PROPOSED RULE BY THE FEDERAL ACQUISITION REGULATORY COUNCIL WOULD BAN THE USE OF SALARY HISTORY DATA BY FEDERAL CONTRACTORS AND REQUIRE DISCLOSURE OF SALARY RANGES IN JOB POSTINGS

Date: 17 January 2025

US Labor, Employment, and Workplace Safety Alert

By: Leann M. Walsh, Erinn L. Rigney

> UPDATE: On 8 January 2025, the Federal Acquisition Regulatory Council (FAR Council) officially withdrew its proposed rule that would have (1) barred federal contractors from seeking and using job applicants' compensation history in decisions on hiring and setting pay and (2) required contractors to disclose salary ranges in job postings. The FAR Council's announcement states that "[i]n light of the limited time remaining in the current Administration," it "decided to withdraw the proposed policy and rule and focus [its] attention on other priorities." Despite the withdrawal of the FAR Council's proposed rule, contractors should generally still refrain from asking about and considering applicants' prior compensation history—which is consistent with OFCCP guidance and many state and local laws. Additionally, contractors who are seeking to be proactive in this area may also wish to consider implementing some of the best practice recommendations detailed in the article below, including reviewing job applications, interview materials, and processes for setting compensation and handling applicant and employee complaints and inquiries regarding pay.

On 29 January 2024, the Federal Acquisition Regulatory Council (FAR Council) issued a Notice of Proposed Rule Making (NPRM) that would prohibit federal contractors and subcontractors from seeking and considering information about applicants' compensation history when hiring or setting pay for individuals working on or in connection with a government contract. On the same day, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued Frequently Asked Questions expressing its view that salary history is not a legitimate non-discriminatory reason for pay disparities.

These actions echo actions by states including California, New York, and Washington that have banned employers from considering salary history when making employment decisions and enacted pay transparency laws requiring inclusion of salary ranges in job postings.

Federal contractors should take note of these developments and adjust pay systems accordingly. This area remains a significant focus of federal and state action.

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PROPOSED FAR RULE

Compensation History Ban

The NPRM would prohibit federal contractors and subcontractors from seeking and considering information about applicants' compensation history when hiring or setting pay for individuals working on or in connection with a government contract. The NPRM defines “work on or in connection with a federal contract or subcontract” to mean work called for by or necessary to perform the covered contract. It defines “compensation history” to include compensation an applicant is currently receiving or has been paid in a previous job. It defines “applicant” as a “prospective employee or *current employee* applying for a position to perform work on or in connection with the contract” (emphasis added). As such, this would prevent employers from considering a current employee's salary when determining compensation for that employee's new role within the company.

Similar to many state[1] and local laws banning consideration of compensation history in employment decisions passed in recent years, the NPRM would prohibit contractors from seeking compensation history, either orally or in writing, directly from the applicant or their current or former employer or agent and from requiring disclosure of such history as a condition of the applicant's candidacy. The NPRM also would prohibit contractors from retaliating against or refusing to interview, consider, hire, or employ an applicant for failing to provide their compensation history in response to an inquiry.

Notably, the NPRM's prohibitions apply at any stage of the recruitment and hiring process, *even if the applicant volunteers their compensation history without prompting*. This differs from many state and local laws, which allow for consideration of salary history if the applicant voluntarily discloses it.

Compensation Disclosure Requirements

The NPRM would also require federal contractors and subcontractors to disclose the expected compensation in all job postings for roles involving work on or in connection with a government contract. This is again similar to many state and local pay transparency laws, in that it would require contractors to disclose the salary or wages, or range thereof, that the contractor in good faith believes it will pay for the position, as well as a general description of the benefits and other forms of compensation that will apply. The salary or wage range may reflect the contractor's pay scale for the position, the range of compensation for those currently working in similar jobs, or the amount budgeted for the position.

The NPRM defines “compensation” broadly to include any payments made to an employee “as remuneration for employment, including but not limited to 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.” For positions where at least half of the expected compensation is derived from commissions, bonuses, and/or overtime pay, the contractor must specify the percentage of overall compensation or dollar amount, or ranges thereof, for each form of compensation, as applicable, that it in good faith believes will be paid for the position.

Notice Requirement

The NPRM would also require that contractors provide covered applicants with a notice of their rights, either as part of the job posting or application process. Further, the NPRM includes specific language for the notice,

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including informing applicants of the agency that issued the solicitation or awarded the contract. The language also includes details on how to file a discrimination complaint with the OFCCP.

The proposed rule includes a 60-day comment period, which ends on 1 April 2024.

OFCCP GUIDANCE ON COMPENSATION HISTORY

Also on 29 January 2024, the OFCCP issued guidance in the form of Frequently Asked Questions (FAQ Guidance). The FAQ reiterates that agency's position that it will not treat compensation history as a legitimate, job-related factor that could justify a salary disparity based on race or gender. The FAQ Guidance broadly defines "compensation history" to include both an individual's current compensation as well as compensation received from prior employers. Thus, even a usual salary progression may be treated as suspect when there is a pay disparity. In other words, current or past pay at the same employer will not be a legitimate justification unless supported by another factor, such as tenure.

Whether consideration of compensation history is supported by other non-discriminatory factors can be subject to debate or negotiation during an audit, particularly in situations involving highly competitive positions or a candidate with unique skills or experience that might justify a higher salary to exceed their prior pay (such as for a tenured faculty member who may be the leading expert in a particular area of scholarship). Additionally, many employers have struggled with rising wage rates due to market pressures in the recent pandemic-related "war for talent" and "great resignation."

For some employers, rising market wage rates have led to wage compression, which occurs if a position's market rate outpaces a company's internal salary-increase practices. In this situation, in order to fill a needed role, an employer may offer candidates starting salaries close to (or even above, in some cases) the salary of longer tenured employees, particularly where they are seeking to match or exceed candidates' current salary in order to recruit them effectively. While courts have historically deferred to an employer's decisions to base compensation on market factors such as rising wage rages[2], OFCCP may be less likely to do so if the practice is effectively used as a substitute or proxy for considering salary history or causes adverse impact leading to pay disparities based on race or gender. Ultimately, if OFCCP is not controlling for salary history but is controlling for tenure (which can be adversely related to salary where wage compression is present), the existence of wage compression can contribute to an OFCCP finding of a pay disparity. Thus, as a best practice, covered contractors should ensure their policies and practices address wage compression by timely assessing and adjusting incumbent pay.

The FAQ Guidance further indicates that although "a private employer's reliance on compensation history to set pay may not itself be prohibited under federal law … the practice may contribute to unlawful discrimination, depending on the specific facts and circumstances at issue." Finally, OFCCP indicates that even compensation history that is proffered by the applicant may cause a discriminatory impact and would also be prohibited by some state laws and the FAR Council's NPRM.

NEXT STEPS

While the FAR Council's NPRM is only at the notice and comment stage, it is likely to become a final rule later this year.[3] As such, federal contractors and subcontractors should begin assessing how they will comply with its requirements. In doing so, contractors should ensure that all current processes and practices where

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compensation history is considered at any stage of the recruiting and hiring process comply with applicable federal and state nondiscrimination law as well as state pay transparency laws. One method of doing so would be to conduct an annual pay equity self-audit (consistent with OFCCP obligation) to determine whether any such practices, including wage compression, have caused pay disparities.

For example, contractors should consider, at minimum, the following steps: (1) review job applications and interview materials to ensure there are no questions seeking prior compensation history; (2) review any processes for setting compensation (along with related materials) to ensure compensation history is neither requested nor considered at any stage; (3) confirm they have a clear process for applicant or employee inquiries or complaints about pay, so they can be timely and appropriately addressed; and (4) prohibit retaliation against applicants and employees for any such inquiries or complaints, and train managers accordingly.

Although the NPRM would apply only to positions that will perform "work on or in connection with a federal contract or subcontract," this may be difficult to determine at the time of recruitment or hire. Moreover, as a practical matter, during an audit, the OFCCP reviews all employees at an establishment (not only those working on a federal contract or subcontract), and if salary history cannot be considered for some employees, as a matter of pay equity, it is likely OFCCP will be reluctant to consider salary history for any employees so as to maintain a consistent statistical approach among all employees. Accordingly, contractors should consider applying the NPRM's requirements to other positions, including those that the contractor reasonably believes could perform work on or in connection with a covered contract. Contractors should begin the process now of identifying these positions so they are ready for when the rule is adopted.

Finally, contractors operating nationwide must comply with various and differing state and local laws banning consideration of salary history and requiring inclusion of salary ranges in job postings. Therefore, they should consider adopting a consistent nationwide approach to simplify and ensure compliance.

The lawyers of our Labor, Employment, and Workplace Safety practice regularly counsel clients on the issues discussed herein and are well-positioned to provide guidance and assistance to clients on these significant developments.

FOOTNOTES

[1] *See* Eugene C. Ryu et al., *California Pay Transparency Act Considerations for Employers*, K&L GATES, (March 28, 2023), https://www.klgates.com/California-Pay-Transparency-Act-Considerations-for-Employers-3-28-2023; April Boyer, et. al., *Help Wanted: What Employers Need to Know About Pay Transparency*, K&L GATES (October 28, 2022), https://www.klgates.com/Help-Wanted-What-Employers-Need-to-Know-About-Pay-Transparency-Requirements-in-Job-Postings-10-28-2022.

[2] *See, e.g.*, Bay v. Times Mirror Mags., 936 F.2d 112, 117 (2d Cir. 1991) (noting nothing "prohibits an employer from making employment decisions that relate an employee's salary to contemporaneous market conditions…"); Davidson v. Bd. of Governors of State Colls. & Univs. for W. Ill. Univ., 920 F.2d 441, 445 (7th Cir. 1990) (upholding a system in which a university paid faculty members the "salary [they] could command in a no less attractive job with some other employer" as evidenced by an actual offer from a competing institution); Ross v. Univ. of Tex. San Antonio, 139 F.3d 521, 526 (5th Cir. 1998) (finding that a pay disparity between younger and older employees does not create reasonable inference of age discrimination where disparities are caused by

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market factors not related to age); Downes v. Bd. of Trs. of Ill. States Univ., Case No. 19-cv-1411, 2023 BL 79201, at *3–4, *13 (C.D. Ill. Mar. 9, 2023) (determining “market factors” at time of hiring was a legitimate factor to consider in rejecting Title VII pay discrimination claim even where “salary compression” exists and is being addressed by employer).

[3] Indeed, at the same time that the NPRM was issued, the U.S. Office of Personnel Management issued a final rule forbidding consideration of salary history by federal agencies as to federal employees. Up until this point, federal agencies had considered salary history and not followed their own best practice, even while OFCCP advised contractors not to do so. The fact that a final rule was issued for federal employees seems to indicate the writing is on the wall that this will soon be the rule for federal contractor employees as well.

KEY CONTACTS



LEANN M. WALSH
PRACTICE GROUP COORDINATOR - LABOR, EMPLOYMENT, AND WORKPLACE SAFETY

RALEIGH
+1.919.743.7319
LEANN.WALSH@KLGATES.COM



ERINN L. RIGNEY
PARTNER

CHICAGO
+1.312.807.4407
ERINN.RIGNEY@KLGATES.COM

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