

Breaking Down the Proposed Salary History and Pay Transparency Requirements for Federal Contractors

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On January 31, 2024, several U.S. government agencies released proposals and guidance aimed at imposing new pay transparency and salary history requirements upon federal government contractors and subcontractors. These proposals, should they go into effect, will subject federal contractors and contractors to a suite of pay equity regulations mirroring those recently enacted in progressive states like California and New York.

Proposed FAR Clause Implementing Salary History Restrictions

Most significantly, the FAR Council, which consists of the Administrator for Federal Procurement Policy and the heads of the Defense Department, NASA, and the General Services Administration, published a [proposal to amend the Federal Acquisition Regulation \(FAR\)](#) to implement a new pay equity clause. Under the new proposal, the new clause would be applicable to the bulk of federal government contracts that are performed in the United States and its outlying areas, and will also flow down to subcontractors at any tier. The proposed clause applies to recruitment for any position that works “on or in connection with” a federal contract – an established standard covering not just the employees who perform the direct services called for under the contract, but also support services that are necessary for the contract’s performance.

The proposed FAR clause prohibits several actions in connection with an employer’s use of an applicant’s prior compensation level in past positions during the recruiting process:

- Contractors cannot seek an applicant’s compensation history from the applicant or the applicant’s former employer, or require the applicant to disclose compensation history.
- Contractors cannot retaliate against or refuse to interview or hire applicants who do not respond to an inquiry about compensation history.
- Contractors cannot rely on an applicant’s compensation history (if known or discovered) as criteria for screening applications or in determining the applicant’s new compensation upon hire.

Notably, the prohibition on using prior compensation in setting an applicant’s new compensation applies even if the applicant voluntarily discloses their compensation in pay negotiations.

The proposed clause would also impose compensation disclosure requirements for contractors' job advertisements. The clause requires that all advertisements for positions that work on or in connection with a federal contract must disclose the range of salary or wages the contractor believes in good faith that it will pay for the position. Job listings must also disclose a "general description" of benefits and other types of compensation (i.e., commissions, bonuses, etc...) offered. If more than 50% of compensation will come from non-wage or salary compensation, then the contractor must specify the percentage of overall compensation or dollar amount of each other form of compensation. Job advertisements must also include a notice of rights under the new FAR clause and information about how to submit claims of discrimination.

New OFCCP Guidance on Salary History

Concurrently with the proposed FAR clause, the Office of Federal Contract Compliance Programs (OFCCP) issued [Frequently Asked Questions](#) guidance about the use of salary history in setting compensation. The guidance does not, at least directly, impose new obligations on contractors, but does suggest that OFCCP will view an employer's use of salary history in setting compensation as a potential indicia of pay discrimination.

OFCCP's guidance does not explicitly take the position that contractors may not use or rely upon salary history in setting compensation. Rather, the guidance states that "the practice may contribute to unlawful discrimination, depending on the specific facts and circumstances at issue." The guidance also does not treat the use of salary history data voluntarily provided by an applicant in negotiations as different from information collected or required to be provided by the employer. The guidance suggests that the use of salary history by a contractor may be reviewed by OFCCP in compliance evaluations as part of its examination of the employer's broader compensation policies.

The FAR Council is accepting comments on its proposed rule until April 1, 2024, which could lead to changes in its scope prior to implementation. Still, federal contractors and subcontractors should review their compensation and recruiting practices to identify whether salary history data is collected and how it is used in setting compensation, as even absent these proposals, the use of salary history in setting compensation is a potential vulnerability that may expose an employer to equal pay claims.

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