

Blog Post

Pay Transparency and a Ban on Consideration of Employee Compensation History for Federal Contractors on the 15th Anniversary of the Lilly Ledbetter Fair Pay Act

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This January marked the 15th anniversary of the Lilly Ledbetter Fair Pay Act of 2009, providing a good moment for the federal government to propose new rules aimed at increasing gender pay equity in federal contracting and federal government employment. The new rules announced by the White House are expected to require covered government contractors to disclose expected salary or salary ranges in job postings and to prohibit those same contractors from using job applicants' pay history to set employee compensation, akin to pay transparency legislation recently enacted in states such as Colorado and California.

In light of the President's announcement, a federal government agency called the Federal Acquisition Regulatory (FAR) Council issued proposed rules regarding pay transparency and compensation history as part of the White House's effort to "reduce pay secrecy, help workers negotiate, and reduce pay gaps." If adopted, the proposed rules would generally apply only to applicants for positions that perform work on or in connection with any federal government contract exceeding \$10,000. The public

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has until April 1, 2024 to comment on the proposed rules before the FAR is expected to announce final rules.

Pay Transparency

The proposed rules will require federal contractors and subcontractors to include expected salary or salary ranges in job postings. Covered job postings must reflect a salary range that the contractor or subcontractor in good faith believes that it will pay for the position. While the posting need not include the cash value of offered benefits, it must include a general description of benefits and other non-salary compensation applicable to the job. However, if at least half of the expected compensation for the advertised position is comprised of commissions, bonuses, or overtime pay, the contractor must specify the percentage of overall compensation or dollar amount (or at least the range of such percentage or dollar amount), for each form of non-salary compensation.

This proposed pay transparency rule follows state laws similarly requiring pay transparency in job postings. Several states, including California and New York, require disclosure of salary ranges in job postings. Unlike its state law counterparts, the proposed rule will have a nationwide scope. Meaning any covered job posting must disclose salary range, regardless of the state where the work is expected to be performed.

Compensation History Discrimination

The FAR Council has also proposed a rule prohibiting contractors from requesting and considering information about a job applicant's compensation history when making employment decisions, including the setting of pay. Under this proposed rule, contractors will not be allowed to: (1) seek an applicant's compensation history, regardless of the source of this information; (2) require disclosure of compensation history as a condition of an applicant's candidacy; (3) retaliate against or

refuse to interview, consider, hire, or employ any applicant for failing to answer questions regarding their compensation history; (4) consider an applicant's compensation history as a criterion in the interview process or in determining the compensation for the applicant; or (5) run afoul of any of these prohibitions *even where the applicant volunteers their compensation history without prompting* from the employer.

The proposed rule broadly defines the term "compensation history" as the "compensation an applicant is currently receiving," as well as "the compensation the applicant has been paid in a previous job." Moreover, the term "compensation" is not limited to an applicant's salary, but also includes any remuneration for employment, including bonuses, commissions, and stock options and awards.

Numerous jurisdictions, including the state of California and New York, have enacted similar bans. However, employers should note that this proposed ban is, in various ways, broader than the laws of certain states and localities. For instance, unlike the proposed rule, California allows employers to consider salary history if the applicant has disclosed it voluntarily and without prompting. In contrast, the proposed rule prohibits *any* consideration of salary history, even if passively acquired. It is crucial for covered federal government contractors to understand that if the proposed rule becomes final, they must follow the more stringent proposed rule over any conflicting state or local law.

Under the proposed rule, if a contractor is non-compliant, complaints may be filed with the agency that issued the solicitation or awarded the contract within 180 days from the date of the violation. The contracting agency would be required to review the complaint, consult with the complainant as necessary, and take the appropriate action. It is not clear at the moment, however, that the contracting

agency can or must impose any penalty on a contractor who violates these rules.

Key Takeaways

The FAR Council's new proposed salary transparency and compensation history rules aimed at federal contractors is part of a broader trend of laws targeting pay inequity in the workforce. These proposed rules are significant because this the first time the federal government is wading into the waters of pay transparency, where the states have primarily driven policy.

Pay transparency laws and compensation history bans can pose various risks to employers who are federal government contractors or even those without any federal government contracts. As always, employers should brush up on the applicable laws for the states in which they employ individuals, including the states where employees may also work remotely. Besides the patchwork of compliance issues these laws create, they can also create retention and competitiveness concerns. Publicizing salary ranges for prospective hires may elicit resentment among current employees and cause upward pressure on compensation offered in high-demand positions. A ban on considering an applicant's compensation history may undermine employers' attempts to more accurately calibrate a prospective employee's pay. If you have questions on how the proposed rules outlined here may affect your business, or are seeking guidance on how to comply, contact your Akerman attorney.

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