

September 16, 2019

*VIA ELECTRONIC SUBMISSION*

U.S. Department of Labor  
Attention: Mr. Harvey D. Fort  
Acting Director, Division of Policy and Program Development,  
Office of Federal Contract Compliance Programs,  
200 Constitution Avenue NW, Room C-3325  
Washington, DC 20210

**Re: Comment on Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption (RIN 1250-AA09), Respectfully Submitted by Interfaith Alliance Foundation**

To Whom It May Concern:

Interfaith Alliance Foundation offers the following comments in response to “Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption,” a proposed rule published by the Department of Labor (“DOL”) in the Federal Register on August 15, 2019 at 84 Fed. Reg. 41677.

Interfaith Alliance Foundation (“IAF”) is a national policy and advocacy organization committed to advancing true religion freedom for all Americans. The only national interfaith organization dedicated to protecting the integrity of both religion and democracy, IAF’s membership is made up of individuals rather than institutions, in all 50 states and serving overseas in the U.S. military, and adhering to more than 75 faith traditions and belief systems.

This year, IAF celebrates twenty-five years at the forefront of the movement to promote true religious freedom. While the notion of religious freedom has been used – and misused – by various groups over the course of our history, IAF’s work remains true to the foundational promise of the U.S. Constitution: that every American has the right to believe as they choose, with the secure knowledge that our government will not play favorites or favor religion over non-religion. Through our federal policy programs, we champion the rights all Americans to follow the faith of their choosing, or no faith, and to be free from discrimination in public life.

For more than 70 years, the federal government has made an enduring commitment to eradicating employment discrimination by federal contractors. The proposed rule represents a marked departure from this storied legacy, undoing many of the essential civil rights protections that have protected federal contractors for decades and creating special protections for a small number of contracting entities that cite their faith as a defense for violating the rights of others. Religious belief does not create a license to discriminate – but the OFCCP appears poised to do so.

We strongly urge DOL/OFCCP to withdraw this Proposed Rule, given the significant harm its finalization would cause to the religious freedom and civil rights of thousands of federally contracted employees across the country.

**I. The Role of OFCCP and Enforcement of Executive Order 11246**

The Office of Federal Contract Compliance Programs (OFCCP) exists to “protect workers, promote diversity and enforce the law.” Among those responsibilities, the Office ensures that federal contractors comply with Executive Order 11246, signed by President Johnson in 1965.

EO 11246 prohibits contractors from discriminating in employment on the basis of “race, color, religion, sex, sexual orientation, gender identity, or national origin.” A 2003 amendment created a set of exemptions for narrowly-defined “religious organizations” in receipt of federal contracts – particularly the ability to select employees that share the faith of the contractor – but left intact prohibitions on employment discrimination on the basis of race, color, sex, sexual orientation, gender identity, or national origin for those same entities.

The proposed rule now put forth by OFCCP directly undermines the employee protections signed into law by President Johnson over 50 years ago while, at the same time, dramatically expanding the pool of entities eligible for a religious exemption. These changes are unnecessary, unjustified, legally flawed, and will likely create substantial costs for employees, applicants, and taxpayers that the Department fails to acknowledge. We strongly urge the Department to maintain its previously settled approach to EO 11246 and to withdraw the Proposed Rule in its entirety.

## **II. The Proposed Rule Violates the Establishment Clause**

Religious freedom is a fundamental American value. Each of us – employers and employees alike – have the right to believe as we see fit, without facing discrimination because of those beliefs. Many faith communities have experienced the harms of coercion, where members of a particular tradition were compelled to relinquish or violate their beliefs to satisfy the demands of social or political forces. The legacy of forced conversion among enslaved peoples and Native Americans, coupled with the professional and social exclusion experienced by other minority faiths, continues to inform the lived experience of that essential promise – to believe as we choose – for millions of Americans.

The constitutional principle of religious freedom therefore incorporates, by necessity, both the freedom *of* and freedom *from* religion. No one person or entity may impose their beliefs on others or discriminate against those who do not share their convictions. The First Amendment grants us the freedom to live out our own beliefs, with respect for the autonomy of others to do the same.

In practice, our system has devised a limited set of religious exemptions to ensure that people of faith are not categorically excluded from participation in public life. Those exemptions, however, cannot burden or harm third parties.<sup>1</sup> Thus, when crafting an exemption, the government “must take adequate account of the burdens” an accommodation places on non-beneficiaries and ensure it is “measured so that it does not override other significant interests.”<sup>2</sup>

The Department presents the proposed rule as a necessary effort to ensure that people of faith can participate in the government contracting process. But the rule vastly and unnecessarily expands the current exemption in EO 11246 for government-funded employers to authorize employment discrimination. The Department does not even consider the harm to employees impacted by taking such an action, among them creating an incomprehensible standard to determine whether an entity is a “religious organization” and opening the

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<sup>1</sup> See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-10 (1985). See also *Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 706 (1994) (“accommodation is not a principle without limits”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014).

<sup>2</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005).

door to for-profit companies and those that only engage in marginal “religious” activities to claim the exemption.

By the proposed standard, an applicant or employee may not even know that the federal contractor they are engaging with is classified as a religious entity – at least until they seek a remedy for discriminatory employment practices. At that point, the individual has already experienced the tangible and intangible harms of discrimination with little recourse. In short, by dramatically expanding the pool of federal contractors that could claim a religious exemption, the proposed rule would render EO 11246’s protections meaningless.

**i. The definition of “religious corporation, association, education institution or society” is unsupported in law.**

The proposed rule presents a new definition of the term “religious corporation, association, educational institution or society” untethered to established case law or regulatory standards. Entities that meet this definition would qualify for the broadened religious exemption. The proposed rule accurately notes that the term “religious corporation, association, educational institution or society,” as used in EO 11246, is commonly understood to have the same meaning as that in the Title VII religious exemption. The proposed rule’s definition, however, does not reflect the Title VII definition.

The proposed rule would vastly expand the types of entities that can claim the religious exemption from non-discrimination laws. Existing protections are appropriately limited in scope to readily recognizable religious entities. The proposed rule however, would include non-profit organizations only marginally engaged in activities with a religious purpose and even allow for-profit corporations to use the religious exemption to excuse discriminatory decisions in the hiring and firing of their workers.

To justify this expansion, the Department manipulates Title VII case law to create an entirely new and expansive test to determine if an entity is “religious.”<sup>3</sup> The proposed rule claims to adopt the *Spencer v. World Vision* standard for determining whether an entity qualifies for the religious exemption, but then, in order to meet its goal of expanding the rule, OFCCP drastically modifies it. The final product contained in the proposed rule is unrecognizable.

The *World Vision* test, as laid out in the *per curiam* opinion, states that an organization meets the definition of a religious entity if it (1) is 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.

The definition proposed by the rule, despite citing the decision, picks and chooses prongs from an alternative test laid out by Judge O’Scannlain in his concurring opinion, watering down some and outright jettisoning others, including the prong that prohibits for-profit entities from qualifying for the exemption.

The proposed rule drops the requirement from the *World Vision per curiam* decision that an entity “not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.”<sup>4</sup> Instead, the proposed rule explicitly permits for-profit entities to qualify for the exemption. Even Judge O’Scannlain’s concurring opinion, which the proposed rule relies upon heavily, states that “the initial consideration, whether the entity is a nonprofit, is especially significant.” The Department is unable to point to one single case where a court extended the Title VII exemption to a for-profit entity.

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<sup>3</sup> See *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (*per curiam*).

<sup>4</sup> *Id.*

The Department relies heavily on the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*<sup>5</sup> to justify dropping this prong. In doing so, the OFCCP ignores several key pieces of the *Hobby Lobby* decision. Most significantly, the Court’s decision in *Hobby Lobby* was restricted to “closely held corporations, each owned and controlled by members of a single family.”<sup>6</sup> The proposed rule is not limited in the same way.<sup>7</sup> Instead the Department simply guesses that it “does not anticipate that large, publicly held corporations would seek exemption or fall within the proposed definition.”

Additionally, the proposed rule drops the *World Vision* requirement that an entity be “engaged primarily in carrying out” the religious purpose for which it was organized.<sup>8</sup> The proposed rule replaces this prong with the mere requirement that the entity “engages in exercise of religion consistent with, and in furtherance of, a religious purpose.” This prong is further watered down by the proposed rule’s adoption of RFRA’s extremely broad definition of the term “engage in religious exercise.”<sup>9</sup>

In contrast to the fact-specific inquiry in *World Vision* to determine if the organization held itself out to the public as a religious entity,<sup>10</sup> the proposed rule would allow an entity to meet this prong if it merely “affirms a religious purpose in response to inquiries from a member of the public or a government entity.” As a result, under this proposed rule, an entity could make no public showing of a religious purpose, yet could meet this prong of the test by merely answering a call from an OFCCP employee and answering “yes” to the question of whether or not it is religious. This would provide no notice to taxpayers, employees, or applicants that the religious exemption may be applied.

Therefore, despite attempting to ground its definition of a religious entity in prevailing legal frameworks, the proposed rule offers a *sui generis* standard without basis in existing case law or regulation. As a result, prospective applicants and current employees may have no knowledge of the religious affiliation of a particular federal contractor – up until the moment they seek remedy for employment discrimination.

### **III. The Proposed Rule Defies Title VII and Creates Nearly Insurmountable Barriers for Employees Seeking to Challenge Employment Discrimination**

In addition to leaving employees and the public in the dark about a federal contractor’s religious nature, the proposed rule heavily favors employers in potential dispute over discriminatory employment decisions. In the event that an employee asserts that they were fired because of their membership in a protected class, a federal contractor may claim the proposed religious exemption as a defense against the charge. The Department will then assess the cause for the decision to determine whether the exemption applies.

The “standard of causation” determines what the employee must show in order to establish that an employer’s action was caused by unlawful discrimination. Under a “motivating-factor” standard, an

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<sup>5</sup> 573 U.S. 682 (2014).

<sup>6</sup> *Hobby Lobby*, 573 U.S. at 717.

<sup>7</sup> The Administration similarly applied an unsupported expansive reading of the *Hobby Lobby* decision and RFRA in finalizing the broad exemption to the ACA’s contraceptive coverage requirement. The Third Circuit has enjoined those rules, concluding that the rules were not supported by the law. *Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019), *as amended* (July 18, 2019).

<sup>8</sup> *See also LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007) (explaining that its nine factor test is designed to answer the question of whether the entity’s “purpose and character are primarily religious.”).

<sup>9</sup> The definition would use this broad term from the Religious Freedom Restoration Act (RFRA), an entirely different statute.

<sup>10</sup> *See World Vision*, 633 F.3d at 738-39. World Vision met this prong through demonstrating that it displayed its religious logo, religious iconography, and religious text across its campus; distributed Christian Messaging Guidelines that governed their external communications; and included a religious statement on every piece of communication.

employee can show that an action was discriminatory by proving that it was even *partially* motivated by a protected characteristic (such as race, sex, or national origin).

In contrast, under the “but-for” standard that OFCCP seeks to apply, an employee can only establish that an action was discriminatory by proving that, *but for the protected characteristic*, the action would not have happened. As long as the employer can cite another plausible reason to justify taking the action, the employee cannot show that they were punished for a discriminatory reason. It is naturally much more difficult for an employee to prevail under this standard.

Congress explicitly adopted the “motivating factor” test in 1991.<sup>11</sup> Moreover, OFCCP rejected the but-for causation standard in 2015, adopting instead the motivating-factor test that is consistent with Title VII and the Civil Rights Act of 1991.<sup>12</sup> The two cases cited in the proposed rule to support a departure from existing standard arose in other contexts and are not relevant to the religious exemption context. Neither case supports the proposed change to the standard for Title VII or EO 11246 cases.<sup>13</sup>

OFCCP also falsely claims it must adopt the “but-for” standard because it eliminates the need to “evaluate the nature of a sincerely held religious belief” and it is improper for OFCCP to make such an evaluation. For decades, however, the courts have resolved claims of employment discrimination by religious organizations without running afoul of those limitations. OFCCP’s concerns about these inquiries are overblown and misrepresents the danger of entangling the administrative body with impermissible judgments of religious conviction.<sup>14</sup>

Under the proposed rule, discrimination claims would be evaluated differently under Title VII than under EO 11246, with claims brought by employees of religiously-affiliated federal contractors tilted heavily in favor of the employer. This regulatory inconsistency runs contrary to OFCCP policy and, furthermore, creates an adjudicatory imbalance that should trouble employers, employees, and those tasked with providing oversight in equal measures.

#### **IV. The Proposed Rule Threatens Significant Harm to American Workers**

As outlined above, the Proposed Rule would undermine key components of employment nondiscrimination protections, leaving thousands of American workers at risk of exclusion from professional opportunities simply because their religious beliefs – or nonbelief – differ from those of their employer.

The right to religious freedom – including freedom from religious coercion – is an essential part of our democratic framework. Our system does not pick and choose which faiths deserve protection and even explicitly states that the government shall not favor religion over non-religion. However, this proposed rule

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<sup>11</sup> See Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m) (amending Title VII to mandate that an “unlawful employment practice is established when the complaining party demonstrates that race, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”).

<sup>12</sup> See 80 FR 54934, 54944-46; see also RIN 1250-AA09 at fn 10.

<sup>13</sup> See *Univ. of Tex. Sw. Med. Ctr. v. Nasser*, 570 U.S. 338, 357 (2013) (distinguishing between status-based discrimination claims, which are analogous to claims under EO 11246, and unlawful retaliation claims, requiring a “but-for” standard only for the latter category); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (“We cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA.”).

<sup>14</sup> See, e.g., *DeMarco v. Holy Cross High Sch.*, 4 3d 166, 169-70 (2d Cir. 1993); *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 328-30 (3d Cir. 1993); *Fremont Christian*, 781 F.2d at 1370; *Pac. Press*, 676 F.2d at 1282; *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992); *Dolter*, 483 F. Supp at 269-71; .

explicitly favors the beliefs of a small group of prospective federal contractors over the beliefs and practices of their employees and non-religious competitors.

Workers harmed by employment discrimination are often people of faith themselves and live their lives in accordance with their own deeply held beliefs. Whether a worker shares her boss's religious beliefs rarely has any bearing on her ability to perform her job responsibilities effectively. However, under the proposed rule, that employee would be pressured to keep silent about her faith or alter her behavior for fear of losing her job.

Furthermore, by providing one group of contractors with the ability to opt out of longstanding employment laws, the proposed rule would privilege religious entities over their non-religious counterparts by insulating them from civil rights complaints and potential litigation. Requiring religious contractors to abide by the same rules as their non-religious counterparts is not exclusionary – it is a necessary measure to protect the right of all employees to be free from discrimination in the workplace. If a faith-based entity refuses to respect the nondiscrimination rights of its employees, it is not entitled to receive federal, state, or local contracts.

If the proposed rule takes effect, more than 20% of the nation's workforce<sup>15</sup> may be stripped of explicit protections and the administrative recourse that OFCCP provides overnight. This loss of protections could be especially harmful for certain subsets of employees, LGBTQ+ workers chief among them. According to a recent study, 37% of lesbian and gay people and 47% of bisexual people report experiencing discrimination at work because of their sexual orientation and almost half (46%) of LGBTQ+ workers report actively concealing their identity out of fear of discrimination. For LGBTQ+ workers living in a state without explicit statutory protections, this change will be even more devastating.

Female employees of religious contractors may also see their employment rights dramatically curtailed. Although federal law currently prohibits discrimination based on sex – including sex stereotypes, gender identity, sexual orientation, and pregnancy and related medical conditions – the proposed rule would embolden federal contractors to cite religious beliefs to justify discrimination. This would turn the clock back on decades of nondiscrimination law, threatening women's ability to obtain and maintain employment.

For example, expanding the religious exemption creates the opportunity for federal contractors fire a woman who uses birth control or who is pregnant and unmarried. Female workers have been also discriminated against in terms of compensation and working conditions because of religious beliefs about the appropriate role of women in society. An employer who believes that women should not be alone with men to whom they are not married could impede on his female employees' advancement and access to mentorship, training opportunities, and senior leadership positions in the workplace.<sup>16</sup> Some employers may

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<sup>15</sup> Frank J. Bewkes and Caitlin Rooney, *The Nondiscrimination Protections of Millions of Workers Are Under Threat*, Center for American Progress (Sept. 3, 2019), <https://www.americanprogress.org/issues/lgbt/reports/2019/09/03/473958/nondiscrimination-protections-millions-workers-threat/>; Office of Federal Contract Compliance Programs (OFCCP), *Facts on Executive Order 11246* (last visited Sept. 9, 2019), <https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html>; see also Lee Badgett, et al., *An Executive Order to Prevent Discrimination Against LGBT Workers*, Center for American Progress & The Williams Institute (Feb. 19, 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTExecutiveOrder-Feb-2013.pdf>; Office of Federal Contract Compliance Programs (OFCCP), *Facts on Executive Order 11246* (Jan. 4, 2002), <https://web.archive.org/web/20160206204951/http://www.dol.gov/ofccp/regs/compliance/aa.htm>.

<sup>16</sup> See Joanna L. Grossman, *Vice President Pence's "never dine alone with a woman" rule isn't honorable. It's probably illegal*, Vox, Dec. 4, 2017, available at <https://www.vox.com/the-big-idea/2017/3/31/15132730/pence-women-alone-rule-graham-discrimination>; Gillian Tan and Katia Porzecanski, *Wall Street Rule for the #MeToo Era: Avoid Women at All Cost*, Bloomberg, Dec. 3, 2018, available at <https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost>; Ben Kesslen, *North Carolina Police Officer Fired for Following the 'Billy Graham Rule,' Lawsuit Says*, NBC News, Aug. 23, 2019, available at

refuse to employ women altogether based on a religious belief that women, or mothers, should not work outside the home.<sup>17</sup>

Lastly, for nonreligious workers and members of minority faiths, the proposed rule would foreclose on untold number of opportunities for employment with federal contractors. The federal government should not permit contractors to fire or refuse to hire a qualified person because they do not meet the company's religious litmus test. Such policies are akin to hanging a sign on the door that says "Jews, Sikhs, Catholics, Latter-day Saints need not apply."

The Department fails to address the profound harm the proposed rule will cause to third parties, including LGBTQ+ individuals, women, nonreligious people, members of minority faiths, and others. If adopted, the proposed rule would redirect the Department's efforts away from its profound legacy of advancing equal opportunities toward providing cover for employment discrimination. On that basis alone, the proposed rule should be withdrawn in its entirety.

## **V. The Department Fails to Justify the Proposed Rule**

Despite assertions to the contrary, the Department fails to justify the proposed rule. Instead it represents a sudden and dramatic shift from long-established standards, among the Department's settled interpretations of EO 11246 and the Equal Employment Opportunity Commission's parallel interpretations of Title VII of the 1964 Civil Rights Act.

As recently as August 2018, the Department consistently interpreted the EP's religious exemption narrowly, permitting preferences for co-religionists by certain religious organizations, and offered to provide further guidance to any contractor who needed it. Moreover, it applied the "motivating factor" test to evaluate claims of discrimination.

The Department's reliance on case law unrelated to employment discrimination laws or the text of Executive Order 11246 cannot justify this sharp change of policy. Nor does the Department's vague statement that it received "feedback" from "some organizations" sufficient to establish any need for this dramatic shift in position. There is no evidence<sup>18</sup> that organizations that would otherwise have provided competitive bids on federal contracts were unable to obtain contracts based on the Department's settled interpretation of the law. It is unclear why a significant redirection is suddenly necessary.

### **i. The Department fails to adequately consider the potential costs of the proposed rule and exaggerates the potential benefits.**

Under the Administrative Procedure Act and relevant Executive Orders, the Department must adequately assess all the potential costs and benefits of the rule and adopt an approach that produces the least total burden and most benefit to society.

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<https://www.nbcnews.com/news/us-news/north-carolina-police-officer-fired-following-billy-graham-rule-lawsuit-n1045706>.

<sup>17</sup> *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986).

<sup>18</sup> Frank J. Bewkes and Caitlin Rooney, *The Nondiscrimination Protections of Millions of Workers Are Under Threat*, Center for American Progress (Sept. 3, 2019) (focusing on a subset of organizations whose employees publicly argued in favor of a new religious exemption targeting LGBTQ workers, this analysis indicates that among those entities that were federal contractors at the time that EO 13672 went into effect, all but one continued to receive new contracts and at least one allocation under those contracts in the 12 months following the EO), available at <https://www.americanprogress.org/issues/lgbt/reports/2019/09/03/473958/nondiscrimination-protections-millions-workers-threat/>.

The purpose of OFCCP is to ensure equal employment opportunity in order to safeguard our nation's values and responsibly steward taxpayer funds. EO 11246 was adopted and amended to address serious and continuing problems of employment discrimination. Employment discrimination has numerous costs for workers and society, including lost wages and benefits, lost productivity, and negative impacts on mental and physical health.

Yet, OFCCP completely fails to acknowledge the potential costs the proposed rule could generate by promoting increased employment discrimination, and exaggerates any possible benefits. The Department has long recognized that employment discrimination wastes taxpayer dollars because it leads to contractors not obtaining the best talent and experiencing unnecessary and costly employee turnover. The Department fails to address how this rule will affect that mission.

Furthermore, employees face economic and non-economic costs in the form of lost wages and benefits, out of pocket medical expenses, costs associated with job searches, and costs related to negative mental and physical health consequences of discrimination.<sup>19</sup> Intangible costs include the perceived decrease in equity, fairness, and personal freedom by taxpayer-funded entities; the ability of workers to make deeply personal decisions regarding expression of their gender identity or sexual orientation, relationships and families, or medical treatment; protection of employees' personal privacy regarding protected characteristics; and respect for the dignity and rights of stigmatized minorities.

The Department also exaggerates proposed benefits of the rule. The proposed rule provides less, not more clarity for employers and employees because it departs from the Department's settled interpretations in favor of vague new standards and multi-factor tests. The Department also presents no evidence that the proposed rule will result in an increased number of bona fide competitive bids for federal contracts.

**ii. The Department has failed to provide the public with adequate time to comment on this major shift in equal employment opportunity enforcement.**

The Department fails to provide any justification for an unusually short 30-day comment period. Given the widespread impact of this proposed rule, members of the public deserve a meaningful opportunity voice their concerns. We believe providing a longer comment period is consistent with OFCCP's stated mission to "protect workers, promote diversity and enforce the law." Interfaith Alliance recently joined nearly 100 civil rights organizations in calling on OFCCP to extend the deadline for comment by a minimum of 60 days.<sup>20</sup>

Should the Department fail to do so, we again propose the withdrawal of the proposed rule for failure to adequately assess the potential costs and benefits of its adoption. We urge the Department to address the myriad harms expected by employees facing employment discrimination by faith-based federal contractors under the proposed expansion of the religious exemption.

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<sup>19</sup> For example, the 2015 U.S. Transgender Survey found that 16% of transgender workers had lost a job because of their transgender status in their lifetime, while 30% of those employed in the past year face mistreatment on the job because they were transgender, <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

<sup>20</sup> The Leadership Conference for Civil and Human Rights, et al., "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption (RIN 1250-AA09)" (Aug. 28, 2019), available at [https://interfaithalliance.org/cms/assets/uploads/2019/09/OFCCP-NPRM\\_RIN-1250-AA09\\_Religious-Exemption\\_Letter-from-Civil-Rights-Groups-to-Extend-Comment-Period.pdf](https://interfaithalliance.org/cms/assets/uploads/2019/09/OFCCP-NPRM_RIN-1250-AA09_Religious-Exemption_Letter-from-Civil-Rights-Groups-to-Extend-Comment-Period.pdf).

## **VI. Conclusion**

As a national organization committed to advancing true religion freedom for all Americans, Interfaith Alliance Foundation urges DOL/OFCCP to immediately withdraw the proposed rule, “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption.” We trust that these comments, along with the many others the Department receives, demonstrate how profoundly damaging the undermining of essential nondiscrimination provisions would be for employees of all faiths and of none.

For more than 70 years, the federal government has made an enduring commitment to eradicating employment discrimination by federal contractors. In 1941, President Franklin D. Roosevelt ordered federal agencies to condition defense contracts on an agreement not to discriminate based on race, creed, color, or national origin. Since then, Democratic and Republican presidents have expanded these protections and promoted equal opportunity in the workplace for all Americans. The Department of Labor has repeatedly affirmed that discrimination in government contracting wastes taxpayer funds because it leads to not hiring the best talent, increased turnover, and lost productivity.

This proposed rule will cause tangible harm to employees, federal contractors, and taxpayers alike. Furthermore, it turns the constitutional principle of religious freedom – including the freedom of and the freedom from religion – on its head by granting a small subset of federal contractors the ability to impose their religious beliefs on all job applicants and employees. If finalized in its current form, the proposed rule would unconstitutionally interfere with the rights of thousands of employees to believe as they choose without fear of discrimination or religious coercion.

We urge you to affirm the religious freedom and civil rights of all employees by preserving the nondiscrimination protections currently in place for federal contractors. The Department has the duty to ensure that the workers of all faiths and of none are free from discrimination in the workplace. This proposed rule runs directly counter to this mission.