



President, OFCCP Set New Employment Rules For Federal Contractors

Insights

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While chastising Congress as “doing nothing,” the executive and administrative branches of the federal government were busy making new employment rules for federal contractors and subcontractors.

This summer, President Barack Obama signed four executive orders and one presidential directive, and the U.S. Labor Department’s Office of Federal Contract Compliance Programs (OFCCP) published two sets of proposed rules and one set of interim rules affecting contractors. With several items remaining on the OFCCP’s regulatory agenda that are slated to be issued in 2014, one almost needs a scorecard to keep track. This article identifies those items and summarizes the activity through August 8, 2014.

The summer rule-setting surge included new affirmative action and nondiscrimination requirements for certain veterans and disabled employees, protections for employees who discuss compensation, a higher minimum wage, a requirement to disclose labor and employment law violations, and a requirement that contractors annually report summaries of compensation paid their employees by sex and race categories. Items remaining on the regulatory agenda concern retaliation and sex discrimination guidelines, and hiring goals for construction contractors’ female and minority employees.

Regulatory Process

When a law is passed by Congress, the federal agency responsible for enforcement of the law is often charged with developing rules and regulations for the interpretation and enforcement of the law. Executive orders signed by a President may also direct the appropriate administrative agency to develop regulations. Once an agency develops a new rule, it issues a Notice of Proposed Rulemaking (NPRM), proposing and discussing the proposed rule. The NPRM is then published in the Federal

(NPRM) presenting and discussing the proposed rule. The NPRM is then published in the Federal Register and the public is invited to submit comments within a specified time period. The agency may decide to change the proposed rule as a result of comments received, implement it without changes, delay its implementation, or withdraw it.

Under the authority of Executive Order 11246, the OFCCP enforces anti-discrimination and affirmative action laws that protect the rights of applicants and employees of companies doing business with the federal government.

Reporting Summary Data On Employee Compensation

Most recently, the OFCCP proposed a rule requiring federal contractors and subcontractors, including construction contractors, to annually report summary employee compensation data, broken down by sex, and racial and ethnic group. This not the first time the agency has addressed the subject: the OFCCP also solicited comments in 2011.

Under the proposed rule, contractors will file Equal Pay Reports showing the number of full- and part-time employees, hours worked, and summary compensation data based on W-2 earnings by sex and race, using the same race and ethnicity and job categories used in the Employer Information Report (EEO-1). Reports will be filed electronically between January 1 and March 31 of each year based on data collected over the entire reporting (calendar) year. A separate report will be required for each establishment, including headquarters.

If implemented, the rule will apply to contractors that are already required to file annual EEO-1 reports, have 100 or more employees, and have contracts or subcontracts of at least \$50,000. The OFCCP is considering extending the rule's coverage to institutes of higher education that are required to file Integrated Postsecondary Education Data System reports with the Department of Education; have 100 or more employees; and have a federal contract, subcontract or purchase order of \$50,000 or more.

The OFCCP describes the proposed rule as one component of a larger strategy to address supposed pay gaps between men and women and among various racial groups. It intends to use the summary information to identify which contractors to audit for enforcement purposes. It also intends to publish summary data by industry in an effort to deter contractors from violating their existing nondiscrimination requirements. Comments are due by November 6, 2014.

Nonretaliation For Disclosure Of Compensation Information

Another part of the strategy seeking pay equity, Executive Order 13665 prohibits federal contractors from discharging or in any other manner discriminating against employees or applicants because they “inquired about, discussed, or disclosed” their own compensation information or the pay information of another employee or applicant. Signed on April 8, 2014, it took effect immediately and directed the agency to propose implementing regulations by the end of September.

The laws of numerous states already make it unlawful for any employer to prohibit employees from sharing compensation information. The National Labor Relations Board (NLRB) also has found such employer prohibitions unlawful.

Sexual Orientation And Gender Identity

Executive Order 13672 prohibits federal contractors and subcontractors holding contracts of \$10,000 or more from discriminating against applicants or employees based on sexual orientation or gender identity. It also adds both classifications to existing affirmative action requirements. Signed by President Obama on July 25, it directs the Secretary of Labor to propose regulations within 90 days and will apply to contracts entered into on or after January 1, 2015.

At the time the President signed the order, 18 states, the District of Columbia, and over 200 cities and counties prohibited employment discrimination on the basis of sexual orientation or gender identity. In those locations that do not have such laws, this Executive Order requires federal contractors and subcontractors to go beyond the nondiscrimination requirements of their state and local laws and Title VII of the Civil Rights Act of 1964.

Minimum Wage

Executive Order 13658 raised the minimum wage that federal contractors and subcontractors must pay employees to \$10.10 per hour on new federal contracts beginning January 1, 2015. Annually thereafter, the rate will be indexed to inflation. Tipped workers must receive at least \$4.90 an hour beginning in 2015, with the rate adjusted for inflation annually. Federal, state, and local prevailing-wage laws setting a higher minimum wage will take precedence over these rates.

The Secretary of Labor published a proposed rule on June 17 setting standards and procedures for its implementation and enforcement of the order. The proposed rule prohibits retaliation and waiver of claims, sets the time for payment of wages, establishes recordkeeping requirements and explains that the order does not create a private right of action.

The proposed rule applies to procurement contracts for construction covered by the Davis Bacon Act, service contracts covered by the Service Contract Act, concessions contracts, and contracts in connection with federal property or lands and related to offering services. It interprets the term “contract” broadly to include contract-like instruments entered into verbally or in writing and any subcontract of any tier. The comment period closed July 28.

Disclosing Past Violations When Seeking Award

Executive Order 13673 requires employers seeking new federal contracts to disclose “whether there has been any administrative merits determination, arbitral award or decision, or civil judgment” rendered against it within the preceding three-year period for labor and employment law violations.

Violations that a prospective contractor must disclose include violations of 14 federal laws enforced by agencies including the U.S. Labor Department (DOL), the NLRB, the Equal Employment Opportunity Commission, and equivalent state laws. The prospective contractor must also disclose the steps it has taken to correct violations, disclose “any agreements” with enforcement agencies, represent that it will require its covered subcontractors to make similar disclosures and represent that it will incorporate that obligation into its subcontracts.

New “labor compliance advisors” will consider the information provided by a prospective contractor and determine if it “is a responsible source that has a satisfactory record of integrity and business ethics.” Standards and guidance are to be developed by the Federal Acquisition Regulations Council and the DOL in a timely fashion.

This order applies to procurement contracts for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds \$500,000. When the contract is worth \$1 million or more, the order also prohibits contractors from using agreements that require employees to arbitrate Title VII or tort claims related to sexual assault or harassment.

Paycheck Transparency

That same Executive Order also provides for paycheck transparency, requiring contractors and subcontractors to provide each individual performing work under the contract, for each pay period, a document showing the individual's hours worked, overtime hours (or a statement that the individual is exempt from overtime pay requirements), pay, and any additions to or deductions from pay. Individuals treated as independent contractors must be provided a document informing the individual of their independent contractor status.

Affirmative Action And Nondiscrimination Clauses

Last fall, the OFCCP published final rules updating covered contractors' (including construction contractors') affirmative action and nondiscrimination obligations toward individuals with disabilities and certain protected categories of veterans under Section 503 of the Rehabilitation Act and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), respectively.

On July 25, the Department of Defense, General Services Administration and National Aeronautics and Space Administration issued an interim rule amending the contract clauses in the Federal Acquisition Regulations to reflect these changes, effective immediately. The modified clauses incorporate the new requirements on mandatory job listings, data collection, recordkeeping, and establishment of hiring benchmarks.

Conclusion

The goals reflected in these actions are laudable but impose increased monetary and practical costs on contractors. The security of compensation information is also a concern: an August 2012 National Academy of Sciences report questioned the ability of the OFCCP and other federal agencies to handle employer pay data in a secure manner.

The new executive orders and rules may lead some contractors to question whether federal contract work is worth the effort, cost and risk involved. But the rules are not final yet. How well the goals are achieved and at what risk and cost will depend largely on the rules for implementation.

And if implemented, the proposed rules may be challenged in court. Because the penalties for noncompliance can include loss of the contract and debarment, the rules may be challenged as unconstitutional takings of property without due process. Section 208 of Executive Order 11246 may provide another basis for a challenge because it states that “[n]o order for debarment of any contractor from further government contracts ... shall be made without affording the contractor an opportunity for a hearing.” Additionally, if Republicans gain control of the White House in 2016, the executive orders could potentially be rescinded.

In the meantime, federal contractors should assume that rules in some form will be implemented and start auditing their pay and recordkeeping practices, reviewing their policies, and devising methods of tracking and reporting violations of discrimination laws.

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