

Looking Back but Moving Forward: OFCCP 2015 Year-End Review and 2016 Update

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PRACTICES Labor and Employment, Affirmative Action and OFCCP Compliance

2015 was an eventful year for government contractors as the Office of Federal Contract Compliance Programs (“**OFCCP**”) finalized several key rules related to contractors’ relationships with employees and job applicants. With more rules expected to be finalized in 2016, the OFCCP will exercise increasing oversight over contractors’ activities. And since this is an election year, eyes will be on the presidential race and potential changes to the OFCCP’s agenda, depending on which candidate enters office in early 2017. This alert summarizes the key rules finalized in 2015, the ones we expect to see finalized in the final year of President Obama’s term, and the potential effects of a new administration on the regulatory agenda.

1. E.O. 13665: Non-Retaliation for Disclosure of Compensation Information

Government contractors should be prepared for a seachange in how they respond to employee disclosures of compensation information. On April 8, 2014, President Obama signed E.O. 13665, which prohibits contractors from retaliating against employees who discuss their compensation. The OFCCP issued its notice of proposed rulemaking on September 15, 2014 and issued its final rule on September 11, 2015. The final rule applies to contracts or subcontracts greater than \$10,000 entered into or modified after January 11, 2016.

The rule amends the E.O. 11246 regulations to prohibit contractors from discharging or discriminating against any employee or job applicant “because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.” 41 C.F.R. § 60-1.4(a)(3). The rule also requires employers to include the OFCCP’s Pay Transparency Policy Statement in existing employee manuals or handbooks and post the language electronically and in conspicuous places available to employees and job applicants. *Id.*

Notably, the rule does not protect disclosures made by an employee, such as a Human Resources employee, who has access to employees’ and applicants’ compensation information as part of the employee’s essential job functions and discloses the compensation to individuals who do not have access to that information. See 41 C.F.R. § 60-1.4(a)(3). Along with this “essential job functions” defense, the rule provides contractors a general defense to a discrimination claim by showing that it disciplined the employee for violation of a workplace rule that “does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants.” 41 C.F.R. § 60-1.35(a).

Because this rule exposes federal contractors to a variety of new requirements regarding employee compensation discussions, we recommend that contractors seek legal assistance with revising their employee handbooks and determining whether the essential job functions defense applies to individual or particular classes of employees.

2. Presidential Memorandum: Pay Data Collection

The Obama administration has also made it a priority to reduce the gender pay gap in the private sector. To that end, President Obama issued a memorandum on April 8, 2014 directing the Department of Labor to propose a rule requiring federal contractors and subcontractors to submit data on the compensation paid to their employees broken down by sex and race.

On August 6, 2014, the OFCCP issued its Notice of Proposed Rulemaking requiring federal contractors and subcontractors with more than 100 employees to submit an annual Equal Pay Report on employee compensation. Specifically, covered employers would be required to electronically submit three pieces of information for each establishment: 1) the total number of workers within a specific EEO-1 job category by race, ethnicity, and sex; 2) a report of the total individual W-2 wages for all workers in the job category by race, ethnicity, and sex; and 3) the total hours worked by all employees in the job category by race, ethnicity, and sex. The OFCCP notes that it will protect the confidentiality of the data to the maximum extent permitted by law by designing a web-based portal that complies with government IT security standards.

The OFCCP will use this data to direct its enforcement resources toward contractors whose data suggests potential pay violations. Unfortunately, because the Equal Pay Report will not collect information about pay factors such as education or experience, some contractors may get selected for audits based on “discrepancies” that are attributable to legitimate, non-discriminatory factors. Accordingly, contractors should continue to analyze their compensation data to ensure any pay disparities can be linked to job-related criteria such as education, years of experience and job performance. While this preparation may not help contractors avoid an audit, it will certainly help them defend against one.

3. E.O. 13672: LGBT Discrimination

On July 21, 2014, President Obama signed E.O. 13672, which amends E.O. 11246 to prohibit federal contractors from discriminating on the basis of sexual orientation and gender identity. Believing that President Obama’s order left no discretion on how to proceed, the OFCCP proceeded straight to issuing a final rule on December 8, 2014, with the rule taking effect on April 8, 2015.¹ The rule applies to every federal contract greater than \$10,000 signed or modified after the effective date.

Specifically, the final rule prohibits federal contractors from discriminating in employment on the basis of sexual orientation or gender identity and requires government contracts to include sexual orientation and gender identity as prohibited bases of discrimination under the Equal Opportunity Clause. The OFCCP has updated the “EEO is the Law Poster” to conform to the final rule. The final rule does not require contractors to collect information or to conduct any data analysis with respect to the sexual orientation or gender identity of their applicants or employees. While the Obama administration and the OFCCP have held the view that sexual orientation and gender identity were already protected classes under E.O. 11246, the new final rule makes it explicit, and employers should make any changes necessary to comply with this rule, if they have not done so already.

4. E.O. 13673: Fair Play and Safe Workplaces

On July 31, 2014, President Obama signed E.O. 13673, which is designed to improve contractor compliance with labor laws and make sure lucrative government contracts go to contractors who play by the rules. Specifically, the order requires employers who have a government contract or

subcontract worth at least \$500,000 to electronically report whether any administrative merits determinations, arbitral awards or decisions, or civil judgments have been rendered against them within a three-year period for violations of a myriad of labor laws.² Based on these disclosures, the government will determine what, if any, effect each contractor's compliance history should have on contract awards.³

Additionally, E.O. 13673 requires contractors and subcontractors to provide certain pay information to employees and independent contractors working on covered federal contracts and subcontracts, and, except under certain circumstances, prohibits contractors and subcontractors with contracts or subcontracts in excess of \$1 million from implementing pre-dispute arbitration agreements for claims arising under Title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment.

Although E.O. 13673 was effective immediately, the White House expects it to be implemented on new contracts "in stages on a prioritized basis, during 2016." FAR Council published a notice of proposed rulemaking on May 28, 2015, with comments due by July 27, 2015. The Department of Labor published separate proposed guidance, with comments originally due on July 27, but extended to August 26, 2015. Among other things, the FAR Council's proposed rule and the DOL's proposed guidance provide a lengthy list of which "violations" must be reported, a description of the reporting process, and a classification of the severity of various violations. We expect a final rule sometime in early 2016, so as contractors await the proposed regulations and guidance, they should at a minimum evaluate their existing arbitration programs to determine whether, and how, they will be affected.

5. E.O. 13706: Establishing Paid Sick Leave for Federal Contractors

On September 7, 2015, President Obama signed E.O. 13706, which requires covered federal contractors to provide at least 7 days of paid sick leave annually, including paid leave for family care. The order requires covered federal contractors to allow covered employees to earn at least 1 hour of paid sick leave for every 30 hours worked, with no limit on how much leave an employee may earn. Unused leave can be carried over from year to year, but federal contractors are not required to pay employees for unused leave upon their separation from employment.

The Department of Labor is to publish a rule on or before September 30, 2016, looking towards an effective date of January 1, 2017. We will provide updates as further regulatory developments occur.

6. Proposed Updates to Sex Discrimination Guidelines

In addition to updating its rules to prohibit LGBT discrimination, the OFCCP is actively revising its Sex Discrimination Guidelines. The OFCCP has not revised the Guidelines since their adoption in 1970, so contractors can expect significant updates to reflect the many workplace and legal changes over the last 45 years.

The OFCCP proposes to eliminate outdated regulations as well as address a variety of barriers to equal opportunity and fair pay, including pay discrimination, sexual harassment, hostile work environments, a lack of workplace accommodations for pregnant women as well as gender identity and family caregiving discrimination.

To cap off these changes, the OFCCP intends to change the term “Sex Discrimination Guidelines” to *regulations* about “Discrimination on the Basis of Sex” to emphasize that the OFCCP’s sex discrimination rules have the force of law against federal contractors. As of this writing, the final rule has yet to be issued, but the regulations are in the later stages of the regulatory process and should be finalized soon.

Conclusion

As President Obama’s time in office draws to a close, the OFCCP is racing against the clock to accomplish its regulatory goals. As a legal matter, the OFCCP must publish its final rules in the *Federal Register* on or before December 21, 2016, so that any such rules have 30 days to become legally effective before the next President is sworn in. Otherwise, the new administration could “freeze” any final rules that have not fulfilled the 30-day publication requirement—and this has been known to happen when the incoming administration belongs to a different political party than the outgoing administration. Accordingly, the OFCCP has roughly 11 months left, and it seems they are already behind as we are still awaiting several final rules that were expected in 2015. Thus, 2016 promises to be another eventful regulatory year for federal contractors, and we look forward to keeping our clients and friends apprised of the latest affirmative action developments.

¹ FAR Council published an Interim Rule adopting the OFCCP rule and FAQs on April 10, 2015, with comments due by June 9, 2015. As of this writing, FAR Council has yet to issue a final rule.

² Laws covered under the order include the Fair Labor Standards Act, the Migrant and Seasonal Agricultural Worker Protection Act, the National Labor Relations Act, the Davis-Bacon Act, the Service Contract Act, E.O. 11246, Section 503 of the Rehabilitation Act, the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, the Family and Medical Leave Act, the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, E.O. 13658 (Establishing a Minimum Wage for Contractors), and equivalent State laws, as defined in guidance by the Department of Labor.

³ This order could be subject to a lawsuit arguing the order is preempted by the National Labor Relations Act. See Cheryl Bolen, *Executive Orders Unfairly Used to Force Ideals, Contractors Say*, BLOOMBERG BNA (Dec. 11, 2015), <http://www.bna.com/executive-orders-unfairly-n57982065006/>. That said, employers should not be counting on the success of any lawsuits and should begin preparing now.