Insights: Alerts

White House Proposes Two Rules Targeting Pay Equity and Transparency

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Spring is in the air and along with the change in season, there are changes on the horizon for how government contractors will have to target pay equity and transparency. The White House announced two new proposed rules on January 30, 2024, regarding pay equity and transparency in federal contracting. These rules, developed by the Administrator for the Office of Federal Procurement Policy (OFPP Administrator), will amend the Federal Acquisition Regulation (FAR) to implement new pay equity and transparency requirements on government contractors and subcontractors.

Pay Transparency Rule

The first proposed rule requires government contractors and subcontractors to disclose the expected salary or salary ranges in job advertisements. These requirements would be applicable for all solicitations and contracts —regardless of dollar amount—meaning it applies to acquisitions at or below the Simplified Acquisition Threshol ("SAT") and to acquisitions for commercial products and services, including Commercially Available Off-the-Shelf ("COTS") items. Under the rule, contractors must disclose the salary or salary range for any job advertisements in connection with any federal government contract exceeding $10,000. Additionally, the advertisement must include a general description of the benefits and non-salary compensation related to the job. If at least half of the advertised position's expected compensation is comprised of commissions, bonuses, or overtime pay, the contractor must disclose the specific percentage of the compensation for each non-salary component.

According to the White House, this rule, if enacted, could help decrease turnover rates and reduce recruiting costs for contractors, as they can streamline the hiring and negotiation process by disclosing the salary or salary range upfront. Several states, including California and New York, already mandate employers to disclose salary ranges in job postings. If this proposed rule is finalized, however, it will require federal government contractors in every state, not just California and New York, to disclose salary ranges and benefits information in job advertisements in connection with any federal government contract exceeding $10,000.

Compensation History Rule

The second proposed rule prohibits contractors and subcontractors from seeking and considering information about a job applicant's compensation history during the recruitment or hiring phases for any position in connection with a federal government contract exceeding $10,000.

This compensation history rule prohibits contractors from:

1. seeking an applicant's compensation history;

2. requiring disclosure of compensation history as a condition of an applicant's candidacy;
3. retaliating against or refusing to consider, interview, or hire an applicant for failing to discuss their compensation history;
4. relying on an applicant's compensation history as a criterion for considering an applicant or in determining the compensation for the applicant; or
5. violating any of these prohibitions even when an applicant voluntarily discloses their compensation history without prompting from the employer.

Under this rule, compensation history is defined as an applicant's current or previous compensation, such as salary, bonuses, commissions, and stock options and awards. If a contractor violates this rule, applicants may file complaints with the agency that awarded the contract within 180 days from the date of the violation. The contracting agency will review the complaint, consult with the complainant, and take appropriate action.

According to the White House, bans on considering compensation history help expand the pool of applicants and make it easier to hire higher quality candidates. States like California and New York already have similar bans in place, though, those states' current laws on this matter are not as strict as the proposed rule. If this rule is enacted, it will completely prohibit the consideration of salary history, in direct contrast to various local laws which currently allow for consideration of an applicant's compensation history if it is disclosed voluntarily and without prompting.

Uncertainty Regarding Scope

The potentially broad application of the proposed rule may be a point of concern and confusion for contractors. As drafted, the proposed rule will apply to all federal contracts, flowing down the supply chain and impacting both prospective employees of contractors and those working “in connection” with a federal contract. Absent further guidance from the FAR Council as to the meaning of working “in connection” with a federal contract, the true scope of the proposed rule's applicability remains an open question.

In the proposed rule's notice, the FAR Council argues that limiting applicability too narrowly could result in confusion and disparate approaches to equitable pay practices among government contractors. The FAR Council has requested public comment, however, regarding which entities would be considered covered prime contractors and subcontractors (including small businesses), the scope of contracts included under the proposed rule, and the parameters of the proposed compensation history ban and disclosure requirements. These requests suggest the FAR Council may be open to limiting the scope of the rule. The public comment period ended on April 1, 2024, and a final rule will be forthcoming.

Takeaways

The White House's stated goals for these proposed rules are to promote pay equity and improve worker satisfaction and effectiveness in federal contracting.

These rules as currently proposed, however, would represent a significant change in the current status quo of federal government contractor and subcontractor hiring practices. Indeed, the rules would have a profound impact on those contractors who rely on prior compensation history to determine potential employees' pay. For now, federal contractors and subcontractors should review the relevant pay transparency laws in the states where they employ individuals and stay up to date on developments applicable to federal government contractors.

Kilpatrick's Labor & Employment and Government Contracting teams are available to provide assistance and

address any further questions or needs. Our teams will also closely monitor any final rules enacted.

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