

Federal Contractors Might Be in for a Wild Ride in 2017

President Obama has signed multiple executive orders impacting federal contractors throughout his administration, and 2016 has been a particularly active year for the Office of Federal Contract Compliance Programs (OFCCP). In 2016, the OFCCP took significant steps toward implementing the president's executive orders focusing on self-reporting of labor law violations (the so-called blacklisting rule) and pay transparency, among other initiatives. Some of those efforts have been stalled and others roll ahead. It remains to be seen whether the Trump administration will quickly put the brakes on, or even rescind, the executive orders and their implementing regulations.

OFCCP's Blacklisting Rule and Ban on Mandatory Arbitration Are Preliminarily Enjoined

Executive Order 13673, Fair Pay and Safe Workplaces, requires covered federal contractors to self-report a whole range of labor law violations. Known as the blacklisting rule, it is designed to determine whether prospective or current contractors have satisfactory records of integrity and business ethics and to ensure that repeat offenders are not awarded federal contracts. Executive Order 13673 also requires covered federal contractors to provide detailed wage statements to their employees. Finally, the executive order prohibits covered federal contractors with a government contract of at least \$1 million from requiring employees to agree to mandatory arbitration of claims under Title VII or for sexual harassment or assault claims in general.

Final regulations implementing Executive Order 13673 were scheduled to become effective October 25, 2016, with the reporting of labor law violations being phased in over time. However, on October 24, 2016, the U.S. District Court for the Eastern District of Texas entered a nationwide preliminary injunction enjoining implementation of the blacklisting rule and the restrictions on the use of mandatory arbitration agreements. It is unclear whether these aspects of the executive order will be permanently enjoined or whether the Trump administration will rescind all or part of the executive order.

OFCCP's Pay Transparency Initiatives Go Forward — for Now

Executive Order 13673's requirement for the provision of wage statements is not impacted by the district court's preliminary injunction. Accordingly, starting January 1, 2017, contractors and subcontractors with a contract exceeding \$500,000 must provide employees with a wage statement each pay period that sets forth the employee's hours worked (including any overtime hours), pay, and any additions or subtractions from pay. If employers provide pay less frequently than weekly, the wage statement must be broken down into weekly components. Employers are not required to report hours worked for employees who have been informed in writing that they are exempt from the overtime laws.

President Obama further promoted pay transparency by issuing Executive Order 13665, which expressly permits employees and applicants of federal contractors to inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants without fear of retaliation. The Final Rule implementing Executive Order 13665 took effect on January 11, 2016, and applies to new federal contracts or alterations to federal contracts made on or after January 11, 2016. Federal contracts and employee handbooks must be updated to reflect the new nondiscrimination provision, and federal contractors must disseminate the nondiscrimination provision by posting it electronically or where it will be available to applicants or employees.

The Obama administration's push for pay transparency also is evident in the Equal Employment Opportunity Commission's (EEOC) recent revisions to the EEO-1 report. On September 29, 2016, the EEOC issued its final revisions to the EEO-1 report, which will require all private employers with



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100 or more employees, including federal contractors and subcontractors, to submit summary pay data on wages paid to their employees. The summary pay data reporting requires employers to identify and report employees' W-2 earnings and hours worked in 12 pay bands, and apply the pay bands to each of the 10 EEO-1 job categories. This reporting requirement is in addition to the current reporting by job category of employee gender, race, and ethnicity and currently is scheduled to go into effect for EEO-1 reports due March 31, 2018.

OFCCP's Paid Sick Leave Provisions Are in Place — for Now

Executive Order 13706, signed by President Obama in September 2015, requires covered federal contractors to provide employees with up to seven days of paid sick leave every year. Paid sick leave may be used for the employee's own care, for family care, and for absences resulting from domestic violence, stalking, or sexual assault.

Executive Order 13706 applies only to certain categories of federal contracts. These include contracts for services under the Service Contract Act, construction covered under the Davis-Bacon Act, concession contracts, or contracts in connection with federal property or lands and related to offering services for federal employees, their dependents or the general public. The executive order excludes contracts for the manufacturing or furnishing of goods subject to the Walsh-Healey Public Contracts Act.

The DOL issued regulations implementing Executive Order 13706 on September 30, 2016, and the regulations are effective as of November 29, 2016. Executive Order 13706 and its implementing regulations will apply to new, covered federal contracts entered into on or after January 1, 2017.

What's Next for Federal Contractors?

Patricia Shiu left her position as director of the OFCCP in November 2016. President-elect Trump and the person he appoints to lead this agency — and other agencies within the Department of Labor — might implement significant changes to reduce compliance burdens on federal contractors. Indeed, his nominee to lead the U.S. Department of Labor, Andy Pudzer, has criticized paid sick leave and other regulations over workers. How far the new administration will go, and how quickly, is unclear, but federal contractors might see a significant shift in reporting obligations and enforcement priorities in the coming years.
