

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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# Biden's Pay Equity Priority, and What Federal Contractors Can Expect Going Forward

*By Betty S.W. Graumlich, Liza V. Craig, and Ozra O. Ajizadeh\**

*According to the authors, pay equity will likely result in renewed enforcement efforts related to pay discrimination from the Office of Federal Contract Compliance Programs.*

Federal contractors (and other employers) should anticipate greater scrutiny related to their compensation policies and practices as a result of recent policy shifts. President Biden has made it clear that a key priority of his administration is closing the gender and racial wage gap that currently exists in the United States, and that he plans to encourage changes at both the state and federal levels.

At the federal level, that means the reintroduction of the Paycheck Fairness Act, the rollout of new policy initiatives, and the issuance of executive orders.

This prioritization of pay equity will likely result in renewed enforcement efforts related to pay discrimination from the Office of Federal Contract Compliance Programs ("OFCCP").

State legislatures also continue to pass laws enhancing pay equity and transparency.

## **BACKGROUND**

The Equal Pay Act ("EPA"), passed in 1963, was one of the first anti-discrimination laws enacted and was intended to abolish wage disparity based on sex. The act prohibits wage discrimination between men and women who perform jobs that require substantially the same skill, effort, and responsibility within the same company.

Despite the existence of the EPA, however, the gender-wage gap still exists with the focus on pay disparities across both gender and race, as evidenced by statistical data.

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## **BIDEN PRIORITY**

On International Women’s Day, March 8, 2021, President Biden created the White House Gender Policy Council via executive order, to ensure that gender equity and equality are pursued in domestic and international policy.

Specifically, the Council is tasked with advancing gender equity and equality by coordinating federal policies and programs that address the structural barriers to women’s participation in the labor force and by decreasing wage and wealth gaps.

The Council is to work closely with the Domestic Policy Council, which is coordinating the interagency, whole-of-government strategy for advancing equity, as set forth in Executive Order 13985 of January 20, 2021 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.)

In addition, President Biden has promised additional funding for agencies such as the Equal Employment Opportunity Commission (“EEOC”), the U.S. Labor Department’s Office of Federal Contract Compliance Programs, and the Justice Department’s Civil Rights Division to investigate violations and enforce pay equity laws.

## **FEDERAL LEGISLATION**

On January 28, 2021, the Paycheck Fairness Act was reintroduced to the U.S. House of Representatives as H.R. 7. The current version of the Paycheck Fairness Act amends the equal pay provisions of the Fair Labor Standards Act of 1938, and requires the OFCCP to collect compensation data from federal contractors and to evaluate the pay practices of not less than half of all non-construction contractors each year.

While various versions of this act have been introduced in the House over the years, they have never been passed by Congress.

## **STATE LEGISLATION**

At the state level, California and Colorado have taken the lead by implementing new pay equity laws that take effect this year.

In late September of 2020, Governor Newsom of California signed into law S.B. 973, making California the first state requiring employers to submit employee data by race and gender. The bill covers only those employees who work in California or are assigned to work at locations in California. The new California pay data reports require employers to report the number of employees by sex, race, and ethnicity:

- (1) In each of the 10 job categories used by the EEO-1 form;

- (2) Whose annual earnings fall within each of the pay bands used by the U.S. Bureau of Labor Statistics in the occupational employment statistics survey; and
- (3) The number of hours worked by each employee.

California's first pay data reports were due March 31, 2021.

Meanwhile, Colorado's Equal Pay Transparency Rules require employers to provide additional transparency related to their employees' pay and promotional opportunities. The rules, which became effective on January 1, 2021, apply to all employers with at least one employee in Colorado. Furthermore, the rules requires employers to provide notice to all Colorado employees of all "promotional opportunities," regardless of work location for that role.

To date, several other states have introduced legislation containing pay disclosure requirements. Namely, Indiana, South Carolina, Massachusetts, and Connecticut all seek to require that employers disclose to job applicants requesting such information a wage range for their posted and current positions. A similar bill in Virginia was not enacted.

### **WHAT FEDERAL CONTRACTORS CAN EXPECT**

While it is clear that these new laws, regulations, and policies will impact businesses broadly, federal contractors should take particular note of the changes that are coming. Currently, federal contractors are required by 41 CFR 60-2.17(b) to perform in-depth analyses of their total employment processes that include an analysis of their compensation system(s) to determine whether there are gender, race, or ethnicity-based disparities. However, existing regulations do not provide guidance as to how federal contractors are to conduct this evaluation.

In fact, in 2018, OFCCP issued DIR 2018-05, Analysis of Contractor Compensation Practices During a Compliance Evaluation, which outlined its standard procedures for reviewing contractor compensation practices during a compliance evaluation.

OFCCP's intent was that this directive would provide clear guidance to contractors, result in more effective self-auditing, and benefit American workers by facilitating the elimination of pay discrimination. However, it is unclear whether this directive has had much of an impact.

With so many new changes underway at both the federal and state level, federal contractors should anticipate greater scrutiny related to their compensation policies and practices and should expect OFCCP changes related to pay equity that may amend DIR 2018-05.

To prepare for these changes and others that may flow from pending federal and state legislation, federal contractors should consult with counsel and

determine whether having a voluntary pay equity audit to identify and resolve race and gender-based compensation disparities makes sense and if so, who should conduct it.

They should also consult with counsel to implement business practices that will remove barriers to pay equity that they identify.