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President Obama Delivers Double Dose of Wage-Related Rules to Employers

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President Obama signed two important documents this week that impact many employers. First, he signed an Executive Order protecting employees who disclose their compensation to co-workers. Second, he sent a Presidential Memorandum to the Department of Labor directing DOL to issue regulations requiring federal contractors and subcontractors to submit compensation data on their workforce by the categories of sex and race. Federal contractors who are subject to oversight by the DOL's Office of Federal Contract Compliance Programs (OFCCP) have been maintaining compensation data for several years and providing it to the OFCCP when audited. The new regulations may require more public disclosure than federal contractors had previously been required to make. Though both documents address compensation, they differ greatly from each other.

The Non-Retaliation Executive Order amends E.O. 11246, the basis of federal contractor affirmative action requirements, to expressly state:

"The contractor will not discharge or in any matter discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed compensation of the employee or applicant to another employee or applicant."

The long-held position of the National Labor Relations Board has been that employees who discuss the terms and conditions of their employment, including wages, are engaging in protected concerted activity. Such conversations are already protected by the National Labor Relations Act. The new Executive Order does recognize that employers may still require employees to not disclose the compensation of co-workers. This provision attempts to balance employee personal free speech rights with the employer's right to protect its confidential business information.

The new order directs the Secretary of Labor to propose implementing regulations within 160 days. We will wait and see if the new OFCCP's regulations expand further the protections employees have always enjoyed under the NLRA or if the regulations impose additional burdens on federal contractors.

The Presidential Memorandum has the potential to impose a very heavy burden on federal contractors. The Memorandum directs the Secretary of Labor to issue a rule within 120 days that "would require federal contractors and subcontractors to submit to DOL summary data on the compensation paid to their employees, including data by sex and race." No such data is regularly submitted to the OFCCP except during an audit.

The OFCCP has attempted to establish a nationwide salary database by industry through a series of surveys. After reviewing the results of surveys taken between 2001 and 2006 the OFCCP determined that the instruments were ineffective and discontinued their use. The issue remained dormant for some time.

In August 2011, the OFCCP issued an Advance Notice of Proposed Rulemaking seeking input on the design and operation of a compensation data collection tool. The contractor community, generally, expressed grave concerns about this proposal. Ultimately, the concept did not move forward.

On February 28, 2013, the OFCCP rescinded its prior guidance on how it would investigate compensation for potential discrimination and issued Directive 307. Directive 307 was not subject to the notice and comment period required by regulations and does not have the same force of law. However, through this Directive, the Agency notified the contractor community that it intended to examine compensation on a case-by-case basis, and to apply Title VII principles and any

and all statistical or non-statistical methods to identify compensation discrimination. In its Directive, the OFCCP expanded the way it would view compensation to include overtime, benefits, training, bonuses, 401k opportunities, sales territories, and “channeling” - whereby females or minorities are found in less highly-compensated positions, in disproportionate numbers. The OFCCP now examines this much broader category of “compensation” in its audits.

With these new Directive 307 procedures in place, employers should expect that any “compensation” data collection tool would not be merely reporting the payroll amounts employees receive. Instead, employers likely will need to modify their human resource information systems to capture whatever “compensation” data the OFCCP would require them to collect.

It is interesting to note that employers are granted confidentiality on the salary data they currently include with their confidential Executive Order 11246 Affirmative Action Plan. However, the Presidential Memorandum makes no assurances of confidentiality. Requiring employers to modify their systems in order to provide detailed compensation information that may become public knowledge imposes a two-fold (or greater) burden on the contracting community.

In addition to watching for the new regulations, the contracting community should continue to monitor the OFCCP's website and watch for agency directives and the agency interpretation of current regulations through its posted FAQs. Navigating the compliance requirements continues to become trickier as more and more requirements are added.

This Legal Alert provides an overview of specific new Presidential directives. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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