

AN A.S. PRATT PUBLICATION

APRIL 2015

VOL. 1 • NO. 1

PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Victoria Prussen Spears

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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISBN: 978-1-6328-2706-7 (eBook)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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An A.S. Pratt™ Publication

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Federal Employment Law Changes for Government Contractors in 2014—What Every Contractor Should Know—Part I

*By Julia E. Judish and John E. Jensen**

In 2014, through new Executive Orders, directives to the Department of Labor, and new regulatory action, the Obama Administration used its executive authority to implement changes to employment practices in the government contracting community. In this first part of a two-part article, the authors explain changes in pay equity, and prohibiting discrimination on the basis of sexual orientation and gender identity. The second part of the article, which will be featured in an upcoming issue of Pratt's Government Contracting Law Report, will focus on actions expanding employment opportunities for veterans and individuals with disabilities.

For government contractors, the year 2014 may be remembered as the Year of Executive Employment Actions. Through new Executive Orders, directives to the Department of Labor, and new regulatory action, the Obama Administration used its executive authority to implement changes to employment practices in the government contracting community. These new actions affect the compliance obligations of nearly every government contractor and subcontractor. The actions reflect a triple focus on pay equity, on prohibiting discrimination on the basis of sexual orientation and gender identity, and on expanding employment opportunities for veterans and individuals with disabilities.

INTRODUCTION

As discussed in greater detail throughout this article, the notable initiatives include:

Pay Equity Measures

- Executive Order 13665, prohibiting government contractors from retaliating against employees or applicants for asking about, disclosing, or discussing their compensation with other workers, and the issuance of a Proposed Rule implementing these changes;

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- A Presidential Memorandum directing the Department of Labor to issue new regulations that will require government contractors to report summary compensation data for their employees, by sex and race, to the Department of Labor on an annual basis, and the Department of Labor's prompt issuance of a Proposed Rule;
- Executive Order 13658, raising the minimum wage to \$10.10 per hour for non-exempt government contractor employees assigned to perform services on federal contracts or subcontracts, with implementing regulations published on October 7, 2014, effective January 1, 2015; and
- A directive to the Department of Labor that it should issue new regulations that (i) will raise the minimum weekly salary to qualify for exempt status above the current level of \$23,660 annually, and (ii) will raise the bar on proving that the exempt responsibilities of exempt professionals, executives, and administrative employees are in fact their primary duties.

Prohibiting Discrimination on the Basis of Sexual Orientation and Gender Identity

- Executive Order 13672, amending Executive Order 11246 to include sexual orientation and gender identity as characteristics protected from discrimination, and the Department of Labor's issuance of implementing regulations on December 9, 2014.

Expanding Employment Opportunities for Veterans and Individuals With Disabilities

- The roll-out by the Office of Federal Compliance Programs ("OFCCP") of an expanded Itemized Listing for contractors selected for a compliance review of one of their establishments.
- New regulations replacing the VETS-100A report with a streamlined and updated VETS-4212 annual reporting requirement, to be submitted by September 30 each calendar year.

In addition, March 24, 2014, marked the effective date of the OFCCP's new regulations establishing hiring benchmarks for government contractors for veterans and for individuals with disabilities. Some of these new requirements took effect on March 24th, and others will need to be adopted by government contractors starting with their next Affirmative Action Plan year.

PAY EQUITY MEASURES

The Obama Administration took four significant steps in 2014 that are likely to raise the compensation levels of lower-paid and perhaps underpaid members

of the government contractor workforce. President Obama was able to act on his own executive authority, without needing the cooperation of Congress, by limiting the reach of some of the measures only to employers that are government contractors and by directing the Department of Labor, an executive branch agency, to issue new regulations under existing law. As discussed below, President Obama issued an Executive Order 13665 aimed at “closing the persistent pay gap for women and minorities,” at least for employees of federal contractors and subcontractors, by prohibiting retaliating against employees and applicants for asking about, disclosing, or discussing their compensation with other workers. On the same day, President Obama issued a Presidential Memorandum calling for new regulations requiring contractors to report summary compensation data for their employees, by sex and race. President Obama issued Executive Order 13658, raising the minimum wage for non-exempt government contractor service and construction employees to \$10.10 per hour, effective January 1, 2015. As government contractors comprise approximately a quarter of the U.S. workforce, these new regulations will directly affect a significant portion of employers, and may also have a ripple effect that extends even to wholly private-sector employers.

In addition, in an action that will affect all employers covered by the federal Fair Labor Standards Act (“FLSA”), President Obama directed the Department of Labor to issue new regulations under the FLSA that, by raising the minimum weekly salary to qualify as an exempt employee and updating the “primary duties” test for “white collar” exemptions, will have the practical effect of increasing the percentage of workers entitled to premium overtime pay. In combination, these measures are likely to raise the compensation levels of lower-paid and perhaps of underpaid members of the government contractor workforce.

Applicants and Employees Have Right to Ask About, Disclose and Discuss Compensation—Executive Order 13665 and Proposed Rule

In citing a “persistent pay gap” between men and women, President Obama reignited ongoing controversy about the size of the gap. The Department of Labor, for example, states that women now earn 81 cents for every dollar earned by male employees,¹ while the Pew Research Center estimates that women earn 84 percent of what male workers earn.² Studies also show a pay gap between minority and white workers. The Bureau of Labor Statistics, for example, reported that in the fourth quarter of 2013, full-time white workers had median

¹ <http://www.dol.gov/equalpay/>.

² <http://www.pewresearch.org/fact-tank/2014/04/08/on-equal-pay-day-everything-you-need-to-know-about-the-gender-pay-gap/>.

earnings of \$813 per week, with median weekly earnings of Black employees only \$632, and Hispanics earning only \$576 per week.³ Theories abound as to whether these wage gaps reflect discrimination or other less pernicious factors. There is no dispute, however, that a wage gap still exists.

One potential cause of the persistent wage gap is a lack of information among employees regarding the wages paid to other employees. If the earnings of co-workers are kept secret, female and minority employees will not have information they need to advocate for matching increases in their own compensation or to push for pay equity adjustments. Many employers have policies that treat compensation data as confidential personnel information and prohibit employees from disclosing their compensation to other employees. The introduction to President Obama's compensation transparency Executive Order asserts that secrecy about compensation practices makes it more difficult to discover and remediate compensation discrimination, tends to diminish market efficiency, and "decrease[s] the likelihood that the most qualified and productive workers are hired at the market efficient price."

To address this issue, Executive Order 13665 amended Executive Order 11246, which prohibits discrimination on the basis of race, ethnicity, and sex and requires covered government contractors and subcontractors to engage in affirmative action to remove obstacles to equal employment opportunities for women and minorities. Executive Order 11246 applies to contractors and subcontractors receiving more than \$10,000 in federal work in a 12-month period and is generally implemented through Federal Acquisition Regulation ("FAR") clause 52.222-26, Equal Opportunity and through the implementing regulations at 41 CFR Part 60-1 and 60-2. Generally, Executive Order 11246 requires that covered contractors engage in applicant tracking and other workforce data analysis to ensure equal employment opportunity and monitor affirmative action efforts with respect to women and minorities, and that covered contractors maintain an affirmative action plan ("AAP") for each of the company's establishments with 50 or more employees. Executive Order 13665 amends Executive Order 11246 to prohibit federal contractors and subcontractors from retaliating against employees and applicants who discuss their compensation with other employees and applicants. Specifically, the Executive Order provides that federal contractors "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." On September 17, 2014, the Department of Labor published in the

³ http://www.bls.gov/news.release/archives/wkyeng_01222014.pdf.

Federal Register a proposed rule that includes a broad definition of “compensation” as “any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment.” The proposed rule incorporates verbatim the Executive Order’s prohibition against “discrimination” against applicants or employees for disclosing, discussing or inquiring about compensation.

Under the Executive Order—and the proposed rule—employers may require confidentiality from human resources, payroll, and other staff with access to the records of employees’ compensation; the Executive Order specifies that, with certain exceptions, “[t]his provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee’s essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information.” In other words, the Executive Order protects employees if they wish to discuss their own compensation, but does not authorize an employee with access to others’ compensation data to make the unilateral decision to disclose a co-worker’s salary level.

Federal Contractors Face New Compensation Reporting Requirements—Proposed Rule

Another potential cause of the persistent wage gap is a lack of information within the federal government about employers’ compensation practices, which impedes federal efforts to enforce civil rights laws. To address this issue, President Obama issued a Presidential Memorandum calling for new regulations to require federal contractors and subcontractors to submit summary compensation data to the Department of Labor. The Memorandum directed that, “[t]o the extent feasible,” the Department of Labor should “avoid new record-keeping requirements and rely on existing reporting frameworks to collect the summary data,” and that it should “minimize, to the extent feasible, the burden on Federal contractors and subcontractors and in particular small entities.”

On August 8, 2014, the Department of Labor issued a proposed rule in response to the President’s directive. The proposed rule would add new provisions to 41 CFR Sec. 60-1.7 and create a new Equal Pay Report obligation for larger government contractors. The Equal Pay Report will “provide summary data on the compensation paid to employees by sex, race, ethnicity, specified job categories, and other relevant data points” in a “format and manner required by the OFCCP” for all employees. The Equal Pay Report form issued by the OFCCP requires covered contractors to submit the total number of workers within a specific EEO-1 job category by race, ethnicity and sex; the total W-2 wages (defined as the total individual W-2 wages for all workers in

the job category) by race, ethnicity and sex; and the total hours worked (defined as the number of hours worked by all employees in the job category) by race, ethnicity and sex.⁴ The OFCCP has proposed an annual reporting window of January 1 to March 31, with the wages totals reported based on compensation information for the prior calendar year for all employees included in the contractor's most recent EEO-1 Report.

Under the proposed rule, only prime contractors and first-tier subcontractors with more than 100 employees and with "contract, subcontract, or purchase order amounting to \$50,000 or more that covers a period of at least 30 days" must file an Equal Pay Report. The data will be treated as confidential by the OFCCP under the Freedom of Information Act ("FOIA") if the contractor identifies the data as confidential and sensitive and if the contractor is still in business. The proposed rule contemplates, however, that the OFCCP may publish "aggregate information" from the Equal Pay Report, including compensation "ranges and averages by industry, labor market, or other groupings." According to FAQs issued by the OFCCP, "[r]equiring federal contractors and subcontractors to report [Equal Pay Report] data will lead to more contractors voluntarily changing their pay practices, and taking other proactive measures to make sure they are in compliance."⁵ In addition, the instructions accompanying the model Equal Pay Report form explain that the data in the reports will be used by the OFCCP:

to establish objective industry standards for employee compensation, and to prioritize contractors and subcontractors for compliance evaluations. This prioritization is based on the amount of difference between a contractor's pay standards when compared to the established industry standards. In this way, OFCCP is able to direct its limited enforcement resources toward contractors and subcontractors for which reported data suggest potential pay violations.⁶

In practical effect, therefore, contractors that pay employees on the low end of the range of their industry and labor market will likely face a choice between raising the compensation levels of their employees or facing increased scrutiny by the OFCCP.

⁴ A sample Equal Pay Report form is available at <http://www.regulations.gov/#!documentDetail;D=OFCCP-2014-0004-0003>.

⁵ http://www.dol.gov/ofccp/EqualPay/EPR_FAQs.html#Q10.

⁶ Instructions for the proposed Equal Pay Report are available at <http://www.regulations.gov/#!documentDetail;D=OFCCP-2014-0004-0005>.

Higher Minimum Wages—Executive Order 13658 and New Regulatory Actions

Under Executive Order 13658, the implementing regulations at 29 CFR Part 10, the interim FAR rule published on December 15, 2014 creating FAR subpart 22.19, Establishing a Minimum Wage for Contractors, and FAR clause 52.222-55, Minimum Wages, the minimum wage for many non-exempt service and construction employees employed by federal contractors and subcontractors rose to \$10.10 an hour, effective January 1, 2015. Most covered contractor employees already earn more than the \$10.10 minimum, but the new requirement sets a higher floor than previously. The new minimum wage applies to employees directly supporting a government contract (i) covered by the Davis-Bacon Act, (ii) covered by the Service Contract Act (“SCA”), (iii) that is a contract for concessions, regardless of SCA coverage, or (iv) that is in connection with federal property or lands and related to offering services for federal employees, their dependents, or the public.⁷ In addition, the Secretary of Labor is empowered to increase the minimum wage level on January 1, 2016, and annually thereafter.⁸ The minimum wage regulations apply only to “new contracts” with the federal government that result from a solicitation issued on or after January 1, 2015, awarded outside the solicitation process on or after January 1, 2015, or renewed, extended, or modified through bilateral negotiation on or after January 1, 2015, but the regulations do not apply to the “unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government.”⁹ The minimum wage regulations apply only to contracts requiring performance in whole or in part within the United States.¹⁰

Significantly, not all non-exempt employees working for federal contractors and subcontractors are subject to the minimum wage requirements: only “those workers directly engaged in performing the specific work called for by the contract” are subject to the higher minimum wage. Employees of the government contractor who do not work on the contract, who only indirectly support the work of the contract, or who “spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts” are excluded from the mandatory higher minimum wage.¹¹ In addition, most employees working on contracts subject to the SCA and Davis-Bacon Act already receive wages in excess of \$10.10 per hour, in part

⁷ FAR 22.19; FAR 52.222-55; 29 CFR § 10.3(a).

⁸ 29 CFR §§ 10.1, 10.5; FAR 22.1902(a); FAR 52.222-55(b)(2).

⁹ 29 CFR § 10.2.

¹⁰ 29 CFR § 10.3.

¹¹ 29 CFR § 10.4(f); FAR 22.1903(b)(2)(i); FAR 52.222-55(c)(2)(i).

because the prevailing wages for most SCA and Davis-Bacon Act wage determinations currently exceed that level. Thus, the wages of most government contractor employees would not be affected, but the rule change could have a ripple effect in the economy that extends well beyond the employees immediately affected.

Lower-paid exempt employees in all sectors are also soon likely to see a boost in compensation levels. On March 13, 2014, President Obama signed a Presidential Memorandum titled “Opportunity for All,” directing the Department of Labor to update existing overtime regulations for so-called “white collar” salaried, exempt employees under FLSA by raising the minimum salary level necessary to qualify for the exemption from the FLSA’s overtime and minimum wage employees.¹² Secretary of Labor Tom Perez explained the President’s new initiative with the comment that “all too often, [exempt] salaried employees are earning less per hour than the employees they supervise.”¹³ By updating the “primary duties” test and increasing the guaranteed weekly salary level, the new regulations will narrow the “white collar” exemptions for professional, administrative, and professional employees. As a result, more workers currently classified as exempt will lose their status as exempt under the FLSA and become eligible for overtime pay under federal law; employers may give raises to other currently low-paid salaried employees in order to preserve their status as exempt employees. The Department of Labor is expected to publish the proposed Rule in early 2015.

PROHIBITING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY

On July 21, 2014, President Obama issued Executive Order 13672, which amended Executive Order 11246 to add sexual orientation and gender identity as characteristics protected from discrimination, in addition to race, color, religion, sex, and national origin. The Department of Labor published implementing regulations on December 9, 2014, which amend 41 CFR Parts 60-1, 60-2, 60-4, and 60-50. The new regulations will apply to covered contractors who hold federal contracts or subcontracts of at least \$10,000 entered into or modified on or after April 8, 2015.

Although Executive Order 11246 imposes both nondiscrimination and affirmative action obligations on federal contractors and subcontractors, the only affirmative action measures required by the new regulations with respect to sexual orientation and gender identity entail (i) including an updated Equal

¹² See <http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr>.

¹³ See <http://social.dol.gov/blog/fixing-overtime-rules-to-reward-hard-work/>.

Opportunity Clause in new or modified subcontracts or purchase orders ensuring that employment decision will be made without regard to applicants' or employees' sexual orientation or gender identity, and (ii) updating the equal opportunity language used in job solicitations and postings.

Unlike with race, gender, disability, or veteran status, the new regulations do *not* require that contractors invite applicants or employees to self-identify as to sexual orientation or gender identity, nor are there any reporting requirements regarding the sexual orientation or gender identity demographics of the workforce. Because there are no federal recordkeeping requirements for sexual orientation or gender identity, employers who inquire about or comment on these characteristics in employees or applicants will increase the risk of potential discrimination claims.

The second part of this article, to be published next month, will focus on actions expanding employment opportunities for veterans and individuals with disabilities.