

## Advanced Employment Issues in Government Contracting

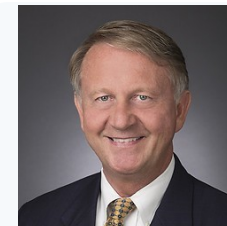
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McLean, VA

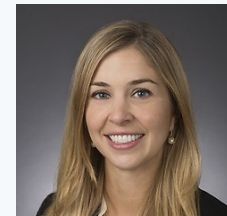


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# I. Developments in the Industry



# A. Key Developments at the OFCCP

- New personnel/leadership
- Four emphases of the new OFCCP and examples:

Transparency	Certainty	Efficiency	Recognition
<u>DIR 2018-08:</u> “ensure transparency in all stages of OFCCP compliance activities to help contractors comply with their obligations and know what to expect during a compliance evaluation”	<u>DIR 2019-03:</u> regarding OFCCP issuing of opinion letters	Renewed focus on resolving aged/older cases	<u>DIR 2018-06:</u> development of “recognition programs”; i.e. programs to recognize contractors for their excellence in affirmative action



Craig Leen  
Director of OFCCP

## B. EEOC Collection of Compensation Data

- April 25, 2019: the U.S. District Court for the District of Columbia ordered the U.S. Equal Employment Opportunity Commission (“EEOC”) to collect **detailed data on employee compensation** and hours worked from covered employers sorted by job category, pay band, race, ethnicity, and gender (the so-called “Component-2” of the EEO-1 form) by **September 30, 2019**
- The court ordered the agency to collect this data for calendar year **2018**
- This data **will go to the OFCCP pursuant to workshare agreement**



# Compensation Data and Pay Equity

- Dilemma: labor may have been cheaper if you hired in the recession. In a vibrant economy, you may have to pay more to attract talent
- You will now have to report wage and hours data by race, ethnicity and sex across 12 bands
- EEOC ready to accept data July 15
- Contractors with 50 employees will get login credentials early July
- Plaintiffs and competitors can get information via FOIA
- Self-Audit?



## C. Section 503 Focused Reviews

- OFCCP announced new focus on disability discrimination
- Why? Unemployment rates are high among disabled
- Contractors will see focused review scheduling letters
- Best practices



# Release of “Best Practices” for Section 503 Focused Reviews

- Maintain a **centralized reasonable accommodation system**
- Ensure that **top leadership** endorses and supports disability inclusion through video and correspondence
- Coordinate with **state and local** rehabilitation agencies
- Provide accessible **online recruiting tools**
- Provide a comprehensive and welcoming **self-identification program**
- Sponsor **disability inclusion programs** in the workplace
- Maintain **employee resource** groups
- Consider appointing a **Chief Accessibility Officer** (or perhaps an ADA Coordinator)

## D. Suspensions and Debarment

- What is “suspension and debarment”?
- **Applicable law:** FAR Subpart 9.4, “Debarment, Suspension and Ineligibility”
- **Mitigating Factors:**
  - The actual or potential harm or impact that results from the act or omission;
  - Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the conduct;
  - Whether you have paid all criminal, civil and administrative liabilities for the improper activity;
  - The extent of cooperation during the investigation or legal or administrative proceeding; whether the wrongdoing was pervasive with the organization;
  - The kind of positions held by the individuals involved in the wrongdoing;
  - Whether the organization has taken appropriate corrective action;
  - Whether the principals tolerated the offense;
  - Whether the activity was brought to the attention of the appropriate government agency in a timely manner

(a full list of the relevant aggravating and mitigating factors that the debarring official may consider can be found at 2 C.F.R. 1200.860)



# DOL Pilot Program



## News Release

U.S. DEPARTMENT OF LABOR ANNOUNCES NEW PILOT PROGRAM FOR DISCRETIONARY SUSPENSIONS AND DEBARMENTS TO ENSURE ACCOUNTABILITY

- **Release date:** April 2, 2019
- **Goal:** reduce the processing time on discretionary suspension and debarment actions from months to days through increased efficiency and sharing of information based on indictments or convictions
- **When:** in effect **April 2019 to April 2020**

## II. Specific Issues in the Industry



# A. False Claims Act and Whistleblower Law

- Overview of FCA / “qui tam” suits
- Whistleblower provisions:

## The FCA protects:

- 1) “**lawful acts** . . . in furtherance of an action under [the FCA]”; and
- 2) “**other efforts to stop one** or more [FCA] violations.” 31 U.S.C. § 3730(h)(1).

## Elements of a whistleblower claim under the FCA:

- 1) **Protected** conduct
- 2) Employer **knowledge** of protected conduct
- 3) Protected activity **caused** the discrimination



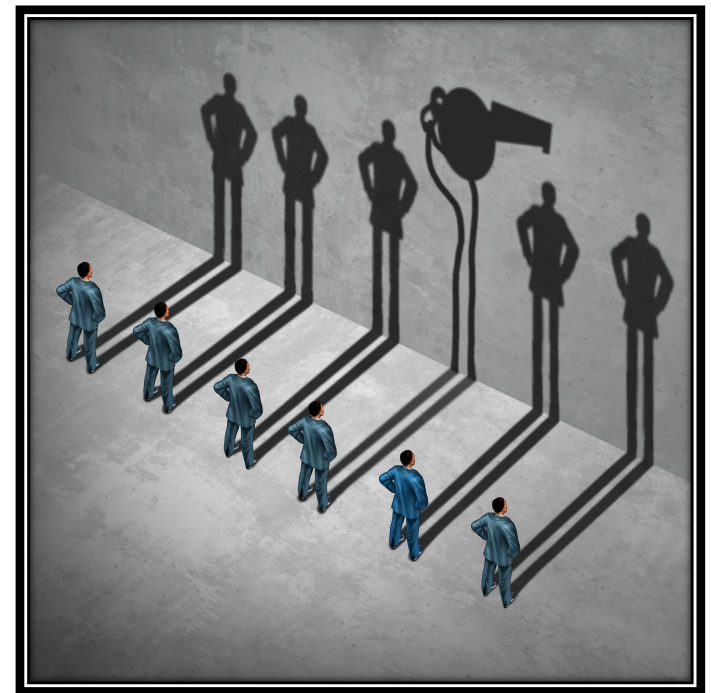
# Special Considerations in Whistleblower Law

- Protected activity v. day-to-day job responsibilities
- Employer knowledge
- Effect of *Cochise Consultancy Inc. v. United States, ex rel. Hunt* on statute of limitations period (May 13, 2019)
- Considerations for **investigating** whistleblower claims
  - Privilege issues
  - Treatment of the whistleblower
  - The effect of the cyber environment/internet



# Managing the Whistleblower

- How to you **manage/counsel/terminate** the whistleblower?
  - What about a whistleblower who is chronically late to work, or whose performance actually warrants termination?
- What do you do with the whistleblower, especially in a **small working environment**?
- Are there special issues to consider when the whistleblower is a manager?



## B. Pay Secrecy

- Executive Order 11246 (amended by EO 13672, EO 13665, EO 13279)

Generally, any businesses or organizations that:

1. Holds a single federal contract, subcontract, or federally assisted construction contract in excess of \$10,000;
2. Has federal contracts or subcontracts that have a combined total in excess of \$10,000 in any 12-month period; or
3. Holds government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount

are subject to pay transparency laws.



Pay transparency laws protect an applicant or employee's inquiries, discussions, and disclosures regarding his or her own compensation, or the compensation of another applicant or employee.

# NLRB and Pay Transparency

- The National Labor Relations Act (“NLRA”) protects the rights of employees to engage in “protected concerted activity.” The law protects the rights of employees to act together to address conditions at work (i.e. pay), with or without a union.
- The term “protected concerted activity” can be defined as any discussion aimed at improving the terms and conditions of an worker’s employment.
- An example of “protected concerted activity” is when two or more employees address their employer about **improving their pay**.
- If you were to fire the employee for sharing his or her pay increase—and his or her conversation was later found to be protected under the act—the NLRB could require you to reinstate the worker and/or provide back pay

# Developments in Pay Secrecy

- In January 2019, Democratic senators introduced the Paycheck Fairness Act (H.R. 7), which is intended to hold employers accountable for discriminatory practices and strengthen the remedies that aggrieved workers have
  - Law would end pay secrecy policies by **banning retaliation against workers who discuss their wages**, making it easier for workers to take part in pay discrimination class actions, banning inquiries into job applicants' salary history and expanding wage and other employment-related data that is collected from employers by the EEOC
- Recent suits regarding pay secrecy:
  - Lawsuit was recently filed against law firm Jones Day alleging that the firm's "black box" compensation system—in which a small group of influential partners sets associate compensation with minimal transparency—is used to pay women less than men at the firm
  - In 2017, the DOL filed a lawsuit and investigation against Google, which claimed that Google refused to disclose data on employee salary history
    - Google employees had begun sharing and posting their earnings online, upending the practice of keeping pay rates "under wraps."



# Issues and Tips for Compliance

## ISSUES

1. Is the pay inquiry, discussion or disclosure **protected**?
  - First, inquiries, discussions, or disclosures of compensation information that employees obtain through their "essential job functions" are not protected. E.g. HR/project control
  - Regulations provide a defense for contractors in the event that compensation inquiries are made while violating a consistently and uniformly applied workplace rule, so long as that rule doesn't generally prohibit compensation disclosures.
2. Make sure no pay secrecy in **offer letters**
3. The effect of social media

## TIPS FOR COMPLIANCE

1. Evaluate whether contractor is subject to any **state law or regulation** that **overlaps** with OFCCP's rule and, if so, determine how best integrate compliance
2. Update existing **employee handbooks or manuals** to ensure they contain the required pay transparency policy statement
3. Conspicuously **post the prescribed language** in a place that can be seen by both existing employees and applicants who visit the employer's property
4. Distribute **guidance to managers and employment decision-makers** regarding the final rule and their obligation to **refrain from retaliating** against or punishing an employee or applicant who inquires about or discusses compensation
5. Include in subcontracts

## C. National Origin Discrimination

“It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or **national origin**; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or **national origin**.”

Title VII of the Civil Rights Act of 1964

# What about export controls?

- There is a vast body of law on national origin discrimination
- However, in light of this prohibition, how can employers properly recruit and hire candidates if there are particular **export controls** at issue?
- **Example:** Sam is from **Country A**. Export controls prohibit U.S. companies from exporting to **Country A**. Can the employer take into account Sam's national origin in hiring decisions?



# Notable Settlements in U.S. Export Control Cases

- In February 2019, the U.S. Department of Justice announced a settlement with Honda Aircraft Company LLC regarding claims that the company violated the Immigration and Nationality Act (“INA”) by discriminating against non-U.S. citizens in an attempt to comply with requirements of the International Traffic in Arms Regulations (“ITAR”) and the Export Administration Regulations (“EAR”).
- In 2018, DOJ reached a similar settlement with Setpoint Systems, Inc., which DOJ accused of having an unlawful policy of hiring only U.S. citizens for positions involving ITAR-controlled information.
- DOJ also reached a settlement with the law firm Clifford Chance US LLP in 2018 after it accused the firm of shutting out dual-citizens and non-citizens authorized to work in the United States based on the firm’s interpretation of ITAR.

## D. Service Contract Act (“SCA”)

- Requires contractors and subcontractors performing services on prime contracts in **excess of \$2,500** to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement.
- The Department of Labor issues wage determinations on a contract-by-contract basis in response to specific requests from contracting agencies.
- For contracts **equal to or less than \$2,500**, contractors are required to pay the federal minimum wage as provided in Section 6(a)(1) of the Fair Labor Standards Act.

# Issues in SCA Compliance

- Solicitation vs. Wage Determination:
  - If the Solicitation contains the SCA clause, but NOT the Wage Determination, does the SCA apply?
  - Pricing implications of SCA
- FLSA Classifications (Exempt v. Non-Exempt Employees) & the Computer exception
- Labor mapping (DOL categories v. Contract, Conformance)



# When the SCA Applies – Pre-Bid

- Examine the incumbent's contract
  - SCA-covered? CBA-covered?
- Consider cross-over impacts between SCA and Affordable Care Act (ACA)
- Pricing
  - Multi-site work?
- Job scoping

**Wage Determinations OnLine.gov**  
Providing public access to federal wage determinations and related information.





# When the SCA Applies – Post-Award

- Pricing
  - Multi-site work?
  - Compliance impact on HR IT systems
  - Best practices?
- Labor Mapping
  - Beware scope creep
  - “Flexing” categories

**Wage Determinations OnLine.gov**  
Providing public access to federal wage determinations and related information.





## E. Procurement Integrity Act

- **What:**

- Prohibits the release of **source selection** and contractor **bid or proposal information**

- **Main provisions:**

- A person cannot **knowingly disclose** contractor bid or proposal information or source selection information before award of a federal agency procurement contract to which the information relates. 41 U.S.C. § 2102(a)
  - “Person” defined as present or former government official
- A person cannot **knowingly obtain** contractor bid or proposal information or source selection information before award of a federal agency procurement contract to which the information relates. 41 U.S.C. § 2102(b)
  - Applies more broadly; “person” not defined

## E. Procurement Integrity Act

- **What:**

- Restrictions on federal officials involved in procurements

- **Main provisions:**

- Agency official participating *personally and substantially* in federal procurement that is in contact with an offeror in that procurement regarding possible employment must (1) report and (2) reject employment opportunity OR disqualify himself/herself. 41 U.S.C. § 2103(a)
- A former Federal official who served in certain positions on a procurement in which contractor was awarded contract in excess of **\$10 million** is barred for **one year** from receiving compensation as an employee or consultant from that contractor. 41 U.S.C. § 2104(a)

# Procurement Integrity

## REMEMBER...

1. Contractor that **voluntarily discloses** its own bid and proposal information does not create a PIA violation
2. PIA prohibits disclosure of information relating to a **pending procurement** (not earlier programs/procurements)
3. PIA violations can lead to **civil and criminal** penalties and/or administrative actions
4. Even if there is not a PIA violation, you may have an actual or potential organizational conflict of interest (OCI)

## TIPS FOR COMPLIANCE

1. Be aware that some Government officials may not understand the rules – up to you to **take precautions**
2. Always mark own information with appropriate **restrictive legends**
3. Institute PIA training for employees
4. Review potential issues quickly – protests must be filed within **14 days** of discovery of the violation

## F. Post Government Employment



- **Permanent Restriction:** Former government employee may not appear before agency on behalf of new employer in connection with a particular matter in which the person participated personally and substantially as a government employee involving specific parties. 18 U.S.C. § 207(a)(1)
- **Two Year Restriction:** Former government employee may not appear before agency on behalf of new employer in connection with a particular matter that was under his or her official responsibility. 18 U.S.C. § 207(a)(2)
- **One Year Restriction:** Former senior government employee may not appear before agency on behalf of new employer. 18 U.S.C. § 207(c)

# Post Government Employment (cont.)

- Prohibition on compensation for representational services.  
18 U.S.C. § 203
- 2018 National Defense Authorization Act (NDAA) imposes new restrictions on senior Department of Defense (DoD) personnel.
  - Section 1045 applies new one and two-year cooling off periods prohibiting former high-ranking military officers and their civilian counterparts from conducting any “lobbying activities with respect to the Department of Defense.”
    - This includes behind-the-scenes activity supporting lobbying contacts during the applicable cooling off period.
- The provisions of 18 U.S.C. § 207 and above rules **do not** apply to former military enlisted personnel.



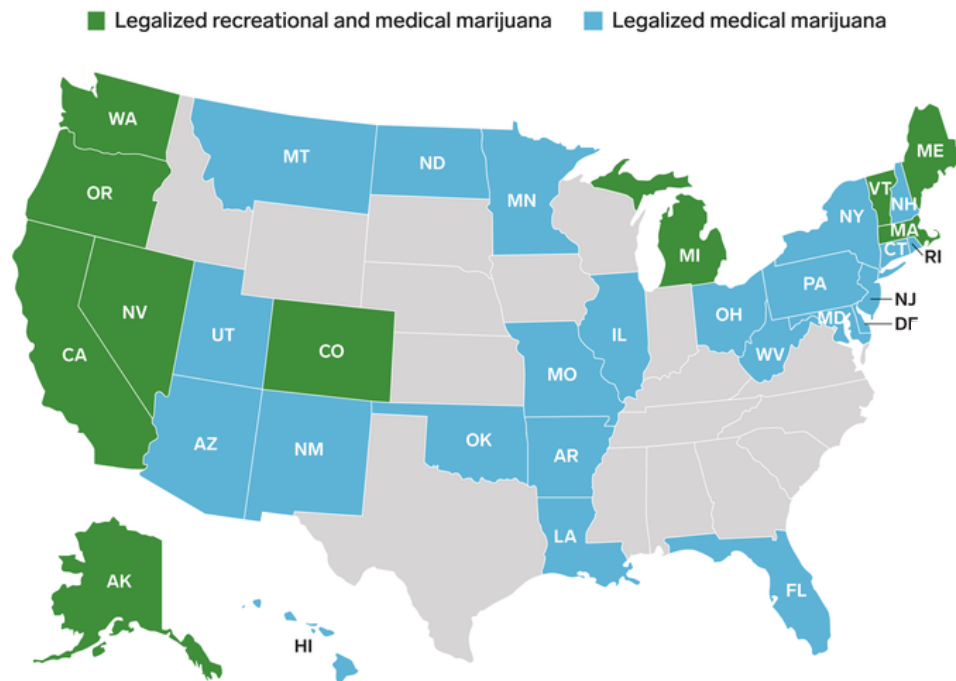
# Issues in Leaving the Government

- When should you require a government ethics letter?
- What should you do if you disagree with the conclusion of the ethics letter?
- When might you have a **potential** conflict of interest?



# G. Marijuana in the Workplace

## States where marijuana is legal



- Even if marijuana is legal in a given state, it is **still illegal under federal law**
- **Applicable Law:** “Drug Free Workplace Act” (“DFWA”)

Requires that federal contractors with a contract for **more than \$100,000**:

- Adopt a **drug-free workplace policy**; and
- Establish a **drug-free awareness program**



# Medical Marijuana Users?

- Legal Paradox: while individuals could lawfully treat their disabilities with licensed medical marijuana use, employers could choose to reject medical marijuana using applicants by relying on the illegality of marijuana under federal law (Americans with Disabilities Act vs. Drug Free Workplace Act)
- Courts are split on the issue of how to handle medical marijuana users (e.g. Connecticut – no federal preemption)
- Complicating matter, a growing number of states are writing employment protections into their marijuana legalization statutes. For example, **Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, New York, Pennsylvania and West Virginia** provide employment protections for medical marijuana users



# DFWA Requirements

- Publish a **statement** notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace and specify what actions will be taken for violations of the prohibition
- Ensure that each employee engaged in the performance of a federal contract receives a copy of the statement
- Notify employees that as **condition of employment**, the employee must abide by the statement and **notify the employer** of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after the conviction
- Establish a **drug-free awareness program** to inform employees of the dangers of drug abuse in the workplace, the drug-free workplace policy, available drug counseling, rehabilitation, and employee assistance programs, and the potential penalties for violations
- Notify the contracting agency within **10 days** after receiving notice of an employee's drug conviction
- Impose a **sanction** on any employee who is convicted of a criminal drug offense, or require participation in a drug abuse assistance or rehabilitation program

# Marijuana in the Workplace: Tips for Compliance

- Maintain a drug-free workplace
- Comply with specific elements of DFWA
- Look to state statutes for exemptions
- Advise applicants and employees (e.g. job descriptions). May serve as a deterrent
- Revisit company drug testing policy
- Reasonable suspicion testing
- Video taping?



# H. Government Audits

## ■ Recent focuses on DOL/Government Audits:

### Pay Equity

OFCCP Guidance:  
**41 C.F.R. §§ 60-20.1–20.8**

**§ 60-20.4  
Discriminatory  
compensation.**  
“Compensation  
may not be based  
on sex”

### Affirmative Action Programs

Certain government  
contractors and  
subcontractors to develop  
and maintain Affirmative  
Action Plans (AAPs). AAPs  
must be developed within  
120 days from the  
commencement of a  
contract and must be  
updated annually  
*See* **41 C.F.R. § 60-2.1(c);  
41 C.F.R. § 60-300.40(b);  
41 C.F.R. § 60-  
741.40(b)(2).**

### Recordkeeping

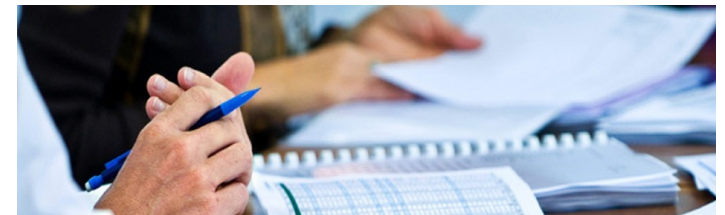
**Executive Order 11246**  
(EO 11246); **Section 503 of  
the Rehabilitation Act**  
(Section 503), and the  
Vietnam Era Veterans’  
Readjustment Assistance  
Act (“**VEVRAA**”) and their  
implementing regulations  
contain different applicant  
recordkeeping  
requirements for federal  
contractors

### Cybersecurity Compliance

**DFARS 252.204-7012**  
cybersecurity  
requirements  
(requires contractors  
to “implement” NIST  
SP 800-171)

# Best Practices to Ensure a Smooth Audit

- Before a government audit is imposed, have **self-auditing** protocol/conduct **periodic audits** (i.e. audit your own organization's equal pay practices)
  - Related: what if the self-audit shows an unlawful hiring discrepancy/a comparable negative finding?
- Ensure your organization has an **internal compliance coordinator**
- Determine **materials that will demonstrate compliance**; if certain items are inapplicable (or unavailable), consider creating and retaining a written explanation documenting the reason
- Establish one **easily-accessible and organized** location to house all records
- Respond **comprehensively** and in an **organized** manner to any governmental inquiry
- If audited, prepare for the investigation, establish a contact person, secure legal counsel for assistance, negotiate or clarify the scope of the document request, and, if necessary, ask for an extension to the response deadline



# Questions?



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