

Biden Administration Proposes New Pay Inquiry and Transparency Requirements For Contractors

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On January 29, 2024, the 15th anniversary of the enactment of the Lilly Ledbetter Fair Pay Act, the Biden Administration [announced](#) that it would be taking new actions to implement the Executive Order on [Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency](#) issued by President Biden in March 2022. The actions impacting federal contractors – which mirror restrictions and requirements imposed by a number of states, but not currently the subject of federal law – are summarized below.

Proposed Pay History and Transparency FAR

The Federal Acquisition Regulatory Council (the “FAR Council”) has published [a proposed amendment to Federal Acquisition Regulation](#) (“FAR”) that would (1) prohibit covered contractors from “seeking and considering information about job applicants’ compensation history when making employment decisions;” and (2) require covered contractors “to disclose the compensation to be offered to the hired applicant in job announcements for certain positions.”

Both requirements apply only to “applicants,” defined as any “prospective employee or current employee applying for a position to perform work on or in connection with the [government] contract.” The proposed FAR amendment (the “Proposed Amendment”) defines “work on or in connection with the [government] contract” 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.” However, the Proposed Amendment “encourages” contractors to apply its provisions “to other positions, including to the recruitment and hiring for any position that the Contractor reasonably believes could eventually perform work on or in connection with the contract.”

The FAR Council justifies these measures based on the determination that they will “promote economy, efficiency, and efficiency in the procurement of property and services by the Federal government.” Specifically, the Government contends that “[c]ompensation history bans and pay transparency requirements have been shown to promote pay equity by closing pay gaps, which leads to increased worker satisfaction, better job performance, and overall increased worker productivity – all factors associated with promoting economy, efficiency, and effectiveness of the Federal contractor workforce.”

The Proposed Amendment, if adopted, will be “included in all solicitations and contracts, where the principal place of performance will be in the United States, which is defined as including its outlying areas.” Contractors subject to the amended FAR will also have to include its provisions in all subcontracts “with a principal place of performance within the United States including outlying territories.”

The public has until April 1, 2024 to submit comments on the Proposed Amendment.

Compensation History Provision

Under the Proposed Amendment, contractors would not be permitted to:

- (1) “seek an applicant’s compensation history, either orally or in writing, directly from any person, including the applicant or the applicant’s current or former employer or through an agent;”
- (2) “require disclosure of compensation history as a condition of an applicant’s candidacy;”
- (3) “retaliate against or refuse to interview or otherwise consider, hire, or employ any applicant for failing to respond to an inquiry regarding their compensation history;”
- (4) “rely on an applicant’s compensation history” either “as a criterion in screening or considering the applicant for employment” or “in determining the compensation for such individual at any stage in the selection process;” or
- (5) violate any of the foregoing prohibitions, “even if an applicant for employment volunteers their compensation history without prompting at any stage in the recruitment and hiring process.”

“Compensation history” is defined as not only “the compensation an applicant is currently receiving,” but also “the compensation the applicant has been paid in a previous job.” Notably, the Proposed Amendment defines “compensation” broadly to include “any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment.” The non-exclusive list of examples provided in the proposal demonstrates its breadth: “salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.”

Salary and Benefits Disclosure In Job Advertisements

Under the Proposed Amendment, contractors would also be required “to disclose, in all advertisements for job openings placed by or on behalf of the contractor or subcontractor for any position to perform work on or in connection with [a government] contract” the “salary or wages, or range thereof, the contractor or subcontractor in good faith believes that it will pay for the advertised position.” The salary scale “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.”

Contractors would also be required to “include a general description of the benefits and other forms of compensation applicable to the job opportunity.” Compensation has the same definition discussed above.

Notice Requirements

The Proposed Amendment would also require covered contractors and subcontractors “to ensure that any applicants covered” by the new requirements (i.e., applicants for positions “to perform work on or in connection with the [government] contract”), “are provided with notice of these requirements as either part of the job announcement or application process.” The Proposed Amendment includes specific language that will have to be provided to such applicants in writing:

This employer is a Federal contractor or subcontractor. Under 48 CFR (FAR) 52.222-ZZ, Prohibition on Compensation History Inquiries and Requirement for Compensation Disclosures by Contractors During Recruitment and Hiring, Federal contractors and subcontractors may not inquire about or rely on an applicant's compensation history to screen an applicant for employment or to determine the applicant's pay for a position on or in connection with a Federal contract or subcontract, even when the information is offered without prompting. The employer must also disclose the compensation for the position in all advertisements for the job opening.

Applicants alleging Federal contractor or subcontractor violations of these requirements:

These applicants may submit a complaint to the central collection point of the agency that issued the solicitation for the Federal contract or awarded the Federal contract or order, as identified at www.dol.gov/general/labor-advisors. The complaint must be submitted within 180 days of the date the violation occurred.

The agency that issued the solicitation or awarded the contract or order on which this applicant would primarily work is _____. [Contractor to fill in with appropriate agency name] For applicants supporting multiple agencies, complaints should copy the central collection point of all known agencies to be supported by the applicant's position.

Applicants alleging discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or protected veteran status should file a complaint with the Office of Federal Contract Compliance Programs (OFCCP). If complaints alleging discrimination are submitted to an agency central collection point rather than directly with OFCCP, the complaints will be forwarded to OFCCP. Information on the process for filing a formal complaint of discrimination with OFCCP can be found at the following website:

<https://www.dol.gov/agencies/ofccp/contact/file-complaint>

We will continue to monitor and report on these developments on [Government Contractor Compliance & Regulatory Update](#).

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