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Proposed Rule Would Impose Pay Transparency and Salary History Requirements for Federal Contractors



The Federal Acquisition Regulatory Council issued a [Proposed Rule](#), "Pay Equity and Transparency in Federal Contracting," on January 30, 2024.

The Proposed Rule would amend the Federal Acquisition Regulations (FARs), which apply to federal government commercial contracts to be principally performed in the United States and its territories. The rule imposes three new requirements on federal contractors and subcontractors.

First, the Proposed Rule would prohibit contractors and subcontractors from seeking an applicant's compensation history, directly or indirectly, and considering compensation history when making employment decisions. Consideration of compensation history is prohibited even if the applicant provided the information voluntarily with no prompting. Covered employers would also be prohibited from retaliating against applicants for refusing to provide compensation history.

Second, the Proposed Rule would require contractors and subcontractors to disclose the compensation to be offered for the position in all job opening advertisements placed by the contractor or on their behalf. The disclosure must include the salary or wages, including ranges if applicable, that the contractor believes, in good faith, they will pay for the position. The disclosure must also include a general description of the benefits and any other forms of compensation.

Third, the Proposed Rule would require contractors and subcontractors to provide written notice of FAR rights to applicants in the job announcement or as part of the application process. The notice must include a description of the Rule and how to submit a complaint regarding alleged noncompliance. The complaint process allows applicants to submit a complaint to the contracting agency point of contact within 180 days of an alleged violation. There are no specific remedies in the Proposed Rule, but the contracting agency may "take action as appropriate."

The Proposed Rule represents a departure from existing employment-related regulations for federal contractors. Typically, the U.S. Department of Labor (DOL) has engaged in rulemaking related to employment standards only for contractors building federal projects or larger contractors supplying services and goods to the government. The Biden administration has chosen to depart from this approach by expanding coverage to all U.S. Department of Defense (DOD), National Aeronautics and Space Administration (NASA), and General Service Administration (GSA) vendors, including those at or below the simplified acquisition threshold (generally \$250,000). The Proposed Rule further expands by including not only work on the contracts at issue but also work "*necessary to the performance of the contract but not specifically called for by the contract.*" It remains to be seen whether this definition would include only support workers, such as human resources and information technology support, or be more expansive. Indeed, some precedent exists, as federal procurement agencies have taken aggressive approaches after the implementation of a rule, as seen in the [vaccine mandate requirements](#).

Takeaways

The Proposed Rule explanation recognizes that at least 22 states and 22 localities have prohibited salary history inquiries, and at least six states have required salary disclosure in primary job postings. Some have significant differences, including when in the hiring process employers may consider salary information, what information needs to be included in a salary disclosure, how broad of a salary range employers may use to meet the requirements, and whether internal moves such as promotions require salary information. For example, the federal proposal requires a description of benefits, while the California Equal Pay Act does not require information regarding benefits according to a recently published set of FAQs. In addition, recent state elections in Virginia will likely lead to passage of a Democratic-sponsored bill to require the posting of salary ranges for not only new positions but positions obtained through "promotion, transfer, or other employment opportunity." These efforts have created a patchwork of regulations for contractors. Covered employers should note that the Proposed Rule would apply to *both* internal and external hires because current and prospective employees are covered. The Proposed Rule, if finalized and implemented, has a strong potential to further complicate compliance for federal contractors and subcontractors.

Interested parties can submit written comments via the [eRulemaking portal](#). The deadline for comments is April 1, 2024.

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