Pay Transparency: The New Way of Doing Business

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Abstract
The federal government, through its recent Executive Orders, is mandating pay transparency for the federal contracting community. This new way of doing business has potentially profound implications for all employers. Companies must be prepared for employees, the federal government and third parties to closely scrutinize their compensation systems and decision-making practices.

Keywords
pay transparency, OFCCP, federal contractors, executive orders

The pay gap persists for women and minorities. The Federal Reserve recently reported that 25% of U.S. households claim to be “just getting by” financially, that 13% claim they are struggling and that 34% report that they are “somewhat worse off or much worse off” than before the recession hit in 2008. Plus, according to the U.S. Department of Labor (DOL), almost half of all workers report that they are prohibited from or discouraged from discussing their own compensation with colleagues. Against this backdrop, a significant shift in pay practices is occurring. The federal government is pulling away the veil of secrecy shrouding employer pay practices. Pay transparency is the new game in town, at least for the approximately 24,000 businesses, employing 28 million workers, that make up the federal contracting community.

Recent Executive Orders lay the foundation for these upcoming changes. In February 2014, the Obama Administration issued an Executive Order raising the federal minimum wage to $10.10 an hour for employees of federal contractors and contractors. This new rate goes into effect January 1, 2015, and applies to all new federal contracts based on solicitations issued on or after that date. On April 8 of this year, the Obama Administration issued an Executive Order prohibiting the federal contracting community from discriminating or retaliating against employees for discussing their compensation. That same day, the President issued a Memorandum directing the DOL to issue regulations requiring federal contractors and subcontractors to disclose compensation data by sex and race.

Just a few months later, on July 31, 2014, the Obama Administration released an Executive Order requiring companies seeking new contracts with the federal government, in which the estimated value of the contract exceeds $500,000, to disclose any labor law violations against the company in the preceding 3 years relating to civil rights, safety and health, collective bargaining, wage and hour and family and medical leave obligations. This Executive Order further requires covered employers to disclose information necessary for employees to verify the accuracy of their paychecks. Finally, the Executive Order prohibits those with federal contracts or subcontracts with an estimated value exceeding $1 million from imposing predispute arbitration agreements covering claims under Title VII of the Civil Rights Act of 1964, as amended (Title VII), or for torts related to or arising out of sexual assault or harassment.

While all of these executive measures are aimed at increasing pay transparency in some way, a closer look at two of these measures highlights just how far the Obama Administration is pushing transparency. By prohibiting predispute arbitration agreements in some contexts, the federal government is attempting to reverse the trend of increased arbitration of employment claims. Arbitration is private, whereas court cases are a matter of public record. Moreover, the perception is that employees tend to fare better in arbitration, whereas employees fare better in court. A 2011 Cornell study supports this notion, finding that employees complaining of discrimination won in arbitration only 21% of the time and in courts they won closer to 50% to 60% of the time. Moreover,

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that same study found that in court cases, employees were awarded damages five times higher, on average, than in arbitration.

Perhaps the Obama Administration’s agenda for tackling pay transparency is spelled out most clearly in the DOL’s Office of Federal Contract Compliance Programs (OFCCP) proposed regulations issued this past August. The proposed regulations would cover companies that file EEO-1 reports, have more than 100 employees and hold federal contracts or subcontracts worth $50,000 or more for at least 30 days. The proposed regulations, which are open for comment through November 6, 2014, would require covered contractors to submit an Equal Pay Report annually, by establishment, with the following information: (1) the total number of workers within a specific EEO-1 job category by race, ethnicity and sex; (2) the aggregate W-2 wages in each EEO-1 job category, by race, ethnicity and sex; and (3) hours worked in each EEO-1 job category, by race, ethnicity and sex.

The OFCCP’s proposed regulations were drafted with an overall view of transparency. Indeed, the agency plans to compare the data received by industry, and then share summary industry standards information with the public annually. The OFCCP claims that this disclosure of compensation data allows employers to assess their compensation structure along with those of others in the industry and provides useful data to current and potential employees. The OFCCP is counting on employers not wanting to be known as the lowest paying company in its industry. Accordingly, the agency is betting on employers voluntarily engaging in self-assessments of compensation policies and practices and potentially changing their pay structures. On the enforcement side, the OFCCP plans to use the compensation data to increase both the number of pay discrimination cases it pursues and the proportion of systemic investigations it initiates.

The federal government’s intense focus on increasing pay transparency has potentially profound implications for all employers. It will affect contractors’ relations with the OFCCP. Analysts predict that compensation issues are quickly becoming the most frequently cited issue in OFCCP conciliation agreements and consent decrees, and the forced disclosure of pay data on an annual basis will help fuel this increase. The transparency in both pay and labor law violations also works as a shaming device, designed to pressure employers to settle outstanding claims and behave better. Those employers who do not heed the warning to clean up their acts could find themselves unofficially blacklisted from future federal contracts or potentially facing debarment from future federal contracts.

Pay transparency will affect contractors’ relations with government agencies other than OFCCP. The OFCCP intends to share data with the Equal Employment Opportunity Commission (EEOC) and possibly other agencies with the goal of improving contractors’ compliance with applicable laws. This push for greater transparency also is apparent at the National Labor Relations Board, which in recent years has cracked down on union and nonunion employers covered by the National Labor Relations Act (NLRA) for utilizing overbroad confidentiality policies and for disciplining employees for exercising their rights to discuss terms and conditions of employment, including compensation, in person and/or via outlets such as social media. The result is that contractors potentially will be subjected to more scrutiny by more agencies and could find themselves defending more government investigations and/or lawsuits.

Contractors’ relations with current and potential employees are at the core of these executive measures. The Obama Administration wants to make it easier for applicants and employees of federal contractors to know and understand how their pay compares with that of others. This transparency, which some employers historically have discouraged, allows applicants and employees to voluntarily inquire about, disclose and/or discuss pay information without fear of reprisal. As a result, applicants and employees of federal contractors should have improved access to often hard-to-obtain information that they may use to negotiate pay increases and/or to pursue pay discrimination claims. Contractors also may find that employees increasingly are discussing pay issues on social media.

Additionally, transparency increases accountability within organizations. Contractors will need to carefully consider how they make compensation decisions, train their managers on compensation processes and audit compensation practices. HR folks also will have to be ready, more than ever before, to explain compensation processes and decisions to affected employees, upper management, boards of directors and audit committees.

Increases in pay transparency also may affect contractors’ relations with unions, whether in the context of union organizing or collective bargaining. It also can affect a contractors’ relations with its customers, as they too will have access to public data on how the contractor treats employees in terms of pay compared with others in the industry.

Last, all employers should be prepared to address the increase in pay transparency. Currently, the federal contracting community makes up more than one fifth of the U.S. workforce. Gaining data from this community will result in large statistical samples of pay rates. Federal and state governments likely will use these data to pass
broader laws on pay practices that affect more employers and to further shame employers into better compliance with current laws.

Pay transparency means that pay practices will have to survive under new conditions, subject to closer scrutiny by applicants, employees, upper management and audit committees, unions, customers and the government. Companies should have a comprehensive plan to address this new way of doing business. This includes examining the metrics used for evaluating compensation, analyzing the results for potential disparate impact on protected classes of employees and allowing increased compliance oversight. It also requires companies to train managers on best practices in conducting performance evaluations, making compensation decisions and discussing compensation with employees.

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