E. K. Ward & Associates
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Executive Order 13706

The United States Department of Labor published for public comment proposed regulations implementing Presidential Executive Order 13706 requiring covered federal contractors and subcontractors to allow eligible employees to accrue one hour of paid leave for every 30 hours worked, up to a maximum of 56 hours per year for themselves or for a broadly-defined "family member".

EO 13706, officially called "Establishing Paid Sick Leave for Federal Contractors," declares it the policy of the US to "increase efficiency and cost savings" by ensuring that employees working under certain federal contracts can earn up to seven days or more of paid sick leave annually, including for eligible family members. The order requires federal executive branch departments and agencies to ensure that new contracts, contract-like instruments, and solicitations include a clause requiring contractors to allow all "employees, in the performance of the contract or any subcontract thereunder," to earn a minimum of one hour of paid sick leave for every 30 hours worked.

Coverage is determined by the type of federal contract held by a contractor. Contracts for supplies or materials would not be covered. Specifically, the paid leave regulations would apply to prime contracts or prime "contract like instruments" that are:

- Procurement contracts for services or construction covered by the Davis- Bacon Act (DBA)
- Contracts for services covered by the Service Contract Act (SCA)
- Contracts for concessions, including any concessions contract excluded from coverage under the SCA; or
- Contracts entered into with respect to federal property and related to offering services for federal employees, their dependents, or the general public

In order for the paid sick leave regulations to apply, the wages of employees performing on or in connection with a prime contract must be governed by the DBA, SCA, or the Fair Labor Standards Act (FLSA).

It is clear that the DOL intends to issue final regulations before the end of the Obama Administration.

USERRA Changes

There were two minor amendments to the Uniformed Services Employment and Re-employment Rights Act (USERRA) included in the FY 2016 National Defense Authorization Act (NDAA) recently signed into law by President Obama. Under USERRA, employers generally must offer reemployment to individuals whose employment is interrupted by military service. This re-employment is not indefinite. With some exceptions, returning service members are NOT eligible for reemployment if they have accumulated more than five years' worth of service-related absences from their employer. *(cont'd on next page)*

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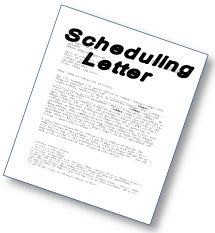
USERRA Changes

The two amendments to USERRA slightly expand the scope of the exemptions to this five-year cap by prohibiting an employer from counting toward the five-year limit any service performed by a service member who is ordered into service by the Secretary of Defense because:

- A state governor requested assistance in responding to disaster or emergency
- The Secretary of the Army, Navy, or Air Force determines that a combatant command requires augmentation for a preplanned mission.

OFCCP Proposed Changes to Scheduling Letter



The US Department of Labor Office of Federal Contract Compliance Program has requested approval for "minor" changes in its Scheduling Letter and accompanying Itemized Listing. OMB authorization for the current scheduling letter will expire on March 31, 2016.

According to the statement filed by OFCCP with OMB, there are four so-called clarifying changes that OFCCP is proposing:

- **Specifying Functional AAP Reviews** - The Scheduling letter will now indicate whether a compliance evaluation is an audit of an establishment-based location or a functional affirmative action program (FAAP).
- **Separate Request for Disability/Veterans AAPs** - The agency is now requesting separate disability and veteran AAPs. However, what is unclear is whether or not contractors can continue to submit a combined disability/veteran AAP.
- **Sensitive and Confidential Information** - Without any explanation, OFCCP is changing the wording of the clause relative to the confidentiality of data and Freedom of Information Act (FOIA) requirements. The verbiage is less assuring but is still consistent with FOIA requirements notifying contractor affected by a potential FOIA disclosure request.
- **Interagency Information Sharing Statement** - OFCCP makes it a point to inform contractors the information they provide may be used in an enforcement action and shared with other federal government agencies to promote interagency coordination and collaboration.

The clarifying changes to the itemized listing now include separate requests for hire and applicant data, and would characterize contractors' "good-faith efforts" in response to placement rate goals in a way that does not suggest illegal quotas.

Proposed Expansion to Collect Employee Compensation Data

The EEOC has published for public comment a proposal to expand the EEO-1 Report to require all employers with 100 or more employees to report their establishment-level race/ethnicity and gender headcount by 12 new compensation bands within each of the existing 10 EEO-1 job categories. Placement of employee headcount figures in each pay band would be determined by the employee's W-2 earnings. Covered employers would also have to provide the total number of hours worked by the employees reported in each cell.

The proposed changes would be effective with the 2017 EEO-1 reporting cycle. For those EKW&A clients who are federal contractors, you may recall the pending regulation published in 2014 by the Department of Labor's OFCCP that would require contractors to report similar pay information on a proposed new "Equal Pay Report." According to the EEOC, the revised proposed EEO-1 form will replace OFCCP's proposed Equal Pay Report and federal contractors will be relieved of a potential dual reporting obligation.

State and Local Level Enforcement

There are a number of examples recently where civil rights advocates have focused increased attention on securing their legislative priorities at the state and local level.

New York Equal Pay Act (NYEPA)

Although there have been efforts within the US Congress over the last decade to strengthen the Equal Pay Act through enactment of the Paycheck Fairness Act (PFA), none of those efforts has succeeded to date. As a result, what we have witnessed more recently instead are efforts by pay equity proponents to strengthen state equal pay laws, often along the lines of the changes proposed in the PFA. New York State (NYS) followed the lead of California in enacting amendments to its equal pay law that extend beyond the requirements of the federal Equal Pay Act. Under the amended law, which went into effect on January 19, 2016, it is arguably easier for covered claimants to establish pay discrimination claims. Among other things, the NYEPA:

- Expands the scope of coverage from the current "same establishment" limitation to include workplaces in the same geographical region;
- Revises the "any other factor other than sex" affirmative defense to a more stringent "bona fide factor" affirmative defense;
- Allows claimants to bring Title VII-styled disparate impact claims;
- Adds pay secrecy language and an affirmative defense for employers for claims arising under this provision;
  - Contractors in NYS should be aware NYEPA allows employers to adopt a written policy that establishes reasonable workplace and workday limitations on the time, place, and manner for inquiries about discussion of or the disclosure of wages;
- Increases the amount of liquidated damages from double back pay to 300% for willful violations.

Caregiver Protections

Federal anti-discrimination law currently does not explicitly include as a protected class "caregivers". Caregivers are defined as applicants or employees who take time to care for children, parents, or other family members. While caregivers may have some rights under such laws as the FMLA, there is no federal protection solely on the basis of "caregiver status". A number of local jurisdictions now have laws that specifically protect caregivers; specifically, Washington, DC; Philadelphia, PA; San Francisco, CA; and most recently New York City (NYC). New York City's new caregiver law was signed into law on January 5, 2016 and becomes effective in early May. It treats caregivers as an identified class protected from employment discrimination.

Local Legal Enforcement Guidance

Given the continuous partisan gridlock, local jurisdictions have taken the opportunity to establish guidance on workplace protection issues. In December, the NYC Commission on Human Rights published new legal enforcement guidance on the City's existing law prohibiting discrimination on the basis of gender, including gender identity or expression. The NYC Human Rights Law (NYCHRL) applies to employers within the City that employ four or more employees. Protected classes under the NYCHRL include: age, race, creed, color, national origin, gender (including gender identity), disability, marital status, partnership status, caregiver status, sexual orientation, and alienage or citizenship status. This guidance provides explicit examples of gender identity discrimination as well as best practices on how stakeholders can comply with the law. This guidance issued by NYC serves as an important reminder that state and local anti-discrimination laws are often more protective than federal law, even on similar issues. This can make compliance more complex for companies that operate on a multi-state basis.

Given the ever increasing regulations, EKW&A clients are advised to familiarize themselves with the workplace laws of the state and local jurisdictions where they have operations. Whatever the compliance need, our staff will partner with you to assess and enhance your fair employment platform and help support your success.

More on VEVRAA and Section 503 Outreach

Evaluating Your Outreach

This year brings the first time that federal contractors and subcontractors must evaluate the effectiveness of their outreach and recruitment practices to individuals with disabilities (IWD) and protected veterans under the new 503C and VEVRAA regulations. Contractors must now:

- Engage in recruitment and outreach to attract IWD's and veterans (outreach to females and minorities is still necessary).
- Conduct an annual self-assessment of outreach and recruitment efforts, document the evaluation, and measure effectiveness.
- Document all outreach and recruitment activities and retain records for 3 years.

While it is obvious that you should be documenting your outreach with recruitment sources that target IWD and veterans, it isn't enough. You will want to carefully evaluate each recruitment source to determine if the recruitment relationship is effective. How so?

- Track the referral source so you can see from where your IWD and veteran applicants are hearing about postings.
- Track how many IWD/veteran candidates are applying from each source.
- Track how many IWD/veteran candidates are ultimately hired from each source.
- Discontinue using sources that aren't producing qualified candidates and find alternatives.
- Evaluate your applicant data year to year and for the prior three years.

Be Audit Ready!

Under the new regulations, you will want to be prepared for potential requests of the following as it relates to outreach to protected veterans and individuals with disabilities:

- Job postings
- Proof of outreach and recruitment to veterans and IWD organizations
- Evaluation of effectiveness of recruitment veteran and IWD sources
- Copies of policies such as FMLA, reasonable accommodation and ADA
- Purchase orders and template letters to ensure the required communication and language is included
- Assessment of personnel processes, including physical and mental qualifications
- The number of employees self-identifying as an IWD

Data Analysis

The new regulations require that contractors must "document the following computations or comparisons on an annual basis". You will want to be able to provide the following data for each annual plan.

- Number of IWD or protected veteran applicants
- Total number of job openings and jobs filled
- Total number of applicants for all jobs
- Number of IWD and veterans hired
- Total number of applicants hired

In determining your applicants, use the Internet Applicant Rule. It is important, however, to review basic qualification screens to ensure criteria does not unfairly eliminate IWD's or veterans.