

## OFCCP Publishes Final Rule on Pay Transparency

SEPTEMBER 17, 2015

On September 11, 2015, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published its Final Rule, *Government Contractors, Prohibitions Against Pay Secrecy Policies and Action*, implementing Obama's April 2014 Executive Order 13665, entitled "Non-Retaliation for Disclosure of Compensation Information." The Order and the final rule prohibit federal contractors from, among other things, discriminating against in any manner, employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants.

### Coverage

The final rule applies to covered federal supply and service contracts and federally assisted construction contracts worth more than \$10,000 and entered into or modified on or after January 11, 2016.

The final rule protects employees from termination or other discrimination for discussing, inquiring about, or disclosing compensation, defined as "salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement," or compensation information, defined as follows:

the amount and type of compensation provided to employees or offered to applicants, including, but not limited to, the desire of the contractor to attract and retain a particular employee for the value the employee is perceived to add to the contractor's profit or productivity; the availability of employees with like skills in the marketplace; market research about the worth of similar jobs in the relevant marketplace; job analysis, descriptions, and evaluations; salary and pay structures; salary surveys; labor union agreements; and contractor decisions, statements and policies related to setting or altering employee compensation.

### Notification Requirements

Covered federal contractors and subcontractors are required disseminate the nondiscrimination provision, using language as prescribed by the Director of the OFCCP, to employee and applicants: 1) in existing employee manuals or handbooks; and 2) by electronic posting or by positing a copy in “conspicuous places” available to employees and applicants.

## Covered Contractor Defenses

The final rule offers two defenses to employers.

### General Defenses

First, the contractor may pursue a defense to an alleged violation of the nondiscrimination provision as long as the adverse action against an employee or applicant is based on a violation of a “consistently and uniformly applied company policy, and that this policy does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants.”

### Essential Job Functions

Second, a contractor will have a defense to any adverse action taken against an employee, if the employee has access to the compensation information of other employees or applicants as part of the employee’s *essential job functions*, and discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information. The disclosure must not have been made in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the contractor, or be consistent with the contractor’s legal duty to furnish information.

## State Legislation

Numerous states—including California, Connecticut, Colorado, Illinois, Louisiana, Maine, Michigan, Minnesota, New Jersey, Oregon, Vermont, and New Hampshire—have adopted some form of anti-wage secrecy legislation. See our client briefing, [Connecticut Enacts “Pay Equity and Fairness” Act—Expanding List of States with Pay Transparency Legislation](#).

Federal contractors should carefully review policies and procedures to ensure compliance with the OFCCP’s final rule.

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