CENTER FOR WORKPLACE COMPLIANCE

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Submitted via Federal eRulemaking Portal: https://www.regulations.gov

Ms. Mahruba Uddowla
Procurement Analyst
Regulatory Secretariat Division
General Services Administration
1800 F Street NW
Washington, DC 20405

Re: Comments of the Center for Workplace Compliance (CWC) in Response to the Proposed Rule Pay Equity and Transparency in Federal Contracting (FAR Case 2023-021; RIN 9000-AO69)

Dear Ms. Uddowla:

The Center for Workplace Compliance (CWC) welcomes the opportunity to submit written comments on the proposed amendment to the Federal Acquisition Regulation (FAR) to implement a governmentwide policy developed by the Administrator for Federal Procurement Policy (OFPP Administrator), as published in the *Federal Register* on January 30, 2024.[1] The Proposed Rule would require federal contractors to disclose compensation for advertised positions, prohibit contractors from considering applicants' compensation history when making employment decisions, and require contractors to provide notice of these rights to applicants.

These comments do not take issue with the major elements of OFPP's proposed policy. Rather, as detailed below, they address practical and technical questions raised by the specific elements of the proposed rule. In brief, CWC recommends that the final rule:

- Allow contractors to consider voluntarily disclosed compensation history;
- Clarify that contractors may consider compensation history of current employees when transferring or promoting employees;
- Provide contractors flexibility in determining wages, or a range of wages, to disclose;
- Not require an extensive disclosure of benefits;
- Acknowledge that disclosures of alternative compensation may result in wide pay ranges;
- Recognize that identifying a single contracting agency may be impracticable for many contractors;
- Permit detailed disclosures in an addendum or online;
- Clarify that the rule does not mandate job advertisements for all positions; and
- Address the rule's potential conflict with laws requiring contractors to consider compensation history.

[1] Office of Federal Procurement Policy; Federal Acquisition Regulation: Pay Equity and Transparency, 89 Fed. Reg. 5843 (January 30, 2024).

Statement of Interest

Founded in 1976, the Center for Workplace Compliance (CWC)[2] is the nation's leading nonprofit association of employers dedicated exclusively to helping its member employers better understand and manage their workplace compliance requirements and risks. Its membership includes approximately 200 major U.S. employers, collectively providing employment to millions of workers.

CWC's directors and officers include many of the industry's leading experts in the fields of fair employment, workplace compliance, and risk management. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of workplace rules and regulations.

All of CWC's members are employers subject to federal laws prohibiting pay discrimination in employment, including the Equal Pay Act and Title VII of the Civil Rights Act of 1964. Nearly all CWC members are federal contractors subject to Executive Order 11246. Similarly, most federal contracts entered into by CWC members are subject to the FAR. CWC has a strong interest in ensuring that FAR policy addressing pay discrimination is promulgated to achieve its intended goals without imposing improper or unnecessary burdens on contractors.

Background and Context

Pay transparency has been important public policy for nearly 50 years. Indeed, at least as far back as 1975, federal labor law has been interpreted as generally prohibiting employer policies that restrict employees from discussing their pay and that of their co-workers.[3] Executive Order (E.O.) 13665 and implementing regulations expanded this policy so that pay transparency and anti-retaliation provisions broadly apply to federal contractors.[4]

Recently, several state and local jurisdictions have adopted a variety of laws addressing pay transparency and related issues. These laws prohibit employers from asking about or considering an applicant's prior salary during the hiring process. Other state and local laws, including Colorado's Equal Pay for Equal Work Act, require employers to disclose pay for advertised positions.[5]

As noted above, nearly all of CWC's members are federal contractors subject to the federal contractor pay transparency rules. In addition, most members are multistate employers subject to one or more state and local pay transparency laws that prohibit certain use of salary history information and require pay disclosure for advertised jobs.

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[2] Formerly the Equal Employment Advisory Council (EEAC).
[3] See, for example, *Jeanette Corp*., 217 NLRB 653 (1975), *enforced*, 532 F.2d 916 (3rd Cir 1976).
[4] E.O. 13665, 79 Fed. Reg. 20749 (April 8, 2014); the Labor Department's implementing regulations were codified largely as an amendment to the Equal opportunity clause codified at 41 C.F.R. § 60-1.4, see 80 Fed. Reg. 54,933 (September 11, 2015).
[5] Equal Pay for Equal Work Act, Colo. Rev. Stat. §§ 8-5-201–8-5-203 (2023).

For the most part, CWC members have not reported challenges implementing and complying with the Obama Administration's pay transparency revisions for federal contractors, perhaps because federal law already prohibited broad pay secrecy policies.

Complying with the more recent state and local laws prohibiting consideration of salary history has proven more difficult because it has required a significant shift in practice for employers. However, it is our sense that most sophisticated multistate employers have generally adopted practices consistent with the policy goal driving these new laws.

Pay disclosure laws are less frequent but present the most serious challenges for employers, largely due to the type and detail of information that employers must disclose in addition to base pay. Employers must answer detailed compliance questions even when the pay rate is not known with certainty ahead of time. Moreover, employers question whether disclosure laws apply to existing employees during a transfer or promotion.

These comments focus on the practical challenges raised by the proposed amendments to the FAR, rather than the policy goals they intend to achieve.

Prohibition on the Use of Compensation History

Proposed Section 22.XX02(b) would establish a policy prohibiting contractors from seeking and considering information about applicants' compensation history when making employment decisions. This prohibition would apply to the recruitment and hiring of any position to perform work on or in connection with a covered contract.

This policy would be implemented through a contract clause with several explicit prohibitions for contractors.[6] For example, proposed clause (c)(1) would prohibit contractors from seeking an applicant's compensation history, while proposed clause (c)(2) would prohibit contractors from requiring disclosure of compensation history as a condition of an applicant's candidacy.

Proposed clause (c)(5) would extend the prohibition on considering applicant compensation history to circumstances where an applicant voluntarily discloses their compensation history without prompting at any state in the recruitment and hiring process.

The contract clause would define "applicant" as a "prospective employee or current employee applying for a position to perform work on or in connection with the contract."

The Rule Should Allow Contractors to Consider Voluntarily Disclosed Compensation History

We question whether federal procurement policy should prohibit contractors from considering an applicant's compensation history. However, if it does, that policy should not extend to compensation information that prospective employees voluntarily provide during the recruitment process. In nearly every jurisdiction to consider this question, policymakers have decided to permit consideration of compensation information voluntarily raised by an applicant.

[6] Proposed § 52.222-ZZ.

Among the states that generally prohibit employer use of applicant salary history, most allow employers to use volunteered salary histories, with some limitations. These states include California (Cal. Labor Code § 432.3 (h)-(i)), Connecticut (Conn. Gen. Stat. § 31-40z (b)(5)), Delaware (Del. Code § 709B),[7] Hawaii (Haw. Rev. Stat. § 378-2.4), Maine (5 Me. Rev. Stat. § 4577 (3)), Maryland (Md. Code, Lab. & Empl. § 3-304.2), Massachusetts (Mass. Gen. Laws ch. 149, § 105A), Minnesota (Minn. Stat. § 363A.08, subd. 8),[8] New Jersey (N.J. Stat. § 34:6B-20), New York (N.Y. Lab. Law § 194-a),[9] Rhode Island (R.I. Gen. Laws § 28-6-22),[10] Vermont (Vt. Stat. Tit. 21 § 495m), and Washington (Wash. Rev. Code § 49.58.100). Colorado (Colo. Rev. Stat. § 8-5-102) and Illinois (820 Ill. Comp. Stat. 112/5, 112/10) (effective 1/1/2025) are the *only* states that prohibit employers from relying on voluntary disclosures.

We are not aware of any jurisdiction that prohibits employers from considering applicants' expressed salary expectations. Often, applicants will frame salary expectations by referencing their own compensation history. In other words, an applicant's voluntary disclosure of compensation history *establishes* the applicant's expectation to be paid a certain amount. Contractors should not be prohibited from considering an applicant's compensation history in this context.

Some states have adopted language appropriately addressing this concern. California law states, "Nothing in this section shall prohibit an applicant from voluntarily and without prompting disclosing salary history information to a prospective employer."[11] California clarifies, "If an applicant voluntarily and without prompting discloses salary history information to a prospective employer, nothing in this section shall prohibit that employer from considering or relying on that voluntarily disclosed salary history information in determining the salary for that applicant."[12] We recommend that the final rule adopt similar language to permit the consideration of information voluntarily disclosed.

The Rule Appears to Allow Contractors to Consider Compensation History of Current Employees When Transferring or Promoting Employees, Although Clarification Would Be Helpful

Proposed Section 22.XX02(d) would prohibit employers from considering compensation history of "applicants" – a term defined to mean prospective employees *or* current employees applying for a position to perform work on or in connecting with a contract.[13] We interpret the

[7] Delaware prohibits employers from screening applicants based on their compensation histories, but expressly allows employers to discuss and negotiate compensation expectations. If an applicant voluntarily and without prompting discusses compensation history in an attempt to negotiate compensation expectations, the employer may arguably use that information without violating the law.
[8] Minnesota allows an employer to consider or act on voluntarily disclosed salary history information to support a wage or salary *higher* than initially offered by the employer.
[9] New York allows applicants and current employees to disclose or verify compensation history "including but not limited to for the purposes of negotiating wages or salary." Employers may confirm compensation history at the time an offer of employment is made when the applicant or current employee responds to the offer by providing prior compensation information to support a compensation *higher* than offered by the employer.
[10] Rhode Island allows an employer to rely on wage history voluntarily provided by the applicant to support a wage *higher* than the wage offered by the employer initially.
[11] Cal. Labor Code § 432.3 (h)-(i).
[12] *Id*.
[13] Proposed § 22.XX01.

proposed prohibition as not extending to current employees who are transferred or promoted. However, additional clarification, such as that provided in the laws of New Jersey and New York, would be welcome.

New Jersey prohibits employers from "screen[ing] applicants based on salary history" and "requir[ing] the applicant's salary history to satisfy any minimum and maximum criteria."[14] However, the New Jersey law specifically excludes internal transfers and promotions from its salary history ban. The exception reads, "This section shall not apply to applications for internal transfer or promotion with an employee's current employer, or use by the employer of previous knowledge obtained as a consequence of prior employment with the employer."

New York also prohibits employers from relying on wage or salary history in determining employment decisions.[15] The law applies to current employees. However, New York clarifies, "[E]mployers may consider information already in their possession for existing employees (i.e. a current employee's current salary or benefits being paid by that employer). For example, an employer may use an employee's current salary to calculate a raise but may not ask that employee about pay from other jobs."[16]

The pay equity and transparency rule should follow these examples by expressly excluding internal transfers and promotions from its salary history ban. It would be impractical for a federal contractor to ignore a current employee's salary in determining the employee's compensation in a new role, project, or promotion.

Compensation Disclosure Requirements

Proposed Section 22.XX02(c) would establish a policy requiring contractors to disclose, in all advertisements for job openings placed by or on behalf of the contractor, the compensation to be offered to the hired applicant, for any position to perform work on or in connection with the contract. The disclosure would include:

- The salary or wages (or range thereof) the contractor in good faith believes that it will pay for the advertised position;
- A general description of the benefits and other forms of compensation applicable to the job opportunity; and
- Where at least half of the expected compensation for the advertised position is derived from commissions, bonuses, or overtime pay, the percentage of overall compensation or dollar amount (or ranges thereof) for each form of compensation, as applicable, the contractor in good faith believes that it will pay for the advertised position.

Proposed 22.XX01 defines "compensation" as "any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to

[14] N.J. Stat. § 34:6B-20(a) (2023).
[15] N.Y. Lab. Law § 194-a.
[16] New York State, "Salary History Ban – What You Need To Know," https://www.ny.gov/salary-history-ban/salary-history-ban-what-you-need-know (accessed April 1, 2024).

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."

The Rule Should Clarify Contractors' Flexibility in Disclosing Wages on Job Advertisements

The contract clause implementing the pay disclosure requirement would require contractors to indicate "the salary or wages, or range thereof, the contractor in good faith believes that it will be for the advertised position." The disclosed salary, wages, or range may reflect the contractor's pay scale for the position, the range of compensation for those currently working in similar jobs, or the amount budgeted for the position.

We interpret the proposed contract clause as allowing contractors to implement these specific methodologies and others, as long as contractors attempt in good faith to represent the salary, wages, or range for jobs advertised at the time of posting. For example, an employer may intend to hire employees for a particular job at a posted salary range, only to find that it miscalculated the market and must pay more for the position. Colorado's disclosure law recognizes this by stating "[a]n employer *may ultimately pay more or less* than a posted range — as long as the range, when posted, was what the employer genuinely believed it would be willing to pay for the job."[17]

We read the proposal's "good faith" requirement as an intent to establish a similar requirement, which appropriately recognizes that contractors cannot always precisely estimate the compensation range at the time a job application is created.

The Rule Should Not Require an Extensive Disclosure of Benefits

We question the extent to which a pay disclosure rule should require employers to disclose benefits on job advertisements. Employers are incentivized to provide a robust 401(k) or retirement program, greater paid vacation time, and more insurance options than the law requires to attract prospective applicants and retain current employees. While benefits may be an important part of an applicant's decision to accept a particular job, we see no reason why contractors should be compelled to disclose such information on a job advertisement.

Of course, employers wishing to attract a bigger pool of qualified candidates may choose to summarize key highlights of their benefits on a job advertisement, but we do not believe there is sufficient reason to mandate such disclosures to remedy pay discrimination.

If the decision is made to require a benefits disclosure, we urge that the requirement be limited to a general statement of benefits. Contractors should not be required to provide detailed benefit summaries in any case.

Disclosure of Alternative Compensation Should Acknowledge Wide Ranges Possible

Proposed Section 22.XX02(c) would establish a policy that requires contractors to specify the percentage of overall compensation or dollar amount (or ranges thereof) for each form of

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[17] Colorado Dep't of Lab. and Empl., *Interpretive Notice & Formal Opinion ("INFO") # 9A: Transparency in Pay and Job Opportunities: The Colorado Equal Pay for Equal Work Act, Part 2* (Dec. 8, 2023).

compensation, as applicable, the contractor in good faith believes that it will pay for the advertised position, when at least half of the expected compensation for an advertised position is derived from commissions, bonuses, or overtime pay.

By nature, many forms of commissions, bonuses, and overtime pay fluctuate depending on factors both within and outside of an employer's control. For example, the majority of a sales worker's compensation may consist of commissions, until the market takes a turn, and sales dry up. Similarly, overtime pay may be widely available to workers in a particular job, perhaps so much so that it comprises a majority of compensation for some employees, but market conditions may change rapidly eliminating overtime pay altogether.

For many jobs, estimating the percentage of overall compensation (or range) from commissions, bonuses, and overtime is far more difficult than estimating base pay or base pay range. It would not be surprising to us if good faith estimates of these forms of compensation contained very large ranges, especially in comparison to estimates for base pay ranges. The final rule or preamble should acknowledge that such estimates are often speculative and imprecise.

Notification of Rights

Proposed Section 22.XX02(d) establishes a policy that would require federal contractors to provide applicants with written notice of the requirements in Proposed Section 22.XX02(a)-(c) as either part of the job announcement or application process. Contractors would be required to identify on each notice the specific agency that awarded the contract (or issued the solicitation) on which the applicant would primarily work. This policy would be implemented through the proposed contract clause.[18] Paragraph (e) of the proposed clause sets forth a five paragraph clause that contractors would be required to use in all covered job announcements or application.

The Notice Provision Should Acknowledge Identifying a Single Contracting Agency May Be Impracticable for Many Contractors

The Proposed Rule would require contractors to provide a notice provision identifying the agency that awarded the contract (or issued the solicitation) on which the applicant would primarily work. The purpose of this requirement appears to be helping applicants locate the appropriate place to file a complaint alleging a violation of the rule.

For some contractors, compliance with this provision will be straightforward. These contractors may only contract with a single contracting agency or may perform work that requires strict delineation among employees working on particular contracts. However, for others this provision will be far more challenging. These contractors do business with many agencies at once and many have employees who perform work on a variety of contracts in a relatively seamless manner. For example, a contractor may operate an information technology helpdesk that services several different agencies with similar needs. A contractor may have hiring needs without being able to identify with any certainty the agency or contract under which each new employee is likely to primarily service.

[18] Proposed § 52.222-ZZ.

The rule should acknowledge this challenge and not find contractors in violation who have acted in good faith to comply with this notice requirement.

The Rule Should Permit Detailed Disclosure in an Addendum or Through a Website Link

Job applicants prefer short job descriptions on job advertisements. Indeed, a major job posting company, states that "job postings with descriptions between 700 and 2000 characters get up to 30% more applicants than other job postings."[19] Employers prefer job advertisements to be informative and appealing for prospective employees and are well aware that lengthy descriptions of jobs, benefits, and legal rights will turn off job seekers.

The proposed rule's notice of rights, by our count, contains over 1,950 characters. Fortunately, the proposed rule does not require contractors to include the notice in job advertisements, as long as notice is part of the application process. Providing contractors with the flexibility to include this detailed information in some other format, such as on the employer's website, is appropriate. The rule should take the same approach with respect to additional disclosures, including the general description of benefits and alternative compensation.

States that have addressed this issue in their own pay disclosure laws include New York, which proposed a regulation that allows employers to provide compensation information in a separate attachment or addendum.[20] Similarly, Illinois allows employers to include a hyperlink to a publicly viewable webpage that lists the salary range and description of benefits.[21] We recommend that the final rule include similar language.

The Rule Should Clarify That It Does Not Mandate Job Advertisements for All Positions

While the proposed rule requires disclosure of certain information in job advertisements, nothing in the rule requires advertisements to be created in the first place. This interpretation is further evidenced by the fact that the burden estimates accompanying the proposal do not include any estimated expenses for creating new job advertisements.

Federal contractors covered by the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) are typically required to post employment openings with the "appropriate employment service delivery system."[22] Consequently, we do not expect this issue will arise frequently, at least for contractors covered by VEVRAA. However, there are atypical cases where job advertisements and postings are not required.

This issue was addressed by New York in its proposed regulations interpreting the state's pay transparency law. The proposed rules state that employers are not prohibited from hiring (or

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[19] Indeed Editorial Team, *How to Craft Standout Job Descriptions* (May 6, 2013 & Supp. June 2018) (accessed April 1, 2024).
[20] Proposed N.Y. Lab. Law § 194-2.3(e).
[21] 820 Ill. Comp. Stat. 112/10) (effective 1/1/2025).
[22] This requirement is included, for example, in paragraph 2 of the Equal Opportunity Clause required by 41 U.S.C. § 60-300.5(a).

promoting, etc.) employees without creating or posting an advertisement.[23] We recommend that the final rule include similar language, either in the text of the rule or in its preamble, to clarify that the rule is not seeking to impose this additional mandate.

The Rule Should Address Its Potential Conflict with Laws Requiring Contractors to Consider Compensation History

The proposed rule does not contain guidance for contractors compelled to consider previous salary history pursuant to federal, state, or local law. For example, the Service Contract Act requires certain contractors to pay employees as least as much as they earned under a predecessor contract in certain circumstances.[24]

Many state laws restricting use of prior salary history recognize this conflict. For example, Connecticut's law does not apply "to any actions taken by an employer … pursuant to any federal or state law that specifically authorizes the disclosure or verification of salary history for employment purposes."[25] Similarly, New Jersey's law does not apply to "any actions taken by an employer pursuant to any federal law or regulation that expressly requires the disclosure or verification of salary history for employment purposes, or requires knowledge of salary history to determine an employee's compensation."[26]

At a minimum, the FAR rule should provide an exception to the general prohibition on contractors from considering an applicant's compensation history, where such consideration is required by law.

Conclusion

Thank you for the opportunity to comment on the proposed revisions to the Federal Acquisition Regulation. Please do not hesitate to contact me if CWC can be of assistance on this important matter.

Sincerely yours,

Gabrielle Lattery

Gabrielle Lattery
Counsel

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[23] Proposed N.Y. Lab. Law § 194-2.2(d).
[24] See 41 U.S.C. § 6707(c).
[25] Conn. Gen. Stat. § 31-40z (b)(5).
[26] N.J. Stat. § 34:6B-20(c)(2).