

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

KNOW YOUR RIGHTS

Pay Transparency Fact Sheet

OFCCP Protects You From Discrimination Based on Compensation Inquiries, Discussions, or Disclosures.

Ensuring that women earn equal pay for equal work is essential to improving the economic security of our families and the growth of the middle class and our economy. Yet in too many workplaces around the country, women and people of color don't know what their counterparts are earning for the same work, and a culture of secrecy prevents them from finding out if they are being discriminated against in time to act on it. Lilly Ledbetter learned only after decades at her job that she had been paid less than her male counterparts while her company had a policy forbidding her from discussing pay with co-workers that prevented her from getting the information she needed to bring a complaint in time. The Lilly Ledbetter Fair Pay Restoration Act, the first piece of legislation signed by President Obama in 2009, helped people like her more effectively challenge unequal pay, but pay secrecy policies still stand in the way of the fundamental principle of equal pay for equal work. If one of Lilly Ledbetter's co-workers had simply been able to tell her about the discrimination that was taking place, she would have been better able to act in time to exercise her workplace rights. Indeed, the ability of workers to share information and effectively organize for their rights is a cornerstone of building an economy that works for everyone. Promoting pay transparency by prohibiting pay secrecy policies helps make the federal contractor workforce more efficient. Pay transparency helps level the playing field for women and people of color, and provides employers access to a diverse pool of qualified talent.

As of January 11, 2016, OFCCP's regulations prohibit covered federal contractors and subcontractors from discriminating against employees and job applicants who choose to inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. Executive Order 11246 already prohibits federal contractors and subcontractors from discriminating based on race, color, religion, sex, sexual orientation, gender identity, and national origin. The new rule provides a critical tool to encourage pay transparency, so workers have a potential way of discovering violations of equal pay laws and can seek appropriate remedies.

1. Do I have the right to ask about, discuss, or disclose what my employer is paying me or others under this new protection?

Yes, you have the right to inquire about, discuss, or disclose your own compensation or that of other employees or applicants through ordinary means such as conversations with co-workers. You cannot be disciplined, harassed, demoted, terminated, denied employment, or otherwise discriminated against because you exercised this right. However, this right is subject to certain limited exceptions, which are discussed below.

2. Are contractors prohibited from having formal and informal pay secrecy policies?

Yes. Contractors are generally prohibited from having policies that prohibit or tend to restrict employees or applicants from discussing or disclosing their compensation or the compensation of others. For example, a contractor's policy that prohibits employees from talking to each other about end-of-the-year bonuses would be considered a violation, as it prohibits employees from discussing their compensation.

3. How is "compensation" defined?

"Compensation" generally refers to any payments made to an employee, or on behalf of an employee, or offered to an applicant, including but not limited to 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.

4. What is "compensation information"?

"Compensation information" refers to the amount and type of compensation given to employees or offered to applicants. Examples of "compensation information" include salary and pay structures; contractor decisions, statements, and policies related to setting or altering employee compensation; and labor union agreements.

5. What are some examples of actions by employers that could be discriminatory under the pay transparency protections?

This type of discrimination generally exists where an employer takes an adverse employment action against an employee or applicant who has disclosed his or her own compensation or the compensation of another employee or applicant. For example, an employer may not fire an employee because she discussed her salary with another employee. Similarly, an employer may not decrease an employee's work hours because he asked his coworkers about their rates of overtime pay.

6. Does the Executive Order include contractor defenses?

Yes. The Executive Order provides contractors with two ways to justify or defend actions taken that might otherwise be seen as discriminatory and prohibited: the "essential job functions" defense; and the general, or "workplace rule," defense.

7. What are "essential job functions" under the Executive Order?

The term "essential job functions" means the fundamental job duties of the employment position an individual holds. A job function may be considered essential if:

- The access to compensation information is necessary in order to perform that function or another routinely assigned business task; or

- The function or duties of the position include protecting and maintaining the privacy of

8. What is the “essential job functions” defense?

Under the “essential job functions” defense, a contractor can defend against a claim of discrimination by showing that it took adverse action against an employee because the employee (a) had access to the compensation information of other employees or applicants as part of his or her essential job duties and (b) disclosed such information to individuals who did not otherwise have access to it.

For example, Sam is an information technology professional at a federal contractor and one of his weekly tasks is to ensure that personnel data, including individualized pay data, has not been compromised. While performing a routine security check, Sam notices that his co-worker Sally makes \$10,000 less a year than Ted, a colleague who does the same job as Sally. The next day, Sam informs Sally of Ted’s pay. In this example, the contractor could defend an adverse action against Sam because he revealed pay information that he discovered performing one of his essential job functions. Access to employees’ compensation data is necessary to perform one of Sam’s routinely assigned tasks. Additionally, Sam’s task involved protecting the privacy of personnel information.

However, even employees who have access to compensation data as part of their essential job functions may discuss, disclose, or inquire about compensation in some instances. For example, they can:

- Discuss or disclose the compensation of applicants or employees 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 in accordance with the contractor’s legal duty to furnish information.
- Discuss their own compensation data with other employees.
- Discuss possible pay disparities involving other employees with a contractor’s
- Discuss or disclose compensation data of other applicants or employees based on information received through means other than access granted through their essential job functions.

9. What is the “workplace rule” defense?

Under the “workplace rule” defense, a contractor can defend against a claim of discrimination by showing it took adverse action against an employee for violating a consistently and uniformly applied workplace rule that does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants. For example, ABC Corporation, Inc. allows

employees to take a 20-minute break for every three hours worked. Jennifer and Sally take a 30-minute break during which they discuss their pay. Their manager refuses to pay both Jennifer and Sally for the extra 10 minutes taken during their break, which is the usual penalty for exceeding the allotted 20-minute break time. In this example, the contractor can defend an allegation that it unlawfully penalized Jennifer and Sally for discussing pay by explaining that Jennifer and Sally were penalized for violating the consistently and uniformly applied workplace rule that employees lose pay if they take a break longer than 20 minutes.

10. Does my employer have to tell me what other employees are being paid?

No. Executive Order 11246 does not require employers to provide employees or job applicants with information on the pay of other employees or applicants.

11. Whom does OFCCP protect?

OFCCP protects the rights of employees and job applicants of companies doing business with the Federal Government. OFCCP's pay transparency protection covers employees and job applicants of companies with over \$10,000 in federal contracts or subcontracts that are entered into or modified on or after January 11, 2016. Workers protected by OFCCP could include employees at banks, meat packing plants, retail stores, manufacturing plants, accounting firms, information technology businesses, and construction companies, among many others.

Filing a Complaint

12. What do I do if I believe my employer discriminated against me because I inquired about, discussed, or disclosed my compensation or the compensation of another employee or applicant?

If you think you have been discriminated against in employment, or in applying for employment, because you inquired about, discussed, or disclosed your own compensation or the compensation of another employee or applicant, you can file a complaint with OFCCP. You do not need to know with certainty that your employer is a federal contractor or subcontractor to file a complaint. OFCCP will determine whether the company is a federal contractor once it has received your complaint.

13. How do I file a complaint with OFCCP?

You may file a discrimination complaint by:

- Completing and submitting a form online through OFCCP's Web site;
- Completing a form in person at the OFCCP office nearest to where you live or work; or
- Mailing or faxing a completed form to the OFCCP regional office that covers the state where you live or work.

The form is available online at <http://www.dol.gov/ofccp/regs/compliance/pdf/pdfstart.htm> and in paper format at all OFCCP offices. To find the office nearest you, visit the online listing of OFCCP offices at <http://www.dol.gov/ofccp/contacts/ofnation2.htm>.

14. Is my employer allowed to fire, demote, or treat me less favorably because I filed a complaint?

No. Under the law, your employer may not retaliate against you for filing a complaint or participating in an investigation. OFCCP's regulations protect you from harassment, intimidation, threats, coercion, or retaliation for asserting your rights.

15. What will happen if there is a finding that I was a victim of employment discrimination under the pay transparency protections enforced by OFCCP?

You may be entitled to a remedy that places you in the position you would have been in if the discrimination had never happened. You may be entitled to be hired, promoted, reinstated, or reassigned; and you may be entitled to receive back pay, front pay, a pay raise, or some combination of these remedies. In addition, if OFCCP finds that the federal contractor or subcontractor violated Executive Order 11246, OFCCP could seek to have the company debarred or removed from consideration for future federal contracts or have the company's current contracts or contract modifications cancelled.

For more information:
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Please note that this fact sheet provides general information. It is not intended to substitute for the actual laws and regulations regarding the program described herein.