

ALERT

Compensation Information for Federal Contractors in the Crosshairs

April 11, 2014

On April 8, 2014, President Obama signed an Executive Order prohibiting federal contractors from discharging or retaliating against employees or applicants who inquire about, discuss, or disclose their compensation with other employees or applicants. The President also signed a Presidential Memorandum directing the U.S. Department of Labor (DOL) to establish a compensation data collection tool that will assist federal contractors and subcontractors in their equal pay compliance efforts. Coming only months after the President signed an Executive Order raising the minimum wage of federal contractors to \$10.10, as previously reported, the Executive Order and Memorandum are among the President's recent efforts to foster greater transparency of compensation practices and combat unequal pay among federal contractors.

The National Equal Pay Task Force, which was created by President Obama in 2010 to monitor equal pay violations, first noted that the barrier to addressing compensation gaps for women and minorities stemmed from a lack of reliable data. Consequently, in August 2011, DOL's Office of Federal Contract Compliance Programs (OFCCP) published an Advance Notice of Proposed Rulemaking seeking comments on the design and functionality of a prospective data collection tool, which received widespread responses. Although OFCCP has not taken additional regulatory action with regard to the proposed tool, the President has nonetheless revisited this matter and has directed DOL to promulgate a rule mandating federal contractors and subcontractors to provide compensation data broken down by race and sex.

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The President has directed DOL to consider three approaches when drafting its proposed rule: (1) the scrutiny of federal contractors whose data appears to contain compensation discrepancies; (2) the minimization of reporting burdens on contractors and subcontractors, with particular close attention on small businesses and small nonprofit organizations; and (3) the encouragement of greater voluntary compliance with federal pay laws and the analysis of industry trends. The proposed rule on compensation data collection is expected to be published in the Federal Register within 120 days of the President's Memorandum.

In addition, within 160 days of the Executive Order, contractors can expect DOL to propose anti-retaliation and non-discrimination regulations regarding compensation discussions. The Executive Order specifically states that it does not apply to instances in which an employee who has access to compensation information as a part of his/her essential job function, such as a Human Resources employee, makes an unauthorized disclosure of the information. The forthcoming proposed rule appears to be less onerous for contractors subject to the National Labor Relations Act (NLRA) because this law already protects pay discussions of union and non-union employees.

On the other hand, it is foreseeable that contractors and the OFCCP will face challenges regarding compensation data collection on sex and race. This is because disparities in compensation may exist for legitimate reasons, such as tenure, educational background, and level of experience. The President instructed the agency to avoid directing enforcement resources toward contractors with no evidence of compensation violations and avoid new record-keeping requirements. Nonetheless, contractors should anticipate new requirements and OFCCP audits on compensation stemming from the Executive Order and Memorandum. In preparation, contractors should review and comment on the forthcoming proposed rule to express any issues or cost burden associated with the compensation data collection tool. Contractors should consider conducting a self-audit of their compensation data and practices with outside counsel to identify and resolve any potential pay discrimination exposure. The audit should include a statistical analysis of the data and review all compensation policies to ensure they are consistently applied and well-documented.