

Management Alert



OFCCP Proposes New Equal Pay Report

By Christine Hendrickson, Valerie J. Hoffman, Lawrence Z. Lorber and Annette Tyman

The changes keep piling on for the contracting community! Today the *Federal Register* published the Office of Federal Contract Compliance Programs (“OFCCP”) notice of proposed rulemaking (“NPRM”) that would require most Federal contractors and first-tier subcontractors to submit compensation data to the OFCCP through a web-based filing system on an annual basis. This compensation data tool—dubbed the “Equal Pay Report”—was responsive to the April 8, 2014 Presidential Memorandum signed by President Obama that called for proposed regulations to be published within 120 days. The NPRM calls for a 90-day public comment period.

The impact on federal contractors will be significant. OFCCP has stated that it will use the compensation data to create industry compensation standards which will then be used as benchmarks for both the OFCCP and the contractor community. For instance, the benchmarks will be part of the methodology used to prioritize which contractors will be selected for OFCCP audits. Additionally, OFCCP indicated that the summary industry-based data would be reported to the public “as soon as practicable,” which could have commercial implications. For instance, the OFCCP suggests that the aggregated industry-based data will provide the contractor community with the opportunity to self-assess their own compensation data against the aggregated industry benchmark. There are also significant unaddressed data privacy concerns that will need to be confronted.

What is Required?

Covered federal contractors and subcontractors would be required to file an Equal Pay Report by March 31 of each year that shows:

- The total number of workers within a specific EEO-1 job category by race, ethnicity and sex;
- Total W-2 wages for all workers in the EEO-1 job category by race, ethnicity and sex; and
- Total hours worked by all employees in the EEO-1 job category by race, ethnicity and sex.

Unlike the EEO-1 report, the proposed Equal Pay Report would require employers to include all employees who worked at any time during the full calendar year from January 1 through December 31. While the agency believes the data is “a critical tool for eradicating compensation discrimination,” the proposed methodology will result in distorted data, as reporting W-2 wages which consist of all wages, including commissions and bonuses, may suggest that there are racial or gender-based differences that do not actually exist because they cannot be normalized by using the total hours worked. Moreover, providing non-annualized hours for partial year and full-year employees will also provide skewed results.

In addition to the reporting requirements, bidders for federal contracts with existing federal contracts must certify that they are in compliance with the Equal Pay Report filing requirements. Finally, existing agency sanctions will extend to contractors and subcontractors who fail to file timely and accurate reports.

Which Employers are Covered?

Many, but not all, federal contractors and subcontractors will be required to file the Equal Pay Reports.

Covered entities are those prime contractors or first-tier subcontractors who have more than 100 employees, and have a contract, first-tier subcontract, or purchase order amounting to \$50,000 or more that covers a period of at least 30 days, including modifications, or serves as a depository of Government funds in any amount, or is a financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes. Construction contractors at any tier with a contract or subcontract of at least \$50,000 are also covered by the proposed regulations.

Educational institutions may also be impacted by the NPRM as OFCCP has solicited comments as to whether federally contracting educational institutions that file IPEDS should also be required to file the Equal Pay Report.

What About the Data Privacy Concerns?

EEO-1 reports are often the subject of Freedom of Information Act (FOIA) requests and often land in the hands of the private plaintiff's bar. OFCCP attempted to put to rest fears that the Equal Pay Report data would be turned over to competitors and plaintiff's attorneys as a matter of course. According to the OFCCP's stated position, FOIA would exempt the disclosure of contractor data where it is shown that (1) the contractor is still in business (2) the data is confidential and sensitive, and (3) the release of data would subject the contractor to commercial harm. Whether the OFCCP's practice is sufficient to consistently protect such data absent an explicit FOIA exemption for pay data remains to be seen.

Moreover, the proposed rule also enables OFCCP to publish aggregate information based on compensation data collected from the Equal Pay Report, such as ranges or averages by industry, labor market, or other groupings. Although OFCCP says that it will be published only in ways that will not reveal any particular establishment's or individual employee's data, this industry-wide data could nonetheless have a real impact on the contracting community.

Perhaps more importantly, the proposal does little to allay the fears, forcefully articulated by none less than the National Academy of Sciences ("NAS") in a report funded by the EEOC entitled "Collecting Compensation Data from Employers," that the federal government is not yet ready to collect this information. In this report, the NAS concluded the federal government needed to plan how they will use pay data, have a pilot study to test any initial plans for data collection and use, and have greater capacity to deal with the data and its analysis once collected before requiring employers to collect and measure pay information. For more information about the NAS report, see [here](#). These steps have yet to be done. In an era where data security breaches of even top secret documents have become *de rigueur*, the idea that the compensation data of high-profile employers would be made publicly available is not a far leap.

It's Important to Be Proactive Now!

So where do we go from here? Contractors would be well-advised to conduct a proactive pay equity analysis now, to address any areas of concern before data is reported to OFCCP. A significant issue is that employers will need to report total compensation (i.e., all wages contained in the Form W-2) rather than just base salary. As a result, contractors are wise to do *total* compensation analyses, in addition to a base salary analysis.

Contractors should also consider submitting comments to voice their opinions on the proposed regulations. Seyfarth Shaw will be preparing comments to the NPRM, which will be due on November 6, 2014. Please contact any member of the Seyfarth OFCCP, Affirmative Action, or Diversity Consulting Team if you wish to add your voice, with our without attribution to the comments.

[Christine Hendrickson](#) is Senior Counsel in Seyfarth's Chicago office, [Valerie J. Hoffman](#) is a Partner in Seyfarth's Chicago office, [Lawrence Z. Lorber](#) is Senior Counsel in the firm's Washington, D.C. office and [Annette Tyman](#) is a Partner in Seyfarth's Chicago office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Christine Hendrickson at chendrickson@seyfarth.com, Valerie J. Hoffman at vhoffman@seyfarth.com, Lawrence Z. Lorber at llorber@seyfarth.com or Annette Tyman at atyman@seyfarth.com

www.seyfarth.com

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