



MEMORANDUM

Equal Pay: Banning Salary History Inquiries and
Requiring Transparency in Job Posting Salary
Ranges for Federal Contractors

November 2020

I. Summary

Race and gender wage gaps—for women, people of color, and mothers—are pernicious and persistent. They are also likely to be exacerbated by the COVID-19 pandemic, making action to address pay disparities more urgent than ever.

Starting with the federal contracting workforce (which comprises approximately 20% of the U.S. workforce),¹ the next administration should bring new transparency to employers' pay practices by issuing an executive order that:

- (1) prohibits federal contractors from seeking or relying on an applicant's salary history during the hiring process to set their pay, or when setting pay for a current job or promotion; and
- (2) requires federal contractors to disclose salary ranges in job postings.

II. Justification

In 2019, women in the United States who worked full-time, year-round, were typically paid just eighty-two cents for every dollar paid to men.² For many women of color, including Latinas (fifty-five cents), Native women (sixty cents), Native Hawaiian and Pacific Islander women (sixty-three cents), and Black women (sixty-three cents), the pay gap relative to white, non-Hispanic men was even more stark.³ While Asian women overall experienced a smaller gap relative to white, non-Hispanic men (eighty-seven cents on the dollar), some groups of Asian women experienced very large gaps.⁴ Parental status also matters considerably for women: mothers, mothers of color, and unmarried mothers were all paid substantially less than fathers, and researchers have identified motherhood as a key contributor to the wage gap.⁵

The COVID-19 pandemic is likely to exacerbate the challenges women face in hiring, promotion, and advancement. Women have borne the brunt of layoffs,⁶ taken on a disproportionate share of caregiving for children in this time of incredible uncertainty,⁷ and are likely to be "on call" for their families as shutdowns continue or recur over the next year or more—these trends hold both in two-parent, opposite-gender families, in which women's wages are lower than men's, and in single-parent, female-headed families. In addition, among women who have remained on the front lines of the crisis—in essential retail, sales, and food service jobs, and in the health care sector—lack of access to guaranteed paid leave for health or caregiving may also contribute to job losses or workplace retribution. Each of these factors contributes to the likelihood that more women will cycle in and out of work or reduce their hours than in typical times. In addition, heightened gender bias is a risk: employers may find themselves more likely to implicitly question women's ability to work reliably until the pandemic passes. All of this could affect women's wages during and post-pandemic.

¹ *History of Executive Order 11246*, Dep't of Labor, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited Sep. 24, 2020).

² National Women's Law Center, *The Wage Gap: The Who, How, Why, and What to Do* (Oct. 2020), <https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf>.

³ *Id.*

⁴ National Women's Law Center, *Equal Pay for Asian American and Pacific Islander Women* (Jan. 2020), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/03/A-API-EPD-1.30.2020.pdf>

⁵ National Women's Law Center, *Effects of COVID-19 Show Us Equal Pay Is Critical for Mothers* (May 2020), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/05/Moms-EPD-2020-v2.pdf>

⁶ Leticia Miranda, 'Historic and unprecedented': Women have been hit hardest by coronavirus layoffs, *NBC News* (Jun 8, 2020), <https://www.nbcnews.com/business/business-news/women-hit-hardest-coronavirus-layoffs-are-we-heading-she-cession-n1226256>; Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey CPS CPS Program Links A-10. Unemployment rates by age, sex, and marital status, seasonally adjusted* (Accessed Sept 9, 2020), <https://www.bls.gov/web/empsit/cpseea10.htm>.

⁷ Claire Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling. 3 Percent of Women Agree.* (May 6, 2020), <https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html>.

The proposed executive order would target these inequities and further advance the federal government's pre-existing nondiscrimination policies.⁸

Salary History Ban

Prohibiting consideration of an applicant or employee's prior salary in hiring and promotions is essential, because, over the course of a woman's career, the effects of a low wage or salary in one job can follow her to another. Absent regulation, employers often take an applicant's or employee's wage history into account when setting their pay in a new position or upon a promotion. Ultimately, as a result of perpetuated wage gaps, caregiving interruptions and low pay overall, women lose hundreds of thousands of dollars or more over the course of their working lives, with the largest losses accruing to groups of women who suffer the largest wage differentials relative to men.⁹ Men of color face similar dynamics.

Salary history bans have been shown to have a particularly substantial impact on groups that have faced the greatest discrimination in pay, raising wages for job-changers by an average of 8% for women and 13% for African-Americans compared to control groups, according to a Boston University analysis of the effects of salary history bans in a number of states.¹⁰ Other studies show effects on narrowing the wage gap between women and men, especially for women with young children.¹¹

Salary Range Disclosure

Providing more information to applicants about a position's salary range reduces information asymmetries between employees and employers in the hiring process and better enables employee negotiation for market-rate compensation. Women are less likely to negotiate for higher pay than men when they receive a job offer: in part, no doubt, because women who negotiate for higher pay are perceived more negatively than men who negotiate; and in part because, based on their own prior experience with compensation, women are likely to expect and accept lower pay than men, assuming that such pay is consistent with the market rate. Revealing a position's salary range is an important negotiation prompt and provides some brake on pay discrimination in initial offers.¹² As the Department of Labor recognized in the commentary accompanying its final rule implementing the non-retaliation EO, "[p]ay secrecy policies interfere with the Federal Government's interest in efficiency in procurement. Economy and efficiency in Federal procurement require that contractors compensate employees under merit-based practices, without any barriers to success."¹³

⁸ Non-Retaliation for Disclosure of Compensation Information, 79 Fed. Reg. 20,749 (Apr. 11, 2014) (Sec. 1: "It is the policy of the executive branch to enforce vigorously the civil rights laws of the United States, including those laws that prohibit discriminatory practices with respect to compensation. Federal contractors that employ such practices are subject to enforcement action, increasing the risk of disruption, delay, and increased expense in Federal contracting. Compensation discrimination also can lead to labor disputes that are burdensome and costly. When employees are prohibited from inquiring about, disclosing, or discussing their compensation with fellow workers, compensation discrimination is much more difficult to discover and remediate, and more likely to persist. Such prohibitions (either express or tacit) also restrict the amount of information available to participants in the Federal contracting labor pool, which tends to diminish market efficiency and decrease the likelihood that the most qualified and productive workers are hired at the market efficient price.")

⁹ National Women's Law Center, *Women and the Lifetime Wage Gap: How Many Woman Years Does it Take to Equal 40 Man Years?* (Mar. 2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/03/Women-and-the-Lifetime-Wage-Gap-v1.pdf>.

¹⁰ Bessen, James E. and Meng, Chen and Denk, Erich, *Perpetuating Inequality: What Salary History Bans Reveal About Wages* (June 1, 2020). <http://dx.doi.org/10.2139/ssrn.3628729>

¹¹ Benjamin Hansen and Drew McNichols, *Information and the Persistence of the Gender Wage Gap; Early Evidence from California's Salary History Ban*, (Apr. 2020), <https://www.nber.org/papers/w27054.pdf>.

¹² National Women's Law Center, *Salary Range Transparency Reduces the Wage Gap*, (Jan 2020), <https://nwlc.org/wp-content/uploads/2018/06/Salary-Range-and-Transparency-FS-2020-1.17.2020-v2.pdf>.

III. Background and Current State

In 1965, President Lyndon B. Johnson took the first steps to root out discriminatory hiring practices among federal contractors by issuing Executive Order 11246, which required affirmative action policies and prohibited contractors from making employment decisions on the basis of race, color, religion, or national origin.¹⁴ Today, after subsequent amendments, EO 11246 prohibits discrimination on the basis of sex, sexual orientation, or gender identity as well.¹⁵

Obama Administration Efforts to Close the Pay Gap

In April 2014, President Obama issued Executive Order 13665 (non-retaliation EO), which amends Section 202 of EO 11246 to prohibit federal contractors from retaliating against employees who discuss their compensation.¹⁶ The Office of Federal Contract Compliance Programs (OFCCP) issued final rules implementing the non-retaliation EO in September 2015;¹⁷ the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) published an interim rule amending Federal Acquisition Regulations (FAR) in 2016, and published a final rule without changes from the interim rule in August 2018.¹⁸ The EO and its regulations are still in force. This is in contrast to the Obama actions related to compensation data disclosure by employers, which hit initial roadblocks during the Obama administration and met an even worse fate during the Trump years.¹⁹

The Obama administration also directed the Office of Personnel Management (OPM) to focus on the federal government's own pay practices. In 2014, the OPM pledged to work with federal agencies to require disclosure of salary information in job postings for both GS and non-GS jobs, expanding from prevailing law, which had only required the posting of starting salaries in job postings in GS jobs.²⁰ The next year, the OPM issued a memorandum directing agencies to limit the use of an applicant's salary history in setting their pay.²¹

¹³ Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54,934, 54,937 (Sept. 11, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-09-11/pdf/2015-22547.pdf>.

¹⁴ *History of Executive Order 11246*, Dep't of Labor, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited Sep. 2, 2020).

¹⁵ Office of Federal Contract Compliance Programs, *Executive Order 11246*, Dep't of Labor, <https://www.dol.gov/agencies/ofccp/executive-order-11246> (last visited Sep. 24, 2020).

¹⁶ Non-Retaliation for Disclosure of Compensation Information, 79 Fed. Reg. 20,749, (Apr. 11, 2014).

¹⁷ Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54,933, (Sept. 11, 2015).

¹⁸ Federal Acquisition Regulation: Non-Retaliation for Disclosure of Compensation Information, 83 Fed. Reg. 42, 570, (Aug. 22, 2018).

¹⁹ In 2014, the Obama administration sought to require federal contractors to disclose aggregate compensation data by race and gender to OFCCP and the EEOC. Ultimately, in 2016, the administration adjusted course and, rather than requiring disclosure only by federal contractors, it mandated disclosure of compensation data by race, gender, salary band, and occupation category for all private employers with 100 or more employees using a new component of EEOC's EEO-1 reporting form, beginning in 2017. Before data collection was due in 2017, the Trump administration sought to stop reporting but following litigation initiated by the National Women's Law Center, the EEOC was ordered to collect compensation information from employers for 2017 and 2018 and it did so. In 2019, however, the EEOC proposed a revision to EEO-1 reporting that eliminates component 2 reporting and the agency said it would not analyze the data it had collected for 2017 and 2018; recently, however, the EEOC backtracked on the 2017 and 2018 data analysis and announced a contract with the National Academy of Science, Engineering and Medicine's Committee on National Statistics. For more information, see Amy Conway et al., End to EEO-1 Component 2 Pay Data Reporting for Now..., JD Supra (Mar 2, 2020), <https://www.jdsupra.com/legalnews/end-to-eeo-1-component-2-pay-data-203553/>; see also Equal Employment Opportunity Commission Announces Analysis of EEO-1 Component 2 Pay Data Collection | US Equal Employment Opportunity Commission, (Jul. 16, 2020).

²⁰ Office of Personnel Management, Governmentwide Strategy on Advancing Pay Equality in the Federal Government 3-4 (Apr. 2014), <https://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/reports/governmentwide-strategy-on-advancing-pay-equality-in-the-federal-government.pdf>.

²¹ Chief Human Capital Officers Council, Additional Guidance on Advancing Pay Equality in the Federal Government, (Jul. 30, 2015), <https://www.chcoc.gov/content/additional-guidance-advancing-pay-equality-federal-government>.

Legislative Efforts to Prohibit Reliance on Salary History and Require Transparency as to Salary Ranges; Recent Court Interpretations

Since 2016, fourteen states and several localities have implemented restrictions on salary history inquiries and reliance on salary history in pay-setting by private sector employers; more have restricted the use of salary history in state or municipal employee hiring.²² Boston University researchers estimate that approximately one-fourth of all workers are in states that restrict or ban the use of prior salary history in hiring or promotions.²³ In addition, three states have adopted requirements around the disclosure of salary ranges in job postings or hiring processes (California, Colorado, Washington).²⁴ States enacted all of these laws following the 2014 federal non-retaliation executive order, and premised them on the same rationale: that creating more transparency around compensation (i) helps to correct the information asymmetries that hold women and people of color back in achieving pay equity, and (ii) tends to reduce biases in pay-setting by employers.

Congress has considered relevant legislation related to salary history, as well. Most recently, in April 2019, the U.S. House of Representatives passed H.R. 7, the Paycheck Fairness Act (PFA), by a vote of 242 -187; seven Republicans joined every Democrat in supporting the bill.²⁵ PFA prohibits employers from inquiring about an applicant's wage history or relying on an applicant's prior wage history to determine an employment salary offer, among many other provisions aimed at reducing and addressing pay discrimination.²⁶ An earlier version of the Paycheck Fairness Act, which did not include the salary history provision, passed the House in 2009 with bipartisan support at the same time as the chamber voted for the Lilly Ledbetter Act. The bill reached the Senate floor in 2014, but failed to secure the sixty votes needed for cloture.

In addition to these legislative efforts, several federal courts of appeal have held that under the Equal Pay Act, employers may not rely on salary history as a defense for paying a woman less than a man for equal work.²⁷ Thus, federal contractors who set pay based on salary history are vulnerable to legal challenge pursuant to federal and, in many cases, state law.

²² Workplace Fairness, *Your Rights: Salary History Disclosure*, (Accessed Sept. 9, 2020), <https://www.workplacefairness.org/salary-history-disclosure>; National Women's Law Center, *ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB*, (Dec. 2018), <https://nwlc.org/wp-content/uploads/2018/12/Asking-for-Salary-History-Perpetuates-Discrimination-1.pdf>.

²³ Bessen, James E. and Meng, Chen and Denk, Erich, *Perpetuating Inequality: What Salary History Bans Reveal About Wages* (June 1, 2020). <http://dx.doi.org/10.2139/ssrn.3628729>

²⁴ National Women's Law Center, *SALARY RANGE TRANSPARENCY REDUCES THE WAGE GAP*, (Jan. 2020), <https://nwlc.org/wp-content/uploads/2018/06/Salary-Range-and-Transparency-FS-2020-1.17.2020-v2.pdf>.

²⁵ H.R. 7, *Vote Details*

²⁶ House Res. 7, "Paycheck Fairness Act" <https://www.congress.gov/bill/116th-congress/house-bill/7/text>.

²⁷ See, e.g., *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (prior salary alone cannot justify a pay disparity); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (finding that a beer distributor improperly used a female hire's previous salary to set her pay significantly lower than that of her male predecessor, her male successor, and other male employees performing the same job); *Angove v. Williams-Sonoma, Inc.*, 70 F. Appx 500, 508 (10th Cir. 2003) (citing *Irby* to find that the EPA "precludes an employer from relying solely upon a prior salary to justify pay disparity"); *Rizo v. Yovino*, 950 F.3d 1217, 1228 (9th Cir. 2020) (en banc) ("[T]he history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex. And allowing prior pay to serve as an affirmative defense would frustrate the EPA's purpose as well as its language and structure by perpetuating sex-based wage disparities."); see also, e.g., *Cole v. N. Am. Breweries*, No. 1:13-cl-236, 2015 WL 248026, at *10 (S.D. Ohio Jan. 20, 2015); *Faust v. Hilton Hotels Corp.*, 1990 WL 20615, at *5..

IV. Proposed Action

Issue an executive order amending Section 202 of EO 11246 that:

prohibits federal contractors from seeking or relying on applicants' salary history, even if voluntarily disclosed, to set future pay for initial hires or promotions;

- (1) requires employers to disclose the anticipated salary range for a position in job postings; and
- (2) directs the Department of Labor to propose implementing regulations within ninety days, which will include provisions setting out enforcement mechanisms for these requirements.

Legal Authority and Implementation

Among other sources of power to regulate federal contractors, the President has the legal authority to issue executive orders to promote the “economy” and “efficiency” in federal contracting under the Federal Property and Administrative Services Act (FPASA).²⁸ FPASA directly provides that “[t]he President may prescribe policies and directives that the President considers necessary to carry out this subtitle.”²⁹ For decades, presidents of both parties have used this authority to issue executive orders that impact federal contracts and the employment practices of federal contractors.³⁰

To invoke the President’s authority under FPASA, the President must assert that the action in question promotes economy and efficiency in federal procurement. During the Obama administration, supporting this assertion required two components: (1) the Council of Economic Advisors conducted an assessment of economy and efficiency to accompany each proposed executive order, and (2) the Office of Legal Counsel at the Department of Justice signed off on that assessment before the administration published the order.

The proposed action builds upon the foundation laid by EO 11246, which courts have uniformly recognized promotes economy and efficiency in federal procurement, and thus lies within the President’s authority pursuant to FPASA.³¹ The proposed action would fulfill the FPASA economy and efficiency requirements by minimizing the risk of pay discrimination litigation (and its associated costs), and maximizing the information available to applicants and employees about fair market prices for their labor. Like the non-retaliation EO, the proposed action aims to promote compensation transparency and correct information asymmetries that perpetuate and obfuscate pay discrimination, and thus would “promote economy and efficiency in Federal Government procurement, potentially contribute to the economic security of working women and their families, and support enforcement of nondiscrimination and equal employment opportunity protections.”

²⁸ P.L. 81-152, 63 Stat. 377 (June 30, 1949) (codified in Title 40 (government-wide) and Title 41 (civilian agencies) of the US Code). For more background, see Vanessa K. Burrows & Kate M. Manuel, Presidential Authority to Impose Requirements on Federal Contractors (2011), available at <https://fas.org/sgp/crs/misc/R41866.pdf>.

²⁹ 40 U.S.C. § 121.

³⁰ The Obama administration relied upon this authority to issue a number of other executive orders related to federal contract workers, for example, requiring federal contractors to provide paid sick days to workers on federal contracts; forbidding them from discriminating on the basis of sexual orientation or from retaliating against employees who inquire about, discuss, or disclose their pay or compensation. See Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 67,598, (Nov. 29, 2016), <https://www.federalregister.gov/documents/2016/09/30/2016-22964/establishing-paid-sick-leave-for-federal-contractors>; Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 Fed. Reg. 42971, (Jul. 23, 2014), <https://www.federalregister.gov/d/2014-17522>; Non-Retaliation for Disclosure of Compensation Information, 79 Fed. Reg. 20749, (Apr. 11, 2014), <https://www.federalregister.gov/d/2014-08426>.

³¹ E.g., *Contractors Ass’n of E. Pa. v. Sec’y of Lab.*, 442 F.2d 159, 170 (3d Cir. 1971); *United States v. Miss. Power & Light Co.*, 638 F.2d 899, 905 (5th Cir. 1981); *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1514 (11th Cir. 1985); *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 466-67 (5th Cir. 1977), vacated on other grounds by 436 U.S. 942 (1978); *Farkas v. Tex. Instr., Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967), cert. denied, 389 U.S. 977 (1967); *Farmer v. Phil. Elec. Co.*, 329 F.2d 3 (3d Cir. 1964); *Leg. Aid Soc. v. Brennan*, 381 F. Supp. 125, 130 (N.D. Cal. 1974).

A diverse workforce and equitable employment practices can confer a wide array of benefits on a company, including decreased risk of liability, access to the best talent, increased employee satisfaction and productivity, increased innovation, an expanded consumer base, and stronger financial performance.³³ Competitive—and thus equal—pay is critical for recruiting and retaining a diverse workforce and high performers, particularly for younger women workers.³⁴ And when workers are confident they are being paid fairly, they are more likely to be engaged and productive,³⁵ which will increase the value the federal government receives on its contracts.

One potential problem is that, if successful, the proposed action will raise salaries, costs which could be passed on to the federal government in apparent contravention of the “economy” and “efficiency” requirements of the FPASA.³⁶ Fortunately, the Obama administration overcame a similar problem in its executive order raising the minimum wage for federal contractors, by arguing the policy promoted economy and efficiency despite the higher costs associated with raising salaries because pay raises would, “increase[] [workers’] morale and the productivity and quality of their work, lower[] turnover and its accompanying costs, and reduce[] supervisory costs.”³⁷ Similar reasoning would help justify this proposed action.

After the White House issues an executive order, two agencies must issue rules implementing it.

First, the Office of Federal Procurement Policy (OFPP) at the Office of Management and Budget must update the FAR to ensure that new contracts issued mirror the executive order’s requirements. OFPP’s rulemaking process requires relatively straightforward documentation, but involves consultation with the Federal Acquisition Regulatory Council (FARC), which is a particularly involved and bureaucratic multi-agency process requiring the agreement of councils for defense acquisition and civilian acquisition.³⁸

Second, the Secretary of Labor (through the Office of Federal Contract Compliance Programs (OFCCP)) must promulgate regulations to implement and enforce the salary history and salary range requirements. Explicitly empowering the Secretary in the executive order will trigger an additional agency-specific rulemaking. For example, the non-retaliation EO directed the Secretary of Labor to propose regulations to enforce the order within 160 days.³⁹ Because the FARC process is highly-involved, the OFCCP rule will be issued before the FAR rule. This is desirable because the latter must properly incorporate the guidance provided by the former.

³² Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54,934, 54,940 (Sept. 11, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-09-11/pdf/2015-22547.pdf>.

³³ Id.; See Vivian Hunt, Dennis Layton, & Sara Prince, *Why Diversity Matters*, McKinsey & Co. 9-13 (Jan. 2015) (finding diverse workforces correlate with better financial performance, because diversity helps to recruit the best talent, enhance the company’s image, increase employee satisfaction, and improve decision making, including fostering innovation); Sylvia Ann Hewlett, Melinda Marshall & Laura Sherbin, *How Diversity Can Drive Innovation*, Harv. Bus. Rev. (Dec. 2013), <https://hbr.org/2013/12/how-diversity-can-drive-innovation>. Conversely, companies that fail to address gender wage disparities and discriminatory employment practices could damage their reputation and brand among consumers, leading to a loss of profits and shareholder value. Natasha Lamb & Will Klein, *A Proactive Approach to Wage Equality is Good for Business*, Employment Relations Today (Summer 2015), <http://arjuna-capital.com/news/a-proactive-approach-to-wage-equality-is-good-for-business/> [Proactive Approach].

³⁴ A recent survey found that the top reasons Millennials and Gen Zs plan to leave their current employment in the next two years are “[d]issatisfaction with pay and lack of advancement and professional development opportunities.” The Deloitte Global Millennial Survey 2019 (2019), <https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html>; Lauren Noel & Christie Hunter Arcscott, *Millennial Women: What Executives Need to Know About Millennial Women* 4, ICEDR (2015), http://www.icedr.org/research/documents/14_millennial_snapshot.pdf (Millennial women leave jobs primarily for more compensation).³⁵ Courtney Seiter, *The Counterintuitive Science of Why Transparent Pay Works*, Fastcompany.com (Feb. 26, 2016), <http://www.fastcompany.com/3056975/the-future-of-work/the-transparent-pay-revolution-inside-the-science-and-psychology-of-open->

³⁶ For a fuller sense of this critique, see Eugene Scalia and Rachel Mondl, “Obama’s minimum-wage increase is on shaky legal ground,” Wash. Post (Feb. 20, 2014), https://www.washingtonpost.com/opinions/obamas-minimum-wage-increase-is-on-shaky-legal-ground/2014/02/20/16509b42-999c-11e3-b931-0204122c514b_story.html.

³⁷ Executive Order -- Minimum Wage for Contractors, The White House (Feb. 12, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors>.

³⁸ See generally Office of the Secretary of Defense, Defense Acquisition System Rulemaking Process, https://www.acq.osd.mil/dpap/ops/docs/Defense_Acquisition_Regulations_System_Rulemaking_Process_Fact_Sheet.pdf (last accessed May 11, 2020).

³⁹ Executive Order 13665.

Policy Considerations

Scope of federal contracts covered

Like EO 11246 and the non-retaliation EO, the proposed action would apply to both larger and smaller government contractors, including: “any business or organization 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 combined total in excess of \$10,000 in any 12-month period; or (3) holds Government ~~lo~~ 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.”⁴⁰ It would also apply to Federal Acquisition Regulation contracts as the non-retaliation EO does.⁴¹ Using the same logic and analysis as applied in the non-retaliation EO context, there should be ~~an~~ exemption for small firms, as the proposed action would not impose substantial costs on them.

Scope of prohibition on relying on or seeking applicants’ or employees’ prior salary

The salary history ban would redress the information asymmetry in the hiring process, while also affording applicants greater leverage in salary negotiations.

The EO should contain the broadest possible language in order to limit contractors’ use of salary history throughout each stage of the hiring process, including but not limited to: including salary history as part of a job application, cover letter, resume or other documents applicants submit; screening applications from people whose current salaries the contractor deems too low or too high; asking for salary history as part of the salary negotiation; seeking salary history from a former employer or third party through a background check or reference check; and determining a new hire’s starting pay based on past or current salary. At the same time, applicants should be able to volunteer their salary history after a contractor makes a job offer that includes proposed compensation in order to negotiate a higher salary, and contractors should be able to confirm a prior salary from a former employer in the context of a negotiation where an applicant volunteers this history.

In order to ensure the strongest defenses are available should the EO be challenged as a violation of the First Amendment, the language of the EO should be crafted specifically to prohibit contractors from both *relying on* and *seeking* applicants’ salary history information. By prohibiting contractor reliance on salary history—i.e., conduct—the EO prohibits activity that is clearly not speech, and also strengthens the arguments for the prohibition on “seeking” that more directly implicates speech. The Supreme Court has long held that the First Amendment does not protect commercial speech that is false, misleading, or related to illegal activity. Only the government’s regulation of accurate commercial speech about legal activity receives intermediate scrutiny. Because the EO would render reliance on prior salary unlawful, an argument is available that inquiries into salary history are inquiries seeking to engage in unlawful activity. *See Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 389 (“Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.”). Even if a court were nevertheless to apply intermediate scrutiny to the prohibition on seeking salary history, however, such a regulation is permissible under relevant precedent, as described further below.

⁴⁰ *Id.*

⁴¹ Federal Acquisition Regulation: Non-Retaliation for Disclosure of Compensation Information, 83 Fed. Reg. 42,570 (Aug. 22, 2018) (FAR final rule, adopting interim rule) Federal Acquisition Regulation: NonRetaliation for Disclosure of Compensation Information, 81 Fed. Reg. 67,732 (Sept. 30, 2016) (FAR interim rule)

In addition, in crafting the EO, it is preferable to prohibit “seeking” salary history rather than simply “asking” prospective employees for their salary history, as the former sweeps in a wider array of conduct, including requesting salary history from former employers or from third-party sources, such as background check vendors.

A national salary history ban for contractors would promote compliance and efficiency by aligning with provisions in states and localities where contractors may already be doing business.

Disclosure of salary ranges in job postings vs. making salary range available to applicants who inquire

Mandated disclosure of salary ranges in job postings directly addresses the information and power asymmetry between employers and applicants/employees, without imposing new burdens for contractors. Such a requirement relies on information that contractors already possess (either in compensation systems or budgets), and increases the efficiency of contractors’ hiring processes by ensuring that a pool of applicants is limited to those who would be willing to accept the position within the indicated salary range.

Mandated disclosure of salary ranges also provides contractors with an incentive to proactively review and evaluate their compensation practices and address any unjustified disparities between employees. It would align federal contractors’ practices with the federal sector’s, where transparent salary ranges and compensation systems are already the norm—and where the much narrower wage gap demonstrates that greater pay transparency helps reduce wage disparities. In contrast, making salary ranges available only upon request fails to promote maximum transparency and keeps the onus on the applicant; it requires applicants to know they have the right to request such information, and assumes that applicants will feel comfortable exercising this right; puts them at risk of retaliation; and requires applicants to initiate enforcement.

Proposed Language

The executive order recommended here could include the following language to describe key substantive provisions, drawn from existing laws:

(a) Prohibition on seeking or relying on salary history

A contractor shall not:

- (1) rely on the wage history of an applicant for employment in considering the applicant for employment, including, but not limited to, requiring that the applicant’s prior wages satisfy minimum or maximum criteria as a condition of being considered for employment;
- (2) rely on the wage history of an applicant for employment in determining the wages such applicant is to be paid by the employer upon hire;
- (3) seek the wage history of an applicant;

(a) Provided, however, that after the contractor makes an initial offer of employment with an offer of compensation to an applicant for employment, a contractor may:

- ⓐ rely on wage history to support a wage higher than the wage offered by the contractor, if wage history is voluntarily provided by the applicant for employment without prompting from the contractor;

(ii) seek to confirm the wage history of the applicant for employment to support a wage higher than the wage offered by the contractor when relying on wage history as permitted in subparagraph (a) above.

(iii) A contractor may rely on wage history in these circumstances only to the extent that the higher wage does not create an unlawful pay differential based on a protected characteristic as set out in EO 11246.⁴²

[Anti-retaliation protection]: (4) refuse to interview, hire, promote, or employ, and may not retaliate against an applicant for employment because they did not provide wage history.

[Within Definitions]: “Wage history” means the wages, salary, or other compensation paid to an applicant for employment by the applicant’s current employer and/or previous employer or employers.

Regulations. Within ninety days of the date of this order, the Secretary of Labor shall propose regulations to implement the requirements of this order.

Severability. If any provision of this order, or the application of such provision or amendment to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

(b) Inclusion of salary ranges in job postings and announcements

A contractor shall not:

(1) fail or refuse to provide an applicant for employment the wage range for the position for which the applicant is applying upon the earliest of the following: in any posting, advertisement or public announcement of an available position; at the applicant’s request; prior to or at the time of inquiring about the applicant’s wage expectations; or prior to or at the time of providing the applicant an offer of compensation;

(2) fail or refuse to provide an employee the wage range for the employee’s job upon hire and at least annually thereafter and upon the employee’s request.

(3) For the purposes of subsection (1), “wage range” means the range that the employer anticipates relying on in setting salary or wages for the position and may include reference to any applicable pay scale, previously determined range of wages for the position, the actual range of wages for those currently holding equivalent positions, or the budgeted amount for the position, as applicable. For the purposes of subsection (2), “wage range” may include reference to any applicable pay scale, previously determined range of wages for the position, or the range of wages for incumbents in equivalent positions, as applicable.

⁴² Alternatively, the EO could include more general language indicating that nothing herein shall limit an applicant’s ability to offer wage history in a negotiation without prompting by the contractor and for the contractor to set pay based on such negotiations as long as such pay setting does not otherwise violate nondiscrimination laws, and leave the rest for regulation.

For inquiries contact:

Better Life Lab @ New America

Vicki Shabo

Senior Fellow: Paid Leave Policy and Strategy

shabo@newamerica.org

National Women's Law Center

Emily Martin

Vice President for Education and Workplace Justice

emartin@nwlc.org

Maya Raghu

Director of Workplace Equality & Senior Counsel

mraghu@nwlc.org