


AN A.S. PRATT PUBLICATION

SEPTEMBER 2016

VOL. 2 • NO. 9



PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



EDITOR'S NOTE: COMPLIANCE

Victoria Prussen Spears

**NEW FOIA IMPROVEMENT ACT
INCREASES NECESSITY FOR
CONTRACTORS TO CREATE
ROBUST FOIA EXEMPTION RECORD**

Jon W. Burd, Tracye Winfrey Howard,
and George E. Petel

**NISPOM AMENDMENTS AFFECT ALL
CLEARED CONTRACTORS**

Chris Griner, Christopher R. Brewster,
Shannon Reaves, and Erin Bruce Iacobucci

**CONTROVERSIAL UPDATED SEX
DISCRIMINATION GUIDELINES
FOR FEDERAL CONTRACTORS**

Kristin Jones Pierre, Sarah Benjes,
and Reagan W. Oden

**A NEW CYBERSECURITY REGIME
AND A NEW REGULATION TO
MANDATE SECURE
INFORMATION SYSTEMS FOR
GOVERNMENT CONTRACTORS**

C. Joël Van Over and
Travis L. Mullaney

**SUPREME COURT FINDS THE
DEPARTMENT OF VETERANS
AFFAIRS VIOLATED PROCUREMENT
LAW—ARE THERE BROADER
IMPLICATIONS FOR
GOVERNMENT CONTRACTORS?**

Lawrence M. Prosen and
Gunjan R. Talati

**SUPREME COURT VALIDATES
“IMPLIED CERTIFICATION”
LIABILITY UNDER FALSE CLAIMS
ACT: ESCOBAR DECISION SIGNALS
INCREASED EXPOSURE FOR
GOVERNMENT CONTRACTORS
AND HEALTH CARE PROVIDERS**

C. Joël Van Over,
Alexander B. Ginsberg,
and Danielle Vrabie

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 2

NUMBER 9

SEPTEMBER 2016

Editor's Note: Compliance Victoria Prussen Spears	301
New FOIA Improvement Act Increases Necessity for Contractors to Create Robust FOIA Exemption Record Jon W. Burd, Tracye Winfrey Howard, and George E. Petel	304
NISPOM Amendments Affect All Cleared Contractors Chris Griner, Christopher R. Brewster, Shannon Reaves, and Erin Bruce Iacobucci	307
Controversial Updated Sex Discrimination Guidelines for Federal Contractors Kristin Jones Pierre, Sarah Benjes, and Reagan W. Oden	311
A New Cybersecurity Regime and a New Regulation to Mandate Secure Information Systems for Government Contractors C. Joël Van Over and Travis L. Mullaney	314
Supreme Court Finds The Department of Veterans Affairs Violated Procurement Law—Are There Broader Implications for Government Contractors? Lawrence M. Prosen and Gunjan R. Talati	326
Supreme Court Validates “Implied Certification” Liability Under False Claims Act: <i>Escobar</i> Decision Signals Increased Exposure for Government Contractors and Health Care Providers C. Joël Van Over, Alexander B. Ginsberg, and Danielle Vrabie	333

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169

Email: heidi.a.litman@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844

Outside the United States and Canada, please call (518) 487-3000

Fax Number (518) 487-3584

Customer Service Web site <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940

Outside the United States and Canada, please call (518) 487-3000

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. A.S. Pratt is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2016 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

An A.S. Pratt® Publication

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

DARWIN A. HINDMAN III

Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Jenner & Block

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter LLP

WALTER A.I. WILSON

Senior Partner, Polsinelli PC

PRATT'S GOVERNMENT CONTRACTING LAW REPORT is published twelve times a year by Matthew Bender & Company, Inc. Copyright 2016 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Government Contracting Law Report*, please access www.copyright.com or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258. Material for publication is welcomed—articles, decisions, or other items of interest to government contractors, attorneys and law firms, in-house counsel, government lawyers, and senior business executives. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 630 Central Avenue, New Providence, NJ 07974.

Controversial Updated Sex Discrimination Guidelines for Federal Contractors

*By Kristin Jones Pierre, Sarah Benjes, and Reagan W. Oden**

The Office of Federal Contract Compliance Programs recently updated the existing sex discrimination guidelines for the first time since their implementation in the 1970s. The authors of this article explain the changes.

Effective August 15, 2016, the final rule¹ of the Office of Federal Contract Compliance Programs (“OFCCP”) substantively updated the existing sex discrimination guidelines for the first time since their implementation in the 1970s. These regulations apply to federal contractors and subcontractors under Executive Order 11246, which established nondiscrimination and affirmative action requirements, including prohibiting sex discrimination in employment. While the revised rule purports to clarify contractors’ obligations and harmonize them with historic changes to federal antidiscrimination statutes and case law, many of the regulatory changes extend beyond current law to address what the OFCCP refers to as the “realities of today’s workforce and workplaces.” Although the OFCCP contends that contractors are already subject to many of these provisions, contractors are advised to consider the expanded compliance requirements and recommended (but not required) best practices. Some important changes include the following:

TRANSGENDER PROTECTIONS

Last year, Executive Order 13672 added sexual orientation and gender identity as prohibited bases of discrimination to Executive Order 11246, and the guidelines have been revised to define sex discrimination in employment (both disparate treatment and disparate impact) and sexual harassment to incorporate gender identity and transgender status. New regulations include the following:

- ***Bathrooms, changing rooms, and showers:*** Echoing the Obama

* Kristin Jones Pierre is counsel at Faegre Baker Daniels LLP advising management on a range of complex workplace matters, including affirmative action programming and compliance. Sarah Benjes is an associate at the firm focusing her practice in employment litigation, counseling, and compliance. Reagan W. Oden is an associate at the firm focusing her practice in labor and employment law, compliance issues, and employment litigation. The authors may be reached at kristin.pierre@faegrebd.com, sarah.benjes@faegrebd.com, and reagan.oden@faegrebd.com, respectively.

¹ <https://www.dol.gov/ofccp/sexdiscrimination.html>.

administration's guidance directing public schools to allow transgender students to use bathrooms matching their gender identity, contractors are prohibited from denying transgender employees access to the restrooms designated for use by the gender with which they identify—as well as changing rooms, showers or similar facilities.

- **Health care coverage:** Explicit exclusion of health coverage for all care related to gender dysphoria or gender transition is facially discriminatory and unlawful.

PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS

The rule newly incorporates the protections of the Pregnancy Discrimination Act and prohibits contractors from treating employees differently on the basis of pregnancy, childbirth or related medical conditions (including childbearing capacity).

- **Accommodations:** Contractors are required to provide comparable accommodations to pregnant employees if such accommodations are available to other employees with a similar inability to perform their job duties (such as disabilities or occupational injuries), including light duty assignments, flexible work arrangements, and position transfers.
- **Medical or family leave:**
 - To the extent that a contractor provides job-guaranteed medical leave (including paid sick leave) for other medical conditions, such leave must be provided on the same terms for employees' pregnancy, childbirth or related medical conditions.
 - To the extent that a contractor provides job-guaranteed family leave, such leave must be provided for male employees on the same terms that family leave is provided to female employees.
 - Where insufficient or no medical or family leave is provided, contractors must ensure that such policies or practices do not have an adverse impact on the basis of sex unless they are shown to be job-related and consistent with business necessity.

COMPENSATION, BENEFITS, AND TRAINING

Contractors may not pay different compensation to similarly situated employees on the basis of sex, including denying opportunities for overtime work, training or higher-paying positions.

- **Comparable factors:** Under the new regulations, employees may be considered “similarly situated” where they are “comparable” on some factors—even if they are not similar on others—including tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors.
- **Equal benefits:** Discrimination on the basis of sex with respect to fringe benefits, such as medical, hospital, accident, life insurance, retirement benefits, profit-sharing, bonuses, leave and other employment privileges is also prohibited. The increased cost of providing a fringe benefit to members of one sex is not a defense to a contractor’s failure to provide benefits equally to members of both sexes.
- **Informal recruiting or promotions:** Sex-based discriminatory practices also include relying on certain recruitment or promotion methods (such as “word-of-mouth” recruitment or “tap-on-the-shoulder” promotion) that have an adverse impact on women where the contractor cannot establish that they are job-related and consistent with business necessity.

The rule does not require any new Equal Employment Opportunity statements or additional data analysis or collection on the part of contractors. The OFCCP also includes an appendix listing optional best practices for consideration (e.g., avoiding the use of gender-specific job titles).