

## Government Contracts Update

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### Equal Pay: Revisiting Federal Contractor Compensation Practices and Policies

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On April 8, 2014, President Barack Obama signed an **Executive Order** and a **Presidential Memorandum** intended to engender pay equality for women and minorities. The Order amends Executive Order 11246 and prohibits federal contractors that generally have contracts exceeding \$10,000 from retaliating against employees who choose to discuss their compensation. The Memorandum directs the Department of Labor (DOL) to propose a rule requiring federal contractors and subcontractors to submit summary compensation data to the DOL, including data categorized by sex and race. The data will be used to develop tools to enhance both voluntary compliance with and enforcement of federal Equal Pay and Civil Rights laws. The DOL must issue the rule within 120 days.

These reforms continue the series of compensation reform efforts from the Obama Administration, which has consistently prioritized pay equality reform. Facing political obstacles from Congress, the President has repeatedly looked to reform employment laws by Executive Order through the federal contracting industry. The anti-retaliation Order is one example of this tactic. The Order is a corollary to the Obama Administration's proposed **Paycheck Fairness Act**, which would prohibit retaliation against employees who discuss compensation in both the public and private sphere. The Order is similar to the protection that the **National Labor Relations Act** (NLRA) already provides, but expands that protection to management personnel and certain industries that the NLRA does not cover.

Contractors will not understand the full impact of either the Order or Memorandum until the DOL implements its regulations. However, because the Order amends Executive Order 11246, like Executive Order 11246, it will apply to all contracts that exceed \$10,000, even contracts for commercial items. The Memorandum requests the DOL "[t]o the extent feasible...avoid new record-keeping requirements and rely on existing reporting frameworks."

Regardless of how the DOL drafts the proposed rule, the rulemaking process increases the urgency and need for contractors to have fair and defensible compensation policies and procedures. Accordingly, contractors should review and be prepared to explain their wage-related policies and procedures for establishing compensation, and should consider taking the following interim steps:

- Review compensation practices to ensure that these practices are based on business logic and free of discrimination based on protected characteristics, such as race and sex.
- Articulate clear standards for establishing compensation for individuals.
- Review internal pay data to determine whether pay discrepancies exist by protected characteristics, such as gender or race. If there is a legitimate rationale for pay discrepancies that may give rise to the appearance of discrimination, document it. If there is no legitimate rationale, explore ways to eliminate unsupportable discrepancies.
- Consider how jobs are grouped or graded, to ensure thoughtful and logical grouping.
- Revise written policies that forbid employee discussions regarding compensation and consider drafting policy language explicitly prohibiting retaliation against employees for engaging in such discussions about wages or raising wage-related concerns.
- Train management personnel not to prohibit employee wage discussions or retaliate against employees for the same.
- For future teaming agreements or subcontracts, consider requiring subcontractors to submit a certification that they comply with the anti-retaliation Executive Order.

If you have any questions about this alert, please contact one of the authors.