

August 2014

An Active OFCCP Plans Even More Changes for Federal Contractors

Equal Pay Reporting and Additional Antidiscrimination Provisions

OFCCP PROPOSES RULE REQUIRING FEDERAL CONTRACTORS TO SUBMIT EQUAL PAY REPORT

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a news release on August 6, 2014 regarding a [Notice of Proposed Rulemaking](#) that requires covered federal contractors and subcontractors to submit an annual Equal Pay Report summarizing employee compensation in the first quarter of each year. If finalized, this [proposed rule](#) would create an additional reporting requirement for covered entities (those companies with more than 100 employees who hold federal contracts or subcontracts worth \$50,000 or more for at least 30 days) already subject to numerous reporting and record keeping obligations.

Using the Equal Pay Report, the OFCCP proposes to collect the following information for each group of workers within each of the EEO-1 job categories:

- total number of workers by race, ethnicity, and sex
- total W-2 earnings (defined as the total individual W-2 earnings for all workers in the job category by race, ethnicity, and sex)
- total hours worked (defined as the total number of hours worked for all workers in the job category by race, ethnicity, and sex)

This proposed rule has far-reaching consequences and highlights the OFCCP's focus on enforcement regarding systematic pay discrimination. Whereas the EEO-1 Report does not collect summary or individual employee compensation (instead using a "snapshot" approach that requires data from one pay period between the months of July and September of the survey year), the proposed Equal Pay Report covers a full calendar year from January 1 through December 31, resulting in significantly more information being made available to the OFCCP prior to the commencement of any compliance review. Moreover, the OFCCP has proposed that the Equal Pay Report be used for purposes of selecting contractors for compliance evaluations, with a focus primarily on a strategy that ranks contractors according to the objective data and then prioritizes compliance evaluations of those contractors and subcontractors who have larger race or gender pay gaps than typically reported in the industry. Those contractors and subcontractors who report patterns with the greatest deviation from the applicable industry standard would have the highest likelihood of selection for further investigation under the proposed rule. In accordance with its usual compliance evaluation procedures, the OFCCP would then examine the contractor's compensation data and practices in detail to make a determination about the contractor's compliance status.

The proposed rule fulfills the directive issued by President Obama's April 8, 2014, Presidential Memorandum, [Advancing Pay Equality Through Compensation Data Collection](#), which requires the secretary of labor to develop a rule collecting compensation data by sex and race from federal

contractors and subcontractors, which, in turn, will enable the OFCCP to focus its enforcement efforts on federal contractors with summary data that suggests potential equal pay violations. Under the proposed rule, the OFCCP would also release reports on the race and gender pay gap by industry, based on the aggregate summary data, to enable employers to review their own data using the same metrics as the OFCCP. The potential for the Equal Pay Report and/or any related industry summary data to be used and/or referenced in employment discrimination matters (initiated by individuals, proposed class actions, and/or government agencies) exists, although the proposed rule is not transparent on this issue.

The proposed rule was published in the Federal Register on Friday, August 8, 2014. Public comments on the proposal may be submitted until November 6, 2014. Additional information regarding the proposed rule, including information from the OFCCP on how to provide comments, can be found [here](#).

PRESIDENT'S EXECUTIVE ORDER PROHIBITS FEDERAL CONTRACTORS FROM DISCRIMINATING ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY, AND OFCCP ISSUES RELATED DIRECTIVE

On July 21, 2014, President Obama signed an [Executive Order](#) prohibiting federal employers and contractors from discriminating against applicants and employees on the basis of their sexual orientation or gender identity. The July 21 Order amends Executive Order 11246, which prohibits federal government contractors and subcontractors from discriminating against an employee or applicant for employment because of that person's race, color, religion, sex, or national origin, by adding sexual orientation and gender identity to the list of protected classes. The order does not apply to private employers who do not hold a federal government contract or subcontract, although those employers may nevertheless be covered by state or local laws that prohibit discrimination on these grounds.

The President's Executive Order requires the Department of Labor to prepare regulations to implement its requirements within 90 days. In anticipation of these new requirements taking effect, federal contractors and subcontractors may wish to review their policies and affirmative action plans as well as any related employment communications or personnel documents, especially those concerning equal employment opportunity, to ensure they are in line with the President's July 21 Executive Order.

Additionally, effective August 19, 2014, the OFCCP has issued [Directive 2014-02](#), Gender Identity and Sex Discrimination. Directive 2014-02 clarifies that existing agency guidance on discrimination on the basis of sex under Executive Order 11246, as amended, includes discrimination based on gender identity and transgender status. The OFCCP continues to seek to remedy any findings of sex discrimination against employees based on their gender identity or transgender status that are discovered by OFCCP compliance officers during compliance evaluations.

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 lawyers in the firm's [Labor, Employment, Benefits + Immigration Group](#):

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