



E. K. Ward & Associates AAP Bulletin 2016

OFCCP's Final Rule on Sex Discrimination

The OFCCP recently passed new sex discrimination rules that expanded on guidelines dating from over 40 years ago. The new protections accommodate today's workforce and include such topics as pregnant workers, gender identity, and caregiver status. The final rule will go into effect August 15, 2016. While most of these regulations are a restatement of current EEO law and federal contractors should already be in compliance, it would be prudent to examine current employment practices to ensure that no employees are negatively affected.

The Final Rule:

- ✓ **Provides protections related to pregnancy, childbirth and related medical conditions** by providing appropriate workplace accommodations (comparable to other workers, such as those with disabilities or occupational injuries).
- ✓ **Promotes fair pay practices.** Contractors may not pay "different compensation to similarly situated employees on the basis of sex."
- ✓ **Provides equal benefits to male and female employees participating in fringe-benefit plans** (i.e., medical, hospital, accident, life insurance, and retirement benefits; profit-sharing and bonus plans; leave, and other terms, conditions, and privileges of employment).
- ✓ **Prohibits sexual harassment.**
- ✓ **Gives men and women equal access to jobs and workforce development opportunities.**
- ✓ **Safeguards workers who provide caregiving to their loved ones.** However, non-birth parents, including adoptive parents, foster parents and workers standing in loco parentis, are not entitled to family leave time equal to that provided to birth mothers.
- ✓ **Protects transgender workers.** Contractors may not discriminate against employees for not conforming to the norms of their birth-assigned gender in terms of dress, appearance, and/or behavior. They must accept the gender identity asserted by the employee and applicant without demanding medical or other evidence that would not be requested from other employees in similar circumstances.
- ✓ **Prohibits discrimination based on sex stereotypes.**
- ✓ **Is consistent with the Religious Freedom Restoration Act and other protections** for religiously affiliated contractors.

For more information, go to:
<https://www.dol.gov/ofccp/sexdiscrimination.html>. It includes a Fact Sheet as well as a crosswalk comparing the old regulations with the new.



Final Updated DOL Overtime Ruling

As of December 2016, new overtime rules will be in play. The most significant change to the Fair Labor Standards Act (FLSA) is a twofold increase in the required salary basis from \$455 per week (\$23,600 annually) to \$913 per week (\$47,476 annually) for determining whether salaried workers are entitled to overtime pay.



The Final Rule focuses primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt. Specifically, the Final Rule:

1. Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South (\$913 per week; \$47,476 annually for a full-year worker);
2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally (\$134,004); and
3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.
4. Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.

The effective date of the final rule is December 1, 2016. The initial increases to the standard salary level (from \$455 to \$913 per week) and HCE (High Compensation Employee) total annual compensation requirement (from \$100,000 to \$134,004 per year) will be effective on that date. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020.

The final rule does not change the duties tests that an employer must use to determine whether an employee **who earns the minimum salary threshold** qualifies as an exempt executive, administrative or professional (white collar) worker.

Employers have a range of options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may:

- increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;
- pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;
- reduce or eliminate overtime hours;
- reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or
- use some combination of these responses.

Items to Consider before 12/1/2016

COST TO ORGANIZATION

- Obvious cost increase for additional overtime pay or salary bump up
- Compliance costs and paperwork burdens for maintenance of records of hours and OT for an increased pool of workers
- Increase in cost to track workers

PAY CONSIDERATIONS

- How will you deal with those exempt employees below threshold of \$47,476? Will you raise salaries, pay overtime or cut hours?
- If you raise salaries to meet the threshold, what are the long-term implications since automatic increases are built in every 3 years.
- What about those just above the threshold?
- Are there any salary compression issues?
- Will you need to alter your staffing structure?

EMPLOYEE COMMUNICATIONS

- How will you handle employee inquiries about non-exempt classification?
- How will you address “working off the clock”, tracking time, modifying duties or hours?

What Should Employers Do to Prepare?

EKW&A recommends that employers start by analyzing their workforce to determine who will most likely be affected by the new ruling. To best address each employee affected by the new ruling, employers may want to track their exempt employees' hours on a temporary basis to determine if a reclassification is necessary versus raising the employee's salary.

For more information, go to: <https://www.dol.gov/whd/overtime/final2016/>

Best Practices - Outreach to Protected Vets and IWD's

While the OFCCP's requirement for proof and evaluation of outreach to protected veterans and individuals with disabilities is relatively new, now is the time to start putting in place and applying best practices to ensure that your organization's outreach activities will pass muster in the event of an audit. There are three areas of outreach that should be considered:

- Relationship Building
- Assessment/Evaluation
- Documentation

Relationship Building

Whereas outreach used to be just about postings, it is now about building relationships with local outreach sources. Postings are not enough. It's about quality, not quantity. Gone are the days when federal contractors could just send mass emails or letters to various organizations as proof of outreach. Today requires follow-up to any communication and personal contact.

Some ideas for building relationships with local outreach sources include:

- Offer a company tour to the outreach source.
- Ask if they offer OTJ training or onboarding to assist the new employee in adjusting to his/her new position.
- Find out if any of the outreach partners have a program to pay the employee's salary for a short period of time (for example, 90 days), to ensure that he/she is ready for the job.
- Leverage network of existing veteran employees to build relationships with external veteran- and champion-groups.
- Develop marketing materials that clearly communicate the employee value proposition to veterans and individuals with disabilities.



- Build commitment by establishing a core internal team from all levels (e.g., senior executives, HR, managers) to support veteran and IWD recruiting activities and communicate value of effort to the organization.
- Include a question on applications that allows applicants to state how they heard about the job opening.
- Don't be afraid to ask questions to your outreach contacts...remember, they are the experts.

Evaluation/Assessment

Although only an annual review is required by the OFCCP, we recommend a documented quarterly review of outreach activities to determine if current sources are providing qualified candidates. The evaluation should answer these questions for each source:

- Did the activity attract qualified applicants who are disabled and/or protected veterans?
- Did the activity result in the hiring of protected veterans and/or individuals with disabilities?
- Did the activity expand the Contractor's outreach to protected veterans and/or individuals with disabilities in the community?

If the review concludes that any of the efforts were not effective in identifying and recruiting qualified disabled individuals and/or protected veterans, alternative efforts must be made to improve outreach.

It is also in your best interest to document best practices learned to ensure future recruiting efforts are more effective.

Documentation/Recordkeeping

Lastly, it is vital that good documentation is kept on all outreach efforts. Typical information that the OFCCP would expect you to track includes:

- Name of outreach organizations
- Type of outreach organization (i.e., geared toward females, minorities, protected veterans, individuals with disabilities)
- Contact information at each of the organizations
- Date of contact with each of the organizations
- Correspondence with the organizations
- Referrals received from each organization
- Evaluation of outreach efforts

WWW.VETERANS.GOV

The DOL has created a virtual, one-stop online employment services website to serve the needs of veterans trying to find employment. The site brings together job banks, state employment offices, American Job Centers, opportunities in top trending industry sectors, and employer tools. You can post a job, make a hiring commitment, and discover resources to support employees who are Veterans and military family members.

Relying on a third party recruiter for outreach isn't enough. It is up to the contractor, not the recruiter, to ensure that ALL outreach is monitored, evaluated, and revised as needed.

Because the outreach may be done from various departments/locations within your organization, you will want to centralize the recordkeeping to ensure that all is accounted for.

Remember, federal contractors are required to document all outreach and recruitment activities and retain these records for three (3) years.

EEOC FACT SHEETS

The Equal Employment Opportunity Commission (EEOC) has released three (3) new fact sheets dealing with pay equity and pregnancy discrimination. One of the fact sheets addresses gender pay discrimination and the agency's pending proposal to collect pay information from employers. The other two fact sheets contain information on pregnancy discrimination specifically aimed at employees and health care providers.

All the fact sheets can be found at https://www.eeoc.gov/eeoc/newsroom/wysk/pay_data.cfm

The pregnancy discrimination documents are available at: https://www.eeoc.gov/eeoc/publication/s/pregnant_workers.cfm and https://www.eeoc.gov/eeoc/publication/s/pregnancy_health_providers.cfm

Are Your EEO Postings Up to Date?

Most federal contractors now have the following posting requirements:

1. **“Equal Employment Opportunity is the Law”** poster (available in English, Spanish and Chinese)
(https://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf)
2. **“EEO is the Law”** poster supplement (available in English, Spanish and Chinese)
(https://www.eeoc.gov/employers/upload/eeoc_gina_supplement.pdf)
3. **“Pay Transparency Nondiscrimination Provision”** poster
(https://www.dol.gov/ofccp/pdf/PayTransparencyNotice_JRFOA508c.pdf)



The EEOC has increased the fines for employers who fail to post the proper Title VII postings. The penalty is now \$525 per violation, a 150% increase. Your “EEO is the Law” posters need to be:

- ✓ Posted on company bulletin boards
- ✓ Made available electronically to employees who work remotely;
- ✓ Made available, as necessary, in a format that is “accessible and understandable” to individuals with disabilities and disabled veterans; and
- ✓ Integrated into online application systems via a “prominent link” or otherwise made available to applicants.



The contractor’s **Section 503/4212 “Equal Opportunity Policy Statement”** must also be posted on company bulletin boards along with instructions as to how employees and applicants can request to view the contractor’s Section 503/4212 AAP. It is to be made available, as necessary, in a format that is accessible and understandable to individuals with disabilities and disabled veterans



Other federal posters that should be posted include:

- ✓ Fair Labor Standards Act (FLSA) Poster
- ✓ Family and Medical Leave Act (FMLA) Poster
- ✓ Occupational Safety and Health Administration (OSHA) Poster
- ✓ Employee Polygraph Protection Act (EPPA) Poster
- ✓ NLRA Posting - Notice of Employee Rights under the National Labor Relations Act

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.