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A T T O R N E Y S A T L A W

CLIENT ADVISORY

Pay Transparency Regulations for Government Contractors (effective January 11, 2016)

Effective January 11, 2016, new OFCCP (Office of Federal Contract Compliance) regulations prohibit most federal government contractors from discriminating against employees and applicants who ask about or discuss compensation. The regulations will apply broadly to contractors that serve as depositories of federal funds or that issue U.S. Savings Bonds and Notes (most banks). Also, the regulations apply to contractors and subcontractors with federal government contracts worth more than \$10,000 in any 12-month period. So the regulations go beyond application to government contractors with written Affirmative Action Plan requirements.

The non-discrimination provision prohibits discriminating against any employees or applicants who inquire about, discuss, or disclose the compensation of that employee or applicant or another employee or applicant. The National Labor Relations Act already protects non-supervisory employees in this regard, designating exactly this conduct as legally protected concerted activity. Prohibiting these discussions or disciplining employees who participate would be an unfair labor practice under the NLRA. (Sections 7 and 8, NLRA, 29 USC §§ 157-58). However, the protections here for employees are even broader in scope as these regulations include supervisory employees. The NLRA only protects non-supervisory employees.

However, one critical exception from application of the new regulations is for employees who have access to the employer's compensation information as part of their job responsibilities. If access to compensation information is part of an employee's "essential job functions," then disclosure is not protected and the employee may be disciplined. Access to compensation information is essential if it is necessary to performance of the employee's job or if the duties of the job include protecting and maintaining the privacy of employees' personnel records.

Federal government contractor employers should take care to determine in advance what employees/positions are exempt from these non-discrimination provisions. Obviously, human resources, compensation and payroll employees are the most likely candidates. But some administrative assistants, IT, and other staff members may also have access to payroll data, sensitive emails or related confidential information (possibly just for purposes of elimination, destruction or shredding). It may be necessary to review, and to amend job descriptions to reflect these essential functions.

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The OFCCP has prescribed specific, mandatory language which must be included in handbooks and which must be posted (electronically or physically). The “EEO is the Law” poster will also be updated to include the language. The language is set forth below for your convenience. As always, don’t hesitate to contact us with questions about these new regulations, or any other employment law affecting government contractors.

PAY TRANSPARENCY MANDATORY STATEMENT

Employer 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 employer’s legal duty to furnish information.