

Federal Contractors Required to Post Salary Ranges in Job Postings Under Proposed DOL Regulations

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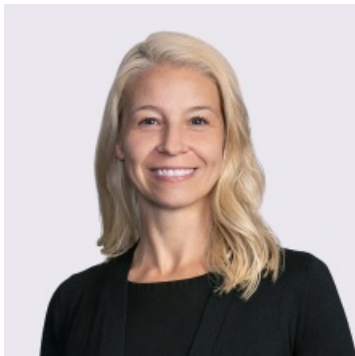
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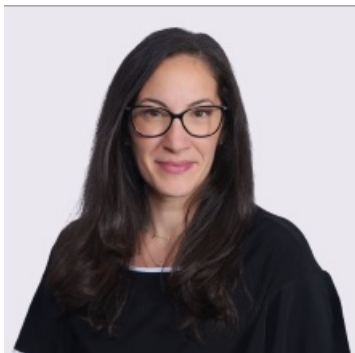


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In recognition of the 15th anniversary of the Lilly Ledbetter Fair Pay Act, the Biden Administration has [released](#) a proposal that would prohibit federal contractors from using a job applicant's prior salary history when setting pay and require federal contractors to post the expected salary range in its job postings.

Background

On March 15, 2022, President Joe Biden issued [Executive Order 14069](#), "Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency," directing the Federal Acquisition Regulatory Council (FAR) to "consider whether any such rules should limit or prohibit Federal contractors and subcontractors from seeking and considering information about job applicants' and employees' existing or past compensation when making employment decisions."

On Dec. 4, 2023, the FAR submitted a "Pay Equity and Transparency in Federal Contracting" proposal to the Office of Management and Budget (OMB) for approval.

On Jan. 11, 2024, OMB approved the proposal and, on Jan. 29, the FAR released the [Notice of Proposed Rulemaking](#) (NPRM), published on the Federal Register on Jan. 30, with [public comments](#) due April 1, 2024.

Highlights

The proposed rule would:

- (1) prohibit contractors and subcontractors from seeking and considering information about job applicants' compensation history when making employment decisions about personnel working on or in connection with a government contract; and
- (2) require contractors and subcontractors to disclose, in all advertisements for job openings involving work on or in connection with a government contract placed by or on behalf of the contractor or subcontractor, the compensation to be offered to the hired applicant, for any position to perform work on or in connection with the contract.

The salary disclosure must:

indicate the salary or wages, or range thereof, that the contractor in good faith believes that it will pay for the advertised position and may reflect, as applicable, the contractor's pay scale for that position, the range of compensation for those currently working in similar jobs, or the amount budgeted for the position.

The disclosure must also include a general description of benefits available.

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Related Services

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Additionally, contractors must provide applicants with notice of the salary history inquiry ban and salary/benefits disclosures on the job announcement or as part of the application process.

The proposed rule defines work performed “on or in connection with” a federal contract or subcontract as “work called for by the contract or work activities necessary to the performance of the contract but not specifically called for by the contract.”

The rule, as currently proposed, does not include a carve out for contracts at or below the simplified acquisition threshold, commercial products (including commercially available off-the-shelf, or COTS, items), or for the provision of commercial services. The NPRM does note it will be reviewing public comment on this position.

There is also a proposed mechanism for applicants to submit a complaint for contractor noncompliance. Complaints will be investigated by the contracting agency and forwarded to the Office of Federal Contract Compliance Programs (OFCCP) if the complaint alleges discrimination. The contracting agency will need to determine whether the complaint relates to a covered position, which must be a position working “on or in connection with” a federal contract. Although the proposed rule does not address the process the contracting agency will use to evaluate whether the position is covered, such an evaluation will likely include communication between the contractor and the contracting agency to determine whether the job is connected with the contract.

Next Steps

We will need to wait for the final rule to know for sure the specific requirements and applicability of the rule (*e.g.*, the current proposed rule does not address any federal pre-emption of similar state laws). Nevertheless, federal contractors can start evaluating whether they will be covered by the rule once it is finalized, identifying positions that entail work performed “on or in connection with” a federal contract, and determining whether they will take a patchwork or holistic approach to compliance. They also should keep in mind that the salary posting requirement could affect any PERM green card sponsorships that they may be considering.

While it remains to be seen whether OFCCP will incorporate a review of the new requirement as part of its compliance evaluations, the agency has repeated its concern over the use of prior salary in setting pay. OFCCP released new [FAQs on compensation history](#), stating in one section that “a private employer’s reliance on compensation history to set pay may not itself be prohibited under federal law, but the practice may contribute to unlawful discrimination, depending on the specific facts and circumstances at issue.” As a reminder, OFCCP FAQs are sub-regulatory guidance that do not have the force and effect of law; however, issuance of the new FAQs in connection with the Biden Administration’s makes clear this is an area of interest for the Department of Labor.

Interested parties should consider submitting a comment in the Federal Register. The public comment period will end on April 1, 2024.

Please contact a Jackson Lewis attorney if you would like to submit a comment, have any questions about these developments, or need other assistance.

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