

PROHIBITIONS AGAINST PAY SECRECY POLICIES

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On September 11, 2015, the Department of Labor issued a Final Rule implementing Executive Order 13665. The Final Rule, entitled “Prohibitions Against Pay Secrecy Policies and Actions,” applies to federal contractors (prime or subs) working on contracts exceeding \$10,000 in value and entered into or modified on or after January 11, 2016.

Executive Order 13665 prohibits contractors from discriminating against employees or applicants for employment merely because they have inquired about, disclosed or discussed the compensation of the employee or applicant or that of another employee or applicant. An important exception exempts those employees who have access to the compensation information of other employees (e.g. human resources) as part of an essential function of their job. Those employees can be bound by confidentiality pay provisions, except if disclosure is necessary in order to comply with a legal duty.

The rationale of the Executive Order is to provide employees with the ability to obtain information about discriminating pay. It was signed by President Obama as a reaction to the case of Lilly Ledbetter. Lilly’s employer implemented a pay secrecy policy that prevented her from discovering a large disparity in pay between her and male co-workers until she was nearing retirement. Lilly filed a complaint with the EEOC and an equal pay lawsuit alleging a violation of Title VII of the Civil Rights Act of 1964 after an anonymous note was left in her inter-office mailbox revealing that she was paid significantly less than her male co-workers. The case made its way to the US Supreme Court (Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)).

There, the Court held that the case was time-barred because it had been more than 180 days since the employer had made its discriminatory pay decision. Less than two years after the Supreme Court’s decision, Congress passed the Lilly Ledbetter Fair Pay Act of 2009, establishing that each discriminatory paycheck restarts the 180 day time clock to file a claim.

President Obama's Executive Order provides additional protection making it easier to obtain information about compensation paid to co-workers. Compensation is broadly defined to include bonuses and benefits, including stock options and awards. An additional issue to consider is the impact of the National Labor Relations Act on pay secrecy policies. Section 7, for instance, provides that employees are entitled to engage in "concerted activities" which generally includes a free discussion of wages.

A contractor that violates the Executive Order can be subject to various remedies including even loss or suspension of a contract or disbarment. Additional sanctions and penalties are also possible, including for violating Section 7 of the NLRA as discussed above.

A related issue is the impact of secrecy and other prohibitions that could impede various whistleblowing statutes. The SEC, for instance, recently penalized KBR, Inc. for having a confidentiality policy that restricted employees from reporting potential illegal or unethical conduct by the company or its employees. The SEC regarded this as an improper restriction of the rights of whistleblowers pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. KBR decided to settle the dispute with the SEC by paying a \$130,000 fine.

In light of the Executive Order and Final Rule and impact of whistleblowing statutes, we recommend that you review your policies and practices to ensure that they do not contain any restrictions prohibiting employees from discussing their pay or prohibiting otherwise protected whistleblower disclosures. Employment agreements, non-disclosure agreements and personnel handbooks should be scrubbed to remove any impermissible language.

The Final Rule further requires each federal contractor to disseminate a Pay Transparency Policy Statement, as prescribed by the Office of Federal Contract Compliance Programs ("OFCCP"). The statement must be incorporated into employee handbooks and manuals in addition to either posting it electronically or in a place that is visible to all employees or applicants. Federal government prime and subcontracts will also have to include an updated equal opportunity clause that now includes the prohibition on pay secrecy.

This Client Alert is intended as an introduction only to the topics addressed – it is not indicative of a full discussion of the issues. Let us know if you want to discuss the issues in this Client Alert in greater detail.

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