
President Takes Action Meant to Increase Pay Equity for Employees of Federal Contractors

By Julia E. Judish and Keith D. Hudolin

On April 8, 2014, President Obama issued an Executive Order and a Presidential Memorandum aimed at “closing the persistent pay gap for women and minorities,” at least for employees of federal contractors and subcontractors. These two executive actions direct the Department of Labor to issue new regulations that will (i) prohibit government contractors from retaliating against employees and applicants for asking about, disclosing, or discussing their compensation with other workers, and (ii) require contractors to report summary compensation data for their employees, by sex and race, to the Department of Labor. By limiting the reach of these measures only to employers that are government contractors, President Obama was able to act on his own executive authority, without needing the cooperation of Congress. Government contractors comprise approximately a quarter of the U.S. workforce. Thus, 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.

Pay Inequality in the United States

In 1963, women in the American workforce earned only 59 cents for every dollar earned by male employees.¹ In response, Congress that year passed the Equal Pay Act, which requires that employers pay men and women equally if they perform substantially the same work. The following year, Congress re-affirmed its commitment to gender equality in the workplace by passing Title VII of the Civil Rights Act of 1964, which, among other things, prohibits employers from discriminating against employees based on race or sex in any of the terms of conditions of employment, including compensation.



¹ <http://www.dol.gov/equalpay/>

Nonetheless, pay inequality has remained persistent. According to the Presidential Memorandum, working women “earn only 77 cents for every dollar that a man earns” and, “[f]or African-American women and Latinas, the pay gap is even greater.” The precise wage gap statistics quoted by the President are not universally accepted; the Department of Labor, for example, states that women now earn 81 cents for every dollar earned by male employees.² Theories also abound as to whether the wage gap reflects discrimination or other less pernicious factors. There is no dispute, however, that a wage gap still exists. In issuing the Executive Order and the Presidential Memorandum, President Obama hopes to increase wage equity by mandating greater transparency about compensation, both through mandatory reporting of compensation data to the government and through protecting employees’ rights to discuss what compensation they and their co-workers earn.

Employees of Federal Contractors Must be Permitted to Disclose and Discuss their Compensation

One potential cause of the persistent wage gap is a lack of information among employees regarding the wages paid to other employees. That is, if a female employee does not know how much the employer pays to men who perform substantially equal work, she will not know whether she has a claim under the Equal Pay Act, and she will not have information she needs to advocate for matching increases in her own salary. Many employers have policies that treat compensation data as confidential personnel information and prohibit employees from disclosing their compensation to other employees. According to the introduction to the Executive Order, this secrecy about pay 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, the Executive Order amends 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. The amendment to the Executive Order prohibits 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.”

The Executive Order does allow employers to require confidentiality from human resources, payroll, and other staff with access to the records of employees’ compensation; it 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 Will Face New Reporting Requirements

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, the Presidential Memorandum calls for new regulations that will require federal

² <http://www.dol.gov/equalpay/>

contractors and subcontractors to submit summary compensation data to the Department of Labor. While the Memorandum leaves the details of the new reporting requirement to the discretion of the Secretary of Labor, the Memorandum makes clear that contractors will need to provide this data by both sex and race. Many federal contractors may already be familiar with the Department of Labor's prior compensation data collection tool, the Equal Opportunity Survey, which some contractors had to submit during the Clinton Administration. The contracting community complained that the Survey was both burdensome and too unrefined a tool to identify compensation discrimination, and the Bush administration rescinded those regulations in 2006, following a report from the Office of Federal Compliance Programs ("OFCCP") that the Survey "had little predictive value for indicating discrimination or non-compliance" by federal contractors.

The Presidential Memorandum signals that the Department of Labor is unlikely simply to reanimate the Survey, at least without significant changes. The Memorandum directs 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."

The government contractor community will have to wait for issuance of new proposed regulations to have a clear sense of the parameters of the new compensation data tool, but existing affirmative action regulations suggest possible ways for the Department of Labor to meet this new directive. For example, under 41 C.F.R. § 60-2.17, federal contractors with over 50 employees and a government contract or covered subcontract of \$50,000 or more are already required, on an annual basis, to "evaluate . . . [their] compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities." While this data is not included in a contractor's Affirmative Action Plan, contractors are expected to maintain records of the evaluation data. In addition, if the contractor is selected for a compliance review, the OFCCP has required the contractor to submit "annualized compensation data (wages, salaries, commissions, and bonuses) by either salary range, rate, grade, or level showing total number of employees by race and gender and total compensation by race and gender." One reasonable possibility, therefore, is that the Department of Labor will now require contractors with at least 50 employees to submit their compensation evaluation data on an annual basis. That approach would constitute a new submission requirement, but not a new record-keeping requirement. In addition, it would avoid burdening smaller contractors that are not subject to the Affirmative Action Plan regulations. Finally, the data could be used by the OFCCP as one factor for selecting contractors for compliance reviews, thus meeting the directive in the Presidential Memorandum that the new compensation data tool "enable[e] DOL to direct its enforcement resources toward entities for which reported data suggest potential discrepancies in worker compensation, and not toward entities for which there is no evidence of potential pay violations."

Next Steps for Federal Contractors

Both of these executive actions direct the Department of Labor to issue new regulations. Thus, under the Administrative Procedures Act, the new requirements will only go into effect after the Department of Labor publishes proposed regulations, allows for a public comment period, reviews the public comments, and then issues final regulations. With respect to the anti-retaliation provisions, the Executive Order states that the prohibition on retaliation against employees and applicants who disclose or discuss their compensation will only be applicable to new federal contracts or subcontracts entered into after the date the Department of Labor promulgates the final regulations. Nonetheless, federal contractors and subcontractors should take steps now to ensure that they are prepared when the new regulations are issued and finalized.

As a first step, government contractors should review their employee handbooks, employee confidentiality agreements, and other personnel policies to ensure that they do not prohibit employees and applicants from disclosing their compensation to other employees and applicants.

In addition, contractors should review their current evaluation processes for employee compensation data and take steps now to investigate and correct any unexplained compensation disparities. Contractors may wish to involve their legal counsel in these analyses, in order to preserve attorney-client privilege and work-product protection for any analyses that might indicate potential legal liability. Contractors that are proactive in conducting these analyses and putting in place effective data reporting systems will be better positioned to comply relatively painlessly with the new reporting requirements, once Department of Labor finalizes them.

Lessons for All Employers

Companies that do no business with the federal government or with government contractors will not be covered by the new regulations, but they would be wise to pay heightened attention to whether their compensation practices result in unexplained racial or gender disparities. While wholly private-sector employers will be spared from whatever compensation reporting requirement the Department of Labor develops, this data would be available to a plaintiff through discovery in a compensation discrimination lawsuit brought under Title VII or the Equal Pay Act, which apply to all U.S. employers with at least 15 employees. In addition, the National Labor Relations Board already takes the position that policies barring non-management employees from discussing compensation with each other constitute an unfair labor practice under the National Labor Relations Act. President Obama's amendment to Executive Order 11246 effectively codifies this position and extends its reach to all employees, even management employees, of government contractors and subcontractors.

Moreover, state and local laws in some jurisdictions may already extend some of the protections offered by these executive actions to private sector employees. For example, California has long prohibited all employers, including those that work solely in the private sector, from requiring employees to refrain from disclosing the amount of their wages or from retaliating against those who disclose the amount of their wages.³

Further, employment practices that are mandatory only in the government contractor sector frequently become viewed as the new normal by employees, who come to expect all employers to have policies that match the standards of government contractor employers. On the state level, legislatures frequently model employment legislation applicable to all employers after federal standards for government contractors. For example, on February 12, 2014, President Obama issued Executive Order 13658, raising the minimum wage for non-exempt government contractor employees to \$10.10 per hour, effective January 1, 2015. Less than two months later, on April 7, 2014, the Maryland legislature passed a law that Governor Martin O'Malley is expected to sign, requiring all Maryland employers to pay a minimum wage of \$10.10 per hour. Other states and localities are expected to follow suit. In short, these executive actions signal a new focus on compensation equity to which all employers should pay attention.

³ Cal. Lab. Code § 232.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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