

The Obama Administration Advances Agenda on Wage Inequality Through Executive Orders and Regulations

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Introduction

The Obama Administration kicked off its economic agenda in 2014 with laser focus on the compensation of American employees. As part of his program, President Obama promised that his administration would increase the minimum wage and make strides toward attaining pay equity for women and people of color.

Since his election in 2008, the President hoped to achieve these goals legislatively through, among other things, enactment of the Paycheck Fairness Act ("PFA"). Originally introduced by Senator Tom Daschle and Representative Rosa DeLauro in 1997, and introduced in every subsequent session of Congress, the PFA is a multi-pronged attempt to enhance the Equal Pay Act of 1963 ("EPA"). The President has described the PFA as "a commonsense piece of legislation that would strengthen the Equal Pay Act and give women more tools to fight pay discrimination."

In addition to strengthening the Equal Pay Act, if enacted the PFA would (a) protect workers who disclose information about their wages from retaliation and (b) require the Equal Employment Opportunity Commission ("EEOC") to issue regulations mandating that employers provide compensation data by the race, gender, and national origin of employees. However, the President has been unable to garner the support necessary to pass the PFA; most recently, on April 9, 2014, it again failed to pass in the Senate.

Frustrated with the longstanding failure of Congress to enact the PFA and other parts of his economic program, and acting on his State of the Union commitment to take executive action when Congress fails to act, President Obama recently issued two Executive Orders and a Presidential Memorandum impacting employee compensation. One Executive Order raises the minimum wage for employees of federal contractors, and the other prohibits retaliation by federal contractors against employees for making inquiries about or disclosing compensation information. Both Executive Orders will be implemented through regulations to be proposed by the Department of Labor. The Presidential Memorandum also directs the Department of Labor ("DOL") to promulgate regulations that will require federal contractors to submit summary compensation data by gender and race to the DOL.

Executive Order — Establishing a Minimum Wage for Contractors

On February 12, 2014, President Obama issued his Executive Order — Establishing a Minimum Wage for Contractors (“Minimum Wage EO”) to increase the minimum wage of employees for certain Federal contractors and subcontractors. The new minimum wage will be \$10.10 for certain “new contracts, contract-like instruments, and solicitations” effective January 1, 2015. Not surprisingly, this is the same nationwide minimum wage that the Obama administration has pushed, unsuccessfully, to enact for years.

The weight of the Minimum Wage EO will fall on contractors and subcontractors whose employees’ wages are governed by the Fair Labor Standards Act (“FLSA”), the Service Contract Act (“SCA”), or the Davis-Bacon Act (“DBA”), and whose contract falls within one of the following four categories:

1. Procurement contracts for services or construction;
2. Contracts or contract-like instruments for services covered by the SCA;
3. Contracts or contract-like instruments for concessions, including any concessions contract excluded by DOL regulations at 29 C.F.R. § 4.133(b); and
4. Contracts or contract-like instruments entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

Regulations, which must be promulgated by October 1, 2014, hopefully will clarify the application of the EO. For example, will the broadest category of contracts (“procurement contracts for services or construction”) be defined consistently with “service contract” in the existing Federal Acquisition Regulations, Part 37? If so, a “contract for services” would not apply to contracts that supply goods or items, but only to contracts that primarily engage a contractor to perform an identifiable task, such as equipment maintenance. Such a definition could limit the number of federal contractors and subcontractors subject to the Minimum Wage EO. The EO also includes a number of qualifiers, including that its governing regulations be “consistent with applicable law,” and consistent with “prevailing wage law.” It remains to be seen how the Minimum Wage EO will have a material impact, while at the same time staying consistent with the FLSA, SCA, and DBA, all of which have been subject to extensive interpretation by the courts.

Executive Order — Non-Retaliation for Disclosure of Compensation Information

On April 8, 2014, President Obama issued his Executive Order — Non-Retaliation for Disclosure of Compensation Information (“Non-Retaliation EO”). It amends Executive Order 11246 by prohibiting Federal contractors and subcontractors from discriminating or retaliating against “any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.”¹ In addition, it orders the Secretary of Labor to propose regulations to implement its mandates within 160 days after its issuance.

The President cites two bases for the executive order. *First*, he states that it will bolster the ability of Federal contractors to identify and remediate unlawful discrimination, noting that the detection of pay discrimination is inhibited if employees cannot ask about or discuss their pay. *Second*, the President claims that the limited availability of compensation information harms market efficiency and

diminishes the likelihood that the most qualified and productive workers are hired at the market-efficient price.

The Non-Retaliation EO became effective immediately on April 8. However, it applies to contracts entered into on or after the effective date of the regulations to be promulgated by the Secretary of Labor.

The National Labor Relations Act (“NLRA”) already protects an employee’s right to discuss wages without fear of retaliation, but the Non-Retaliation EO provides a more robust right. While the NLRA generally extends only to concerted activity (*i.e.*, two or more employees jointly complain about their wages, benefits, or other terms and conditions of employment), the Non-Retaliation EO extends to any discussion about pay. In addition, while the NLRA does not apply to managers and supervisors, the Non-Retaliation EO applies to all employees.

Presidential Memorandum — Advancing Pay Equality through Compensation Data Collection

Also on April 8, 2014, President Obama issued his Presidential Memorandum — Advancing Pay Equality through Compensation Data Collection (“Memorandum”). It directs the Secretary of Labor to propose regulations no later than August 6, 2014 that would require federal contractors and subcontractors to submit to the DOL summary data, by race and gender, of compensation paid to employees. The Memorandum was driven primarily by the President’s concern that private sector employers have no obligation to provide pay data, and effective enforcement of federal pay equity laws is hindered by the lack of visibility into their pay practices.²

President Obama’s effort to force the disclosure of pay data has been on the presidential agenda since his election. In 2010, he assembled the National Equal Pay Task Force (“Task Force”), composed of members from the EEOC, the Department of Justice, the DOL, and the Office of Personnel Management. This Task Force was charged with improving the enforcement of equal pay laws, including the Lilly Ledbetter Fair Pay Act of 2009, signed by the President on his first day in office.

Toward this goal, the Task Force identified lack of data collection as a significant barrier to closing the pay gap for women and minorities, and commissioned a study of that issue by the Committee on National Statistics of the National Research Council. The results of that study were published in 2012.³ The Committee made a series of recommendations including:

- In conjunction with OFCCP and the Department of Justice — Civil Rights Division, the EEOC should prepare a comprehensive plan for the use of compensation data **before** initiating any data collection effort;
- After completion of such a plan, the agencies should initiate a pilot study by an independent party to test the collection instrument and the plan for the use of the data; and
- The EEOC should consider implementation of appropriate data protection techniques and should seek legislation that would increase the ability to protect the confidentiality of the compensation data.⁴

In addition, in August 2011, the DOL announced an Advance Notice of Proposed Rulemaking (“ANPRM”). This ANPRM solicited, and obtained, input from stakeholders regarding tools to effectively collect compensation data from employers.

President Obama's Memorandum attempts to leverage the findings of the Task Force and the comments received in response to the ANPRM. Like the Non-Retaliation EO, the Memorandum does provide some guardrails in its instructions to the DOL. For example, it provides that the new regulations should avoid creating new record-keeping requirements and should rely on existing reporting frameworks. Based on current OFCCP practices and questions posed in the ANPRM, the current so-called "Item 11" summary data required of contractors during an OFCCP compliance evaluation, or submission of compensation data on something akin to the annual EEO-1 report of the demographics of an employer's workforce, are likely candidates for any new pay data collection tool.

Next Steps

Regulations for both Executive Orders and the Memorandum will be forthcoming in 2014 and the employer/contractor community must be prepared to comment and voice its comments or concerns, and, if the latter, propose some alternatives. For the Minimum Wage EO, employers should particularly focus on the scope of its applicability, as well as its consistency with current wage and hour laws. With respect to the Non-Retaliation EO, contractors should review their policies regarding the confidentiality of employee compensation.

Finally, it is clear that EEO pay equity remains a primary objective of the Obama Administration and that all employers, but federal contractors and subcontractors in particular, must be prepared for continued scrutiny of their pay practices by OFCCP and EEOC. Development of a defensible EEO pay analysis should be a high priority for all employers. In addition, consistent with the recommendations by the Committee on National Statistics, a study essentially requested by the Obama Administration, the proposed rules should (a) with particularity explain how the data will be analyzed and used, (b) not create unreasonable record keeping burdens on the contractor community, and (c) establish increased safeguards to protect the confidentiality of this highly sensitive information.

We will be following developments and will supplement this Client Alert when appropriate.

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- ¹ This provision does not apply to employees with access to such information as part of their essential job duties (e.g., HR employee) who disclose the information to others who are unauthorized to have such information.
 - ² The first paragraph of the Presidential Memorandum recounts the oft repeated statistic that women currently earn only 77 cents for every dollar earned by a man. This statistic has been the subject of much criticism including a research study commissioned by the DOL under President Bush. That study found that the raw wage gap of 20.4% is between 4.8-7.1% when legitimate, non-discriminatory factors are considered. See *CONSAD Research Corp., An Analysis of Reasons for the Disparity in Wages between Men and Women* (January 2009).
 - ³ National Research Council, *Collecting Compensation Data from Employers*, Committee on National Statistics, (The National Academies Press 2012).
 - ⁴ *Id.* at 2-5, 86-91. While the OFCCP currently states that it will protect the submission of compensation data “to the fullest extent” under the Freedom of Information Act, it refuses to agree to any data protection protocols to ensure that the data it receives is protected from hacking.