How Gov’t Contractors Can Avoid Pay Transparency Mishaps

Description

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The final rule implementing Executive Order 13665 (the Pay Transparency Act) went into effect on Jan. 11, 2016. The act prohibits employers from requiring their employees to keep their compensation confidential. Under the new rule, covered employers also can no longer keep the employee’s right to share their compensation a secret. Rather, covered employers must now affirmatively inform their employees and applicants that they have the right to share compensation information.

The final rule applies to most federal contractors, including (1) those who hold a single federal contract, subcontract or federally assisted construction contract in excess of $10,000; (2) those who have federal contracts or subcontracts that have a combined total in excess of $10,000 in any 12-month period; or (3) virtually all banks and credit unions. Covered employers must comply with the notice provisions of the new rule on or before they enter into a new government contract or amend an existing contract. Thus, employers will likely have to update their policies this year unless they do not have federal contracts up for renewal.

Violations of the Pay Transparency Act are handled by the Office of Federal Contract Compliance Programs (OFCCP). Complaints must be filed within 180 days from the date of the alleged discriminatory action. The OFCCP may utilize the analysis similar to that found in discrimination cases to determine whether there is a permissible “motivating factor” by the employer for the alleged discrimination to assess whether a potential violation may have occurred.

Covered employers should note that the protections do not just extend to the sharing of salary information. Rather, the definition of “compensation” is broad. It includes compensation to not only be in the form of a paycheck or salary but also includes wages, overtime, bonuses, commission, vacation and holiday pay, profit sharing, retirement, and several other forms of compensation.

Moreover, the exceptions are limited. There are two activities that are not protected by this act. First are disclosures of compensation information that employees receive through their everyday “essential job functions.” For instance, an employee who has access to a confidential list of employee compensation because they are working in the employer’s human resource department cannot turn around and disclose the information from the list to their co-workers. However, if the same employee knows a co-worker’s salary not just because they saw it on the list, but also because the co-worker directly told the employee their salary, the employee then could disclose that employee’s salary and still be protected.

This potentially makes firing an employee for disclosing salary information that appears to have been obtained through their job functions problematic, as the employer has to determine whether the employee also received the information through a permissible (and protected) source prior to taking action.

In addition, employees who obtain compensation information in their job duties are allowed to discuss disparities of another employee’s compensation (even if confidentiality received because of their job) with a management official. Finally, such employees can of course discuss his or her own compensation with other employees.

The second exception to the protection is that disclosures or inquiries are not protected if the manner of the

disclosure or inquiry would violate a workplace rule that is consistently and uniformly applied. There are numerous examples of how this exception would apply in the working world. An employee would not be able to wear a T-shirt which says “I only get paid $15 an hour” if they are required to wear a uniform. An employee would not have the right to joyfully yell in the middle of a hallway that they “get five weeks of vacation this year” if yelling in the hallway is prohibited. Employees can also be disciplined if they stopped working to discuss their pay (assuming they would not be allowed to stop working to discuss other matters).

Employers should be mindful that there are a few parts of the final rule that must be incorporated into existing policies. Although covered employers are not required to train employees on the protections afforded by the final rule, covered employers must provide the information to employees by several means. First, employees must be sure to include the required language into employee handbooks. It is important to use the exact language provided by the OFCCP.

The language can be found on the U.S. Department of Labor’s website here. Many employers will not want to provide an explanation beyond this language, as the same is only more likely to encourage disclosures. However, some employers may want to detail the exceptions previously noted. Particularly, employers should explain the applicable exception to employees who receive confidential salary information to avoid confusion regarding the same.

Second, employers must post the required language in a conspicuous place that is available not only to all employees but also applicants. This can be logistically accomplished several ways. Perhaps most easily, employers with web-based application systems can include the language within online portals. Employers still utilizing other means — such as print advertising — can either include the information in the advertisement or on the hard copy of the application. Finally, the equal opportunity clause present in federal contracts and subcontracts must also be revised to include language demonstrating that contractors are prohibited from discriminating in any way against employees or applicants for employment due to the fact that compensation was inquired about.

Employers should think carefully about whether their confidentiality policies and agreements (both standalone confidentiality agreements and clauses embedded in employment contracts) violate the law. Policies that are overbroad and do not specifically carve out compensation information from the definition of “confidential information” may inadvertently violate the law.

The protections under the Pay Transparency Act also go further than similar protections under the National Labor Relations Act. Under the NLRA, employees are also afforded certain protections for discussing pay with their co-workers. The Pay Transparency Act extends this protection to an increased number of employees, including those in elevated positions. Most significantly, the NLRA does not require employers to notify employees of their rights.

As such, a common misconception of employees is that they cannot or should not discuss salaries or compensation. Unfortunately, covered employers can no longer take advantage of this misconception. Rather, they must anticipate more employees discussing salaries (and demanding more pay because of the salary discussion).

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