

Management Alert



OFCCP Announces Final Rule to Promote Pay Transparency

By Annette Tyman and Michelle Mellinger

Today the Department of Labor announced its Final Rule implementing Executive Order 13665, which promotes pay transparency and openness by allowing employees and applicants to share information about their pay and compensation without fear of discrimination. The Final Rule takes effect on January 11, 2016, 120 days after its publication in the Federal Register, and amends the existing regulations that implement EO 11246. The Final Rule can be found [here](#).

The Final Rule amends the EO 11246 implementing regulations in three substantive ways: (1) amends the Equal Opportunity Clause to include protections for employees and applicants who inquire about, discuss, or disclose their compensation; (2) provides employers with two defenses to discrimination allegations; and (3) requires inclusion of the nondiscrimination provision in existing employee handbooks and dissemination of the nondiscrimination provision.

EO Clause Includes Pay Secrecy Protections

Pay secrecy protections are now part of the Equal Opportunity Clause, which must be included in covered federal contracts and subcontracts. The EO was amended to include the following nondiscrimination protections:

The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.

41 CFR 60-1.4(a)(3). Consistent with OFCCP's Compensation Directive 307, "compensation" is defined 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." Note, under the regulations, it is still permissible to incorporate the equal opportunity clause by reference in all Government contracts and subcontracts.

The OFCCP has flexibility in its approach to pay secrecy claims, consistent with the principles of Title VII. For example, under the "motivating factor" standard, a complainant need only demonstrate that discussing or disclosing compensation information was one of any number of factors in the employer's discharge or discipline decision, even if it was not the only determining factor. OFCCP's approach for analyzing causation will depend upon the facts of the case as they are developed in its investigation and in discovery.

Employer's Limited Defenses to Discrimination Allegations

The Final Rule provides two defenses to an allegation of discrimination. First, a contractor may pursue a "general defense" by establishing that the adverse action was based on a violation of a "consistently and uniformly applied company policy," provided that the rule does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants. For example, a consistently applied rule that prohibits

employees from accessing information without authorization could fall within the general defense provision. By contrast, a rule that treated all discussions of pay as “disruptive” would violate the regulations.

The second defense available to employers is the essential job functions defense. Employers may discipline or discharge an employee who discloses “compensation information” if the employee has access to compensation information as part of his or her essential job functions, provided the disclosure was not in response to a formal complaint or charge or other legal duty to furnish information. “Compensation information” is defined broadly to include virtually all compensation related matters, including for example, the contractor’s desire to attract and retain particular employees based upon perceived value or profitability to the organization.

Despite the essential job functions defense, employees with access to compensation information are not without protections. For example, the defense does not apply if an HR employee with access to compensation information pursues his or her own compensation claim. Likewise, the same employee would be permitted to raise possible compensation disparities of other employees to a management official under the company’s internal complaint process without facing adverse action.

Inclusion and Dissemination of the Nondiscrimination Provision

Finally, the Final Rule requires covered contractors to incorporate the nondiscrimination provision into their existing employee manuals and handbooks and to disseminate the nondiscrimination provision to employees and job applicants. Dissemination may be by electronic posting or by posting a copy of the provision in conspicuous places available to employees and applicants for employment.

What Is Not in the Final Order

In the proposed rule, the OFCCP sought public comment on whether to require management training on the new nondiscrimination requirements. Based on the feedback it received, the OFCCP declined to require mandatory training, but encourages personnel training on the new nondiscrimination provision as a best practice.

What Should Federal Contractors Do Now?

By January 11, 2016, contractors should include the nondiscrimination provision in its employee manuals and handbooks and disseminate the provision through electronic and/or physical postings. Although management training is not required, ensure that all managers with authority to discipline employees are aware of and do not violate the pay secrecy law. Finally, contractors are strongly encouraged to seek legal assistance in reviewing compensation and making any remedial compensation decisions to protect that information from disclosure.

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