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Preventing Wage Secrecy in DC: Another Layer to the Regulatory Cake

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On March 11, 2015, the District of Columbia's Wage Transparency Act of 2014 (the "Act") took effect. The Act makes it unlawful for employers to prohibit employees from discussing their wages, and also prohibits employer retaliation against those who do. Significantly, the Act requires the Mayor to assess civil fines against offending employers in progressively higher amounts for repeated violations.

For employers located in DC, the Act represents another layer in a regulatory scheme already aimed at preventing wage secrecy. Similar to the Act, the National Labor Relations Act (NLRA), passed by Congress in 1935, is now interpreted to require that employers not prohibit employees (both unionized and non-unionized) from discussing their wages, hours, and other terms and conditions of employment. Recently, National Labor Relations Board General Counsel Richard Griffin issued a report surveying common employer rules that would likely be deemed unlawful because employees could reasonably construe them to prohibit their discussion of wages or working conditions, such as a rule requiring confidentiality of employee information.¹

The current Administration has also weighed in on this issue. On April 8, 2014, President Obama issued Executive Order 13665, entitled "Non-Retaliation for Disclosure of Compensation Information." Containing similar provisions, the Executive Order prohibits federal contractors from discharging or discriminating against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. On September 17, 2014, the Office of Federal Contract Compliance Programs (OFCCP) issued a proposed rule designed to implement the Executive Order. A final rule is expected in the coming months.

Despite their similarities, the Act, the NLRA, and the Executive Order have important differences with regard to scope and penalties.

The Act's Broad Prohibitions on Adverse Employment Action and Retaliation

A key purpose of the Act is to close the wage gap between male and female employees. According to DC's Council Committee report on the measure, "[i]n order to detect and combat pay discrimination, employees must be able to voluntarily share salary information with their coworkers without fear of punishment."

¹ See Fred Miner and Adam Tuzzo, [NLRB General Counsel Issues Report Concerning Legality of Common Employer Rules](#) (Mar. 25, 2015).

To meet this goal, the Act casts a wide net. It prohibits employers from limiting an employee, as a condition of employment, from inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of another employee. Moreover, as applied to the Act, an "employee" is expansively defined as "an individual employed by an employer," thus covering managers, supervisors, and non-supervisory employees alike.

The Act also prohibits an employer from taking an adverse employment action against an employee for discussing his or her wages. This means that an employer may not discharge, discipline, interfere with, or otherwise retaliate against an employee who inquires about, discloses, compares, or otherwise discusses the employee's wages or the wages of another employee. It also protects perceived discussion of wages—whether or not such a discussion actually took place.

Retaliation against an employee for engaging in conduct protected by the Act is prohibited. Accordingly, an employer may not prohibit or attempt to prohibit an employee from lodging a complaint, or testifying, assisting, or participating in an investigation or proceeding, related to a violation of the Act. The employer and the employee cannot by private agreement waive any of the Act's protections prospectively.

Exceptions to the Act: An Employer *Can* Prohibit Wage-Sharing by HR Officials, and in Response to Inquiries by Employees

Despite the Act's purpose of promoting wage transparency, an employer may nonetheless prohibit an employee with "regular access" to information about employees' wages in the course of the employee's work, such as a human resources representative, from sharing the information. However, an employer may not prohibit such information-sharing if the disclosure is in furtherance of or response to an investigation, action, or hearing, or the employer otherwise has a legal obligation to furnish the information.

The Act does not, however, require an employer to disclose the wages of an employee in response to an inquiry by another employee. Similarly, an employee is not required to disclose his or her wages in response to an inquiry by another employee.

Hefty Fines

Penalties for failing to comply with the Act are substantial. If an employer is found in violation of the Act, the Mayor will assess a civil fine in the amount of \$1,000 for the first violation, \$5,000 for the second violation, and \$20,000 for each subsequent violation.

Differences Among the Three Regulatory Approaches

Employers should understand the key differences among the Act, the NLRA, and Executive Order 13665. These include:

Employers Covered

- Of course, the NLRA is nationwide in scope. The Act generally covers private-sector employers in DC. On the other hand, only employers that are certain federal contractors must comply with the Executive Order.

Employees Covered

- The Act and Executive Order protect managers and supervisors in addition to non-supervisory employees, whereas the NLRA generally does not protect "supervisors" who fall within Section 2(11) of the NLRA.
- Like the Act, the Executive Order does not protect an employee who has access to employees' salary information as part of that employee's "essential job functions," unless the disclosure is in response to a formal complaint or charge, is in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the employer's legal duty to furnish information.
- The NLRA and Executive Order generally protect job applicants. It is unclear whether the Act's scope extends to job applicants.
- Through its proposed rule implementing the Executive Order, the OFCCP extends protection to agricultural workers and employees of rail and air carriers, employees generally not protected by the NLRA. The Act also applies to these categories of employees, to the extent they are working in DC.

Conduct Prohibited

- Unlike the NLRA—which only safeguards “concerted activity” between two or more employees—the Executive Order and the Act take a more expansive approach, protecting a single employee who discusses wages.
- Unlike the Act and the Executive Order, the NLRA protects employees who discuss not only wages, but hours and other terms and conditions of employment.

Penalties

- The Act subjects offending employers to progressively steeper fines for subsequent violations. If violations of the NLRA are found, remedies include back-pay and reinstatement. Among other remedies, the OFCCP’s proposed rule contemplates termination of a violating employer’s federal contract.

Additional Local Efforts

Employers in Maryland should also be aware of similar state and local efforts. Recently, Maryland’s Montgomery County passed its own wage secrecy law, entitled “Retaliation for Wage Disclosure—Prohibited”, which is slated to take effect on May 13, 2015. Like the Act, Montgomery County’s law prohibits an employer from discharging or in any other manner discriminating or retaliating against an employee because he or she has inquired about, discussed, or disclosed the wages or the employee or another employee, or has asserted any such right. The prohibition, however, does not apply to an employee who has access to other employees’ or applicants’ wage information as part of the employee’s essential job functions, and discloses such information to individuals who do not otherwise have access to the information, unless the disclosure is 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 is consistent with the employer’s legal duty to furnish information.

A similar bill was introduced in the Maryland Senate (Senate Bill 425, “Wage and Disclosure and Discussion Protection”).

Recommendations for Employers

Employers in the DC metro region are potentially subject to several regulatory schemes with varying degrees of overlap. Therefore, employers are advised to review their current policies in light of these varying requirements.

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