

July 18, 2014

Executive Roundup: Federal Contractors Facing New Obligations After First Half of 2014

Recent executive and administrative actions have expanded affirmative action, non-discrimination, wage minimum, and reporting requirements governing federal contractors. This client advisory summarizes some of the more noteworthy developments from the first half of 2014.

Federal Contractor Minimum Wage Increase

On June 17, the Department of Labor (“DOL”) issued proposed regulations to raise the minimum wage from \$7.25 to \$10.10 for non-exempt employees working on or in connection with certain federal contracts and subcontracts. Federal contracts subject to the proposed minimum wage requirements include procurement contracts for services or construction, contracts or other agreements subject to the Service Contract Act or Davis-Bacon Act, and contracts for concessions, among others. Federal contractors must also include the increased wage requirements in subcontracts. The regulations apply to all new and replacement contracts beginning January 1, 2015. In addition, the DOL intends to increase the minimum wage annually for federal contractors based on the Consumer Price Index.

Employee Wage Reporting Requirements

On April 8, President Obama directed the DOL to develop regulations requiring federal contractors and subcontractors to submit regular summary reports of their employees’ wages, organized by sex and race. The regulations are intended to help the DOL identify and

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investigate wage disparities between protected classes. Under the President's executive order, the DOL's proposed regulations are due August 6, 2014.

Expansion of Affirmative Action Plan Requirements

On March 24, the Office of Federal Contract Compliance Programs ("OFCCP") promulgated new regulations promoting the hiring and advancement of protected veterans and individuals with disabilities as part of federally contracted affirmative action plans ("AAPs"). Some regulatory mandates may be delayed until the start of the company's first full AAP year after March 24, 2014. Other mandates, such as ensuring that electronic job application systems are compatible with accessibility enhancement tools (such as those used by the visually impaired), the expanded disclosures required in job postings, and the modified EEO language to be included in subcontracts, take effect immediately for all covered federal contractors. Among other requirements, the AAPs must include an "equal opportunity policy statement" which is made available to employees, and a statement of support from the contractor's highest ranking United States executive.

The regulations do not establish hiring quotas for veterans or individuals with disabilities, but contractors who develop an AAP must, as part of that plan, annually evaluate their utilization of individuals with disabilities in light of OFCCP numerical guidelines. Failure to meet these guidelines is not a per se infraction, but such companies will be required to develop plans to address deficiencies in their hiring and promotion processes that may explain sub-optimal recruitment of individuals with disabilities. Employers will also be required to develop their own hiring benchmarks for protected veterans, and to assess whether efforts to increase the hiring of such individuals are successful. Contractors must maintain records documenting their AAP auditing, improvement, and reporting activities, as well as their use of outreach programs to facilitate the recruitment and hiring of protected individuals.

Covered federal contractors will also be required to invite applicants to self-identify as a protected veteran or individual with a disability prior to the extension of an offer of employment, and invite current employees to self-identify as an individual with a disability every five years. Furthermore, contractors must include additional disclosures in job postings, provide reasonable accommodations for the completion of electronic job applications where necessary, identify and engage in self-determined outreach and recruiting activities for increasing the hiring of protected veterans and individuals with disabilities, and disclose their affirmative action obligations in writing to subcontractors, vendors, suppliers, and applicable labor unions. The new regulations also slightly modify the language required to incorporate contractors' equal opportunity obligations into subcontracts by reference to the regulations.

Sexual Orientation and Gender Identity Discrimination

On June 16, President Obama announced his intent to issue an executive order prohibiting federal contractors from discriminating against employees and job applicants based on their sexual orientation. Thereafter, the President stated that he would issue an additional executive order prohibiting discrimination on the basis of gender identity.

Prohibiting Retaliation for Pay Discussions

On April 8, President Obama amended Executive Order 11246, which bars federal contractors from discriminating based on race, sex, national origin, and religion, to also prohibit retaliation against employees for discussing their pay. Although the National Labor Relations Act already prohibits retaliation for discussing pay, and Title VII and the Equal Pay Act prohibit retaliation for protected complaints about unequal pay, this amendment allows the OFCCP, in addition to the Equal Employment Opportunities Commission and National Labor Relations Board, to enforce the prohibition against such retaliation.

Moratorium on TRICARE Affirmative Action Enforcement

On May 7, the OFCCP imposed a five-year moratorium on enforcement of its affirmative action requirements against healthcare providers who receive reimbursements from TRICARE, a health plan for active and retired military personnel and their families. However, the OFCCP will continue to attempt to enforce its Equal Employment Opportunity regulations with respect to such entities, and will enforce the AAP requirements against TRICARE subcontractors who have other federal prime contracts or subcontracts.

Additional Regulatory Priorities

In addition to the above, the OFCCP has recently announced its intent to propose updated regulations regarding Executive Order 11246's prohibition on sex discrimination, and regulations implementing new affirmative action goals for racial minorities and women in certain industries later this fall.

To avoid noncompliance with the new and forthcoming regulations, covered federal contractors are encouraged to review and update their hiring and employment policies, as well as their Affirmative Action Plans. If you have any questions or would like detailed information about the new laws, please contact Nick Bauer at (212) 758-7793 or any other attorney at the Firm.

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