AFFIRMATIVE ACTION UPDATE

Volume 15, No. 2 **Douglas B. Brown & Associates, LLC** **September 21, 2015**

EXECUTIVE ORDER 13665 - NON-RETALIATION FOR DISCLOSURE OF COMPENSATION INFORMATION FINAL RULE

On Friday, September 11th, the OFCCP released the final rule implementing Executive Order (EO) 13665 providing for Non-Retaliation for Disclosure of Compensation Information. The Rule becomes effective January 11, 2016. It will apply to new or modified federal supply and service contracts and subcontracts, as well as federally assisted construction contracts of more than $10,000 in value entered into or modified on or after that date. It will also apply to contracts or subcontracts that, in the aggregate, total more than $10,000, or financial institutions holding federal funds, or who are issuing and paying agencies for U.S. savings bonds in any amount.

The EO prohibits federal contractors and subcontractors from discriminating against employees and applicants who discuss, inquire about, or disclose information regarding compensation acquired through ordinary means such as a discussion between coworkers or through an anonymous note from a coworker. It does not require employers to disclose information regarding compensation in response to a demand from an employee or an applicant.

Compensation includes all the items currently considered by the OFCCP to make up compensation including such elements as base pay, commissions, bonuses, stock options, incentives, overtime, shift differentials, vacation and holiday pay, etc.

There are two defenses that employers can raise to alleged violations of the rule. The first is an "essential job functions" defense and the second is a general or "workplace rule" defense. In the essential job functions defense, an employee such as an HR Manager or Payroll Administrator who obtained compensation information while performing their job would not be protected if they disclosed this information. On the other hand, they would be protected if they discussed their own compensation with a coworker.

The workplace rule scenario applies where an employer has, for example, a rule prohibiting disruptive behavior. If an employee went into the company lunch room, stood up on a table, and shouted their compensation information to other employees, they would not be protected as long as the contractor consistently enforced the rule in regard to other instances of disruptive behavior.

The two tangible changes that employers will see are: 1) adding a reference to the new EO in the Equal Opportunity Clause used in their covered contracts and purchase orders; and 2) adding a new "Pay Transparency Policy Statement" to their EEO policies and Employee Handbooks (see below). Ultimately, there will be a new "EEO is the Law" poster available that incorporates the new compensation language.

"Pay Transparency Policy Statement: The contractor will not discharge or in any other manner discriminate against employees or applicants because they have inquired about, discussed, or disclosed their own pay or the pay of another employee or applicant. However, employees who have access to the compensation information of other employees or applicants as a part of their essential job functions cannot disclose the pay of other employees or applicants to individuals who do not otherwise have access to compensation information, unless the disclosure is (a) in response to a formal complaint or charge, (b) in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or (c) consistent with the contractor's legal duty to furnish information."

NEW EXECUTIVE ORDER ESTABLISHING PAID SICK LEAVE FOR FEDERAL CONTRACTORS

On Labor Day, September 7, 2015, President Obama signed a new Executive Order requiring federal contractors and subcontractors to offer up to 7 days (56 hours) or more, of paid sick leave each year, depending on the number of hours worked. Employees will earn 1 hour of paid sick leave for every 30 hours worked. The order also specifies that this leave can be used not only for illness or care of the employee, but also to care for a sick or injured family member. In addition, the order mandates that unused sick time be carried over to the next year. It also requires that employees rehired after a separation of less than one year have their sick time reinstated upon rehire. Lastly, the EO states that the paid sick leave cannot be conditioned upon the employee finding a replacement to cover their absence.

The EO is scheduled to take effect January 1, 2017, and instructs the Secretary of Labor to have implementing regulations completed by September 30, 2016. As such, the new paid sick leave benefits will apply to new contracts entered into on or after January 1, 2017.

Employees are supposed to request leave at least 7 calendar days in advance when the need for leave is foreseeable or as soon as is practicable. Employers may only require certification from a healthcare provider if the need for paid sick leave is for 3 or more consecutive work days.

It's important to note that this EO applies specifically to the federal contractors or subcontractors who are covered by the Davis-Bacon Act, the Service Contract Act or the Fair Labor Standards Act. If the federal contractor is not subject to any of those three acts, it does not have to comply with the order. However, the vast majority of contractors will be covered by one of the acts. Furthermore, the EO will only apply to the following types of contracts: a procurement contract for services or construction; a contract or contract-like instrument for services covered by the Service Contract Act; a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations; a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

There are a number of unanswered questions that hopefully will be answered by the implementing regulations.

- The EO does not mention procurement contracts for the provisions of "goods." So if a contractor is only providing goods ("stuff") to the Federal Government, are they covered?
- The EO does not mention any size or dollar thresholds in terms of applicability to a contractor. So, does a contractor with 8 employees who provides $5,000 worth of services to the Federal Government now have to provide paid sick leave?
- Nothing is said about what happens if an employee fails to comply with the certification provision.

There are undoubtedly other questions that will come up requiring clarification. As the implementing regulations may be a year off, we are going to have to wait to see if answers are provided.

The Department of Labor estimates that this will allow over 300,000 workers who currently do not receive paid sick leave the opportunity to begin receiving it. This is only a fraction of the 44 million workers that the DOL estimates currently do not receive paid sick leave, but for federal contractors and subcontractors, it's a very important change.

ARE EMPLOYEES OF TEMPORARY STAFFING FIRMS ALSO "EMPLOYEES" OF THE FEDERAL CONTRACTOR USING THEIR SERVICES? IF SO, WHAT IS THE EXPECTATION OF INCLUDING TEMPORARY EMPLOYEES IN A CONTRACTOR'S AAP?

Back in October 2014, we published a newsletter article discussing whether the OFCCP had set the stage for claiming that temporaries are employees for affirmative action purposes. The article was in response to an OFCCP frequently asked question (FAQ) published on August 5, 2014 regarding the "Employer-Employee Relationship" that addressed the question of when is an individual treated as an employee for the purpose of inclusion in a contractor's AAP.

On August 27, 2015, the National Labor Relations Board (NLRB) published a decision in the case of *Browning-Ferris Industries of California ("Browning Ferris")*, 362 NLRB No. 186 (August 27, 2015). In that decision, the NLRB essentially overturned 30 years of NLRB case law regarding when two entities would be considered "joint employers" for the purpose of collective bargaining obligations.

In short, it is now the position of the NLRB that a joint employment relationship may be found to exist between two unrelated entities "…if they share or codetermine those matters governing the essential terms and conditions of employment…" even if one entity does not hire, fire, supervise or determine the wages and benefits of another employer's employees. The ability of one entity to exercise control over "...dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance…" will be sufficient to establish "control."

While we might ask why an NLRB decision is relevant to the questions of who is included in an Affirmative Action Plan (AAP), the OFCCP looks at how the NLRB determines the existence of a joint employer relationship. So to the extent that the NLRB has overturned the apple cart as to when a joint employment relationship exists, we are predicting that there is an excellent probability the OFCCP is going to be getting much more aggressive in this area.

So how might the NLRB's decision influence the OFCCP's view of contractors who engage the services of temporary staffing firms? Will the OFCCP now expect that temporaries working in a contractor's facility, but not on their payroll, be treated as employees who should be included in the AAP?

In the OFCCP's August 5, 2014 FAQ, the Agency set forth the factors used by the court in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992), as the test contractors should use to determine whether individuals are "workers" of the contractor and should be treated as employees for the purpose of inclusion in the contractor's AAPs. Among the factors listed are:

- The right to control when, where and how the individual performs the job
- The skill required for the job
- The source of the instrumentalities and tools
- The location of the work
- The duration of the relationship between the parties

- Whether the contractor has the right to assign additional projects to the individual
- The extent of the individual's discretion over when and how long to work
- The method of payment
- Whether the individual's work is part of the regular business of the contractor
- Whether the contractor is in business
- The provision of employee benefits to the individual

So in light of the above, and taking into account the new NLRB decision, what might the OFCCP say about the following scenario?

> The contractor uses temporary employees on the payroll of the temporary staffing firm (TSF) to perform what would be characterized as entry-level, low skilled production jobs. While on assignment at the contractor's work location, the temps must:
>
> 1. work at a specific location assigned by the contractor;
> 2. utilize tools/instruments provided by the contractor;
> 3. work the hours and times stipulated by the contractor;
> 4. possess the basic qualifications required by the contractor;
> 5. receive instructions and directions from individuals who are employees of the contractor;
> 6. work side by side with individuals who are employees of the contractor and who are performing the exact same tasks as the temps;
> 7. work subject to the discretion of the contractor in terms of whether or not they return to work the following day/week/month;
> 8. perform tasks that are necessary for the contractor to produce its products or perform services, and;
> 9. the contractor only hires onto its payroll individuals who have worked for a period of 90 days at the contractor's worksite as a temp.

We predict that given the above and the *Ferris-Browning* decision, the OFCCP will be taking the position that temporaries working in a contractor's establishment who are on the payroll of a TSF are also the employees of the contractor, if the contractor exercises common law "control" over the "essential terms and conditions of employment." In this context, control can be direct or indirect. And if the OFCCP determines that a joint employment relationship exists, the next logical step is the demand that the contractor include the temporaries in the AAP for that establishment.

If temporaries are included in the AAP, then the contractor must also capture, report and audit the TSF's applicant flow data developed when seeking qualified temps for placement at the contractor's establishment. Additionally, all the outreach, data collection, job listing, wage and all other compliance obligations that the contractor has for its own employees would also apply to those temporaries performing work for the contractor that is necessary to the performance of the contractor's covered federal contract or covered subcontract. If the temporaries are not performing work necessary to the performance of a covered contract or subcontract, then there would be no obligations to include them.

So, should contractors who are using the services of a TSF just start to include those individuals in their AAP? Should they impose all the recordkeeping and outreach obligations of the contractor on the TSF? Should they be auditing the compensation and selection practices of the TSF for indicators of adverse impact?

Our current recommendation is to maintain current practices and continue to monitor the OFCCP's approach to contractors who utilize the services of a TSF and see how the Agency responds if it becomes aware that a contractor has a relationship with a TSF. In the meantime, contractors are well advised to be reviewing the contracts they have with their TSF(s) and their current practices regarding how they utilize the services of the TSF.

To the extent possible, contractors should:

1. Avoid being involved in the hiring, firing, discipline, etc. of the temps.
2. Avoid being involved in the supervision of the temps.
3. Avoid hiring directly from the temp workforce onto the full-time payroll of the contractor. Rather, temps should be required to express interest in open positions the same as all other outside applicants.
4. Ensure that the temps have separate employee handbooks, separate terms and conditions of employment, and separate HR policies and procedures.
5. To the extent possible, have the temps perform work different from that of the contractor's regular employees.
6. Review and revise the contracts held with TSF and other 3rd party providers.
7. Insert protective indemnification language in the contracts for actions of the TSF/other 3rd parties found to create liability.

Are there going to be problems with doing this? You betcha. There's the problem of whether a TSF will agree to do all of the above. Even if they would agree, there's the question of what this would do to the price of the contract. Putting in place all the protocols necessary to capture, retain and report this data may be a substantial additional cost not currently figured into the value of the contract.

There is the problem of whether implementing the above recommendations are practical in light of the operating realities of the factory floor. There is also the problem of whether the TSF/other 3rd parties are currently engaging in practices that would create liability for the contractor if the contractor has to start reporting the data from the TSF.

Finally, what about the employees of the cleaning service that the contractor engages to clean the building? What about the employees of the subcontractors who the contractor engages to provide support services to it in the performance of the contract? The answer to these questions is simply not clear.

CONCLUSION

Both the House of Representatives and the Senate have introduced legislation to overturn the effect of the NLRB decision. The Protecting Local Business Opportunity Act would amend the National Labor Relations Act to memorialize the previous "direct control" test instead of the new "indirect control" standard. Even if the Act passes, the likelihood that it would survive a White House veto is slim.

The decision by the NLRB adds to the likelihood that the OFCCP will be looking hard at temporary workforces. Contactors who are using the services of a TSF have the option of going ahead and adding the temps to their AAPs if the temps are performing work necessary to the performance of a federal contract or subcontract. They may choose to do nothing and waiting to see what happens. Or, they can try to put as many protections as possible in place right now to be able to make a good-faith argument that they are not the joint employer of the employees of the TSF. That being said, all the carefully drafted language in the world will not change a finding of "control" if in fact, the contractor does exercise direct control over the work of the temps.