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Extra! extra! federal contractor changes coming right and left! read all about it!

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Federal contractors are experiencing whiplash trying to keep up with the changes that keep coming. In our efforts to keep federal contractors and those that do not want to become federal contractors (like health care entities) up to date, we will summarize key developments and practical impact so contractors can take a moment to catch their collective breath and plan their next steps.



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1. [President Obama Amended Executive Order 11246 to Prohibit Retaliation for Pay Discussions](#). On April 8, 2014, President Obama amended Executive Order 11246 to bar federal contractors and subcontractors from firing or discriminating against employees or applicants for discussing compensation with other employees or applicants. (E.O. 11246 bars discrimination because of race, national origin, religion, and sex by federal contractors that have contracts that in total exceed \$10,000 and requires affirmative action for minorities and women by covered contractors). The Department of Labor ("DOL") must issue regulations within 160 days (September 15, 2014), and the amendment will apply to contracts entered into on or after the regulations' effective date.

Practical impact? Almost none because federal labor law already prohibits such retaliation against non-supervisory employees in almost all industries and the federal anti-discrimination law known as Title VII already prohibits discrimination against even supervisors who discuss compensation with other employees for the purpose of opposing discriminatory pay practices. The anti-retaliation provision appeared to be a political ploy to garner attention for the

Administration's Paycheck Fairness Act (S. 84), which would make wage discrimination claims based on sex easier to prove and prohibit employer retaliation such as that prohibited in the executive order. Republicans have blocked debate of that bill.

2. *President Obama Directed DOL To Propose New Compensation Report For Federal Contractors*. On April 8, 2014, President Obama directed DOL to propose a rule by August 6, 2014, requiring federal contractors and subcontractors to submit summary data on their employees' compensation by sex and race. The directive instructed DOL to consider a tool that would enable DOL to direct its enforcement resources toward companies whose data suggest potential discrepancies in employee pay and to avoid new record-keeping requirements, if possible. The executive memorandum instructed DOL to consider independent studies regarding the collection of compensation data.

Practical Impact? Potentially very significant, although it will depend on the proposed rule's details. Contractors previously had to file a similar annual report from November 2000 to September 2006 called the Equal Opportunity Survey. OFCCP cancelled it because the agency was not able to effectively use it to identify and remedy compensation discrimination. Currently, many federal contractors do not annually analyze their compensation for potential discrimination, though OFCCP regulations require such analysis. Any new DOL requirement that federal contractors submit compensation data will put those contractors whose summary data show significant facial pay disparities by sex or race at risk for additional scrutiny and audits, potentially leading to OFCCP findings of pay discrimination, and demands by OFCCP for monetary payments to remedy the alleged discrimination. In addition, DOL's collection of such information creates the risk that the DOL will disclose specific federal contractors' compensation data and increases the risk that contractor employees will learn and inadvertently or intentionally disclose it, which could damage employers' ability to recruit and retain employees and make public highly confidential information. Contractors should watch for DOL's proposal in early August 2014 and consider immediately stepping up their efforts to analyze their compensation data, ideally in a way that maximizes the chance to shield the analysis under the attorney-client privilege from disclosure to OFCCP or an opposing party.

3. *President Obama Signed Executive Order Increasing Hourly Pay of Employees of Federal Contractors To \$10.10*. On February 12, 2012, President Obama signed an executive order raising the minimum wage to \$10.10 per hour for some workers of federal contractors and subcontractors under new and renegotiated federal contracts on or after January 1, 2015. The covered contracts are procurement contracts for services or construction, contracts, or contract-like instruments for services covered by the Service Contract Act (SCA), contracts or contract-like instruments for concessions, and contracts or contract-like instruments 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. DOL has until October 1, 2014, to issue regulations defining these terms.

Practical impact? Significant if a contractor is covered. Contractors should review the executive order and determine whether their contracts are covered and if so, which employees are covered and how the executive order impacts their pay rates. Until DOL issues final

regulations, however, such determinations will remain tentative.

4. *OFCCP's New Regulations on Protected Veterans and Individuals with Disabilities Were Effective March 24, 2014.* OFCCP's new regulations for individuals with disabilities and protected veterans went into effect on March 24, 2014. The regulations involve a two-step implementation with non-affirmative action plan obligations having gone live on March 24th and the remainder becoming operational on the first day of the contractor's next affirmative action plan occurring on or after March 24, 2014 (which would be January 1, 2015, for those contractors whose plans are based on the calendar year). The new obligations require pre- and post-offer self identification questions for protected veterans and persons with disabilities, set a 7% incumbency goal for disabled employees, establish a 7.2% hiring benchmark for protected veterans, require new purchase order language, expand some record retention periods from two to three years, require communication with state job service agencies (including requesting priority referral of protected veterans), and significantly expand contractors' self-assessment obligations, among other things.

Practical Impact? Very significant. The changes impact all parts of a contractor's compliance regimen. Contractors must become familiar with the requirements and make changes to come into compliance.

5. *OFCCP Is Anticipated To Provide Five-Year Break from Enforcement For TRICARE Recipients.* OFCCP has not officially announced it, but the agency is anticipated to announce a five-year moratorium on audits of and enforcement activity against health care entities that have as their only basis for OFCCP coverage participation in TRICARE, the Department of Defense's health care program for active and retired military members. The moratorium became public on March 13th when Rep. Tim Walberg, (R. - Mich.), the chairman of the House Education and the Workforce Committee's Subcommittee on Workforce Protections, entered into the Congressional record a letter from DOL Secretary Thomas E. Perez dated March 11, 2014, discussing the OFCCP's moratorium. In addition to this letter to the House, OFCCP will issue an official directive that establishes the moratorium. During the five-year period, OFCCP will do "extensive outreach," which includes providing technical assistance, training, convening listening sessions, and conducting webinars on OFCCP's legal authorities and jurisdiction. What OFCCP will not do, however, is give up its effort to bring health care entities that receive or participate in TRICARE under OFCCP's regulatory control. OFCCP is just agreeing not to pursue health care entities for five years.

The moratorium appears to be the result of resistance from TRICARE providers to OFCCP jurisdiction and to Congressional oversight reflecting displeasure with OFCCP's application of its obligations to TRICARE recipients. There is a bill ([H.R. 3633: Protecting Health Care Providers from Increased Administrative Burdens Act](#)) pending before Congress providing that entities that receive payment from the federal government related to the delivery of health care services to individuals will not be treated as a federal contractor or subcontractor by the OFCCP. Health care entities that do not wish to be federal contractors should support passage of this bill because its current chance of enactment is very low.

Practical impact? Little. Even for health care providers that have receipt of TRICARE or participation in a TRICARE network as their *only* relationship with the federal government or federal government health plans, the break is temporary. The moratorium letter assumes that federal subcontractor status exists for such hospital providers despite the statute (National Defense Authorization Act, H.R. 1540, 2012) that Congress passed to exempt such coverage. The moratorium merely delays enforcement of OFCCP's ambiguous standards. OFCCP potentially could also assert jurisdiction over conduct that occurs during the five-year break. Health care entities that hold other types of federal contracts or subcontracts or provide other services to federal entities (such as to the Bureau of Indian Affairs, Veterans Administration, Department of Defense, federal prisons, and the like) remain subject to OFCCP's assertion of coverage, despite the moratorium. The moratorium also does not address OFCCP's jurisdiction over medical providers that receive funding through the Federal Employees' Health Benefits Program (FEHBP), Medicare Advantage Plans (Part C) and Medicare Prescription Drug Plans (Part D). While a health care entity might now be more willing to consider participating in TRICARE-related services, caution remains the rule of thumb before signing federal contracts and subcontracts related to provision of medical services. Future acceptance of contracts and subcontracts during the moratorium period may form the basis for OFCCP jurisdiction afterward.

6. [2014 VETS-100A Report Filing Categories Remain Unchanged](#). Federal contractors and subcontractors with a contract or subcontract of \$100,000 or more awarded or modified on or after December 1, 2003, must annually file a VETS-100A Report. That report lists the number of employees and new hires during the reporting period who are a "recently separated veteran," "disabled veteran," "Armed Forces service medal veteran," and "other protected veteran." These veterans categories differ from the updated categories in OFCCP's new regulations concerning protected veterans. See #4 above. OFCCP renamed the "other protected veteran" category to "active duty or wartime campaign badge veteran," but the definition of the category remains unchanged. DOL announced that the VETS-100A veterans categories for filing in 2014 remain the same as 2013.

Practical impact? Federal contractors need to postpone changes in their Human Resources Information Systems ("HRIS") and applicant tracking systems to ensure the veterans categories needed for the VETS-100A filing are not changed to account for the OFCCP's new protected veterans regulations before they need to be. Federal contractors should not begin to use the new protected veterans categories until the first day of the contractor's written affirmative action plan year that occurs on or after March 24, 2014. If a contractor does have a mismatch between the two sets of protected veterans categories, it needs to carefully review its reports to ensure the correct data is reported in its 2014 VETS-100A report.

7. [DOL Proposed Updating Veterans Categories and VETS Report](#). On February 24, 2014, DOL's Veterans' Employment and Training Service proposed requiring federal contractors to report their applicants and their employees who are veterans in total and not by veteran and EEO-1 categories. It also proposed changing the name of the VETS-100A report to the VETS-4212 report, which is filed by contractors with contracts entered or modified after December 1, 2003, and valued above \$100,000. The proposal would also rename "other protected veteran" to "active duty wartime or campaign badge

veteran” to match the veterans’ categories in the new OFCCP regulations. The comment period ended April 25, 2014.

Practical impact? None now, though contractors should watch for the final regulations.

8. *Dodd-Frank Diversity Standards — A Work in Progress*. The Dodd-Frank Wall Street Reform and Consumer Protection Act requires six financial regulatory agencies to assess the diversity of the employees working at the companies regulated by the agencies, which are Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, National Credit Union Administration, Consumer Financial Protection Bureau, and Securities and Exchange Commission. On October 25, 2013, the agencies published [proposed joint standards](#) for assessing the regulated companies’ diversity policies, and accepted public comments until February 7, 2014. The proposed standards and public comments are under review by the agencies. If the agencies adopt the proposed regulations, contractors’ compliance with OFCCP’s obligations may very well satisfy many of these obligations. Employment-related highlights of the proposed regulations include self-assessment by the employer, disclosure by the employer of the self-assessment on the employer’s website and to the Office of Minority and Women Inclusion (“OMWI”) within the applicable regulatory agency, and internal and external dissemination by the employer of its diversity and inclusion programs and practices, but no audits along the lines of an OFCCP compliance review by the OMWI of the applicable regulatory agency are proposed.

As the above highlights reflect, this is a dynamic area. Federal contractors and subcontractors need to ensure they remain up-to-date on developments and take steps to ensure they comply with the growing number of compliance obligations. Contractors need to come into compliance with the new regulations for protected veterans and individuals with disabilities, and monitor when changes are made to the veterans’ categories in their HRIS and applicant tracking systems. Despite the moratorium, health care entities need to remain vigilant about becoming federal contractors and review closely all proposed health care contracts and subcontracts to avoid inadvertent federal contractor and subcontractor coverage. They also should support legislative efforts in Congress to exempt receipt of payments from the federal government for health care services from OFCCP jurisdiction. Banks and other financial institutions that are federal contractors need to assess their OFCCP compliance and diversity practices while watching for the final diversity standards under the Dodd-Frank Act.

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