominantly for religious communities, the manufacturer's fundamental purpose is secular and pecuniary, not religious, as evidenced by its mission statement. Because the manufacturer lacks a religious purpose, it cannot carry out activity consistent with that (nonexistent) religious purpose. And while the manufacturer advertises heavily in religious publications and consults with religious functionaries on its designs, the manufacturer does not identify itself, as opposed to its customers, as religious. Finally, given that the manufacturer is a for-profit entity, it would need to make a strong evidentiary showing that it is a religious organization, which it has not.

(ii)(A) *Example.* A nonprofit organization enters government contracts to provide chaplaincy services to military and federal law-enforcement organizations around the country. The contractor is organized as a non-profit, but it charges the military and other clients a fee, similar to fees charged by other staffing organizations, and its manager and employees all collect a market-rate salary. The organization's articles of incorporation state that its purpose is to provide religious services to members of the same faith wherever they may be in the world, and to educate other individuals about the faith. Similar statements of purpose appear on the organization's website and in its bid responses to government requests for proposals. All employees receive weekly emails, and occasionally videos, about ways to promote faith in the workplace. The employee handbook contains several requirements regarding personal and workplace conduct to ensure "a Christian atmosphere where the Spirit of the Lord can guide the organization's work."

(B) *Application.* Under these facts, the contractor likely qualifies as a religious organization. The contractor's organizing documents expressly state that its mission is primarily religious in nature. Moreover, the contractor exercises religion through its business activities, which is providing chaplaincy services, and through its hiring and training practices. Through its emails and other communications, the contractor holds itself out as a religious organization to its employees, applicants, and clients. Finally, notwithstanding that the contractor collects a placement fee similar to nonreligious staffing companies, it is organized as a non-profit.

(iii)(A) *Example.* A small catering company provides kosher meals primarily to synagogues and for various events in the Jewish community, but other customers, including federal agencies, sometimes hire the caterer to provide meals for conferences and other events. The company's two owners are Hasidic Jews and its six employees, while not exclusively Jewish, receive instruction in kosher food preparation to ensure such preparation comports with Jewish laws and customs. This additional work raises the company's operating costs higher than were it to provide non-kosher meals. The company's mission statement, which has remained substantially the same since the company was organized, describes its purpose as fulfilling a religious mandate to strengthen the Jewish community and ensure Jewish persons can participate fully in public life by providing kosher meals. The company's "about us" page on its website states that above all else, the company seeks to "honor G-d" and maintain the strength of the Jewish religion through its kosher meal services. The company also donates a portion of its proceeds to charitable projects sponsored by local Jewish congregations. In its advertising and on its website, the company prominently includes religious symbols and text.

(B) *Application.* The company likely qualifies as a religious organization. The company's mission statement and other materials show a religious purpose. Its predominant business activity of providing kosher meals directly furthers and is wholly consistent with that self-identified religious purpose, as are its hiring and training practices. Through its advertising and website, the company holds itself out as a religious organization. Finally, although the company operates on a for-profit basis, the other facts here show strong evidence that the company operates as a religious organization.

(iv)(A) *Example.* A for-profit collector business sells a wide variety of artistic, cultural, religious, and archeological items. The government purchases some of these from time to time for research or aesthetic purposes. The business's mission statement provides that its purpose is to curate the world's treasures to perpetuate its historic, cultural, and religious legacy. Most of the business's customers are private individuals or museums interested in the items as display pieces or for their cultural value. The business's marketing materials include examples of religious iconography and artifacts from a variety of world religions, as well as various cultural and artistic items.

(B) *Application.* The business likely does not qualify as a religious organization. Its mission statement references an arguably religious purpose, namely perpetuating the world's religious legacy, but in context that appears to have more to do with religion's historic value rather than evidencing a religious conviction of the business or its owner. Similarly, it is at best unclear whether the business is engaging in activities in furtherance of this purpose when most of its sales serve no religious purpose. Finally, while the business displays some religious items, these appear to be a minor part of the business's overall presentation and do not convey that the business has a religious identity. The factors to qualify as a religious organization do not appear to be met, especially given that the business as a for-profit entity would need to make a strong evidentiary showing that it is a religious organization.

* * * * *

Sincere means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief.

* * * * *

(a) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

(b) [Reserved]

■ 3. Amend § 60–1.5 by adding paragraphs (e) and (f) to read as follows:

§ 60–1.5 Exemptions.

* * * * *

(e) *Broad interpretation.* This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb *et seq.*

(f) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

[FR Doc. 2020–26418 Filed 12–8–20; 8:45 am]

BILLING CODE 4510–45–P