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The OFCCP's Pay Secrecy Final Rule for Federal Contractors and Subcontractors is Now Effective

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On January 11, 2016, the final rule issued by the Office of Federal Contract Compliance Programs (OFCCP) amending regulations¹ to implement President Obama's Executive Order 13665, the so-called "Pay Secrecy" or "Pay Transparency" order, took effect. That order, issued in April 2014, amended Executive Order 11246 to bar federal contractors and subcontractors from retaliating or discriminating against an employee or applicant for inquiring about, discussing, or disclosing his or her own compensation, or the compensation of any other employee or applicant. While the regulations apply only to federal contracts or subcontracts in excess of \$10,000 that are entered into or modified on or after January 11, 2016, employers that currently are or may be federal contractors would be well served to become familiar with the regulations' requirements and begin preparing for them now. The Pay Transparency executive order and implementing rule have been touted as part of the Administration's efforts to ensure equal pay for equal work, an objective President Obama again cited during his recent State of the Union Address.

Retaliation Prohibition and Defenses

The final rule protects employees and applicants of federal government contractors and subcontractors who inquire about, discuss or disclose their own pay and benefits, or the pay and benefits of others, from adverse action, so long as the employee did not obtain this information through performance of his or her own essential job functions.²

This requirement is subject to both "general defenses" and an "essential job functions defense." The general defenses provision permits a contractor to pursue any defense to a claimed violation, "as long as the defense is not based on a rule, policy, practice, agreement, or other instrument that prohibits employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants."³ By way of example, as identified by the final rule, it would be a general

1 All amendments are to regulations contained within 41 CFR § 60-1.

2 41 CFR § 60-1.4(a)(3), (b)(3).

3 41 CFR § 60-1.35(a).

defense if the employer can establish that it "disciplined the employee for violation of a consistently and uniformly applied company policy," assuming the policy itself does not prohibit an employee from discussing or disclosing compensation.⁴

In addition, the employer will not be subject to penalties if the disclosure or discussion of compensation information was performed in furtherance of the "essential job functions" of a position. Specifically, if an employee – such as a human resources manager – (a) as part of that employee's essential job functions has access to the compensation information of other employees or applicants and (b) discloses such compensation information to individuals who do not otherwise have access to it, the disclosure is not protected under the final rule.

Nondiscrimination Provision

The final rule requires that contractors and subcontractors distribute the nondiscrimination provision to their employees, both by incorporating it into their existing handbooks or manuals and "by electronic posting or by posting a copy of the provision in conspicuous places available to employees and applicants for employment."⁵ The following is the language that must be disseminated:

PAY TRANSPARENCY POLICY STATEMENT

Contractor will not discharge or in any other manner discriminate against employees or applicants because they have inquired about, discussed, or disclosed their own pay or the pay of another employee or applicant. However, employees who have access to the compensation information of other employees or applicants as a part of their essential job functions cannot disclose the pay of other employees or applicants to individuals who do not otherwise have access to compensation information, unless the disclosure is (a) in response to a formal complaint or charge, (b) in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or (c) consistent with the contractor's legal duty to furnish information.⁶

State Law Considerations

While Executive Order 13665 and the OFCCP's implementing regulations represent the federal government's first foray into the arena of pay transparency or secrecy among private employers, it is important to note that many states already have requirements pertaining to protecting employees and/or applicants who inquire about or discuss compensation that overlap with, but are different in important ways from, the final rule. At least 10 states currently have statutes or regulations pertaining to pay secrecy or transparency. These state law requirements vary, but may be broader than the final rule.

Recommendations

- Employers that are or plan to become a federal contractor or subcontractor, with contracts to be effective or modified on or after January 11, 2016, should:
- Evaluate whether the employer is subject to any state law or regulation that overlaps with the final rule and, if so, determine how best integrate compliance;
- Update existing employee handbooks or manuals to ensure they contain the required pay transparency policy statement;
- Conspicuously post the prescribed language in a place that can be seen by both existing employees and applicants who visit the employer's property; and

⁴ *Id.*

⁵ 41 CFR § 60-1.35(c).

⁶ See http://www.dol.gov/ofccp/pdf/PayTransparencyNotice_JRFQA508c.pdf (accessed Dec. 7, 2015).

- Distribute guidance to managers and employment decision-makers regarding the final rule and their obligation to refrain from retaliating against or punishing an employee or applicant who inquires about or discusses compensation.