

AFFIRMATIVE ACTION UPDATE

**** NEWS FLASH ****

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Douglas B. Brown, LLC

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OFCCP'S RULE ON PROHIBITIONS AGAINST PAY SECRECY IS NOW IN PLACE

As announced last September, OFCCP's rule on Prohibitions Against Pay Secrecy Policies and Action is now effective. The rule applies 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 the effective date of January 11, 2016. It also applies 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 rule 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. Compensation consists of all items currently defined by the OFCCP including elements such as base pay, commissions, bonuses, stock options, incentives, overtime, shift differentials, vacation and holiday pay, etc. The rule does not require employers to disclose information regarding compensation in response to a demand from an employee or an applicant.

As such, while the rule is effective January 11, 2016, contractors do not have to comply with the rule until they either 1) enter into a new contract after January 11th, or 2) modify a current contract after January 11th. For example, if there is no new or modified contract until September 1, 2016, a contractor would not have to comply until that date. However, it is recommended that contractors begin the process to come into compliance sooner as opposed to later.

The two tangible changes for employers 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. For the time being, however, the Department of Labor has issued a supplement to the current poster that employers must display. Below is a link to the supplement:

http://www.dol.gov/ofccp/regs/compliance/posters/pdf/OFCCP_EEO_Supplement_Final_JRF_QA_508c.pdf

Employers can raise two defenses to alleged violations of the rule. The first is an "essential job functions" defense and the second is a general or "workplace rule" defense. For 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.

As for the workplace rule defense, this scenario applies where an employer has, for example, a rule prohibiting disruptive behavior. If an employee went into the company lunchroom, 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.

“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.”

If there are any questions or comments concerning anything contained above, they can be directed to this office by calling us at 440-564-7987 or sending an email to dbb@dbbrown.com. The discussion of this matter is for the clients and friends of Douglas B. Brown, LLC and does not represent nor is intended as a substitute for professional legal advice.