

One Minute Memo®



OFCCP Proposes Anti-Pay Secrecy Regulations for Federal Contractors

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Today, the Office of Federal Contract Compliance Programs (“OFCCP”) issued proposed regulations that would limit covered federal contractors’ ability to take adverse action against applicants and employees who discuss compensation. The proposed rule is available [here](#).

The protections afforded by the proposed regulations may have a familiar ring to employers covered by the National Labor Relations Act (NLRA). The NLRA has been interpreted to prohibit covered employers from discriminating against some employees who discuss or disclose compensation information under certain circumstances. These proposed implementing regulations to [Executive Order 13665](#), would extend much broader nondiscrimination protections for disclosing pay information than the NLRA, and the OFCCP’s proposal brings with it the threat of routine audit by the OFCCP. The proposed regulations issued today cover:

- Both applicants and employees of federal contractors and subcontractors;
- Managers and supervisors;
- Activity that may not be considered to be “concerted” under the NLRA; and
- Information about the amount and type of pay **and** decisions, statements, and actions related to setting or altering employee compensation. The OFCCP states in the NPRM that the proposed definition “is meant to be broad enough to cover any information directly related to employee compensation, *as well as the process or steps that led to a decision[.]*”

Highlights of the Proposed Rule

The NPRM proposes to amend the existing Equal Opportunity Clause of Executive Order 11246 to require that all Federal contracts and subcontracts include language prohibiting discrimination against employees and applicants who disclose or discuss compensation. The proposed regulations still allow that these modifications to be incorporated by reference by citing 41 CFR § 60-1.4(a). This is good news for federal contractors who likely just completed the painstaking process of modifying their subcontract and purchase order language to be compliant with the VEVRAA and Section 503 regulations.

Most meaningfully, the regulations, if adopted in their current form, will give legal redress to applicants and employees under Executive Order 11246 who can demonstrate that discussing, or disclosing compensation information was a “motivating factor” in their termination or other adverse employment action. Under this “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 necessarily the only determining factor. This is a less stringent standard than the “but-for” test that applies to retaliation claims under Title VII, as articulated in the Supreme Court’s recent ruling, *University of Texas Southwestern Medical Ctr. v. Nassar*, No. 12-484 (June 24, 2013). The OFCCP’s decision to adopt the lower “motivating

factor” test is likely to generate significant public comment given that President Obama’s Executive Order, to which these proposed regulations respond, was titled “*Non-Retaliation for Disclosure of Compensation Information*,” giving the appearance that it intended to impose only non-retaliation prohibitions.

In addition to modifying the equal employment opportunity clause and adding legal protections, the proposed rule would also require that covered contractors incorporate the nondiscrimination provision into their existing employee manuals or handbooks, and disseminate the nondiscrimination provision to employees and job applicants. Moreover, the OFCCP seeks public comment on a proposal that could require training on these new retaliation requirements for managers during routine new manager training, or subsequent manager meetings.

Limited Defenses Available to Contractors

The regulations, as proposed, give employers two limited defenses. First, employers will not be found to have violated the new regulations if the employer can demonstrate that the employee or applicant violated a legitimate workplace rule. For example, the NPRM describes a scenario where an employer that takes adverse action against an employee who violates the employer’s rules against disruptive behavior in the workplace by repeatedly posing unwelcome compensation questions to her colleagues. By demonstrating that it took action against the employee to enforce a legitimate workplace rule, the employer may rebut any allegation of discrimination under the proposed rules. The inquiry will then focus on whether the rule was uniformly and consistently applied.

Second, another defense in the proposed rule mirrors a defense set forth in Executive Order 13665, to wit, a contractor will not violate the proposed rule if it takes adverse action against an employee, who is entrusted with confidential compensation information of other employees or applicants “as part of his or her essential job functions,” for disclosing such compensation information. To rely on this defense, the offending employee must have access to confidential compensation information as part of his or her fundamental job duties, and not marginal functions of the position.

What Should Federal Contractors Do Now?

These executive actions are the latest in a year filled with regulatory initiatives impacting federal contractors, including the new OFCCP disability and veterans regulations that went into effect on March 24, 2014, and four other executive orders impacting federal contractors (see [here](#), [here](#), [here](#), and [here](#)). As a result, if you are in the process of updating your policies to comply with these other regulatory requirements, we recommend that you review your policies in connection with that review.

Further, employers that undertake non-attorney client privileged compensation analyses should take note, as these discussions are likely to be fair game for the OFCCP if the proposed regulations are adopted as written. The OFCCP proposal does not indicate that it is seeking to disrupt attorney-client privileged discussions so we strongly encourage you to seek legal assistance in making any remedial compensation decisions.

The OFCCP has requested public comment on a number of issues related to these proposed regulations, including whether to require manager training on the new nondiscrimination requirement. The period for providing public comments on this NPRM starts today and will run until December 16, 2014.

If you would like more information on the proposed regulations or submitting comments to the OFCCP on the NPRM, please contact your Seyfarth relationship attorney or any member of the OFCCP, Affirmative, Action, or Diversity Consulting Team.

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