

OFCCP Issues Final Rule Prohibiting Pay Secrecy Policies and Actions By Federal Contractors

The Office of Federal Contract Compliance Programs (OFCCP) issued its [Final Rule](#) last week implementing [Executive Order 13665](#) (entitled Non-Retaliation for Disclosure of Compensation Information). Executive Order 13665 amends Executive Order 11246 by prohibiting federal contractors from discharging or discriminating against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant.

The Final Rule was published in the *Federal Register* on September 11, 2015, and goes into effect on January 11, 2016. The Final Rule affects covered federal contractors who enter into or modify existing covered federal contracts greater than \$10,000, on or after January 11, 2016, and includes employees and job applicants who work for, or apply to work for, a company that has a covered contract with the Federal Government.

The Final Rule implements Executive Order 13665 by:

- Revising the “equal opportunity clause” to include the new nondiscrimination provision, which is required in all qualifying federal contracts, federally assisted construction contracts, subcontracts, and purchase orders;
- Requiring federal contractors to incorporate an OFCCP-prescribed nondiscrimination provision into existing employee manuals and handbooks; and
- Requiring federal contractors to disseminate the nondiscrimination provisions to employees and job applicants.

The Final Rule also provides federal contractors with two defenses to allegations of discrimination based upon discussing or disclosing compensation information. First, a federal contractor may pursue any defense that is not based on a rule, policy, practice, agreement, or other instrument that prohibits employees or applicants from discussing or disclosing their compensation or the compensation of other employees. For example, the contractor can demonstrate that an employee was discharged or disciplined for a violation of a consistently and uniformly applied company policy, and that the policy does not prohibit the discussion or disclosure of compensation information. Second, if an employee has access to the compensation information of other employees or applicants as part of the employee’s essential job functions and discloses such information to individuals who do not have access to such information, the discipline or discharge of the employee will not be deemed to be discriminatory, unless the disclosure: (1) was in response to a formal complaint or charge; (2) was in furtherance of an investigation, proceeding, hearing, or action; or (3) was consistent with the contractor’s legal duty to furnish information.

OFCCP’s website includes a [page](#) containing more information and documents pertinent to the Final Rule, including the prescribed nondiscrimination provision language for handbooks/manuals, the supplement to the “EEO is the Law” Poster, and some Frequently Asked Questions.

The Final Rule prohibits contractors from having policies that prohibit or restrict employees or applicants from discussing or disclosing compensation information. Therefore, federal contractors should review their policies and procedures to ensure that they are consistent with the Final Rule. In addition, all managers should be trained so that they do not make any comments or take any actions that could be considered discriminatory based on an employee’s discussion or disclosure of compensation information.

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