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But Wait, There's More: Pay Transparency Rules and New Sick Leave Executive Order Add Challenges For Federal Contractors

By The Federal Contractor Compliance Practice Group

With the symbolism self-evident, the Obama Administration used the occasion of the Labor Day holiday to broaden employee rights under the labor and employment laws. That day, President Obama announced that he had signed an Executive Order, entitled **Establishing Paid Sick Leave for Federal Contractors (the "Paid Sick Leave Order")**. A few days later, the Office of Federal Contract Compliance Programs issued its final rules implementing the President's 2014 Executive Order, entitled **Non-Retaliation for Disclosure of Compensation (the "Pay Transparency Order" and the "Final Rules")**. Final rules are yet to be issued on the **highly controversial Fair Pay and Safe Workplaces Executive Order** and the **Presidential Memorandum Requiring the Collection of Pay Data**. Nonetheless, it is clear that the compliance challenges confronting the federal contractor community continue to grow.

Most imminent is the Pay Transparency Order which will become effective on January 11, 2016. The Final Rules and strategies that contractors should consider to get ready are discussed immediately below. **This Client Alert also summarizes the requirements of the Paid Sick Leave Order as well as recent state law developments requiring paid sick leave.** Implementation of the Paid Sick Leave Order is not imminent, however. The Secretary of Labor has until September 30, 2016, to issue regulations implementing the order, and the order will apply only to certain types of contracts initiated on or after January 1, 2017.

I. The Pay Transparency Order

A. Justification for the Executive Order

In a lengthy preamble to the Final Rule, the OFCCP harkens back to the very first bill signed into law by President Obama, the Lilly Ledbetter Fair Pay Act (the "Fair Pay Act"). Despite the passage of the Fair Pay Act, the OFCCP argues, "pay secrecy policies still stand in the way of the fundamental principle of equal pay for equal work."¹ The Final Rules contend that policies and practices that foster pay secrecy inhibit workers, like Ms. Ledbetter, from exercising their rights to seek redress for illegal pay practices and impede the OFCCP from executing its duties. If employees are unaware of pay disparities, the OFCCP asserts, they lack the ability to invoke the OFCCP's complaint procedures, are unable to provide OFCCP investigators with the information needed in compliance evaluations, and thereby perpetuate illegal compensation practices.²

[For more information on the Paid Sick Leave Order, click here](#)



B. Prohibiting Compensation Discrimination

Under the Final Rules, federal contractors cannot discharge or otherwise discriminate against employees or job applicants because they inquire about, discuss, or disclose their own or another's "compensation." It defines "compensation" broadly to reach beyond an employee's hourly rate or salary and sweep in other forms of payment, such as overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, stock options, and benefits.³

1. Two Exceptions to the Rule

The Final Rules create two defenses that employers may assert to a claim under this new rule—the "essential functions" defense and the "workplace rule" defense.

The "essential functions" defense provides that, except in limited circumstances, a contractor may take adverse action against an employee for disclosing the compensation of other employees or applicants (not his or her own) if that employee has access to such information as part of his or her "essential job functions."⁴ Unlike the "workplace rule" defense (discussed below), this is an absolute defense to liability.⁵ In response to comments, the OFCCP revised the originally proposed definition of "essential job functions," which mirrored the definition of the term in the Americans with Disabilities Act, in order to "minimize subjectivity and provide specificity"⁶ Instead, under the Final Rules a job function is essential if:

- access to compensation information is necessary to perform that function or another routinely assigned business task, or
- the function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.⁷

The prototypical employee who would typically satisfy the essential function exception would be a human resource manager. Such an employee ordinarily has access to employee compensation information as part of his or her routine job duties as well as a responsibility to protect the confidentiality of such information from disclosure. But the definition is also broad enough to cover most supervisors and managers who are given access to confidential compensation information about others for purposes of participating in the compensation review process. Note, however, that the "essential functions" defense does not apply where such an individual (a) discusses compensation information that she obtained from a source outside of her essential functions, (b) discusses her own potential claim of compensation discrimination, or (c) discusses compensation information of others obtained through her essential functions but in response to a formal complaint or charge or through the employer's internal investigation process.⁸

The "workplace rule" exception permits a contractor to take adverse action against an employee if done to enforce a consistently and uniformly applied rule, policy, practice, or agreement that does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants.⁹ A contractor, for example, may prohibit employees from disruptive behavior in the workplace. If an employee were to jump on a desk in the middle of the office and start shouting his pay, the employer could issue discipline if the discipline were for being disruptive and not for disclosing pay. In contrast, if the employer meted out discipline because it simply treated all discussions of employee pay as disruptive, the Final Rules would be violated.



2. Proving Discrimination

The Final Rules also address the analytical framework the OFCCP will use to evaluate whether unlawful conduct has occurred.

In connection with the proposed rule, there was a divergence of opinion over whether the newly prohibited conduct would be more akin to a claim of discrimination or a claim of retaliation. The distinction is critical for proving causation. In discrimination claims under Title VII, it is sufficient that the challenged conduct is a “substantial” or “motivating” factor in the employer’s adverse employment action. In retaliation cases under Title VII, however, there must be proof that the adverse action would not have occurred “but for” the retaliatory motive.

The Final Rule to some extent settled the disagreement in favor of the causation framework available in discrimination cases, *including* the “motivating factor” framework.¹⁰ The OFCCP declined, however, to limit its analyses to the motivating factor approach, explaining it will define the appropriate analytical framework on a case-by-case basis.¹¹

C. **Amending Contracts and Handbooks**

1. Equal Opportunity Clause

The Final Rules revise the equal opportunity clause codified at 41 C.F.R. § 60-1.4(a) and § 60-1.4(b) to include a new paragraph 3 describing this new nondiscrimination obligation. As previously mandated under OFCCP regulations, contractors must incorporate the equal opportunity clause into their nonexempt contracts and subcontracts, either in its entirety or by including it by reference.¹²

While contractors must technically revise the equal opportunity clause that is currently included in their contracts, the Final Rules do not alter the way the clause may be included by reference, which is the most common method of satisfying this obligation among contractors. Thus, to the extent contractors include the clause by reference, they will not need to change their existing contract and subcontract language.

2. Employee Manuals/Handbooks

Contractors must amend their current employee handbooks or manuals. The Final Rules require contractors to incorporate an OFCCP-prescribed nondiscrimination provision in their existing handbooks or manuals and disseminate it to employees *and* applicants. The nondiscrimination provision is available on OFCCP’s web site at www.dol.gov/ofccp/PayTransparency.

Contractors must disseminate the provision by either electronic posting or by posting a copy of the provision in conspicuous places available to employees and applicants. In order to provide the required notice to applicants for employment, for most contractors this will mean via a link or comment on their online career site. This notice obligation is separate from and in addition to the duty to post the “EEO is the Law” poster which has been required since the effective date of the recent revisions to the VEVRAA and Section 503 regulations.

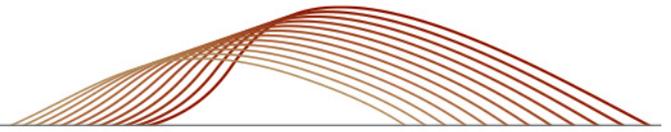
D. **Next Steps**

Contractors have four months before the Final Rules become effective on January 11, 2016. And no action may even be necessary on January 11, as the Final Rules apply to only new covered federal contracts or subcontracts, or modifications thereof, entered into on or after that date. Contractors should:



1. Take proactive measures to prepare themselves for next year's new obligations, including to make sure that current policies or guidelines do not prohibit the discussion or disclosure of compensation information.
2. Review their contracts and ensure they have properly included the equal opportunity clause. If they include the clause verbatim, they must replace the language in their contracts with the revised clause. Again, if currently included by reference, no change is required.
3. Start the process of incorporating the OFCCP-mandated nondiscrimination clause into their handbooks, and distribute or otherwise make it accessible to employees. In addition, for applicants, contractors will need to configure their career sites or online application platforms to provide access to the clause as they now do to the "EEO is the Law" poster.
4. Familiarize themselves with the affirmative defenses carved out under the Final Rules in order to identify the jobs within their unique organizations that might implicate those defenses. By doing so, contractors can better prepare for the analysis they should conduct if contemplating an adverse employment action related to a discussion or disclosure of compensation information.
5. Consider how to message or train their human resources personnel and people managers on the new prohibitions.

See below for more on information on the Paid Sick Leave Order.



NEW EXECUTIVE ORDER REQUIRES FEDERAL CONTRACTORS TO PROVIDE SICK LEAVE

In his 2015 State of the Union address, President Obama challenged Congress to “send me a bill that gives every worker in America the opportunity to earn seven days of paid sick leave,” saying, “it’s the right thing to do.” As Congress has not acted, the President has, issuing a new executive order that will require certain federal contractors to provide paid sick leave to employees who work on federal government contracts.

The Paid Sick Leave Order will require federal contractors and subcontractors to provide up to seven days of paid sick leave annually to employees who work on government contracts. Specifically, federal contractors will be required to allow their employees to earn not less than one hour of paid sick leave for every 30 hours worked. It appears that the order will not apply to contracts for goods, and will only apply to contracts for services or construction, concessions, or contracts for services in connection with federal property or lands. Additionally, the executive order appears limited to contracts that exceed the Davis Bacon and Service Contract Act thresholds.

The paid sick leave would be available for a wide range of reasons, including:

- The employee’s own physical or mental illness, injury, or medical condition.
- Obtaining diagnosis, care, or preventive care from a health-care provider.
- Caring for a child, a parent, a spouse, a domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.
- An absence resulting from domestic violence, sexual assault, or stalking.

The paid sick time will have to be provided in response to an oral or written request made, if possible, at least seven calendar days in advance. Employers cannot require the employee to provide a certification from a health-care provider unless the paid sick time leave lasts for three or more consecutive workdays.

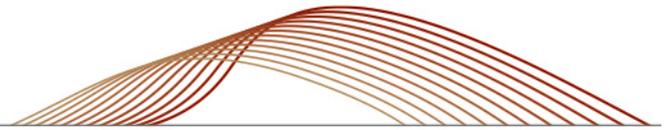
Under the order, paid sick time must carry over from year to year. Accrued but unused sick leave does not have to be paid out when an employee separates, but if an employee is rehired by a covered contractor within 12 months after a job separation, the employee’s accrued sick leave must be reinstated.

The Secretary of Labor has until September 30, 2016, to issue regulations implementing the order, and the order will apply only to contracts initiated on or after January 1, 2017.

Growing Number of Jurisdictions with Paid Sick Leave Laws

President Obama’s executive order requiring government contractors to provide sick leave is the latest in a growing trend of laws mandating that employers provide paid sick leave.

As noted in our [July 2015](#) and [October 2014](#) Client Alerts, California has been at the forefront of sick leave legislation. Additionally, Connecticut,¹³ Massachusetts,¹⁴ and Washington, D.C.,¹⁵ have laws requiring paid sick leave, and Oregon’s new paid sick leave law¹⁶ goes into effect on January 1, 2016. A number of cities have also passed their own paid sick leave laws, including New York City,

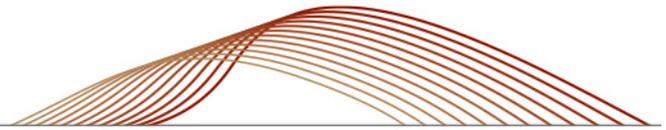


Philadelphia, Pittsburgh, Seattle, and San Francisco. Many of these laws differ from each other (and from the executive order) and require significant and highly technical revisions to existing sick leave and paid time off policies to remain in compliance. Key areas of difference may include:

- Who is covered.
- The purposes for which paid sick leave can be used.
- The rate of paid sick leave accrual.
- Rules regarding carryover from year to year.

Accordingly, while federal contractors would be well advised to re-examine their policies in light of the executive order, all employers operating in jurisdictions with paid sick leave laws should do the same to ensure compliance with state and local laws, too. Paul Hastings employment law attorneys are available to assist with what can be very complicated review projects.





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- ¹ "OFCCP Announces a Final Rule to Promote Pay Transparency," <http://www.dol.gov/ofccp/PayTransparency.html>.
 - ² 80 Fed. Reg. 54933, 54937 (Sept. 11, 2015).
 - ³ 80 Fed. Reg. at 54974 (to be codified at 41 C.F.R. § 60-1.3).
 - ⁴ 80 Fed. Reg. at 54977 (to be codified at 41 C.F.R. § 60-1.35(b)).
 - ⁵ *Id.*
 - ⁶ 80 Fed. Reg. at 54940.
 - ⁷ 80 Fed. Reg. at 54975 (to be codified at 41 C.F.R. § 1.3).
 - ⁸ 80 Fed. Reg. at 54948.
 - ⁹ 80 Fed. Reg. at 54977.
 - ¹⁰ 80 Fed. Reg. at 54948.
 - ¹¹ *Id.*
 - ¹² 41 C.F.R. § 60-1.4(a).
 - ¹³ Connecticut General Statutes 31-57r
 - ¹⁴ Massachusetts General Law. ch. 149, § 148C; 940 Code of Massachusetts Regulations 33.00
 - ¹⁵ D.C. Official Code § 32-131.01 *et seq.*
 - ¹⁶ Oregon Senate Bill 454; Oregon Revised Statutes 653

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