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Human Rights

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September 16, 2019

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

**Re: Implementing Legal Requirements Regarding the Equal Opportunity Clause's
Religious Exemption Docket No.: OFCCP-2019-0003; RIN 1250-AA09**

Dear Acting Director Fort:

We submit the following comments on behalf of the New York State Division of Human Rights and the New York State Department of Labor in response to the notice in the Federal Register soliciting comments on the Proposed Rule regarding “Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption.”

Thank you for the opportunity to comment.

Very Truly Yours,

Commissioner Angela Fernandez
New York State Division of Human Rights

Commissioner Roberta Reardon
New York State Department of Labor

Proposed Rulemaking: Re: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption Docket No.: OFCCP-2019-0003; RIN 1250-AA09

The New York State Division of Human Rights (NYSDHR) and the New York State Department of Labor (NYSDOL) have reviewed the above-referenced notice (the Proposed Rule), published in the Federal Register on August 15, 2019, proposing changes regarding Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption.

NYSDHR is the agency in charge of enforcing the New York State Human Rights Law. The law ensures equal opportunity in employment, housing and public accommodations, among other areas of jurisdiction, in New York State. The Human Rights Law is enforced through investigation and adjudication of complaints filed by individuals as well as NYSDHR-initiated complaints; the creation of studies, programs, and campaigns designed to inform and educate the public on the effects of discrimination and their rights and obligations under the law; and the development of human rights policies and proposed legislation for the State. Full and fair access to employment has been declared a civil right in New York State. NYSDHR was created “to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; to eliminate and prevent discrimination in employment” N.Y. Exec. L. § 290.3.

NYSDOL is an executive agency responsible for protecting New York workers and administering the numerous statutory provisions codified within New York’s Labor Law. The Department of Labor vigorously enforces the Labor Law to give businesses that obey the law an even break, and to ensure that all workers are afforded the full protections of the law.

New York State has a longstanding public policy of anti-discrimination in employment. NYSDHR will enforce the Human Rights Law against any employer not exempt under the Human Rights Law that denies employment or otherwise discriminates against an individual because of their membership in a protected class. It is unlawful “to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment” because of that person’s age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status. N.Y. Exec. L. § 296.1. The Human Rights Law has covered sexual orientation as a protected class since 2002. N.Y. Exec. L. §§ 292.27, 296, *et seq.* The Human Rights Law has been interpreted by NYSDHR and New York Courts as affording protection against discrimination based on gender identity or expression as a form of sex discrimination. In January 2019, gender identity or expression was added as an explicit protected class under the Human Rights Law. N.Y. Exec. L. §§ 292.35, 296, *et seq.*

NYSDHR and NYSDOL oppose the Proposed Rule which would expand the religious exemption in Executive Order 11246, which includes anti-discrimination requirements for

federal contractors. The current religious exemption permits religious organizations to exercise preference in hiring for individuals of a particular religion. The Proposed Rule adds definitions for the terms “*exercise of religion*,” “*particular religion*,” “*religion*,” “*religious corporation, association, educational institution, or society*,” and “*sincere*.” Each of the proposed definitions is extremely broad and would result in extending the Executive Order’s religious exemption for non-discrimination in employment to businesses that are not operated or supervised by religious institutions and would permit such businesses to condition employment on adherence to religious tenets. The potential for abuse is great. Individuals will be excluded from valuable employment opportunities because of business owners’ personal beliefs about the requirements of their religion. Moreover, there will be confusion among employers in New York State, as the qualifications for what entities are entitled to a religious exemption will be drastically different under the Proposed Rule as compared to state law.

In New York State, there are protections in place for religious organizations to exercise preference in hiring based on religion. The Human Rights Law provides an exemption which permits religious institutions to exercise a preference in hiring for persons of the same faith so that those institutions can effectuate their religious mission. The exemption states: “[n]othing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment . . . or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained N.Y. Exec. L. § 296.11. This exemption provides protection to religious institutions acting in their religious capacities while also protecting employees’ rights to be free from discrimination.

In New York, under no circumstances would any employer that is not a religious institution or which is not an educational or charitable organization and operated, supervised or controlled by a religious organization be permitted to discriminate based on any protected class covered under the Human Rights Law, including sexual orientation and gender identity or expression. The protections of the Human Rights Law strike the right balance between religious practice and anti-discrimination. New York State opposes the proposed Rule because it will undermine employees’ rights to their own religious beliefs and have a significant negative impact on vulnerable populations by permitting discrimination on the bases of sex, sexual orientation, and gender identity or expression, among others.

The New York Court of Appeals has held that the rights of free exercise under the federal and New York State constitutions do not relieve an employer of the obligation to comply with a valid and neutral law of general applicability. *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006). In *Serio*, plaintiffs challenged legislation requiring health insurance policies that provide coverage for prescription drugs to include coverage for contraception. The employers claimed such provisions violated their rights under the religion clause of the federal constitution. The Court dismissed that argument, holding that “the burden on plaintiffs’ religious exercise is the incidental result of a neutral law of general applicability. Religious beliefs were not the ‘target’ of the law, and it was not that law’s ‘object’ to interfere with plaintiffs’ or

anyone's exercise of religion." The Court also held the law did not violate the Free Exercise Clause of the New York Constitution to the extent that its exemption from contraceptive coverage for "religious employers" does not extend to faith-based social service organizations. "Where the State has not set out to burden religious exercise, but seeks only to advance, in a neutral way, a legitimate object of legislation, the New York Free Exercise Clause does not require the State to demonstrate a 'compelling' interest in response to every claim by a religious believer to an exemption from the law." *Id.* at 526.

The Human Rights Law has been recognized as a law of general applicability under which religious justification for sexual orientation discrimination by businesses has been rejected. For example, In *Gifford v. McCarthy*, 137 A.D.3d 30 (3d Dept 2016), operators of a wedding venue refused to host a same-sex wedding. The operators petitioned for judicial review of a determination by NYSDHR, which found the operators guilty of unlawful discriminatory practice based on sexual orientation in violation of the Human Rights Law. Like the law requiring contraception coverage in *Serio*, the Court held religious beliefs were not the "target" of the Human Rights Law, and it was not the Human Rights Law's "object" to interfere with petitioner's or anyone's exercise of religion. *Id.* at 39. Rather, the Human Rights Law generally forbids all discrimination against a protected class in places of employment and public accommodations regardless of the motivation.

While we recognize that the burden placed on the Giffords' right to freely exercise their religion is not inconsequential, it cannot be overlooked that SDHR's determination does not require them to participate in the marriage of a same-sex couple. Indeed, the Giffords are free to adhere to and profess their religious beliefs that same-sex couples should not marry, but they must permit same-sex couples to marry on the premises if they choose to allow opposite-sex couples to do so. To be weighed against the Giffords' interests in adhering to the tenets of their faith is New York's long-recognized, substantial interest in eradicating discrimination.

Gifford, 137 A.D.3d at 40 (internal citations omitted).

The Proposed Rule alters the balance in favor of religious exemptions at the expense of important anti-discrimination protections. The Proposed Rule will extend a religious exemption to a broad swath of employers who are federal contractors, regardless of whether they are a religious institution or an educational or charitable organization that is operated, supervised or controlled by a religious organization. The Proposed Rule will cause confusion among employers in New York State. Although a business might be able to discriminate against applicants based on sexual orientation or gender identity under the Proposed Rule, under no circumstances will that business be able to engage in such discriminatory conduct within New York State unless they are a religious institution or an educational or charitable organization that is operated, supervised or controlled by a religious organization. NYSDHR will continue to enforce the Human Rights Law against any employer not exempt under the Human Rights Law

that denies employment or otherwise discriminates against an individual because of their membership in a protected class.

Moreover, in accordance with the requirement in 2 CFR 200.317, which provides that states receiving federal grants must apply the same policies and practices to both federal grant funded and state funded procurements, New York will continue to hold all grant subrecipients procured under federally funded programs to the same requirements and standards as all other New York State contractors. As such, New York State will not permit the Proposed Rule to result in increased discrimination against workers because of their sex, sexual orientation, and/or gender identity or expression. Instead, the primary impact of the rule will be to create conflicting standards within New York State for contractors receiving both federal and state funds. This will create additional administrative burdens and confusion for contractors as well as state agencies such as NYSDOL.