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Proposed Federal Rule Will Require Federal Contractors and Subcontractors to Disclose Compensation Data in Job Postings and Prohibit Compensation History Inquiries

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In this article, the authors discuss a proposed rule that, if adopted as proposed, will have significant implications for federal contractors and subcontractors.

The Federal Acquisition Regulatory Council, which consists of the U.S. Department of Defense, General Services Administration, National Aeronautics and Space Administration, and Office of Federal Procurement Policy, has published a proposed rule titled, "Prohibition on Compensation History Inquiries and Requirement for Compensation Disclosures by Contractors During Recruitment and Hiring," in the Federal Register. According to the notice, the intended impact of the rule is to "promote pay equity by closing pay gaps, which leads to increased worker satisfaction, better job performance, and overall increased worker productivity – all factors associated with promoting economy, efficiency, and effectiveness of the Federal contractor workforce."

If adopted as proposed, the rule will have significant implications for federal contractors and subcontractors.[1] Specifically, the proposed rule has four main components:

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(1) A compensation history ban;

(2) A compensation disclosure requirement for job advertisements;

(3) An applicant notice provision; and

(4) Contractual flow down obligations for subcontracts.

APPLICABILITY

The prohibitions and requirements of the proposed rule are broad and would apply to contractors with federal contracts and subcontracts for commercial products (including Commercially Available Off-the-Shelf (COTS) Items) or commercial services valued in excess of $10,000, and to be performed within the United States (including its outlying areas). This means that if the rule is adopted as proposed, it would apply to most contractors, even those that do not meet the $50,000 threshold that triggers affirmative action program requirements.

The proposed rule is also limited to the recruitment and hiring of positions that will perform work on or in connection with a federal contract or subcontract, defining "work on or in connection with the contract" as work called for by the contract or work activities necessary to the performance of the contract. From a practical perspective, however, it will likely be exceedingly difficult for contractors to determine whether a worker may perform work on or in connection with a covered contract at the point of recruitment or hire. Perhaps for this reason, the proposed rule encourages (but does not require) contractors to apply these compensation history prohibitions and disclosure requirements to other positions, including those the contractor reasonably believes could eventually perform work on or in connection with the covered contract.

COMPENSATION HISTORY BAN

As many states and local jurisdictions have done over the past few years, the proposed rule would prohibit federal contractors from:

1. Seeking an applicant's compensation history, either orally or in writing, directly from any person, including the applicant or the applicant's current or former employer or through an agent;

2. Requiring disclosure of compensation history as a condition of an applicant's candidacy;

3. Retaliating against or refusing to interview or otherwise consider, hire, or employ any applicant for failing to respond to an inquiry regarding their compensation history; and

4. Relying on an applicant's compensation history to screen or consider the applicant for employment or in determining the compensation for the applicant at any stage in the selection process.

As used in the proposed rule, "compensation history" means "the compensation an applicant is currently receiving or the compensation the applicant has been paid in a previous job." Further, in contrast to certain states and local jurisdictions that allow employers to consider or rely on an applicant's salary history that was voluntarily provided, the proposed rule prohibits contractors from taking the actions outlined above at any stage in the recruitment and hiring process, even if the applicant volunteers their compensation history without prompting.

Notably, the proposed rule defines "applicant" as "a prospective employee or *current employee* applying for a position to perform work on or in connection with the contract."[2] Thus, unless the proposed rule is modified, employers would be prohibited from considering a current employee's salary when determining compensation for that employee's new role within the company.

COMPENSATION DISCLOSURE REQUIREMENTS FOR JOB ADVERTISEMENTS

Following state and local trends, the proposed rule also would require contractors to disclose in job advertisements the compensation to be offered for positions working on or in connection with a federal contract. Specifically, the disclosures must include the salary or wages (or range) the contractor in good faith believes that it will pay for the advertised position, as well as a general description of the benefits and other forms of compensation applicable to the job opportunity. The proposed rule defines "compensation" broadly to include "any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to 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."

In determining the salary or wage range, contractors may use the contractor's pay scale for that position, the range of compensation for those currently working in similar jobs, or the amount budgeted for the position. Further, for positions where at least half of the expected compensation is derived from commissions, bonuses, and/or overtime pay, the contractor must specify the percentage of overall compensation or dollar

amount, (or range), for each form of compensation that the contractor, in good faith, believes will be paid for the advertised position.

NOTICE TO APPLICANTS

Contractors must also provide written notice to applicants covered under the compensation history ban and disclosure requirements. The notice must be part of the job announcement or application process and include specific language contained in the required contract clause provisions. This language notifies applicants about the prohibitions under the proposed rule, and provides details on how to file a complaint, including how to file a discrimination complaint with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

CONTRACTUAL PROVISIONS FOR SUBCONTRACTS

Contractors will also be required to "include the substance" of the contract clause in all solicitations and contracts, including in all subcontracts, where the principal place of performance is within the United States. The contract clause details all of the proposed rule's requirements and prohibitions including the compensation history ban, compensation disclosure requirement, applicant notice, and contract clause flow down requirements.

COMPLAINT PROCESS AND OFCCP INVOLVEMENT

In addition to the prohibitions and requirements addressed above, contractors should be aware that the proposed rule provides for an applicant complaint process whereby an applicant can allege compliance violations. Under the proposed rule, an applicant alleging violations may submit a complaint to the contracting agency point of contact as identified at *http://www.dol.gov/general/labor-advisors*. The complaint must be submitted within 180 days of the date the alleged violation occurred.

Further, applicants who wish to submit complaints that allege discrimination prohibited by Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act would continue to submit complaints directly to the OFCCP. If complaints alleging discrimination are submitted to an agency point of contact rather than directly with OFCCP, the complaints will be forwarded to OFCCP for review.

NEXT STEPS FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS

While the supplemental information accompanying the proposed rule identifies several anticipated benefits including reducing the pay gaps that disadvantage certain populations, increasing the pools of qualified applicants, incentivizing applicants to invest in job-related skills and experiences, reducing turnover rates, and lowering recruiting costs, if adopted, these new requirements and prohibitions will require significant effort and planning for federal contractors.

Although the proposed rule is only at the notice and comment stage, federal contractors should begin preparing a strategy on how it will comply with these new requirements should they become final. At a minimum, contractors should inventory their current federal contracts and subcontracts and identify the jobs that perform work on or in connection with those contracts. Further, nationwide contractors who are currently juggling the patchwork of state and local laws banning salary history inquiries and requiring compensation disclosures in job advertisements, may consider adopting a nationwide approach to simplify compliance in these areas.

NOTES

1. Because the proposed rule would apply to prime contractors and subcontractors alike, when used in this article, the term “contractor” or “federal contractor” also includes federal subcontractors.

2. Emphasis added.

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