

US Federal Contractors: 2016 Year in Review, 2017 Preview, Effect of Trump Presidency

Article By:

Merrell B. Renaud

2016 was another year filled with changes and new requirements for federal contractors and subcontractors. And the Office of Federal Contracts Compliance Programs (OFCCP) has continued its record of active enforcement.

It is generally expected that the election of Donald Trump to the presidency will mean a more employer-friendly climate. Many believe that Trump will roll back many of President Obama's Executive Orders. It is also expected that a Trump administration will mean less aggressive enforcement from federal agencies such as the Department of Labor and the OFCCP.

Ultimately, this may mean that some of the Executive Orders are either rolled back in scope or rescinded entirely. For now, however, the Executive Orders remain in place as do the new guidance from the OFCCP and the revised EEO-1 Form so employers are advised to continue to comply with current rules and prepare for the eventual implementation of the rules that are scheduled to take effect in 2017.

As the year's end approaches, it is a good time for employers with covered federal contracts and subcontracts to ensure that they are complying with all of the new regulations and that they are prepared for what's ahead in 2017. Below we review the most significant changes affecting government contractors that went into effect in 2016 and the changes that are set to go into effect in 2017.

Changes effective in 2016:

- **Pay transparency** (Executive Order 13665): Effective January 11, 2016, covered federal contractors and subcontractors were prohibited from terminating or discriminating against job applicants or employees for discussing their pay or the pay of their co-workers. Contractors must also include the Pay Transparency Policy Statement (prescribed by OFCCP) in employee handbooks and must disseminate the statement to applicants and employees. The "EEO is the Law" poster also will be updated to reflect this change and employers will be required to post the updated poster. This regulation applies to employers with federal contracts or subcontracts over \$10,000 that are entered into or modified on or after January 11, 2016. Notably, neither contractors nor their employees are *required* to disclose

information related to pay. Rather, it prohibits employers from taking adverse actions against employees who discuss or inquire about pay.

- **Sex discrimination regulations:** On August 25, 2016, the OFCCP's Final Rule on Sex Discrimination became effective – replacing the prior Sex Discrimination Guidelines. The rule represents the OFCCP's interpretation of the nondiscrimination provisions of Executive Order 11246 and expanded the definition of "sex." Specifically, the rule requires nondiscrimination on the basis of sex and prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions, gender identity, transgender status, and sex stereotyping. Under the new rule, employers cannot deny transgender employees access to the restroom "designated for use by the gender with which they identify." The rule also prohibits discriminatory compensation or fringe benefits. The rule provides numerous examples of discrimination on the basis of sex and offers suggested "best practices" to covered employers. The OFCCP has published [FAQs](#) and a Fact Sheet with additional information on the final rule.
- **Fair Pay and Safe Workplaces Rule** (Executive Order 13673): On October 25, 2016, the final rule implementing President Obama's Fair Pay and Safe Workplaces Executive Order, the so-called "blacklisting" rule, went into effect. The rule, as we [previously reported](#), requires covered contractors and subcontractors to disclose all "labor law decisions" they had during the prior three years as part of the process of applying for a new federal contract or subcontract. If the government determines that a contractor or subcontractor has too many "labor law decisions" to report or the few it has are too severe, pervasive, repeated or willful, it could deny them a federal contract or subcontract. This rule has a phased-in implementation. For the first six months, only contractors with solicitations of \$50 million or more are subject to the rule's disclosure requirements. In April 2017, the disclosure requirement will apply to solicitations of \$500,000 or more. Subcontractors are not required to report until October 25, 2017. The rule initially requires disclosures of labor law violations going back one year and will increase to a three-year period by October 25, 2018. In addition, the rule prohibits pre-dispute arbitration agreements to resolve claims arising under Title VII of the Civil Rights Act, or related tort claims for contracts of goods or services of \$1,000,000 or more. Finally, the rule requires federal contractors to provide wage statements and information regarding their hours worked, overtime hours, pay, and any additions or deductions to their pay to workers (referred to as the "paycheck transparency" provision), beginning January 1, 2017. However, as we reported [here](#), on October 25, 2016 (the day the rule went into effect), a Texas court granted a nationwide preliminary injunction blocking most of the rule from taking effect. The injunction (at least temporarily) prevents implementation of the disclosure requirements of the rule and the arbitration restrictions, but *does not* affect the paycheck transparency provision of the rule, which is in addition to the Pay Transparency requirements of Executive Order 13665, discussed above.
- **Lower veterans' hiring benchmark:** OFCCP lowered the hiring benchmark for protected veterans from 7.0% to 6.9% for 2016 for federal contractors and subcontractors who opt to use this benchmark for their affirmative action plan. Because the hiring benchmark changed in March 2016, many contractors may have already established their plan for the year using the prior 7.0% benchmark and will need to adjust to the new benchmark for their next plan year. The hiring benchmark is subject to change annually, with changes typically announced

in March. The current benchmark (and any future updates) can be found [here](#).

Changes scheduled to take effect in 2017:

- **\$10.20 minimum wage/\$6.80 for tipped employees** (Executive Order 13658): Beginning January 1, 2017, workers are required to be paid \$10.20 per hour while performing work on or in connection with covered federal contracts and subcontracts, an increase from the \$10.15 required in 2016. This requirement applies to covered federal contracts and subcontracts that are solicited (including replacement or renewal of expiring contracts) on or after January 1, 2015. The new minimum wage for tipped employees working on or in connection with covered federal contracts and subcontracts also increases to \$6.80 per hour from the \$5.85 per hour required in 2016. Contracts and subcontracts subject to the minimum wage requirements generally include the following: (1) procurement contracts for construction covered by the Davis-Bacon Act (DBA); (2) service contracts covered by the Service Contract Act (SCA); (3) concessions contracts; and (4) contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public. The definition of “contract” also includes a “contract-like instrument.” The monetary thresholds for prime contracts are as follows: (1) prime DBA contracts that exceed \$2,000; (2) prime SCA contracts that exceed \$2,500; and (3) prime procurement contracts where the workers’ wages are governed by the FLSA that exceed \$3,000. There is no monetary threshold for subcontracts awarded under such prime contracts.
- **Paid sick leave** (Executive Order 13706): Beginning with covered federal contracts and subcontracts issued on or after January 1, 2017, including new contracts and replacement contracts for expiring contracts or contract modifications, federal contractors and subcontractors will be required to provide at least 1 hour of paid sick leave for every 30 hours an employee works “on” or “in connection with” a covered contract, for a total of up to 56 hours (7 days) per year. Leave must be given for an employee’s own illness, injury or preventative care, for the employee to care for a child, parent, spouse, domestic partner, or an individual with whom the employee has a relationship that is the “equivalent of a family relationship,” or for care or services related to domestic violence, sexual assault or stalking. For additional details, please review [our previous post](#).
- **EEO-1 Pay Data Rule**: Beginning with the 2017 report, which is due March 31, 2018, private employers (including federal contractors and subcontractors) with 100 or more employees will be required to report employees’ W-2 compensation information and total hours worked on the revised EEO-1 report. Federal contractors and subcontractors with 50-99 employees will not be required to report pay data or hours worked but will still be required to report by sex and race/ethnicity as previously required. To report compensation, each of the job categories are broken down into 12 different pay bands, and the pay information is taken from employees’ W-2 “Box 1” income. For more details see our [prior blog post](#).

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