

## *Employment & Labor Issue Alert*

### OFCCP Publishes Final Pay Transparency Regulations for Government Contractors



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The OFCCP recently published final Pay Transparency regulations for government contractors. Mandated by Executive Order, the new regulations protect applicants and employees from adverse treatment for sharing pay information, establish employer defenses to pay-transparency discrimination claims, and impose publication requirements on contractors.

#### **Regulations Prohibit Pay-Transparency Discrimination**

The regulations add a new anti-discrimination provision to the Equal Opportunity Clause that will become part of every government contract and subcontract. That provision states:

**The contractor will not discharge or in any other manner discriminate 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.**

“Compensation” is broadly defined to include not only salary and wages, but also overtime pay and shift differentials; bonuses, commissions, and profit sharing; vacation, holiday, insurance, retirement and other benefits; and stock options and awards. Unlike the NLRB’s recent pay-transparency rules, this nondiscrimination provision applies to all employees, including supervisors and managers.

In pursuing pay-transparency discrimination claims, the OFCCP will apply the “a motivating factor” standard. This means the OFCCP can prove discrimination if pay transparency was a motivating factor in an adverse employment decision, even if other legitimate grounds also animated the contractor’s decision. The OFCCP also warns that, in some cases, it will apply the McDonnell Douglas burden-shifting approach to show that an employer’s proffered justification for its actions is a pretext for discrimination. Unlike Title VII or other discrimination claims, only the OFCCP—not individual employees—can prosecute an alleged violation of the Equal Opportunity Clause.

#### **Employer Defenses: Essential Job Function & Non-Discriminatory Policy**

The regulations create two contractor defenses to a pay-transparency discrimination claim.

##### The Essential Job Function Defense

A contractor has a complete defense and does not violate the Equal Opportunity Clause if it takes adverse action against an employee “who has access to the compensation information of other employees or applicants as part of such employee’s essential job functions” and who impermissibly discloses that information. This “essential job function” defense applies to employees (1) who perform job functions or who routinely are assigned tasks that require them to have access to confidential compensation information or (2) whose duties include protecting and maintain the privacy of personnel records, including compensation information. Compensation information includes any information directly related to employee compensation or the process or steps that led to a decision to provide a particular type or amount of compensation, including, for example, an employee’s level of compensation, as well as any individual or market data the company uses to establish compensation levels. To balance the company’s interest in confidentiality with the principles of pay transparency, employees with access to compensation information may lawfully disclose that information—and obtain protection under the Equal Opportunity Clause—in three enumerated circumstances: (1) in response to a formal complaint or charge of pay-transparency discrimination; (2) in support of an investigation or proceeding, including an internal company investigation; or (3) pursuant to a legal duty to furnish

information. For example, the “essential function” defense does not apply to employees who use their access to information to report possible pay disparities through the contractor’s internal complaint process. It also does not apply to employees who only disclose information not obtained by virtue of their access, such as the amount of their own compensation.

### The Non-Discriminatory Policy Defense

Contractors also may defend an adverse employment action on the grounds that the action was the result of a legitimate, non-discriminatory, and uniformly applied policy. The OFCCP gives two examples. First, a contractor may apply its general policy to discipline disruptive employees if an employee disrupts the workplace by standing on his desk and shouting out his compensation information. Second, a contractor may apply its general attendance policy to discipline an employee who misses work to communicate with another employee about compensation issues. In both instances, the discipline is grounded in the workplace policy that applies regardless of the nature of the employee’s communications. A contractor cannot, however, increase the severity of discipline because an employee discusses compensation, nor can it adopt and enforce a policy that, for example, would define any conversation regarding compensation as disruptive.

### **New Publication Requirements**

Government contractors always have had the obligation to include the Equal Opportunity Clause in all covered subcontractors, either by restating the Clause or by incorporating it by reference. If the Clause is restated, then contractors now must include the pay-transparency provision. If the contract incorporates the Clause by reference, then the pay-transparency provision automatically becomes part of new subcontracts.

The new regulations also require all contractors to include in their existing handbooks a nondiscrimination provision drafted by the OFCCP and available on its [website](#). This same nondiscrimination provision must be posted electronically or in locations where it will be available to all employees and applicants. Eventually, the Department of Labor will publish a revised, mandatory “EEO is the Law” poster that addresses this and other recent regulatory changes. In the meantime, OFCCP this month published a “Poster Supplement” that government contractors must post alongside the current EEO poster; this supplement also is available on the OFCCP’s [website](#).

### **Effective Date and Next Steps**

These new regulations take effect on January 11, 2016, and will apply to all new or modified government contracts entered after that date. Because most government contracts are one-year, renewable contracts, these regulations will become effective for most contractors on the first contract renewal date after January 11, 2016.

Contractors should begin to prepare for compliance with these new regulations now. Contractors might, for example: determine which employees have access to compensation information as an essential job function, and update job descriptions accordingly; limit access to compensation information only to those employees who need access; prepare to modify subcontracts, as necessary; prepare to modify employee handbooks by deleting any pay-secrecy provisions and adding the OFCCP’s nondiscrimination provision; and prepare to post the nondiscrimination provision and post the supplemental EEO is the Law poster.

These Pay Transparency regulations are separate from the OFCCP’s proposed rules that would require most government contractors to report employee compensation data to the Department of Labor each year. Contractors can expect to see final pay-reporting regulations in the coming months. We will summarize the impact of those regulations for you once they have been published.

### **For More Information**

If you have questions or want more information regarding the OFCCP’s final Pay Transparency regulations, you should contact your legal counsel. If you do not have regular counsel for affirmative action matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. You may contact **Charles McClellan** at [cmcclellan@foulston.com](mailto:cmcclellan@foulston.com) or by calling 316.291.9764. You may also contact **Boyd Byers**, Employment and Labor Practice Group Leader, at [bbyers@foulston.com](mailto:bbyers@foulston.com) or 316.291.9716. For more information about Foulston Siefkin, please visit our website at [www.foulston.com](http://www.foulston.com).

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