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OFCCP Regulations Prohibiting Pay Secrecy Policies & Required Posting Effective Now

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Executive Order 13665 & Pay Transparency Regulations Effective Now
Following the NLRB's lead on employee rights regarding discussion of confidential wage issues, Executive Order 13665 and the Office of Contract Compliance Program's ("OFCCP's") implementing pay transparency regulations became effective January 11, 2016. ***The Executive Order*** prohibits Federal contractors and subcontractors from discriminating against employees who discuss their compensation or the compensation of their fellow employees. ***The Final Rule*** is designed to promote equal pay for women and people of color by promoting pay transparency. Specifically, the Final Rule "prohibit[s] Federal contractors from discharging or discriminating in any way against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant." Importantly, covered federal contractors and subcontractors are required to post the following pay transparency statement either electronically or in conspicuous places.

Pay Transparency Policy Statement

The contractor will not discharge or in any other manner discriminate against employees or applicants because they have inquired about, discussed, or disclosed their own pay or the pay of another employee or applicant. However, employees who have access to the compensation information of other employees or applicants as a part of their essential job functions cannot disclose the pay of other employees or applicants to individuals who do not otherwise have access to compensation information, unless the disclosure is (a) in response to a formal complaint or charge, (b) in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or (c) consistent with the contractor's legal duty to furnish information.

Unlike the NLRA, the scope of these protections extends to supervisors, managers and others not protected by the provisions of the NLRA. "Compensation" refers to any payments made to an employee, or offered to applicants, including, for eample, salary, wages, bonuses, commissions, vacation, holiday pay, stock options, profit sharing and other benefits or wages given. Employees cannot be disciplined, harassed, demoted, terminated denied employment, or otherwise discriminated against because they discussed compensation. Employers are also prohibited from having policies that "prohibit, or tend to prohibit," employees or applicants from tending to discuss or disclose compensation. Notably, employers are not obligated to share compensation information; this Final Rule only protects employees who choose to do so.

The Final Rule only applies to contracts entered into or modified on or January 11, 2016. Amending Executive Order 11246, the Final Rule only covers an employer who: "(1) holds a single Federal contract, subcontract, or federally assisted construction contract in excess of $10,000; (2) has Federal contracts or subcontracts that combined total in excess of $10,000 in any 12-month period; or (3) holds Government bills of lading, serves as a depository of Federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount."

The scope of the Executive Order has some practical business-related limitations. Federal contractors and subcontractors may still use otherwise valid general confidentiality agreements not covering these protected communications. Employees may not disclose compensation information obtained during the course of their "essential job functions." Employees with access to confidential information as part of their job, such as a payroll or benefits administrator, may be barred from revealing such information. An employer may take adverse action against an employee for violating a consistently and uniformly applied "workplace rule," which may indirectly touch on the subject matter of this rule under certain circumstances. For example, if an employer has a workplace rule that stipulates that employees are only permitted to take 20-minute breaks, an employer is permitted to take adverse action against an employee who takes a 30-minute breaks, even though an employee may assert that he or she discussed protected compensation information during the break.

The implementation of Executive Order 13665 is the most recent example of the numerous changes and proposed changes of the Administration and the OFCCP over the past two years. For a summary of those significant changes and proposed changes, read more below.

Without regard to federal contractor status, more than a dozen states make it unlawful for employers to discipline or discharge employees for comparing or discussing their compensation with each other (e.g., California, Colorado, Connecticut, District of Columbia, Illinois, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, Oregon and Vermont.)

Employment of Veterans & Individuals with Disabilities

Over a year has passed since the OFCCP amended its regulations on employing veterans and individuals with disabilities. While contractors who were in the middle of their AAP year as of the March 14, 2014 effective date were not required to comply until the beginning date of their next AAP year, the regulations are now effective for all contractors. As a result, the OFCCP has continued its focus on contractor employment of veterans and individuals with disabilities. See the regulations ***here*** (veterans) and ***here*** (disabilities).

Veterans: One of the significant requirements of the amended veterans regulations under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) is establishing a hiring benchmark for veteran hires for the contractor's entire workforce or by job group (either based on national percentage of veterans in state labor force – currently approximately 8% and periodically posted on OFCCP website – or based on variety of employer-specific factors provided in the regulations). An additional requirement is the expanded self-identification invitation. Contractors are required to invite all applicants to self-identify as a protected veteran pre-offer and post conditional offer (pre-offer request can be made at the same time as pre-offer self-identification of race and gender under EO 11246). Other requirements include annual outreach and recruitment effort assessments for veterans, written notification of affirmative action policy to subcontractors and request for their cooperation, annual self-

assessment of outreach and recruitment efforts with "reasonable" conclusions regarding efforts, directly listing vacancies with state employment services (no reliance upon third-party listing services), and notice to state hiring official of federal contractor status and request for priority referrals of veterans.

The regulations and the OFCCP impose increased recordkeeping burdens upon contractors to generally track the number of veteran referrals, ratio of veteran and non-veteran applicants and hires (adverse impact analysis similar to Executive Order 11246), and collect analysis information. Specifically the following recordkeeping is required:

- Number of veteran referrals;
- Number of job openings;
- Number of jobs filled;
- Number of applicants for all jobs;
- Number of applicants who self-identified protected veterans, or who are otherwise known as protected veterans;
- Number of applicants hired; and
- Number of applicants identifying as protected veterans hired.

Significantly, the length of record retention was increased to 3 years for records of external outreach and recruiting efforts, new data collection and analysis requirements, and records related to hiring benchmarks.

Disabled Individuals. For the first time, the OFCCP regulations under Section 503 of the Rehabilitation Act of 1973 include a utilization/placement goal (7%) for individuals with a disability in the current workforce. While this is not a quota, similar to the veterans data collection and analysis requirements for veterans, contractors must maintain data sufficient to determine whether the contractor is meeting the 7% goal and, if not, the contractor's efforts to do so. Even more burdensome than the veteran self-identification regulations, the OFCCP requires contractors invite all applicants to self-identify as an individual with a disability pre-offer (can be requested at the same time as pre-offer self-identification of race and gender under EO 11246); to invite newly hired employees to self-identify as disabled within one year following the March 2014 implementation of the regulations; and at 5-year intervals thereafter.

To more effectively measure the effectiveness of the contractor's efforts, the OFCCP similarly increased the recordkeeping requirements under these regulations to include the following information:

- Number of jobs filled;
- Number of applicants for all jobs;

- Number of applicants who self-identified as disabled individuals;
- Number of applicants hired; and
- Number of applicants identifying as disabled hired.

Contractors are required to maintain recordkeeping for 3 years for records of external outreach and recruiting efforts, new data collection analysis requirements, and records related to hiring benchmarks. The regulations require contractors to preserve "records relating to requests for reasonable accommodation" for 2 years after they are made. The regulations specifically provide that failure to preserve complete and accurate records as required by the regulations "constitutes noncompliance." Unless the contractor can demonstrate that the destruction or failure to preserve records resulted from circumstances beyond the contractor's control, the information destroyed or not preserved may be presumed to be unfavorable to the contractor.

VETS 4212 REPORT

The DOL's Final Rule implementing a revised veterans reporting form for covered federal contractors and subcontractors became effective on October 27, 2014. You can read the Final Rule ***here***.

The main purpose of the rule is to reduce the burden in completing the prior report, the VETS-100 report, which required covered contractors to report the number of "covered" veteran employees and new hires by EEO-1 category and specific protected veteran category (i.e., "recently separate veteran," "disabled veteran.") The VETS-4212 solicits information on "protected" veterans in their workforce in the aggregate, rather than by specific protected veteran category. Consistent with the updated VEVRAA regulations, "protected veteran" has been updated to include "active duty wartime or campaign badge veteran." Contractors have the option of reporting new hire data (protected veteran hires and total hires) by EEO-1 category in a hiring location or reporting only total aggregate numbers for new hires by hiring location.

The rule applies generally to "protected veterans" under the VEVRAA, which includes: "disabled veterans, veterans who served on active duty during a war or campaign for which a campaign badge was authorized, veterans who were awarded an Armed Forces Service Medal and recently separated veterans." Covered contractors are those with government contracts and subcontracts of $100,000 or more entered into or modified after December 1, 2013.

MINIMUM WAGE REGULATIONS EFFECTIVE JANUARY 1, 2016

On February 12, 2014, President Obama signed Executive Order 13658 to raise the minimum wage to $10.10 for workers on all federal construction and service contracts. Additionally, employees working on covered contracts who earn tips must be paid a minimum cash wage of $5.85 per hour. This rule went into effect on January 1, 2016. In addition to paying the minimum wage, covered contractors and subcontractors must also write the change into any covered lower-tiered subcontracts and notify any covered workers. The Department of Labor passed a Final Rule on September 16, 2015, establishing the new minimum wage.

Covered contracts include "all contracts for construction covered by the Davis-Bacon Act; contracts for services covered by the Service Contract Act; concessions contracts, such as

contracts to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment on Federal property; and contracts to provide services, such as child care or dry cleaning, in Federal buildings for Federal employees or the general public." There are a few exceptions: "(1) grants; (2) contracts and agreements with and grants to Indian Tribes under Public Law 93-638, as amended; (3) any procurement contracts for construction that are not subject to the DBA (i.e., procurement contracts for construction under $2,000); and (4) any contracts for services, except for those otherwise expressly covered by the Final Rule, that are exempted from coverage under the SCA or its implementing regulations," as well as "contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government."

Likewise, certain types of employees are excluded from this rule, including "workers who are employed in a bona fide executive, administrative, or professional capacity." Also, FLSA-covered workers employed under covered contracts are excluded "if they spend less than 20% of their work hours in a particular workweek performing in connection with covered contracts."

SICK LEAVE EXECUTIVE ORDER 13706 EFFECTIVE JANUARY 1, 2017

On Labor Day, September 7, 2015, President Obama signed an executive order requiring federal contractors and subcontractors to provide paid "sick leave" to their employees working on federal contracts or subcontracts. Specifically, covered contractors are required to certify that all employees performing the contract or any subcontract "shall earn not less than 1 hour of sick leave for every 30 hours worked" and must permit covered employees to accrue up to 56 hours of paid sick leave per year. The executive order applies to covered contracts entered into after January 1, 2017.

Paid "sick leave" may be used for the employee's own illness or medical condition, to care for a child, parent, spouse, or domestic partner and for issues relating to domestic violence or stalking. As noted in the Executive Order and the White House Fact Sheet, the requirements for eligibility and notice are distinct from the FMLA. You can read the text of this order ***here***. You can also read the White House fact sheet issued alongside the order ***here***. The executive order outlines general requirements; the Secretary of Labor is directed to issue presumably more detailed regulations by September 30, 2016.

While the executive order does not require accrued, unused sick leave to be paid upon termination, the order does require that paid sick leave will carry over from one year to the next and must be reinstated for employees rehired by a covered contractor within 12 months after a job separation.

At least four states (Connecticut, California, Oregon, and Massachusetts), Washington, D.C., and numerous counties and cities have passed similar laws and ordinances. There are over twenty other states with pending paid sick leave legislation or active campaigns for such legislation.

The White House Fact Sheet estimates that the Order will affect approximately 300,000 employees working on covered federal contracts or subcontracts.

Equal Pay Report Proposed Regulations

On August 6, 2014, the United States Department of Labor (DOL) announced a proposed rule requiring federal contractors and subcontractors to submit an annual Equal Pay Report on

employee compensation. The rule would apply only to "companies that file EEO-1 reports, have more than 100 employees, **and** hold federal contracts or subcontracts worth $50,000 or more for at least 30 days." You can read the proposed rule ***here***. A Final Rule has not be issued.

The proposed rules addressed President Obama's April 2014 memorandum for the Secretary of Labor on advancing pay equality through compensation data collection. The OFCCP proposes to use the report to "collect summary employee pay and demographic data using existing government reporting frameworks" to assist the OFCCP in its enforcement of federal rules on equal pay. The Administration anticipates that the rule will encourage federal contractors and subcontractors to self-govern and implement "voluntary necessary measures to achieve full compliance."