



## *Federal Contractor Requirements Continue to Expand – Department of Labor Proposes New Pay Data Collection Tool*

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### **I. Introduction**

Last week, the Department of Labor (“DOL”) met the deadline established by President Obama in his April 8, 2014 Presidential Memorandum and issued a Notice of Proposed Rulemaking (“NPRM”) requiring federal contractors to submit annual summary employee compensation data by gender and race/ethnicity.<sup>1</sup> The NPRM proposes an amendment to 41 C.F.R. section 60-1.7, which currently requires prime federal contractors and first tier subcontractors to file annual EEO-1 reports detailing the gender and race/ethnicity of their employees in 10 job categories.

Key features of the NPRM include the following:

- The DOL proposes that contractors file an annual “Equal Pay Report” in addition to their annual EEO-1 report.<sup>2</sup> This requirement will, according to the NPRM, address two primary objectives laid out in the Presidential Memorandum: (1) help direct enforcement resources towards contractors whose reported data suggest potential pay discrimination; and (2) encourage voluntary compliance and remediation among contractors.<sup>3</sup>
- The Office of Federal Contract Compliance Programs (“OFCCP”) will be expected to utilize the Equal Pay Report to compare a contractor’s pay discrepancies against a newly created “industry standard” to identify contractors for compliance evaluations. OFCCP will publish these industry standards so that contractors can compare their “pay differential ratios” to that of others in their industry. In turn, contractors will be expected, according to the NPRM, to use the report to proactively investigate their pay practices and remediate, as needed.
- The NPRM contains specific proposals regarding the form, content, and use of the Equal Pay Report. Recognizing the complexity of pay data collection and analysis -- and perhaps due to the limited time DOL had in which to complete its proposals -- the NPRM seeks comment on dozens of specific questions relating to the proposed report. The agency’s consideration of the responses to those questions may materially change the nature of any final rule. Comments must be submitted by November 6, 2014, the eve of the national mid-term elections. Contractors should carefully assess the increased requirements and costs of the

proposed rule and provide independent comment to the DOL or join with affiliated member organizations so that their voices may be heard.

The remaining sections of this Client Alert summarize the proposed regulation and the potential impact on contractors.<sup>4</sup>

## II. New Reporting Obligations

Under the proposed amendment to 41 C.F.R. section 60-1.7, prime contractors and first tier subcontractors must file the Equal Pay Report if they meet the following three requirements:

- Are obligated to file an EEO-1 Report;
- Have more than 100 employees; and
- Have a government contract, subcontract, or purchase order for at least \$50,000 that covers a period of at least 30 days.<sup>5</sup>

Covered contractors must submit aggregate compensation data by “sex, race, ethnicity, specified job categories, and other relevant data points.”<sup>6</sup> The preamble suggests that “other relevant data points” may include hours worked, but the proposed regulation does not specifically include that requirement.<sup>7</sup> While the lengthy preamble to the proposed regulation discusses categorizing the compensation data by EEO-1 job groups and using compensation data from employees’ W-2 tax forms for employees covered by the EEO-1 report, the proposed regulation itself contains no hint of these requirements.<sup>8</sup> Thus, contractors must await further details from the OFCCP to learn how their data must be organized. (“Contractors must submit the Equal Pay Report in the format and manner required by OFCCP.”)<sup>9</sup>

In its current form, the NPRM creates significant uncertainties for contractors. For example, contractors cannot at this point determine the process that will be needed to compile the required information. Further, the suggestion that hours worked will be among the data collected raises more questions about the utility of this tool for directing enforcement activities, particularly for contractors with large exempt populations for whom actual hours worked are not tracked.<sup>10</sup>

The NPRM describes that OFCCP will build an online filing system to receive electronically the Equal Pay Report.<sup>11</sup> If electronic filing “impose[s] an undue hardship,” however, contractors may request a “hardship exemption” from the agency.<sup>12</sup> The OFCCP will make available on its website the eligibility criteria and application procedure for the exemption. If the hardship exemption is granted, contractors will have to submit their Equal Pay Report in an alternative format.<sup>13</sup> Thus, the reporting obligation remains, even with an exemption. How long it will take for the OFCCP to construct an operational website portal for collecting this information remains to be seen.

Contractors who fail to submit the Equal Pay Report (and EEO-1 reports, for that matter) will be deemed in violation of Executive Order 11246 and the implementing regulations.<sup>14</sup> Consequently, contractors may be subject to sanctions in the form of cancelation, termination, or suspension of the contract, and/or become ineligible for further government contracts.

## III. Preserving Confidentiality of Compensation Data

The proposed regulation recognizes that contractors have legitimate business concerns with releasing compensation data on their domestic workforce, as such data is commercially sensitive within an

industry.<sup>15</sup> To alleviate those concerns, the proposed regulation contains a confidentiality provision: the agency will, to the maximum extent possible under the Freedom of Information Act (5 U.S.C. § 552), keep the compensation data exempt from public disclosure. Further, the NPRM explains that “[i]t is the practice of OFCCP not to release contractor data where [t]he contractor is still in business; and [t]he contractor indicates, and through the Department of Labor’s review process it is determined, that the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm.”<sup>16</sup>

To the extent that the OFCCP makes public the compensation data, it would do so only in aggregate form. The agency reserves the right to publish “aggregate information,” “such as ranges or averages by industry, labor market, or other groupings, but only in such a way as not to reveal any particular establishment’s or individual employee’s data.”<sup>17</sup>

It is unclear whether the OFCCP’s practice of precluding disclosure *to the public* would apply to federal or state enforcement agencies interested in a particular employer’s data. However, contractors can anticipate that their Equal Pay Reports will be the subject of discovery in litigation (as are EEO-1 reports) and consider such reports in the context of their information governance and their record retention protocols.

#### **IV. Impact on Contractors: How Will the Data Be Used?**

As explained below, the DOL intends the Equal Pay Report to serve as a data tool that both the OFCCP and contractors will use to evaluate pay practices.

##### **A. OFCCP’s Use of the Equal Pay Report**

The OFCCP will use data from the Equal Pay Reports to target contractors for compliance evaluations, as well as predict the likelihood of finding a violation during a compliance evaluation. The agency intends to aggregate pay differential ratios for protected groups to create an “industry standard” for pay differences among protected groups, as compared to favored groups (e.g., female professionals earn 60% of their male colleagues’ compensation in a certain industry).<sup>18</sup> The industry standard will reflect not only the aggregated data from contractors’ Equal Pay Reports in a certain industry, but will likely include secondary data sources, such as industry data based on North American Industry Classification System (“NAICS”), labor market data from the Bureau of Labor Statistics (“BLS”), or geographic differences reflected in the Metropolitan Statistical Area (“MSA”).<sup>19</sup> The agency seeks comment on its proposed use of secondary data sources to determine the “industry standard.”<sup>20</sup>

The industry standards will be published. Contractors with pay variances that “substantially depart” from the industry standard are more likely to be flagged for a compliance evaluation, according to the NPRM, than contractors with pay variances that are consistent with the industry standard.<sup>21</sup> Under this framework, “an establishment where the average female professional earns 75 percent as much as her male co-worker might not be selected for an OFCCP compliance evaluation if the ratios for women in similar firms average 60 percent.”<sup>22</sup>

The agency premises this analytical framework on the assumption that “like employees” are similarly categorized in EEO-1 job groups across an industry.<sup>23</sup> For example, if female professionals have less full-time work experience than their male counterparts, that distinction (according to the OFCCP) should be similar across peer employers in the same industry.<sup>24</sup> This analytical framework does not account for differences in geography or job requirements from contractor to contractor. In light of

these issues, it is uncertain whether the Equal Pay Report will in fact assist the agency in selecting federal contractors for evaluation.

The good news is that the agency states in its NPRM that it will **not** use this tool to establish pay discrimination violations; “the agency is not seeking to establish pay discrimination violations through a general reporting requirement.”<sup>25</sup> Rather, the tool allows the agency to collect standardized data in the first instance as a variable to consider in scheduling compliance evaluations. If a contractor’s Equal Pay Report raises a red flag, the agency will follow up through an audit to obtain more refined data, including narrower job category data, to assess whether pay discrimination actually exists at an establishment. That said, it remains to be seen whether initial identification of a contractor using this tool will carry with it any practical presumption through the investigative process.

## ***B. Contractors’ Use of the Equal Pay Report***

Understanding how the agency will use the Equal Pay Report, contractors can assess their likelihood of an audit once the industry standards have been established. The OFCCP intends to provide training and technical assistance to aid contractors’ understanding of the industry standards, and how contractors can conduct self-assessments of their compensation practices.<sup>26</sup> Armed with this information, contractors can proactively monitor their pay variances as compared to their respective industry standard and investigate pay variances in advance of a compliance evaluation, according to the NPRM. If enacted, and if contractors utilize the published industry standards as intended, the element of surprise in receiving a Corporate Scheduling Announcement Letter may diminish.

## **V. Next Steps**

The NPRM is consistent with President Obama’s pay equity agenda.<sup>27</sup> Accordingly, federal contractors should plan for the newly proposed regulations to be implemented in some form. In light of this change on the horizon, federal contractors should do the following:

- Be active in the public comment stage of the current NPRM, which lasts until November 6. The proposed regulation implicates important and controversial issues, such as preserving the confidentiality of compensation data and using secondary data sources in creating the “industry standards,” that will benefit from robust participation from the contractor community.
- Begin reviewing your policies, practices, procedures, and technology platforms to evaluate whether your company is set up to collect, store, and report the proposed compensation data. The transition to this obligation will be facilitated by adequate foresight and preparation.
- Consider which internal stakeholders should be involved in evaluating a contractor’s compensation data as compared to the agency’s industry standard.

By taking such measures, federal contractors can facilitate their transition to incorporating this additional layer of compliance into their practices. We will continue to follow developments in this area.

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<sup>1</sup> See Government Contractors, Requirement To Report Summary Data on Employee Compensation, 79 Fed. Reg. 46,562 (proposed Aug. 8, 2014) (to be codified at 41 C.F.R. pt. 60-1), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-08-08/pdf/2014-18557.pdf>.

<sup>2</sup> See *e.g.*, 79 Fed. Reg. at 46,585.

<sup>3</sup> The Memorandum identified two additional guardrails for the DOL's proposed rule: (1) to minimize the requirement on the contractor community, particularly small entities, and (2) to avoid new record-keeping requirements.

<sup>4</sup> This Client Alert continues our reporting on the Administration's 2014 trifecta of executive actions related to compensation. On February 20, 2014, President Obama signed an executive order increasing the minimum wage for certain federal contractor employees to \$10.10 an hour. On April 8, 2014, the same day as the Presidential Memorandum on pay data collection was issued, President Obama signed an executive order prohibiting covered contractors from retaliating against those who discuss their compensation with co-workers. See [<http://paulhastings.com/docs/default-source/PDFs/stay-current-eos-and-presidential-memo.pdf>]

These compensation-related executive actions, combined with other recent Executive Orders related to (1) ending discrimination against LGBT employees and (2) requiring contractors to (a) report labor and employment violations in the procurement process, (b) limit the use of pre-dispute arbitration agreements, and (c) create new federal pay stub reporting requirements, may lead employers to rethink remaining or becoming federal contractors. See [<http://www.paulhastings.com/publications-items/details/?id=8fc6e169-2334-6428-811c-ff00004cbded>]; [<http://paulhastings.com/publications-items/details/?id=70bae169-2334-6428-811c-ff00004cbded>]

<sup>5</sup> 79 Fed. Reg. at 46,569, 46,585.

<sup>6</sup> *Id.* at 46,606.

<sup>7</sup> See, *e.g.*, *id.* at 46,562.

<sup>8</sup> Compare *id.* at 46,570 with *id.* at 46,605-46,606.

<sup>9</sup> The OFCCP has issued "Frequently Asked Questions: Proposed Rule on Requirement to Report Summary Data on Employee Compensation." See [http://www.dol.gov/ofccp/EqualPay/EPR\\_FAQs.html](http://www.dol.gov/ofccp/EqualPay/EPR_FAQs.html). Regarding how the Equal Pay Report will be submitted, the FAQs state that "[e]ach contractor must submit the Equal Pay Report electronically through a web-based filing system. Contractors may key in their data electronically or upload their forms into the system using the standard formats provided by OFCCP." *Id.*

<sup>10</sup> Ostensibly to address the challenge presented by exempt employees, the preamble suggests that contractors could use 2080 or 1040 as hours for full or part-time exempt employees, respectively. 79 Fed. Reg. at 46,578.

<sup>11</sup> *Id.* at 46,582.

<sup>12</sup> *Id.* at 46,606.

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- 13 *Id.* at 46,582
- 14 *Id.* at 46,606.
- 15 79 Fed. Reg. at 46,582-83.
- 16 *Id.* at 46,606.
- 17 *Id.* at 46,604.
- 18 *Id.* at 46,572.
- 19 *Id.* at 46,562, 46,571.
- 20 79 Fed. Reg. at 46,571.
- 21 *Id.* at 46,572.
- 22 *Id.* at 46,572.
- 23 *Id.*
- 24 *Id.*
- 25 79 Fed. Reg. at 46,574.
- 26 *Id.* at 46,572-73.
- 27 The Administration continues to support its pay equity platform with references to speeches and papers that a woman makes 77 cents for every dollar a man earns, even though the statistic is widely contested. For example, a research study commissioned by the DOL under President Bush found that the raw wage gap of 20.4% is between 4.8-7.1% when legitimate, non-discriminatory factors are considered. See CONSAD Research Corp., *An Analysis of Reasons for the Disparity in Wages between Men and Women* (January 2009).