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## *OFCCP Issues Proposed Rules Prohibiting Discrimination Based Upon Employee Inquiries and Disclosures Regarding Compensation*

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This alert updates our alert issued in [April](#) after President Obama issued Executive Order 13665 (EO 13665), which through amendments to Executive Order 11246 prohibits discrimination by federal contractors against employees making inquiries about or disclosing compensation information. Like many other whistleblower-type protections, EO 13665 is designed in part to encourage greater transparency into the way contractors do business, and in this case, specifically how they pay employees. Indeed, it provides more robust protection than Title VII or the National Labor Relations Act already provide. It will create greater opportunities for disciplined and discharged employees to bring complaints of retaliation to the OFCCP, except where the contractor can prove one of two defenses outlined in the Executive Order.

This month, the OFCCP issued a notice of proposed rulemaking (NPRM) that provides definitions for some key terms and clarifies the defenses that contractors may assert to these newly created protections. Most contractors, for competitive reasons, attempt to keep certain compensation-related information private. As a result, it will be critical for contractors to understand the defenses that are defined in the NPRM to avoid running afoul of the new Executive Order prohibitions. The comment period for the NPRM runs for 90 days (until December 16, 2014), and contractors should work with the member organization to which they belong to make sure their concerns regarding the NPRM are included in any comments.

The provisions of EO 13665 and its implementing regulations will apply to covered federal contracts entered into or modified on or after the effective date of the final regulations.

### **Summary of Proposed Regulations**

Executive Order 13665 amends Executive Order 11246 to prohibit federal contractors from discriminating against employees or applicants who ask about, discuss, or disclose their own compensation or the compensation of another employee or applicant, but it allows contractors to take adverse action against such individuals in two specific circumstances discussed below. To effectuate EO 13665, the NPRM proposes to amend the implementing regulations for Executive Order 11246 in four ways: (1) adding three defined terms (Compensation, Compensation Information, and Essential Functions); (2) amending the mandatory equal opportunity clause to include the new prohibition against discharging or otherwise discriminating against applicants or employees who inquire, discuss

or disclose their compensation or that of another; (3) establishing two contractor defenses to allegations of violations of the new nondiscrimination obligation (a general nondiscrimination defense and an essential functions defense); and (4) creating internal and external notification obligations for the nondiscrimination protection created by EO 13665.

### ***Amendment to the Equal Opportunity Clause***

Currently covered federal agencies must include a 7-paragraph “equal opportunity clause” in their government contracts, and the contractors must include the same 7-paragraph clause in “flow down language” in their subcontracts and purchase orders. The OFCCP proposes amending the current equal opportunity clause by adding a new paragraph (which will be paragraph 3) articulating the new obligation not to “discharge or discriminate in any other manner 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 have disclosed their compensation or the compensation of others, with limited exceptions.” 79 Fed. Reg. 55740-55742 (Sept. 17, 2014) (amending 41 C.F.R. § 60-1.4). Happily for contractors, the NPRM does not seek to alter a contractor’s ability to incorporate by reference the equal opportunity clause into its subcontracts and purchase orders. Thus, the new rules will not require yet another change to the “flow down” language emanating from EO 11246, such as was required in the new regulations under VEVRAA and Section 503.

### ***New Proposed Definitions***

Key components of the EO 13665 prohibition are three new defined terms: “compensation,” “compensation information,” and “essential functions.”

- “Compensation” is broadly defined 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 contributions to retirement.” 79 Fed. Reg. 55740 (Sept. 17, 2014) (amending 41 C.F.R. § 60-1.3).
- “Compensation Information” is defined as “information pertaining to any aspect of compensation, including but not limited to information about the amount and type of compensation as well as decisions, statements, or actions related to setting or altering employees’ compensation.” *Id.*
- “Essential Functions” are defined as “fundamental job duties of the employment position an individual holds.” *Id.* Thus, “marginal functions” are excluded from this phrase. “Essential functions” is a term familiar to many Human Resources professionals and employment law attorneys because both Section 503 of the Rehabilitation Act and the Americans with Disabilities Act Amendments Act (ADAAA) utilize this term. The OFCCP intends to adopt this familiar term from Section 503 and the ADAAA, but for a limited purpose related to the second of the two defenses discussed below.

### ***Analytical Framework and Contractor Defenses***

The OFCCP makes clear in the NPRM that it considers EO 13665 as establishing a prohibition against *discrimination*, not *retaliation*. 79 Fed. Reg. 55719 (Sept. 17, 2014). This is more than just a semantic difference. Indeed, this distinction will materially impact whether a contractor can defeat liability for

taking adverse action against someone who has made inquiries about or disclosed compensation information. For a Title VII retaliation claim, the employee has the burden of proving that the protected activity was the “but for” cause of the adverse action. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013). On a discrimination claim, however, the complaining party must prove only that the prohibited factor (*e.g.*, race, sex, etc.) was a motivating factor for the adverse action, and the employer can only limit the remedy (not defeat liability) by establishing that it would have taken the same adverse action in the absence of the prohibited factor. *Id.* at 2522-2523. It is the latter framework that the OFCCP intends for EO 13665, though the agency specifically has invited comment on this question. 79 Fed. Reg. 55720 (Sept. 17, 2014). The approach described in the NPRM, however, will make it much easier for complaining parties to assert claims before the OFCCP.

Two contractor defenses against a claim of violating this new nondiscrimination obligation are described in the NPRM.

- The “generally applicable nondiscrimination” defense: As in the Title VII context, contractors may rely on legitimate, nondiscriminatory reasons to explain an adverse action, provided that the reason is not related to enforcing a rule, policy, or practice of prohibiting employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants. 79 Fed. Reg. 55742 (Sept. 17, 2014) (adding 41 C.F.R. § 60-1.35). As part of this defense, contractors must show that they would have taken the adverse action regardless of whether the employee or applicant engaged in the protected activity. Consistent with the objective of EO 13665—that is, to promote greater transparency regarding compensation—the NPRM states that “OFCCP is concerned that contractors’ legitimate workplace rules ... be ... narrowly defined to ensure they do not unnecessarily prohibit, or tend to prohibit, employees or applicants from inquiring about, discussing or disclosing their compensation or the compensation of other employees or applicants.” *Id.* at 55721.
- The “essential job functions” defense: This defense is narrower than the other; it applies only to employees who have access to other employees’ compensation information as part of their “essential job functions” and who disclose such compensation information to those who do not have access to it, provided that the disclosure was not made “in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the contractor, or is consistent with the contractor’s legal duty to furnish information.” *Id.* at 55742.
  - The NPRM provides that a job function may be considered essential for any number of reasons, including but not limited to, because: (a) the reason the position exists is to perform that function; (b) there are a limited number of employees available among whom the performance of that job function can be distributed; and (c) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function. *Id.* at 55740.
  - The NPRM also proposes to adopt the factors used under Section 503 of the Rehabilitation Act and the ADAAA to determine whether a job function is essential. The OFCCP is seeking specific comments on these factors, recognizing that not all may be applicable in the context of pay transparency. The factors are: (i) the contractor’s judgment as to which functions are essential; (ii) written job descriptions prepared

before advertising or interviewing applicants for the job; (iii) the amount of time spent performing the function; (iv) the consequences of not requiring the incumbent to perform the function; (v) the terms of a collective bargaining agreement; (vi) the work experience of past incumbents in the job; and/or (vii) the current work experience of incumbents in similar jobs. *Id.* at 55718.

- A key question will be whether this defense will be available as against supervisors and managers who are involved in annual compensation planning exercises. The NPRM makes clear that the OFCCP contemplates certain human resources professionals will be covered. *Id.* at 55716-17. But the NPRM also makes clear that the general prohibition against discrimination in EO 13665 is intended to be broader than the NLRA rules protecting concerted activity inasmuch as the NLRA rules do not protect supervisors and managers. *Id.* at 55720.

The OFCCP will evaluate the availability of either defense based on the specific facts and circumstances of each case.

### ***Notice Requirements***

The new regulations would require federal contractors to communicate this new nondiscrimination protection to both employees and applicants. Under the NPRM, contractors would be required to (1) incorporate the nondiscrimination provision into their existing employee manuals or handbooks, and (2) disseminate the nondiscrimination provision to employees and job applicants. *Id.* at 55742. The nondiscrimination provision will be mandatory language to be prescribed by the OFCCP. Contractors can, pursuant to the NPRM, meet this notice obligation either electronically or by conspicuously posting a copy in places available to employees and applicants.

### **What Should Contractors Do Now?**

While awaiting the final regulations, contractors should undertake the following actions:

- Review existing policies or rules of conduct to identify and revoke any that prohibit applicants or employees from inquiring about, discussing, or disclosing their own compensation or the compensation of other applicants or employees, unless their access to compensation information regarding others is related to an essential job function.
- Identify positions in which their essential job functions include having access to compensation information. In addition to personnel in the compensation organization responsible for the design and implementation of a contractor's compensation scheme and philosophy, these also will likely include recruiters responsible for making starting salary offers, hiring managers, and compensation managers responsible for merit raises and incentive compensation awards.
- Provide guidance to employees in positions identified as having access to compensation information as an essential job function. They should be informed of the requirement that compensation information in their possession remain confidential for competitiveness reasons. However, individuals holding these positions should not be disciplined for discussion or disclosure of their own compensation.

We will continue to report on developments regarding EO 13665 as well as developments on the other executive actions regarding compensation advanced by President Obama in 2014.



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