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The OFCCP's War Path: Federal Contractors Take Note

WHAT YOU NEED TO KNOW

- Subject to very limited exceptions, employees of federal contractors must be permitted to discuss their compensation without retaliation or fear of intimidation.
- Federal contractors will be required to provide paid sick leave to employees beginning on January 1, 2017, in accordance with President Obama's new executive order.
- In light of the Office of Federal Contract Compliance Programs' (OFCCP) expanded focus on compensation during the audit process, federal contractors may be exposed to additional risk if annual pay equity analyses are not being performed to identify and eradicate pay inequities affecting females and minorities.
- Federal contractors may wish to carefully review any compensation data prior to providing it to the OFCCP during the audit process and ensure that company officials discussing that data are adequately trained to speak on behalf of the company during an audit, as their statements regarding compensation and other related human resources practices can be binding.

OFCCP ANNOUNCES FINAL RULE TO PROMOTE PAY TRANSPARENCY

On September 10, 2015, the U.S. Department of Labor published a [final rule](#) implementing Executive Order 13665, issued by President Obama in 2014 to promote pay transparency and openness. This rule applies to contractors that enter into new, or modify existing, federal contracts after January 11, 2016, which are valued in excess of \$10,000. The final rule, among other things, requires employers to update their nondiscrimination policies and include a provision addressing pay transparency for both employees and applicants. While this rule does not provide employees a private right of action against employers, it does allow the OFCCP to investigate pay transparency complaints and bring enforcement actions. It also amends Executive Order 11246 by requiring that the equal opportunity clause in covered federal contracts and subcontracts include a provision specifying that federal contractors and subcontractors must refrain from discharging, or otherwise discriminating against, employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants.

The final rule further amends Executive Order 11246 by requiring that federal contractors incorporate a prescribed nondiscrimination provision into their existing employee manuals or handbooks and disseminate that provision to employees and to job applicants by electronic posting or by posting a copy of the provision in a conspicuous place available to employees and applicants. Furthermore, the final

rule redefines “compensation” as “salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.”

Under the final rule, employers have two possible defenses to pay discrimination claims: (1) a “general defense” and (2) an “essential job functions” defense. The general defense provides that an employer can establish a defense by showing that the adverse action was based on a violation of a “consistently and uniformly applied company policy” and that the policy does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants. The essential job functions defense permits an employer to discipline an employee who discloses “compensation information” if the employee’s job involves access to compensation information, provided that the disclosure was not in response to a formal complaint or charge.

Although the proposed rule sought comments on whether to require mandatory training, the final rule does not require mandatory training for managers regarding the new nondiscrimination provisions. Ideally, however, employers may want to train managers regarding the final rule, as managers could easily make missteps resulting in liability for the contractor. The final rule does not require contractors to make additional disclosures about employee compensation. As federal contractors review their compliance efforts, a pay equity study may be the ideal first step in a review of compensation practices to identify and address pay inequities before the OFCCP arrives.

PAID SICK LEAVE EXECUTIVE ORDER ISSUED BY PRESIDENT OBAMA

On September 8, 2015, President Obama issued a much anticipated new executive order requiring federal contractors to provide up to seven days of paid sick leave to employees per year, effective January 1, 2017. Pursuant to this executive order, employees will be able to accrue not less than one hour of paid sick leave for every 30 hours worked. They will be eligible for paid sick leave for their own medical conditions, preventative care, care of family members, domestic violence, sexual assault, and stalking. Furthermore, the use of paid sick leave cannot be made contingent on the requesting employee finding a replacement to cover any work time to be missed. The Department of Labor must issue implementing regulations on this executive order before September 30, 2016.

OFCCP PUSHES CONTRACTORS FURTHER TO COMPENSATION DATA COLLECTION

As demonstrated by the recently issued final rule on pay transparency, the OFCCP has put a great deal of emphasis on pay equity issues over the past couple of years. As a prime example of this, [Directive 307](#), initially put in place in 2013, continues to make compliance reviews a much more detailed audit process for federal contractors. Under Directive 307, OFCCP compliance officers have significant latitude to assess federal contractors’ compensation systems and practices. In 2015, it has been particularly noticeable that the OFCCP has delivered on its promise to push federal contractors to disclose more compensation information during the audit process. Any federal contractors undergoing compliance reviews may want to be prepared to respond to the [revised scheduling letter](#) and [itemized listing](#) released in 2014, which require contractors to report detailed compensation data, including salary, wages, bonuses, and other types of remuneration during a compliance review. As noted above, as federal contractors review their compliance efforts, a pay equity study may be the ideal first step in reviewing compensation practices to identify and address pay inequities before the OFCCP arrives.

For more information or if you have questions about how the issues raised in this alert affect your policies and practices, please contact one of the following members of our [Labor, Employment, Benefits + Immigration Group](#):

[Stephen W. Aronson](#) | [Bruce B. Barth](#) | [Alice E. DeTora](#) | [Natale V. DiNatale](#)

[Peter A. Dagostine](#) | [Ian T. Clarke-Fisher](#) | [Britt-Marie K. Cole-Johnson](#) | [Sandra Marin](#)

[Susan N. Masters](#) | [Matthew T. Miklave](#) | [Nicole H. Najam](#)

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