PRESIDENT OBAMA’S “EQUAL PAY” EXECUTIVE ORDERS: Much Ado About (Almost) Nothing?

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President Obama has again announced executive actions directed solely toward federal contractors – this time, addressing pay equity. The first Executive Order prohibits federal contractors from retaliating against employees for discussing their compensation. The second, a Presidential memorandum, directs the U.S. Department of Labor to propose regulations requiring federal contractors to submit data on employee compensation. Both directives were issued yesterday, on “equal pay day.”*

*“Equal pay day” (April 8) is the day that a hypothetical woman’s earnings will equal those of a hypothetical man from the previous year. In other words, the theory is that a woman has to work four extra months (16 months total) to earn the same compensation that her male counterpart does in 12 months.

Given the political climate and the President’s inability to get his legislative agenda through Congress, these executive actions aimed at federal contractors are not surprising. In February, the President signed an Executive Order to raise the minimum wage for employees of certain federal contractors. Although the impact of all of these actions appears to be limited, they continue to place additional burdens on those companies doing business with the government, potentially putting them at a competitive disadvantage with companies that are not federal contractors.

Employees Gotta Talk

In prohibiting employers from taking action against employees for discussing their compensation, the Executive Order says, “Ensuring that employees of Federal contractors may discuss their compensation without fear of adverse action will enhance the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices, which will contribute to a more efficient market in Federal contracting.” The Order adds a new paragraph to Executive Order 11246, providing as follows:

The contractor will not discharge or in any manner discriminate against any employee or applicant for employment because such employee or
applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as part of such employee’s essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor’s legal duty to furnish information.

That sounds daunting, until you realize that, for the vast majority of employers, this is nothing new. The National Labor Relations Board has long taken the position that discussing employee compensation is “protected concerted activity” and a right enjoyed by union and non-union employees alike. The Executive Order reaches farther than the NLRB position by providing protection to supervisors and managers, and covering employees of federal contractors that may not be covered by the National Labor Relations Act, such as railroads and airline carriers. In large part, however, this Executive Order appears to be “show” for the President’s supporters rather than a measure that will achieve any real change.

The DOL must issue proposed regulations to implement the Executive Order within 160 days, and the Executive Order will apply to federal contracts entered into on or after the effective date of the Final Rule.

Pay Information by Sex and Race

The President’s Memorandum directs the DOL to propose regulations within 120 days that would impose a new reporting requirement on federal contractors – to submit summary data, broken down by race and sex, on compensation paid to employees. (Interestingly, the Memorandum instructs the DOL only to propose such regulations, not to actually issue a Final Rule.)

The President says that the lack of pay data is “a barrier to closing the persistent pay gap for women and minorities” and directs the DOL to consider ways to (1) maximize efficiency and effectiveness by enabling the DOL to direct its enforcement resources toward contractors for which there is evidence of potential pay violations; (2) minimize, to the extent feasible, the burden on contractors – in particular, small businesses and small non-profit organizations; and (3) encourage greater voluntary compliance, and identify and analyze industry trends. To the extent possible, the DOL is directed to avoid new recordkeeping requirements and rely instead on existing “reporting frameworks.”

We will not know the details of this new requirement, of course, until the DOL issues a Notice of Proposed Rulemaking, but in general, the requirement that federal contractors submit compensation data is also not new. Federal contractors have been providing aggregate pay information to the Office of Federal Contract Compliance Programs during compliance reviews since 2000. More recently, since approximately 2010, the OFCCP has demanded employee-level data on compensation in virtually every single compliance review initiated by the agency. Further, the OFCCP has proposed to amend its Scheduling Letter to mandate that federal contractors submit the employee-level data at the beginning of each compliance review. This proposal is still pending approval by the Office of Management and Budget.

Moreover, federal contractors were previously burdened with responding to the notorious EO Survey, which was
put into place by the OFCCP during the Clinton Administration and rescinded during the Bush Administration after studies showed that it failed to accurately predict which federal contractors were likely to be committing pay discrimination. There is no reason to believe that a new tool that collects only summary data will be any more useful in assessing contractors’ compensation schemes.

The Administration should realize, as it has come to light that female White House staffers are earning only 88 percent of the compensation that their male counterparts earn, that analyzing compensation is a highly complex task that requires a detailed review of all the relevant factors. Summary data broken down by race and gender will be of little to no value for such an analysis, and this new reporting requirement will accomplish nothing more than creating yet another time-consuming administrative burden for our federal contractors.

As soon as the OFCCP issues proposed regulations on these topics, we will be sure to alert you to the details.

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