



Labor & Employment ADVISORY ■

OCTOBER 14, 2014

Recent OFCCP Rules and Forms: What Federal Contractors Need to Know

Federal contractors and subcontractors should take note of several recent developments impacting their legal obligations.

Final Regulations Implementing New Federal Contractor Minimum Wage

Pursuant to an Executive Order from President Obama, the U.S. Department of Labor (DOL) issued a [final rule and regulations](#) increasing the minimum wage for employees working on new federal contracts to \$10.10 per hour beginning January 1, 2015, with annual increases to follow. The final rule is largely an adoption of the proposed rule that was issued for comment in early June and the subject of a prior [advisory](#).

Covered Contracts. The new regulations apply broadly to four major categories of federal government contracts and any subcontract of any tier under such contracts: (1) procurement contracts for construction covered by the Davis-Bacon Act (DBA); (2) service contracts covered by the Service Contract Act (SCA); (3) concessions contracts, including those excluded under the SCA; and (4) contracts to offer services on federal property or lands. The wage increase applies to new federal contracts, including replacement contracts, in any of the preceding categories that result from a solicitation issued on or after January 1, 2015, and new contracts awarded outside of the solicitation process on or after January 1, 2015. The wage increase does not apply to contracts unilaterally renewed by the federal government, but does apply to contracts renewed, extended or modified through bilateral negotiations on or after January 1, 2015.

Covered Workers. The new regulations apply to any person engaged in performing work on or in connection with a covered contract and whose wages under such contract are governed by the Fair Labor Standards Act (FLSA), the SCA or the DBA, other than individuals employed in a bona fide executive, administrative or professional capacity or under a special certificate pursuant to the FLSA. Similar to administrative practices under the SCA and DBA, the final rule excludes covered workers performing work “in connection with” (as opposed to “work on”) covered contracts for less than 20 percent of their hours worked in a given workweek. The DOL views a worker performing “in connection with” a covered contract as any worker who is performing work activities that are necessary to the performance of a covered contract but who is not directly engaged in performing the specific services called for by the contract itself; whereas workers performing “on” a covered contract are “those workers directly performing the specific services called for by the contract.” In situations where workers are not exclusively engaged in covered contract work, the federal contractor must keep accurate records segregating the periods in which a worker performed work on or in

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

connection with a covered contract from periods in which noncovered work was performed. Arbitrary assignments of time on the basis of a formula will not be sufficient.

Recordkeeping Requirements. Covered contractors must make and maintain, for a period of three years, the following records for each covered worker:

- name, address and social security number;
- the worker's occupation or classification;
- the rate of wages paid;
- the number of daily and weekly hours worked by the worker;
- any deductions made; and
- the total wages paid.

Notice Posting. Contractors must notify all covered workers of the applicable minimum wage rate. For contracts also covered by the SCA or DBA, the contractor may meet this requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes. For workers governed by the FLSA, the contractor must post a notice provided by the DOL in a prominent and accessible place at the worksite so it may be readily seen by workers. Contractors that customarily post notices to workers electronically may post the notice electronically, provided such electronic posting is displayed prominently on a website that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

Enforcement. Any worker, contractor, labor organization or other person or entity that believes a violation of the regulations has occurred may file a complaint with the DOL's Wage and Hour Division. The DOL may investigate possible violations either as the result of a complaint or on its own initiative. The regulations provide for remedies such as back payment of wages and debarment.

Notice of Proposed Rulemaking Concerning Pay Transparency

Government contractors will likely need to revise employee handbooks and provide a primer to managers on avoiding actions that could be characterized as discrimination for disclosure of compensation information. On September 17, 2014, the Office of Federal Contract Compliance Programs (OFCCP) released a [notice of proposed rulemaking \(NPRM\)](#) regarding President Obama's Executive Order aimed at promoting greater pay transparency for employees of federal contractors. As part of the President's overall policy goal of reducing gender pay inequality, the proposed rule prohibits federal contractors and subcontractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing or inquiring about compensation information. The policy aims to allow employees to learn and share salary and compensation data of coworkers and in turn raise and attempt to address any perceived inequities with their employers.

Among the proposed new requirements, contractors will be required to agree to a new provision in the mandatory equal opportunity clauses barring pay disclosure discrimination, to include nondiscrimination statements in employee handbooks, and to post and disseminate nondiscrimination information to employees and applicants. Prime contractors will also be required to include in subcontracts flow-down provisions that include the nondiscrimination clause. The proposed rule also requires that the prime contractor "take such action with respect to any subcontract

or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance.” Although the enforcement mechanism under the new rules remains unclear, the proposed language hints that the means for enforcement, at least to some extent, may be left up to the federal agency administering the contract in question.

The NPRM does contain an important exception that allows an employer to take adverse action against an employee who improperly discloses compensation information that the employee obtains as part of his or her essential job functions. This means that human resource professionals or other managerial employees who access compensation information as part of their essential functions can still be bound to nondisclosure agreements or otherwise reprimanded for the improper disclosure of payment information. While the NPRM proposes rules for determining when an employee’s job functions would place him or her within this exception, it also expressly invites comments on this important issue.

The scope of this proposed rule will likely be far reaching, as it applies to contracts over \$10,000 and requires incorporation of the nondiscrimination statement into the equal opportunity clause of a grant, contract, loan, insurance or guarantee involving federally assisted construction that is not exempt.

Although several aspects of the NPRM are still unclear, including how these additional requirements will be enforced, government contractors should begin to consider adjustments to long-standing practices of treating employee compensation as confidential and revisions to employee handbooks and equal employment statements. That said, contractors should not make any changes yet, as the proposed rule is open for comment until December 16, 2014, and it is possible that OFCCP’s final regulations will be different than those proposed by the NPRM. Once issued, the final regulations will apply to new contracts signed after a date that presumably will be specified in the final rule.

Revised OFCCP Scheduling Letter

On October 1, 2014, OFCCP released its new [Scheduling Letter](#) and [Itemized Listing](#) that it uses when initiating a compliance review. The new documents significantly expand several portions of OFCCP’s audit submission requirements:

- Most importantly, contractors are now required to submit individualized compensation data, rather than the aggregated data required by the old scheduling letter. The compensation data must include the individual’s job title, job group and EEO-1 category.
- Contractors are now required to disclose compensation policies and supporting documentation that demonstrates the factors used to determine compensation.
- Compensation is more broadly defined, including not just base salary or wage, but also hours worked, incentive pay, merit increases and overtime.
- Employment information must be reported by individual race and ethnicity rather than by “minority” and “non-minority” classifications previously used. Significantly, the revised race and ethnicity listings do not comport with the seven racial categories used in the annual EEO-1 report that most contractors use to collect and report race and ethnicity information, which presents some ambiguity as to whether OFCCP will continue to accept information in that format.
- OFCCP now requires contractors to define promotions and explain the basis of the promotion data. OFCCP has historically considered promotions to be a personnel move from one job group to another job group, whereas

many contractors consider some personnel moves within a job group to also be classified as a promotion. This new requirement aims to bring these sometimes conflicting interpretations into agreement.

OFCCP has said that it plans to issue an FAQ regarding the new letter at some point in the near future.

Updated VEVRAA Reporting Requirements

On February 24, 2014, the Department of Labor's Veterans' Employment and Training Service (VETS) issued a notice of proposed rulemaking to revise the regulations implementing the reporting requirements under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). Under VEVRAA, government contractors are required to annually report the number of employees and new hires who fall into one of several different protected veteran groups. On September 25, 2014, a [final rule](#) was published in the *Federal Register* that eases the reporting burden on federal contractors and subcontractors, standardizes terminology with the existing EEO-1 Report and renames the required annual report.

Principally, the final rule standardizes definitions of terms used in the regulations and renames the annual report the Federal Contractor Veterans' Employment Report VETS-4212. Most importantly, the report required by the final rule will require contractors to report specified information on protected veterans in their workforce in the aggregate, rather than for each category of veterans protected under the statute. The preamble to the rule states that "[b]y making available data on the total number of protected veterans employed and newly hired by Federal contractors it will now be possible to include cross-year comparisons of Federal contractors' employment and hiring of protected veterans in the annual report, as well as the proportion of contractors' workforce and new hires made up by the protected veterans." Contractors and subcontractors will have to comply with the reporting requirements in the final rule beginning with the annual report to be filed in 2015.

If you would like to receive future *Labor & Employment Advisories* electronically, please forward your contact information to labor.advisory@alston.com. Be sure to put "subscribe" in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

ATLANTA

Alexandra Garrison Barnett
404.881.7190
alex.barnett@alston.com

Ashley D. Brightwell
404.881.7767
ashley.brightwell@alston.com

Lisa H. Cassilly
404.881.7945
lisa.cassilly@alston.com

Brett E. Coburn
404.881.4990
brett.coburn@alston.com

Clare H. Draper IV
404.881.7191
clare.draper@alston.com

R. Steve Ensor
404.881.7448
steve.ensor@alston.com

Kimberly L. Fogarty
404.881.4502
kim.fogarty@alston.com

Kristen Fox
404.881.4284
kristen.fox@alston.com

Kandis Wood Jackson
404.881.7969
kandis.jackson@alston.com

Molly M. Jones
404.881.4993
molly.jones@alston.com

J. Thomas Kilpatrick
404.881.7819
tom.kilpatrick@alston.com

Christopher C. Marquardt
404.881.7827
chris.marquardt@alston.com

Wes R. McCart
404.881.7653
wes.mccart@alston.com

Charles H. Morgan
404.881.7187
charlie.morgan@alston.com

Glenn G. Patton
404.881.7785
glenn.patton@alston.com

Robert P. Riordan
404.881.7682
bob.riordan@alston.com

Eileen M. Scofield
404.881.7375
eileen.scofield@alston.com

Alicia P. Starkman
404.881.4994
alicia.starkman@alston.com

Brooks Suttle
404.881.7551
brooks.suttle@alston.com

CHARLOTTE

Susan B. Molony
704.444.1121
susan.molony@alston.com

DALLAS

Jon G. Shepherd
214.922.3418
jon.shepherd@alston.com

LOS ANGELES

Lindsay G. Carlson
213.576.1038
lindsay.carlson@alston.com

Martha S. Doty
213.576.1145
martha.doty@alston.com

James R. Evans, Jr.
213.576.1146
james.evans@alston.com

Jesse M. Jauregui
213.576.1157
jesse.jauregui@alston.com

Deborah Yoon Jones
213.576.1084
debbie.jones@alston.com

Ryan T. McCoy
213.576.1062
ryan.mccoy@alston.com

Nicole C. Rivas
213.576.1021
nicole.rivas@alston.com

Casondra K. Ruga
213.576.1133
casondra.ruga@alston.com

WASHINGTON, D.C.

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

Charles A. Gartland II
202.239.3978
chuck.gartland@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2014

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777

BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719

CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111

DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899

LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100

NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444

RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260

SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001

WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333