

BEFORE THE
OFFICE OF PERSONNEL MANAGEMENT

NONDISCRIMINATION PROVISIONS

PETITION FOR RECONSIDERATION

SUBMITTED BY EMILY T. PRINCE, ESQ.

Pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq., Petitioner submits this petition for reconsideration of the Office of Personnel Management's (OPM) final rule, dated July 29, 2014, which purports to update OPM nondiscrimination regulations in light of new statutory provisions and decisions of the Equal Employment Opportunity Commission (EEOC). Because the rule fails to account for additional nondiscrimination statutes and does not address ongoing illegal activity in the administration of the Federal Employee Health Benefit Program (FEHB or FEHBP), it is not in the public interest absent additional revisions.

As a Federal agency, OPM is obliged by Executive Order 11478, issued August 8, 1969, as amended, to adhere to the interpretations of the EEOC in matters of employment nondiscrimination so that the Federal government will speak with one voice on such issues.¹ As the authority on Federal personnel issues, OPM must work all the more to ensure that, as "America's model employer for the 21st century,"² the Federal workforce is protected in accordance with EEOC precedent. Unfortunately, OPM has failed in this role.

On April 20, 2012, the EEOC issued in decision in *Macy v. Holder*, Appeal No. 0120120821. The decision held that, for three independent reasons, discrimination on the basis of gender identity is inherently discrimination on the basis of sex, including an explicit holding,

¹ Section 3 of Executive Order 11478, as amended.

² <http://www.opm.gov/about/>.

echoing the District Court for the District of Columbia³, that discrimination against the act of transition (i.e. socially, medically, or otherwise affirming oneself as a sex or gender other than that assigned at birth) is actionable under Title VII of the Civil Rights Act.⁴

Given that the EEOC speaks for the Federal government on such matters, what followed should have been a review of how existing policies might violate this interpretation. Sadly, what followed was mostly silence. In the case of OPM, the agency is to be commended for its 2011 issuance of guidance to Federal agencies to avoid common issues that arise when transgender employees first arrive at an agency or begin to transition at work. However, this was the first of many necessary actions, not a final step. After the decision in *Macy*, OPM remained silent on the issue of FEHBP health insurance plans, each of which⁵ prohibits claims for “sex transformation” in identical or similar phrasing. On June 13, 2014, OPM broke its silence by affirming the ability of carriers to openly discriminate in this fashion in a carrier letter.⁶ While acknowledging the medical consensus that transition-related care is medically necessary, OPM’s carrier letter nonetheless explicitly permits insurers to categorically exclude such treatment simply because it relates to transition. Contemporaneously, OPM drafted the subject regulation, purporting to bring the agency into compliance with changes to nondiscrimination laws. The failure to address FEHBP is conspicuous.

The subject regulation was to “update the nondiscrimination provisions of certain regulations to reflect current law”⁷ and yet omitted one of the Administration’s largest legislative

³ *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

⁴ This decision was further supported by the President in his issuance of Executive Order 13672, issued July 21, 2014, which specifically includes gender identity as a prohibited basis for discrimination. OPM

⁵ Petitioner is aware of at least one instance where a California statewide plan removed its exclusion of transition-related care; however, it is Petitioner’s understanding that this was an isolated instance of inclusion driven by a need to comply with California state law, rather than a policy change by OPM.

⁶ FEHB Program Carrier Letter No. 2014-17 (June 13, 2014), *available at* <http://www.opm.gov/healthcare-insurance/healthcare/carriers/2014/2014-17.pdf>.

⁷ 79 FR 43919 (July 29, 2014).

accomplishments. While nondiscrimination may not be the first thing one associates with the Affordable Care Act, it nonetheless provides protections against discrimination in any health program “administered by an Executive Agency.”⁸ With over 2.6 million civilian employees of the Federal government,⁹ OPM is responsible for managing an enormous health care program. Even if OPM was somehow not aware of this statute, the issue was raised by Petitioner during Executive Branch review of the subject regulation¹⁰ and should have been addressed during interagency review of the rule prior to publication. However, OPM failed to so much as acknowledge 42 U.S.C. § 18116 in both the notice of proposed rulemaking and the final rule. FEHBP was not mentioned, even as OPM updated other portions of its regulations implementing other nondiscrimination statutes.

Had OPM not neglected a Federal statute in effect for over four years, the agency would have been forced to confront its own discriminatory policies. The final rule as written correctly notes that discrimination on the basis of gender identity is discrimination on the basis of sex and therefore prohibited. However, OPM openly discriminates on the basis of gender identity, as demonstrated by FEHB Program Carrier Letter 2014-17, discussed above. Where 42 U.S.C. § 18116 prohibits discrimination in health programs, OPM openly solicited for discriminatory plans in the FEHB program it administers. For plan year 2014, few plans covered transition-related costs, which OPM claims was the result of a now-lifted ban.¹¹ For plan year 2015, OPM expressly permits health insurance carriers to maintain exclusions for transition-related care with

⁸ 42 U.S.C. § 18116.

⁹ *See, e.g.*, “Total Government Employment Since 1962,” available at <http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/>.

¹⁰ Petitioner met with the Office of Information and Regulatory Affairs on July 15, 2014 to discuss the subject regulation. A record of the meeting is available at <http://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=3206-AM77&meetingId=326&acronym=3206-OPM>.

¹¹ OPM has failed to identify when the ban was established or in what document. OPM has failed to timely respond to a FOIA request on the matter, FOIA Request No. 2014-03980, filed June 23, 2014.

no additional paperwork burden. Such burden was reserved for carriers that will be complying with 42 U.S.C. § 18116 and not discriminating on the basis of gender identity; OPM requires such carriers to provide additional explanations of exactly how they will be removing their prohibited exclusions.

The subject regulation, as written, was a missed opportunity for OPM to honestly and openly address its policy of discrimination in its implementation of the FEHB program. Instead, OPM chose to continue its discrimination in an explicit fashion, ignore the issue in the subject regulation, and nonetheless claim to have updated regulations to be in conformity with new statutory obligations. Because the subject regulation fails to remedy noncompliance with Federal nondiscrimination statutes it purported to address, the regulation is not in the public interest and Petitioner asks it be revised and reissued with an acknowledgement that discrimination against transition-related care in FEHBP insurance plans is prohibited by statute and will not be tolerated by OPM. Should OPM determine revisions are unworkable or impracticable, Petitioner asks in the alternative that OPM immediately begin a new rulemaking process to require the coverage of transition-related care in all FEHBP insurance plans no later than insurance plan year 2016.

Sincerely,

Emily T. Prince, Esq.
August 25, 2014