



# Affirmative Action and Compliance

## Obama's Year of Action & You

### Obama's 2014 Executive Orders

During 2014, Obama sidestepped lack of congressional support by signing executive orders that would continue his sought-after reforms. He signed executive orders expanding equal pay protections, prohibiting LGBT discrimination by federal contractors, and barring federal contractors from retaliating against employees who talk about their salaries or other compensation information. Let's look at each of these policy initiatives to understand what each means to you, the federal contractor.

#### Pay Secrecy Legislation

In April, the President issued Executive Order 13665 to prohibit retaliation against applicants and employees who engage in wage discussions. The Department of Labor issued a NPRM in September which amends OFCCP's regulations implementing EO 11246. The belief is that employees need to freely discuss compensation in order to discover and address unfair pay disparities. The rule is designed to encourage a change in the culture in corporate America to allow employees and applicants to freely share sensitive pay information for the first time.

Specifically, the rule:

- Permits employees and applicants to openly discuss their own pay and that of others
- Delineates the role of individuals with access to pay information as part of their "essential job function":
  - They may still talk about their own pay
  - It is yet unclear if they may talk about the pay of others if compensation information is acquired by other means than their work access (see below - Remaining Issues/Questions)
- Establishes that legitimate workplace rules may be enforced if they do not prohibit wage discussions
  - The National Labor Relations Act (NLRA) has been interpreted to prohibit pay secrecy policies; however, it does not cover supervisors nor does it apply to agriculture or airline industries.
- Defines what information can be shared under regulatory protection:
  - Aligns with the definition OFCCP uses in the context of compensation discrimination investigations
  - Includes "any payments made to, or on behalf of, an employee or offered to an applicant 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 contributions.
- Defines "who" can share "compensation" information under regulatory protection:
  - Defined to cover "any information related to all aspects of compensation"
  - Includes "decisions, statements, or actions related to setting or altering compensation"
  - Meant to cover "any information directly related to employee compensation, as well as the process or steps that led to a decision to award a particular amount or type of compensation"

#### Remaining Issues/Questions

- The OFCCP is specifically seeking comment on how to define "essential job functions"
- May still enforce legitimate workplace rules that do not prohibit wage discussions



e. k. ward and associates

300 international drive  
suite 100

williamsville, ny 14221

716 626.1188

www.ekward.com

- Current proposal does not contemplate situations such as employees “filling in” a position on a temporary basis or ad hoc job assignments
  - Proposed regulations do not include provisions for inadvertent disclosures
- ➔ **The Take Away:** The practice of treating pay information as confidential, and asking employees not to share or discuss pay in the workplace will no longer be permitted. The proposal requires contractors to disseminate the nondiscrimination provision in employee handbooks and manuals, through electronic or physical postings, and also to add this topic to training courses for both new and incumbent supervisors/ managers. Contractors are encouraged to review company policies regarding compensation to ensure no “prohibitive” language exist. Be sure to also revise EEO/OFCCP subcontract clauses.

### Lesbian/Gay/Bisexual/Transgender (LGBT) Non-Discrimination Order

President Obama issued Executive Order 13672 on July 21st prohibiting contractors from discriminating against applicants and employees on the basis of their gender identity and sexual orientation. It substituted "sex" with "sexual orientation, gender identity" in a number of important places in Executive Order 11246. It covers both non-discrimination and affirmative action. The following aspects of the new ruling remain unclear:

- Level of affirmative action and goals
  - Recordkeeping, data collection and reporting requirements
  - Audit and enforcement authority and mechanisms.
- ➔ **The Take Away:** Employers doing business with the government need to stay abreast of the changes in labor rules to stay compliant. Now is the time to take a fresh look at non-discrimination policies, practices, and management training with these changes in mind.

## Equal Pay Report

On August 8th, the OFCCP issued a Notice of Proposed Rulemaking (NPRM) with the purpose of using the Equal Pay Report to direct its enforcement resources toward those federal contractors and subcontractors whose summary compensation data suggest potential pay violations. The NPRM proposes two key components: 1) covered federal contractors and subcontractors must file an Equal Pay Report for each establishment; 2) objective industry standards based on aggregate compensation data are to be developed and published to encourage contractors to review their pay data using the same metrics as OFCCP. The OFCCP wants to "harmonize" the Equal Pay Report with existing EEO-1 reporting requirements. By using existing reporting frameworks that contractors already maintain in electronic payroll records, including W-2 earnings, and the longstanding categories and definitions that apply to the EEO-1 Report (e.g. workforce demographic data - identical seven race and ethnicity categories, gender, and company identification information - 10 EEO-1 job categories, exemptions, definition of "employee"), the proposed Equal Pay Report would minimize costly new recordkeeping requirements and any additional compliance burden on federal contractors and subcontractors.

Important differences between the EEO-1 and the Equal Pay Report that should be noted:

- Multiple establishment contractors must file an Equal Pay Report for each of its establishments [regardless of size - i.e., reports must be filed for locations with fewer than 50 employees (this means no "Type 6" report)].
  - EEO-1 uses a "snapshot date" approach, while the Equal Pay Report will "cover a full calendar year".
  - The annual report must be submitted to OFCCP no later than March 31 of each year (it can be filed as early as January 1st of each year).
- ➔ **The Take Away:** Contractors should strongly consider conducting proactive pay equity analyses now, so that any areas of concern can be addressed before data is reported to OFCCP. This should include a total compensation analysis since contractors will need to report total compensation (i.e., all wages contained in the Form W-2) rather than just base salary.
- ➔ The DOL has extended the comment period through Jan. 5, 2015.

## New Scheduling Letter



The OFCCP released, without a comment period, its revised Scheduling Letter and Itemized Listing, taking effect on October 16th. While some of the changes reflect requirements under Section 503 and 4212, others do not. We recommend that contractors review the new reporting and disclosure requirements in advance of a potential audit. Most notable changes include:

- **Type of Evaluation**

The scheduling letter notifies the federal contractor as to the type of evaluation they have been selected for:

- Establishment audit
- Headquarters audit
- Corporate management compliance evaluation
- Functional audit

- **Electronic submission is encouraged.** All data must be submitted electronically if it is maintained in an electronic format that is "complete, readable and useable".

- **"Itemized Listing"**

The listing formerly consisted of 11 items and is now comprised of 22 items. Highlights include:

- Submission of employee-level compensation data
- Submission of employment transaction summaries by race/ethnicity subgroups
- New 503/4212 items, including some not required by revised AAP regulations

- **Item # 18 (formerly Item #10) – Employment Transaction Summaries**

- Applicants, hires, promotions, terminations (this is the same as before except you will be required to submit a definition of promotion in your organization)
- Retain option of submission by job group or job title
- “**Should**” include applicants of unknown race/ethnicity or gender
- **NEW:** Applicant and employee data must be submitted by the five pre-2007 racial and ethnic categories (African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaska Native, White). (Formerly, personnel activity could be submitted by male, female, white and minorities in the aggregate. Contractors may also use the seven "new" race/ethnicity categories required by the EEO-I report. These categories have been widely adopted for both AAP/EEO-I purposes since 2007.)

- **Item # 19 (formerly Item #11) - Employee-level Compensation Data**

Previously, Compensation Data was submitted in summary form. It must now be reported on an individualized basis and must include:

- **Type of Employees**

- Full-time
- Part-time
- Contract (employees, not contractors)
- Per diem
- Day labor
- Temporary

- **Mandatory Fields**

- Gender and Race/Ethnicity
- Job title, Job Group, EEO-I Category
- Date of Hire
- Compensation data including hours worked in a typical workweek
- Identify the following separately: incentive pay, merit increases, bonuses, commissions, locality pay, and overtime.

▪ **Section 503/4212 Items**

The items in this section of the Scheduling Letter are entirely new. Some pre-date the 503/4212 final regulations and some are not listed in the final regulations. Again, no notice or comment period was provided. Items that must be submitted include:

- Results of the evaluation of the effectiveness of outreach and recruitment efforts that were intended to identify and recruit qualified protected veterans and individuals with disabilities (IWDs) - 41 CFR § 60-741.44 (f)
- Documentation of all actions taken to comply with the audit and reporting system requirements - 41 CFR § 60-741.44 (h)
- Documentation of the computations or comparisons (data matrix) described in 41 CFR § 60-741.44 (k) for immediately preceding year
  - If six months or more in current AP year, provide the information for at least the first six months
- Documentation of IWD utilization analysis and veteran hiring benchmark with methodology - 41 CFR § 60-741.45
  - Not typically part of written AAP
  - If six months or more in current AAP year, provide "information that reflects" current year "progress" (503) or "results" (4212)

▪ **Reasonable Accommodation Policy and Records**

- Proof that contractor creates and maintains these records.
- Assessment of personnel policies [41 CFR § 60-741.44 (b)] including:
  - Date of assessment and next scheduled assessment
  - Results of assessment and actions taken
- Assessment of physical and mental job qualifications [41 CFR § 60-741.44 (c)], including:
  - Date of assessment and next scheduled assessment
  - Results of assessment and actions taken

▪ **Practical Considerations**

- Many contractors not yet covered by many of the new 503/4212 requirements
  - Even in "transitional year," not clear that items would be required
  - Submission of these items may not be required, but expect to demonstrate to OFCCP steps taken toward compliance

For a copy of the new scheduling letter, go to:

[http://www.reginfo.gov/public/do/PRAViewIC?ref\\_nbr=201104-1250-001&iCID=13735](http://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201104-1250-001&iCID=13735)

## New 4212 Vets Report Replaces the VETS-100A

Say goodbye to the VETS-100A report. 2015 will usher in the new and improved VETS-4212 Report. What is important to note?

- You will only have to report on "protected veterans" not by the individual veteran categories.
- Now that the 2014 filing cycle is closed, you only need to collect "protected veteran" status.
- You are still required to maintain records of the last three years' previous data submitted on the VETS-100A reports.
- The VETS-4212 job category numbering now mirrors the EEO-1 report.

## FLSA - Overtime and Federal Contractors Minimum Wage

Earlier this year, President Obama issued a Presidential Memo directing the U.S. Secretary of Labor to propose revisions to modernize and streamline the existing overtime regulations under the FLSA. The focus was directed to increasing minimum salary levels in the FLSA's so-called white collar exemptions to expand the pool of workers eligible for overtime pay. The proposal would increase the minimum salaried level from \$455/week to \$1090/week over a period of time. The bill would also amend the salary level in order to qualify as an exempt "highly compensated employee" from \$100,000 to \$125,000 in 3 years. Classification issues continue to make it difficult for companies to properly determine exempt/non exempt status.

Additionally, Executive Order 13658 was published in October establishing a minimum wage for employees working on covered federal government contracts. The final rule raises the minimum wage from \$7.25 to \$10.10 an hour. Federal contractors must now include a minimum wage clause in both covered contractors and lower-tier subcontracts. The rule also applies to 1) individuals with disabilities who were previously paid below the minimum wage cause of their disability, and 2) workers who receive tips, whose minimum wage will be raised from \$2.13 to \$4.90.

## Voluntary Self-Identification of Disability

### When to Request Self-Identification of Disability

1. Applicant Phase-Pre-offer voluntary self-ID
2. First year survey of workforce
3. Every 5th year survey of workforce
4. In the interim between the first and 5th year, you must send out a reminder of the employee's ability to change their status to an individual with a disability, as appropriate.

**Paper Copies** - Contractors utilizing a paper invitation must retain hard copies or electronic copies of each of the completed paper forms. Additionally, any log, spreadsheet, or database that is developed to record the resulting data must be retained.

**Electronic Copies** - Contractors *may* create an electronically fillable copy of the form provided it meets the following requirements:

- Display the OMB number and expiration date;
- Contain the text of the form without alteration;
- Use a sans-serif font, such as Calibri or Arial; and
- Use at least 11-pitch for font size (with the exception of the footnote and burden statement, which must be at least 10-pitch in size).

Though it may seem that specifying the size and type of font is unnecessary, OFCCP is doing so to ensure the consistency of appearance, ease of reading, and accessibility of the form. By using the OMB number and date, job applicants and employees recognize that the form is an officially approved government form.

### Recordkeeping Requirements

- All self-identification forms must be kept confidential and separate from the personnel or medical file.
- All self-identification forms must be kept for a minimum of 3 years from date of creation.
- Electronically captured self-identification status may be recorded/retained in one of three options:
  1. **Electronic copies** (pdf, scanned, etc.) may be retained (any log, spreadsheet or database that is used to record the data must also be retained for a minimum of 3 years.)
  2. **Hard copies** of the electronically completed form may be retained (any log, spreadsheet or database that is used to record the data must also be retained for a minimum of 3 years.)
  3. **A detailed log, spreadsheet or database** of the data collected from the electronically completed forms may be created and maintained. The contractor, however, must also be able to demonstrate how they delivered and/or displayed the voluntary invitation to self-identify. This allows compliance officers to verify that contractors met their obligation to use the OMB-approved form.

To download the **Voluntary Self-Identification Form** (mandatory form – may not be edited), go to:  
[http://www.dol.gov/ofccp/regs/compliance/sec503/Voluntary\\_Self-Identification\\_of\\_Disability\\_CC-305\\_SD\\_Edit1.24.14.pdf](http://www.dol.gov/ofccp/regs/compliance/sec503/Voluntary_Self-Identification_of_Disability_CC-305_SD_Edit1.24.14.pdf)

## Voluntary Self-Identification as Protected Veteran

### When to Request Self-Identification

1. Pre-offer voluntary self-ID
2. Post-offer voluntary self-ID

### Recordkeeping Requirements

All Protected Veteran self-ID forms must be kept for a minimum of 3 years from date of creation. This data collection will enable the federal contractor to document and update the annually required comparisons and information regarding applicants and employees (i.e., number of protected veteran applicants; the total number of protected veteran applicants hired). To download a sample **Invitation to Self-Identify for Veterans**, go to:  
<http://www.ekward.com/wp-content/uploads/2014/11/Revised-PrePost-VETS-Self-ID.doc>

## EEOC & Pregnancy Related Conditions

In July, EEOC published a revised set of guidance on pregnancy discrimination issues. This new guidance takes the position that employers have a duty to accommodate certain pregnancy-related conditions, even though there is not an explicit requirement under Title VII of the 1964 Civil Rights Act. The Pregnancy Discrimination Act (PDA) of 1978 requires employers to treat women affected by pregnancy, childbirth or related medical conditions the same in all aspects of employment, including the provision of health insurance and benefits.

Under the ADA, ordinary pregnancy was not considered a disability thus employers are not required to provide disability related reasonable accommodations to pregnant workers, but those suffering from pregnancy related conditions that “substantially limit one or more major life activities” may be considered individuals with disabilities for which ADA reasonable accommodations must be considered. The 2008 ADA Amendments Act (ADAAA) has broadened the definitions of disability, increasing the number of individuals now entitled to workplace reasonable accommodations. As a result, some have argued that employers now have a legal obligation to provide workplace accommodations to pregnant workers who are similar in their “ability or inability to work” as their disabled peers. EEOC has fully embraced this argument and issued revised guidance on pregnancy enforcement. A copy of the revised guidelines can be found on the EEOC website at: <http://www.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm>

## Current Focus of OFCCP Audits

OFCCP auditors are increasing focus on current technical obligations, such as:

- Purchase orders
- State job postings
- Mental/physical restrictions in job descriptions and when updated
- Evidence of alternative application process if using online system
- Accommodation examples
- Evidence of good faith outreach efforts

We have also heard of auditors requesting proof of federal contractors enforcing new regulations that are technically not enforceable until the following AAP year, such as count of self-identified disabled employees, proof of new EEO tagline on job advertisements, a copy of your contracts showing the new EEO wording. In that respect, it is important you and your staff are well educated about the current and new regulations so you can provide the necessary information and show compliance. We invite you to call us (716-626-1188) should you have any questions about the new regulations and how to best implement them.

## Wellness Programs

Corporate wellness programs have come under the scrutiny of enforcement agencies for potential violation of ADA and GINA issues by offering employee incentives to encourage participation. These wellness programs are designed to promote healthy lifestyle choices among employees by encouraging participation in employer-sponsored activities such as health risk assessments, weight management programs, fitness and exercise programs and smoking cessation clinics. Many of these programs offer some type of reward or financial incentive to encourage maximum employee participation. The issue raised by EEOC is the extent to which employer use of incentives to encourage participation in wellness programs is in fact “voluntary”. EEOC’s contention is that a program is not “voluntary” if the employee is penalized financially or otherwise for not participating. They also contend that medical inquiries made in conjunction with health risk assessments are not job related and consistent with business necessity as required by the ADA. **Employers are advised to review the incentives and penalties offered to encourage employee participation in a wellness program to make sure the program is in fact voluntary.**

**Disclaimer:** This document is meant only as a guide based on practical recommendations for AAP compliance. The information is not intended to be, nor does it constitute legal advice. It is recommended that your Affirmative Action Plan compliance procedures and all employment policies, procedures and practices be reviewed by your in-house counsel or other legal counsel with qualifications background and experience in AAP compliance.