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# Federal Contractors Must Amend Employee Handbooks to Add Fair Pay Provision

By Thomas P. Brady / Sep 16, 2015

On September 11, 2015, the Department of Labor issued new regulations requiring federal contractors to include a nondiscrimination in pay provision in their handbooks. Federal contractors are also required to post a notice of the policy, either electronically or physically, in a conspicuous place where employees and applicants may view it.

On April 8, 2014, President Barack Obama issued Executive Order 13665, entitled "Non-Retaliation for Disclosure of Compensation Information," which amended Executive Order 11246. The Executive Order prohibited a federal contractor from discharging or discriminating against any employee or applicant because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant to another employee or applicant.

The Executive Order contains an exception which the regulation incorporates. Federal contractors may discharge or discipline employees who have access to the compensation information of other employees or applicants as a part of the employee's "essential job functions" and disclose the compensation of other employees or applicants to individuals who do not otherwise have access to such information. This exception does not cover disclosures in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or that is consistent with the contractor's legal duty to furnish information.

The November 11, 2015 regulation requires employers disseminate the nondiscrimination provision contained in the Executive Order to their employees and subcontractors. Federal contractors must include the language as prescribed by the Director of the Office of Federal Contract Compliance Programs in their employee manuals or handbooks. Federal contractors must also disseminate the nondiscrimination provision, either electronically or physically posting the notice in a conspicuous place available to employees and applicants.

We suggest the following language for the nondiscrimination policy. The Executive Order and regulations support this language:

The Company will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee, who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions, discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the Company, or consistent with the Company's legal duty to furnish information.

The federal contractor's violation of this provision may lead to the cancellation of the federal contract. The government may also impose other sanctions and remedies as allowed by Executive Order 11246 or Department of Labor regulations, rules or orders. Employers who prohibit or discipline employees will also violate the National Labor Relations Act. *Love Culture Inc.*, 362 NLRB No. 145 (2015). Employers who prohibit employees from discussing their wages and fringe benefits may also violate state wage and hour laws or local ordinances. Specifically, Michigan and Illinois laws prohibit an employer from prohibiting employees from discussing their wages and benefits.

The final rule applies to all federal contracts that exceed \$10,000 in value and are entered into or modified on or after the effective date of the rule. The effective date of the rule is January 11, 2016.

## Recommendations

We recommend to federal contractors and all employers:

- If the employer is a federal contractor and subject to Executive Order 11246, the employer must incorporate the above language in its handbook, if the employer has an employee handbook or manual, and post the policy in a conspicuous place by January 11, 2016. Employers who do not have federal contracts or subcontracts that exceed \$10,000 do not have to amend their handbooks or post the notice.
- All employers should review their handbooks and policies to ensure that they do not prohibit employees from discussing their wages and benefits.
- All employers should instruct supervisors and managers on the law to prevent them from inadvertently violating Executive Order 11246, recent National Labor Relations Board decisions, finding employers' policies that prohibit employees from discussing wages and benefits violate the National Labor Relations Act or certain state laws.

If you have any questions about the regulation or federal government contractors' affirmative action duties, please contact Thomas P. Brady at (313) 965-8291 | tbrady@clarkhill.com, or another member of Clark Hill's Labor and Employment Practice Group.