February 18, 2020

***VIA* Electronic Submission to WWW.Regulations.GOV**

Mark Zelden
Director, Center for Faith & Opportunity Initiatives
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Response to Proposed Rule
85 Fed.Reg. 2929-2938, RIN 1291-AA41
Docket No. DOL-2019-0006

Director Zeldon:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Department of Labor's (DOL or Department) Proposed Rule, published in the Federal Register on January 17, 2020, 85 Fed.Reg. 2929-2938, Docket No. DOL-2019-0006.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws and comments on relevant Notices of Proposed Rulemaking (NPRMs). NELA also engages in legislative advocacy on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees. Thus, NELA has an interest in the proposed modifications to 29 C.F.R. Part 2, Subpart B, Section 2.37 (§ 2.37). As employment lawyers, much of NELA members' practice involves Title VII.

NELA opposes this Proposed Rule on several grounds. First, current DOL regulations accurately describe faith-based organizations' religious exemption under Title VII. *See* 29 C.F.R. Part 2, Subpart B § 2.37. The DOL contends its proposed modification is necessary to align the Rule with case law, but this is unconvincing, *given that the proposed rule references circuit court cases from years before the current Rule's first publication in 2016*. The Rule currently in effect continues to accurately describe faith-based organizations' employment obligations under Title VII. The

Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer* was issued following the 2016 Rule, but still fails to justify the Proposed Rule because it did not address employers who accept government funding and are therefore subject to Title VII. *See* 137 S. Ct. 2012, 2024 n.3 (2017) ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."). Thus, the Proposed Rule is unnecessary and cannot be justified by developing case law, as DOL suggests. There is no justification to undo the vital religious freedom protections that were implemented just three years ago and that were the result of consensus among leaders on different sides of the issue.

Second, the Proposed Rule encourages religious organizations *to discriminate* under the guise of religion, starkly contradicting settled law. "The primary purpose of Title VII was to assure equality of employment opportunities[.]" *Int'l Bhd. of Teamsters v. United States*¸ 431 U.S. 324, 338 (1977) (internal quotation and citation omitted). To ensure Title VII effectively protects employees from discrimination, its religious exemption is narrow. *See id.* at 381 ("Under long-standing principles of statutory construction, [Title VII] should 'be given a liberal interpretation . . . [and] exemptions from its broad sweep should be narrowed and limited to effect the remedy intended.") (quoting *Piedmont & Northern R. Co. v. ICC*, 286 U.S. 299, 311-312 (1932)). The Title VII exemption "does not confer upon religious organizations a license to make those [employment] decisions" on the basis of race, national origin, or sex. *Rayburn*, 772 F.2d at 116, cert. denied, 478 U.S. 1020 (1986). The Proposed Rule may result in employees facing the negative consequences of sex discrimination, including discrimination based on being LGBTQ, seeking reproductive health care, being pregnant, or not conforming to the employer's particular views of how men and women should behave—protections long provided by Title VII.

The Proposed Rule is unnecessary to maintain the religious exemption, but it undermines the core of Title VII's purpose, eroding civil rights protections for individuals already distinctly vulnerable to discrimination. In particular, many LGBTQ people regularly confront workplace discrimination. In fact, the workplace is one arena where LGBTQ people perceive the highest levels of discrimination.[1] Forty-six percent of LGBT workers feel unable to express their sexual orientation or gender identity at work, largely because they fear being stereotyped or losing their professional relationships, which would irreparably damage their careers.[2] A majority of LGBTQ workers have overheard derogatory remarks about LGBTQ people in their workplaces.[3]

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[1] Nat'l Pub. Radio et al., *Discrimination in America: Experiences and Views of LGBTQ Americans* 29 (Nov. 2017), https://www.npr.org/documents/2017/nov.npr-discrimination-lgbtq-final.pdf.

[2] *See* Human Rights Campaign Found., *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide* 10-11 (Jun. 2018), https://assets2.hrc.org/files/assets/resources/AWorkplaceDivided-2018/pdf.

[3] *Id.* at 16; *see also* Ctr. for Am. Progress & Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being LGBT in America* 19 (Nov. 2014). http://www.lgbtmap.org/file/paying-an-unfair-price-full-report.pdf.

The Proposed Rule further encumbers LGBTQ persons' ability to seek and maintain employment without oppression or ridicule. The Supreme Court recently recognized that our laws must protect the rights of lesbian, gay, and bisexual people because "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth" and "[t]he exercise of their freedom on terms equal to others must be given great weight and respect by the courts." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). The Proposed Rule is contrary to the protections afforded by Title VII.

In contrast to settled law, the Proposed Rule elevates the religious exemption, which Congress and the Supreme Court have long-held must remain narrow. Awarding funds to organizations that discriminate against qualified applicants for taxpayer-funded jobs because they fail a religious litmus test perpetuates discrimination against protected classes. Moreover, the justification for the Title VII exemption, to maintain religious organizations' autonomy and independence from the government, fails when the organizations solicit government funds.

The DOL has no reason to unravel essential religious freedom protections implemented in 2016, which resulted from a consensus among leaders from different sides of the issue. We are particularly alarmed that the Department seeks to overturn consensus agreements reached just a few years ago, instead proposing highly polarizing new language that favors one ideology and undercuts the realization of the original purpose of Title VII.

NELA urges you not to finalize this rule. We thank the DOL for its consideration. If you have questions or wish to discuss these matters, please contact Laura Flegel at lflegel@nelahq.org or (202) 898-2880.

Sincerely yours,

Laura M. Flegel
National Employment Lawyers Association
Director of Legislative & Public Policy