

NWX-DOL ESA OFCCP (US)

Moderator: Lisa Jordan
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1:00 pm CT

Coordinator: Welcome and thank you for standing by. All participants are in listen-only for the duration of today's conference.

This call is being recorded. If you have any objections, you may disconnect at this time.

I would now like to turn the call over to Brenda Stewart. Ma'am, you may begin.

Brenda Stewart: Thank you, (Jennifer) and welcome everyone. Again, my name is Brenda Stewart and I will be your Moderator for today's webinar on OFCCP's Final Rule Prohibiting Pay Secrecy Policies.

Now, throughout this webinar, you may ask our presenters questions, but only through the WebEx chat box.

With me in the room is Margaret Kraak from OFCCP. We also have (Keir Bickerstaff) from the Solicitor's Office. They will be reviewing your

questions and comments coming through the chat box. We will answer as many questions as possible during the webinar. But please note there will be some that we won't be able to get to today. But we will review all of the questions that come in and use them, as appropriate, for your future guidance, including the published Frequently Asked Questions, that's on OFCCP's Web site.

Now, the chat box is located to the right of your screen. Click on the diamond next to the word chat. And when submitting your questions, please make sure it goes to all panelists.

Also note that closed captioning is available at the bottom right hand side of your screen. And at the lower left, you'll also see an area that allows you to expand your viewing area, if you desire.

And now, I'd like to introduce our presenters. Next slide.

Chris Seely is the Branch Chief of Regulatory Legislative and Policy Development in the Office of Federal Contract Compliance Programs. In this position, he develops and implements regulations, policies, and guidance for both federal contractors and for OFCCP staff, and oversees a staff of regulatory analysts and equal opportunity specialists. Most recently, Chris has worked on guidance implementing new protections based on sexual orientation and gender identity, and this final rule that prohibits pay secrecy policies.

Prior to becoming the Policy Branch Chief, Mr. Seely worked as an Equal Opportunity Specialist in OFCCP's Southeast Regional Office in Atlanta. Mr. Seely received his Bachelor's Degree from (Barry College) and his Juris Doctor through the University of Georgia School of Law. Welcome, Chris.

Chris Seely: Thank you.

Brenda Stewart: Also joining us, we have (Jennifer Fry). She's an attorney with the Civil Rights and Labor Management Division of the Office of the Solicitor of Labor. She's advised on the drafting and implementation of this final rule.

Miss (Fry) spent her first two years at the Department serving in the Honors Program. Since joining the Civil Rights and Labor Management Division, Jen has worked on various OFCCP matters, including rulemaking and enforcement projects.

She's also provided legal services to the Office of Labor Management Standards, the Civil Rights Center, the Office of Disability Employment Policy, and the Office of Apprenticeship.

Miss (Fry) received her Bachelor's Degree from Colgate University and her Juris Doctor from the George Washington Law School. Welcome, (Jennifer).

(Jennifer Fry): Thanks, Brenda.

Chris Seely: Ok. Well, thank you everybody for joining us today. On April the 8th, 2014, President Obama signed Executive Order 13665 to prohibit federal contractors from discriminating against workers, for discussing, disclosing, or inquiring about compensation information. The President ordered the Department of Labor to implement the new worker protection through rulemaking, and OFCCP published a final rule that set forth the scope of the protection and new contractor obligations on September 11th, 2015. The rule took effect on January 11th, 2016, earlier this month.

In September, when the final rule was published, we provided a webinar to give background on the final rule and to explain the changes that OFCCP made after considering public comments on the proposed rule that was published in 2014. That webinar is available on our Web site for anyone who missed it or would like more background on the changes from proposed to final rule.

And the objective for today's webinar is to review the basics of the final rule and to provide a number of scenarios to help explain when an employee would be protected in discussing, disclosing, or inquiring about compensation information -- and when the rule may not protect them.

We will also quickly highlight how we'll operationalize these requirements. And while we may not address every question that you have, our Web site does have many FAQs, a Fact Sheet, and other helpful resources, including a link to the final rule and the Electronic Code of Federal Regulations. And all of those resources may address your questions. Next slide.

Executive Order 13665 adds a prohibition to the current list of protected basis in Executive Order 11246, which already covers race, color, religion, sex, sexual orientation, gender identity, and national origin. And now in addition to those groups, covered federal contractors and subcontractors are prohibited from discriminating against employees and applicants because they discussed, inquired about, or disclose their own compensation, or the compensation of others.

The basic protections afforded by the Executive Order as amended apply to applicants and employees of federal contractors, subcontractors, and federally assisted construction contractors and subcontractors who hold over \$10,000 in government contracts in one year.

Contractors must comply with the provisions of the Final Rule when they enter into or modify contracts and subcontracts on or after the rules of January 11th, 2016 date. And next slide. (Jennifer)?

(Jennifer Fry): There are many reasons underpinning the issuance of the Executive Order on Pay Secrecy and these final rules implementing that order. Despite the existence of laws protecting workers from gender-based compensation determination, the pay gap between men and women persists.

2014 wage data from the US Census and Bureau of Labor Statistics shows that women make between 79 and 83 cents for every dollar men make. The pay gap between white men and people of color also persists. 2014 data from the Bureau of Labor Statistics shows that African-American men earn 76% of the median weekly earnings of white men. And African-American women earn only 68% of the median weekly earnings for white men.

Among the possible contributing factors to the enduring pay gap is the prevalence of workplace prohibitions on discussing compensation. By prohibiting discrimination against workers who discuss, inquire about, or disclose compensation. This final rule will help prevent workers from being disciplined or fired for trying to learn if they are victims of compensation discrimination.

Both the Final Rule and Sections 7 and 8 of the National Labor Relations Act prohibit covered employers from discriminating against employees and job applicants who discuss or disclose their own compensation or that of others, however, the final rule extends those protections to additional categories of workers, including supervisors and managers, among others. Next slide, please.

The final rule makes specific changes to the regulations implementing Executive Order 11246 and 41 CFR Part 60. In the definition section, located at 41 CFR 60-1.3, the final rule adds definitions for compensation, compensation information, and essential job function.

In 41 CFR 60-1.4, the final rule inserts a new paragraph in the Equal Opportunity Clause to include a new non-discrimination provision mandated by the amended Executive Order.

The final rule also changes the EO clause's outdated reference to Deputy Assistant Secretary to Director of OFCCP.

Finally, the rule adds 60-1.35, which not only describes potential defenses for contractors, but also requires contractors to notify employees and job applicants of the non-discrimination protection.

Now, I'll turn it back to Chris and we'll go into more detail about each of these sections.

Chris Seely: Ok. Well, the first section we'll go over is 41CFR 60-1.4. The final rule amends the Equal Opportunity Clause for federal contracts and sub-contracts, and for federally-assisted construction contracts and sub-contracts by inserting a new paragraph which explicitly states the new non-discrimination provisions mandated by the Executive Order.

As a result, the Equal Opportunity Clause now prohibits covered federal and federally-assisted construction contractors and sub-contractors from discharging or in any manner discriminating against employees or applicants

because they inquired about, discussed, or disclosed their compensation or the compensation of others.

As stated earlier, the amended EO clause will apply to cover contracts and sub-contracts entered into or modified on or after the January 11th, 2016 final rule effective date.

Brenda Stewart: Ok, Chris. We've had a question that's come in.

Chris Seely: Ok.

Brenda Stewart: Where can contractors find this amended EEO clause? I'm sorry, EO clause.

Chris Seely: Ok. Well, the Equal Opportunity Clause is located in the language of Executive Order 11246 in Section 202. It's also available in the final rule, which was published in the Federal Register on September 11th, 2015. And it's now also available in the Electronic Code of Federal Regulations.

The links to all of these locations can be found on our Pay Transparency Landing page, which is available on our Web site.

Brenda Stewart: Ok. We also have another question related to the EO clause.

Chris Seely: Ok.

Brenda Stewart: If the contractor already references the OFCCP EO Clause in its purchase orders, or sub-contracts, does the contractor now have to do anything else to the EO Clause reference that it previously used?

Chris Seely: That's a good question. No. Nothing else has to be done under the amended Executive Order. The contractor can continue to reference that Equal Opportunity Clause, or to use it in its entirety in their sub-contracts' purchase orders.

Brenda Stewart: Thanks, Chris.

Chris Seely: Ok. All right. Well, then let's move to the next slide. This slide goes over Section 41 CFR 60-1.35(c). These are the dissemination provisions. So, in addition to amending the Equal Opportunity Clause, covered federal contractors must also incorporate the pay transparency non-discrimination provision into their employee manuals or handbooks, and they must post the provisions for employees and job applicants in a conspicuous place using language prescribed by the Director of OFCCP that's available on our Web site.

And we made the provision available in two different formats -- one that we designed mainly for printing and placing in employee manuals and handbooks, and one that's designed to be used more as a poster for contractors that choose to physically post the language in a conspicuous place, or to be used for electronic dissemination.

Also, to be clear, the requirement to post the Pay Transparency Non-discrimination Provision is separate from the requirement to post the EEO is the Law poster and the EEO is the Law poster supplement.

Brenda Stewart: Ok, Chris. While you're talking about this requirement, we have some questions coming in.

Chris Seely: All right.

Brenda Stewart: Is the posting requirement for this new non-discrimination provision satisfied if a contractor posts an EEO is the Law poster?

Chris Seely: The answer to that is no. The posting requirements are separate. Though OFCCP published the supplement to the EEO is the Law poster on our Web site and that supplement does include a reference to the final rule protections, the contractors are required to post a pay transparency non-discrimination provision that's available on our Web site, which describes the new non-discrimination provisions. And they are required to post it separately from the EEO is the Law poster supplement.

So let me just go over those posting requirements one more time. There's three. One, the EEO is the Law poster. That's on our Web site. It'll be denoted as having been revised in 2009. There's the number two, the EEO is the Law poster supplement, which was produced by (SEER) to incorporate changes to our regulations, including the prohibition on pay secrecy policy. And also, three, the pay transparency non-discrimination provision. And that's required by the pay transparency final rule.

It reflects the equal opportunity clause language that I just discussed and it explains the worker protection in more detail than the poster supplement for applicants and employees who otherwise might not be able to see the contract clause or be aware of the regulation.

Brenda Stewart: Ok. We do have another question.

Chris Seely: All right.

Brenda Stewart: Can the term “contractor” be replaced with the legal entity name of the contractor? For example, the ABC Corporation, Inc. in the pay transparency non-discrimination provision?

Chris Seely: Ok. Thank you, Brenda. The answer to that is again no. Because OFCCP believes that the uniform use of the non-discrimination provision is necessary to ensure consistency and clarity in the information provided to applicants and employees, contractors need to at a minimum use the non-discrimination provision provided on our Web site. So all the language in the provision needs to be included.

Of course, nothing in the final rule limits the contractor from providing additional information to their employees about their rights and obligations. This is another one of the frequently asked questions we’ve had, so that answer is on our Web site under the FAQs for pay transparency.

Brenda Stewart: Thanks, Chris.

Chris Seely: Ok. Well, let’s go to the next slide. On this slide, we have section 41 CFR 60-1.3, the definition section including compensation. And our enforcement includes protecting workers from compensation discrimination based on the protected categories.

Now, enforcing this protection involves factual investigations, data and legal analyses, which allow OFCCP to identify and remedy any unlawful discrimination. And to ensure consistency in implementing all of the OFCCP’s protections, the final rule defines the terms compensation, compensation information, and essential job functions, which are terms involved in uncovering compensation discrimination.

So the final rule defines compensation as payments made or offered as remuneration for employment, including but not limited to 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.

And it also should be noted that this list of compensation types was not meant to be exhaustive. But although the wording of the compensation definition is in directive 2013-03 does not include allowances or (insurance), OFCCP does view that directive in the final rule to be consistent. All right, next slide.

(Jennifer Fry): The rule also defines compensation information as the amount and type of compensation provided to employees or offered to applicants, including but not limited to the desire of the contractor to attract and retain a particular employee for the value the employee is perceived to add to the contractor's profit or productivity, the availability of employees with like skills in a marketplace, market research about the worth of similar jobs in a relevant marketplace, job analysis, descriptions, and evaluations, salary and pay structures, salary surveys, labor union agreements, and contractor decisions, statements, and policies related to setting or altering employee compensation.

This definition is intended to be broad enough to encompass any information directly related to employee compensation, as well as the process or steps that led to a decision to award a particular type or amount of compensation.

The examples that I just read and that are on the slide are included in the final rule to provide contractors guidance on what constitutes compensation information. Let's move to the next slide, please.

The last definition we'll discuss is essential job functions. Determining what the essential job functions of a job are is important in the context of this rule because, as we'll discuss in the next slide, if an employee's job function is related to compensation information or essentials, the employee would be generally restricted from discussing or disclosing the pay of other applicants and employees.

The final rule sets forth a two-prong approach that examines whether one, the access to compensation information is necessary in order to perform that function or other routinely assigned business tasks, or two, the function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.

There are some circumstances when an employee with essential job functions can discuss or disclose pay, and we'll discuss those circumstances in a few slides. But before we get into the exceptions, we'll first discuss when the defense would apply and how contractors can use it.

Brenda Stewart: Ok, Jennifer. Before you go into that, we do have a question...

(Jennifer Fry): Sure.

Brenda Stewart: ...about the definitions. Do the essential job functions of having access to the base pay data have to be defined in the job description? Or would it be enough if it's proven that it was part of the essential job function without it being in writing?

(Jennifer Fry): That's a good question. But no, a person's essential job functions don't have to be defined in their position description. If they're contained in a position description, this is strong evidence that those duties would be essential job

functions. But, the determination of whether an employee's job functions with regard to compensation information or essentials should take all the facts into account.

Brenda Stewart: Thanks, Jennifer.

(Jennifer Fry): Yes. All right. Let's move onto the next slide, then.

So after the pay transparency webinar in September, we received a lot of questions about the essential job functions given. So today, we'll start with it before we discuss the workplace rule defense.

Under the essential job functions defense, a contractor can defend against a claim of discrimination by showing that it disciplined or took adverse action against an employee because the employee A, had access to the compensation information of other employees or applicants as part of his or her essential job duties, and B, disclosed that compensation information to individuals who didn't otherwise have access to it.

And as we just discussed, essential job functions for purposes of the defense can include those where access to compensation information is necessary in order to perform that function or other routinely assigned business tasks, or the function or duties of the position include protecting and maintaining the privacy of employee personnel records.

We'll be giving some examples shortly to illustrate what would or would not qualify as essential job functions. Generally, if a contractor can show that the employee that it took action against revealed compensation information that he or she obtained in the course of performing their essential job functions, then the contractor can avoid all liability.

However, employees who reveal information obtained in the course of these essential job functions are protected in some limited situations, and we'll discuss that next.

Brenda Stewart: Ok, (Jennifer), you do have a question.

(Jennifer Fry): Yes.

Brenda Stewart: Is the contractor required to train employees with a function that has access to compensation information before it takes action against the employee for disclosing compensation information?

(Jennifer Fry): No. There are no training requirements under the final rule. But OFCCP encourages contractors to train their employees on the new protection.

Chris Seely: Ok. Well then, we'll (move) to the next slide. All right, so here we have the essential job functions defense exceptions. Employees whose job functions are considered essential under the final rule are protected in certain circumstances when discussing or disclosing the compensation of other applicants or employees.

The contractor will not be able to use the essential job functions defense when the employee discloses this information in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by their employer, or if the disclosure is consistent with the contractor's legal duty to provide information. Next slide.

In addition to the exceptions provided for in the regulatory text that I just mentioned, there may be other exceptions to the essential job function defense

that arise. For instance, if an employee whose job functions are considered essential discovers a potential pay disparity involving other employees, he or she may discuss it with a contractor management official or while using the contractor's internal complaint process.

Additionally, the defense only applies when an employee is disclosing compensation information about others that they learned through their essential job functions. So, an employee can always discuss his or her own pay and information about pay that they learn outside their essential job functions.

To illustrate the essential job functions defense and some of its exceptions, we're now going to walk through some potential scenarios. So, let's go to the next slide.

All right. So here, we have some essential job function defense scenarios. This is the first one. And it's a scenario where you have (Alan) the architect working for a federal contractor. One day, he goes to the printer to get a rendering and he inadvertently sees a document that contains pay data about (Bill) and (Ted), who are both engineers. And it so happens that (Bill) is the only black engineer employed by the contractor.

The next day, (Alan) tells (Bill) that he's actually being paid \$10,000 less than (Ted) in salary. So, here the question is can the contractor lawfully discipline (Alan) based on his disclosure to Bill. (Jennifer)?

(Jennifer Fry): The answer is no. The contractor can't discipline (Alan) for this disclosure. Going back to our definition of essential job functions, functions may be considered essential if the access to compensation information is necessary in order to perform that function or another routinely assigned business task, or

the function or duties that the position included protecting and maintaining the privacy of employees' personnel records.

Here, (Alan) was performing a fundamental duty of his job -- which was producing renderings -- but he didn't need to access compensation information in order to perform that task. Nor is his position in charge with protecting the privacy of employee records. So (Alan's) job functions don't fall within the definition of essential job functions for purposes of this rule. And the contractor can't rely on the essential job functions defense here.

So disciplining (Alan) on the basis of his conduct would constitute discrimination.

Brenda Stewart: Well we do have another question.

(Jennifer Fry): Ok.

Brenda Stewart: So if inadvertently compensation of others is seen, the person who saw the salary data chooses to discuss it. Can it not be disciplined?

(Jennifer Fry): So in this example, it didn't matter that (Alan) saw the pay data inadvertently. (Alan's) job functions related to compensation don't qualify as essential, so even though he saw the information inadvertently, he's still protected in discussing it.

Chris Seely: I have a question too, (Jennifer). So what about the person who left the pay data on the copy machine? If they intentionally left it on the machine for someone else to find it, would they be protected?

(Jennifer Fry): The answer would depend on whether the person who left the pay data on the copy machine was someone who accessed it during the course of their essential job functions. So if this person did not access it as part of their essential job functions, then the contractor can't rely on the essential job function defense, and the individual would be protected -- whether they left it there intentionally or unintentionally.

But if the person did access it as part of their essential job functions, then the final rule would not protect this disclosure of pay information -- again, regardless of whether it was intentional or not. In that case, the pay secrecy rule would not prevent the contractor from taking action against the individual in accordance with whatever standards it imposes on its employees who are entrusted with maintaining pay or other employee data in a confidential way.

Chris Seely: All right. Ok. That answers the question. Let's go to the next slide. Here, on this scenario we have another essential job function defense scenario where (Peter) the IT professional at a federal contractor, and one of the weekly tasks he has is to ensure the personnel data, including individualized pay data, hasn't been hacked.

One week, he's running his security check and he notices that (Sally) made less than (Ted). And later, he tells (Sally) of the disparity. So what about this situation? Would the contractor lawfully be able to discipline (Peter) in this scenario?

(Jennifer Fry): Here, yes, the contractor can lawfully discipline (Peter) for disclosing this information. In contrast to (Alan) the architect, it's clear that (Peter) requires access to compensation information in order to perform one of his job functions, which is making sure the individualized pay data hasn't been hacked.

Additionally, (Peter) is responsible for protecting and maintaining the privacy of employee personnel records. So because his job functions meet the definition of essential job functions under the rule, (Peter) would not be protected in revealing compensation information that he obtained through those job functions to someone who also didn't have access to the information.

Brenda Stewart: (Jennifer), we have a question about this scenario. If (Peter) did not have the essential job function of working with salary information, if he heard about other people's salaries, can he tell others what those people make?

(Jennifer Fry): Yes, he can. That's basically what we laid out in scenario one with (Alan) the architect. So if Peter did not fall within the definition of essential job functions and he heard people discussing their pay, he would be protected under the final rule when engaging in those discussions and telling others what he had heard. The essential job functions defense wouldn't apply to him.

Brenda Stewart: Ok. Thank you.

(Jennifer Fry): Yes.

Chris Seely: Ok. Let's go to the next scenario. That's scenario three. And here we have the beginning of a multi-faceted scenario that we put together to illustrate how the essential job functions defense arise for someone who works in human resources. You may recognize the basics of the scenario from our September webinar, but here we have more variations today for you all to learn from. So let's go over the basic facts of the scenario.

(Jane Administrator), she works for a general contractor as a payroll administrator. And she accesses and processes compensation data as part of

her essential job functions, while (Jane's) coworkers (Mary Driver) and (John Driver) are both drivers. Ok? So let's go to the first wrinkle in that scenario on the next slide.

So one time while processing the month's payroll, (Jane Administrator) notices that (Mary Driver's) pay is less than (John Driver's) pay. So Jane reveals the information to (Mary), who would otherwise have had no clue about the pay difference. In this situation, can the contractor lawfully discipline (Jane Administrator)?

(Jennifer Fry): Again, yes. The contractor can use the essential job function defense in this case. Similar to our last example with (Peter) the IT professional, (Jane) requires access to compensation information in order to perform her job functions. And so she also meets the definition. And again, she revealed compensation information that she obtained while performing these functions.

That's the type of situation that the defense was intended to apply to, and the contractor could lawfully discipline (Jane) here.

Chris Seely: Ok. Let's go to the next slide, scenario 3B. So here we have another essential job function scenario, but this time over lunch, (John Driver) tells (Jane) the administrator how much he makes. Later that day, (Mary Driver) also tells (Jane) how much she makes. So at that point, (Jane) mentions to (Mary) that (John) is getting paid more than her.

In this situation, would the contractor lawfully be able to discipline based on her disclosure, (Jennifer)?

(Jennifer Fry): No. The contractor can't rely on the essential job function defense here. Even though (Jane Administrator) works in HR and still accesses compensation

information as part of her essential duties, the defense only applies to the disclosure of compensation information that the employee accessed through his or her essential job function.

Here, the information about (John) and (Mary's) pay came directly from them and not through any confidential information maintained by the contractor. (Jane) didn't need to be in a trusted position accessing information. So accordingly, (Jane) is protected under the final rule when communicating this information.

Chris Seely: Ok. Let's go to the next scenario. This one is a defense exception scenario. So here, (Mary Driver) files a claim with OFCCP alleging that her male coworkers are being paid more than she is for doing the same work. And during the investigation, a compliance officer with OFCCP asks (Jane) the administrator to list the salary for all drivers, including (Mary) and (John).

And so (Jane) provides the information. So in this situation, would the contractor be able to lawfully discipline (Jane) for her disclosure?

(Jennifer Fry): No, the contractor can't discipline (Jane) for this disclosure, because providing this information in a form to a formal complaint or investigation is one of the exceptions to the essential job functions defense. So the contractor wouldn't be able to rely on that defense.

Chris Seely: Ok. So, let's go to the next slide. Here, we have another little wrinkle where (Jane) the administrator looks at the data more closely and realizes that women drivers earn about 20% less than male drivers. So, she schedules a meeting with her manager to discuss the pay disparity. So, in this situation where she learns about the pay disparity, raises it with her manager, would (Jane) the administrator be able to be lawfully disciplined? Or would the

contractor be able to lawfully discipline (Jane) for discussing the pay disparity with her manager?

(Jennifer Fry): No. Again, talking with your manager about compensation information is another exception to the essential job functions defense. So the contractor can't discipline (Jane) for this disclosure, either.

Chris Seely: Ok. Well, let's go to yet another defense exception scenario. Here, we have a situation where after discussing the pay disparity for women drivers with her manager, the contractor doesn't do anything to reduce the wage gap for women drivers.

So, (Jane) files a formal complaint using the contractor's internal complaint process. She files it on behalf of the women drivers. And in the complaint, she reveals the compensation of all the drivers -- both men and women.

So what about this scenario? In this scenario, would the contractor be able to lawfully discipline (Jane) for disclosing all of this compensation information in her formal complaint?

(Jennifer Fry): Still no. Discussing compensation information within the context of a contractor's internal complaint process is also an exception to the essential job functions defense. So disciplining (Jane) here would not be lawful.

Chris Seely: Ok. But let's go to our last defense exception scenario. So after following the contractor's formal complaint process, the contractor does nothing to reduce the wage gap for women drivers. So (Jane Administrator) decides to file a formal complaint with OFCCP on behalf of the women drivers, in which she reveals the compensation of all of the drivers, men and women.

So here, would the contractor be able to rely on the essential job functions defense in taking adverse action against (Jane) for filing a complaint with OFCCP?

(Jennifer Fry): No. Disciplining (Jane) for filing this complaint would've been unlawful discipline even before the pay secrecy Executive Order and regulations, because filing a formal complaint with OFCCP is protected activity under Executive Order 11246. If the contractor takes adverse action against (Jane) for filing a complaint, regardless of what information is in that complaint, that would constitute unlawful reprisal. So, (Jane) is still protected here, but not specifically because of the final rule.

Brenda Stewart: (Jennifer), we have a question here where we need some clarification because they're not sure about the understanding answer. How can (Jane) file a complaint on behalf of female drivers when she's not supposed to disclose this protected information because it's an essential function of her duties? Should the contractor be able to discipline her?

(Jennifer Fry): So, it's correct that under the Pay Secrecy Rule, employees who access compensation information as part of their essential job functions aren't protected in revealing that information. But, filing a complaint of discrimination with protected activity under Executive Order 11246 already, and employees had a right to file complaints with OFCCP prior to the paid secrecy rule.

So the final pay secrecy rule expanded the protections for applicants and employees, and it didn't take away any rights that existed previously under the Executive Order. So (Jane) would still be protected in filing her complaint here.

Brenda Stewart: Ok. I understand it better.

Chris Seely: Ok, let's go to the next slide. So as we mentioned, Executive Order 13665 in the final rule incorporates two defenses that are available to contractors. We already just went over the essential job functions defense. The other defense is a general work place rule defense. It provides that a contractor may pursue a defense to an alleged violation of the non-discrimination provision, as long as the defense is not based on a rule or policy that prohibits employees or applicants from discussing or disclosing their compensation, or the compensation of other employees or applicants.

Although a contractor need not discipline all employees in an identical way under the workplace rule, they must show that they did not discipline the employee or applicant in question more severely under the rule, because of the employee's or applicant's protected activity.

However, relying on a workplace rule may not serve as a complete defense under the motivating factor analytical framework in which OFCCP may use in determining liability. So before we go through another scenario to illustrate the operation of the workplace rule defense, we first need to explain the approaches available to OFCCP for analyzing complaints under the final rule. And I'll turn it back over to (Jennifer).

(Jennifer Fry): Thanks. As Executive Order 13665 established a new prohibition against discrimination against any employee or applicant, OFCCP set forth in the final rule that a motivating factor framework is available to analyze claims under the Executive Order. So if discrimination motivated the employer's actions even partially, then the employer could still be liable for the actions it took.

While the motivating factor framework is a permissible approach for claims brought under Executive Order 13665, it's not the only approach OFCCP may use to prove discrimination. Relevant case law holds that while the motivating factor analysis is available in discrimination cases, plaintiffs may also proceed under the determinative factor framework, if they choose.

Which approach makes more sense will depend on the specific facts of the case as they're developed in the investigation and in the discovery.

We'll go over some scenarios in just a minute to illustrate this.

OFCCP may also opt to prove its case by a bold framework, arguing for example that discrimination was the determinative factor in an employer's adverse actions, but in the alternative, that it was at least a motivating factor.

The Supreme Court and multiple circuit courts have recognized this approach as permissible under Title 7.

It's important to note that the remedies available to OFCCP are different under the two approaches. Under the motivating factor approach, if OFCCP is able to demonstrate that the discrimination partially motivated the employer's actions, but the employer can demonstrate that there were other lawful reasons for the adverse employment action and that the employer would've taken the same action even after the discrimination, then the employer could be held liable for discrimination, but the remedies -- for example, back pay -- would be limited and perhaps eliminated completely, depending on various factors.

Under the determinative factor approach, however, establishing liability means that discrimination was the reason rather than contributing reason for the adverse action. Under this approach, there's no similar limitation on

monetary relief, so OFCCP could seek any of its available remedies, including back pay, front pay, and reinstatement. These considerations will also inform which approach OFCCP may use in a given case.

On this slide, we show the types of relief available to OFCCP. As I just mentioned, the type of relief available could depend on whether OFCCP pursues the case under the motivating factor or the determinative factor analytical approach. Generally, OFCCP's remedies are designed to make the discrimination victims whole to the extent reasonably possible.

It's important to note that the types of make whole relief listed here wouldn't necessarily be appropriate in every case. And there may be other forms of make whole relief that are appropriate given the facts of the case.

As the slide indicates, make whole relief could include a job offer, back pay, and front pay, if appropriate. Back pay is designed to restore the monetary value of wages, salary, and benefits lost by the victim due to discrimination, whereas front pay is designed to avoid the loss of future wages, salary, and benefits, for replacement in a job or reinstatement is not feasible.

Additionally, we may pursue injunctive-type relief or a corrective remedy to stop the violation, deter the effects of the violation, and to prevent the violation from occurring.

Other types of corrective relief include training, monitoring, and reporting requirements.

Compensatory and punitive damages are not available in enforcement actions under the Executive Order.

If OFCCP is unable to resolve a violation, it will refer the violation to the Solicitor of Labor for further administrative enforcement proceedings. These proceedings may result in remedies that include debarring the contractor from receiving future contracts or modifications or extensions of existing contracts.

Now let's see how these types of relief might play out in a case where the employee did not have essential job function and the contractor only raises a general workplace rule defense.

Chris Seely: Ok. So here we have a scenario for on the workplace rule defense, and this slide shows the basic back pattern that will be doing variations on. So, a contractor, ABC Corporation, allows employees to take a 30-minute lunch break. (Jen) and (James) take a 45-minute break during which (Jen) asks (James) to tell her how much he makes.

So, let's discuss whether the contractor can take any adverse action against them in a few different scenarios. Next slide.

So in this slide, the manager refuses to pay both (Jen) and (James) for the extra 15 minutes taken during their break. It's the usual penalty for exceeding the allotted 30-minute break time. In fact, employees consistently receive the same penalty for taking extra break time. So, (Jennifer), would the contractor lawfully be able to refuse to pay them?

(Jennifer Fry): Yes. The contractor would probably be able to defend them self-using the general workplace rule defense. The first step is to decide whether the contractor relied on a legitimate workplace rule in withholding pay from (Jen) and (James). Here, the answer's yes, as the contractor can generally discipline employees from returning late from lunch.

This rule doesn't tend to prohibit employees from discussing their pay.

The next step is to figure out whether the workplace rule was applied consistently. With the given fact here, particularly that employees consistently receive the same penalty for taking extra break time, the answer to this question is yes, as the rule was consistently and uniformly applied.

Chris Seely: Ok. On the next scenario -- so here, you know, this time (Jen) is suspended. And her manager tells her that it's inappropriate to ask (James) how much he earns. So in this situation, would the contractor be able to lawfully suspend (Jen) for the day based on that reason?

(Jennifer Fry): No, it wouldn't be able to here. Contractors may not discipline an employee for inquiring about the compensation of another employee. Disciplinary policies cannot prohibit or tend to prohibit employees or applicants from discussing or disclosing their compensation, or the compensation of other employees or applicants.

In this scenario, it appears that (Jen's) protected activity -- which was inquiring about pay -- was a determinative factor for the suspension. This is demonstrated by the fact that the contractor suspended (Jen) and not (James), and explicitly referenced the fact that the discipline was due to (Jen) inquiring about pay.

Because the evidence about the contractor's motive is clear, and the contractor offers no other legitimate reason for taking the adverse action, this is an example of a case in which OFCCP may analyze the claim under the determinative factor framework.

Thus, as explained earlier, OFCCP may be able to seek back pay and other relief that would not be available if the protected activity was only a motivating factor into (Jen's) suspension.

And just to be clear, nothing requires (James) to tell (Jen) how much he makes, and that same being even though an applicant may ask a hiring manager how much employees make in a particular job, the final rule doesn't require that the hiring manager disclose the pay of particular employees.

Chris Seely: So the hiring manager isn't required to disclose that compensation information to an applicant, but could a hiring manager who works for a federal contractor choose to tell an inquiring applicant how much employees make in the position for which that person is applying.

(Jennifer Fry): A manager's (sub) duties likely require protecting and maintaining the privacy of employee personnel records, including compensation information. And this means that a hiring manager's job duties pertaining to compensation may be considered essential job functions.

If that's the case, then the hiring manager would not be protected in disclosing the compensation information of other employees to an applicant.

A contractor can, however, authorize a hiring manager to proactively promote what the contractor sees as good about its pay policy from practices.

Chris Seely: Well, could a hiring manager give a range of pay for employees in the same position, instead of, you know, giving actual wages?

(Jennifer Fry): The answer is still the same. The definition of compensation information is the amount and type of compensation provided to employees or offered to

applicants. So the definition doesn't distinguish between the salaries of specific employees and ranges of pay.

So if the hiring manager accesses pay data as part of his or her essential job functions, then the manager would not be protected in providing a range of pay to an applicant. So again, nothing prevents a contractor from allowing the hiring manager to share the information.

A contractor can certainly authorize a hiring manager to give an applicant data on pay or range of pay, (unintelligible) wouldn't be protected in revealing that information against the contractor's wishes.

Chris Seely: Ok. Let's move to the next slide. In this scenario, we have the situation where after learning about his pay being withheld, (James) tells his manager that he was late because (Jen) was asking how much he earned. In addition to withholding pay for (Jen) and (James) for the extra 15 minutes, the manager suspends (Jen) for a day and he tells her again that the extra discipline was because she was asking him how much he makes, but also because she was late from break the week before.

So, here you have the supervisor telling her two reasons -- one, she's being suspended for asking about the pay, and one, because she was late the week before. Would the contractor be held liable for the suspension under the new rule?

(Jennifer Fry): The contractor could potentially be held liable here, meaning again, that it may have been unlawful to suspend (Jen) for the reasons provided. In the last example, the manager had only given one reason for suspending (Jen), which was that she had asked about (James') pay. And that's clearly discriminatory under the pay secrecy rule.

But here, the manager, like you said, is giving two reasons -- because (Jen) asked about (James') pay and because she had been late coming back from break the week before.

So as we determined in the last slide, the contractor clearly can't rely on the first reason in using the workplace rule defense, because contractors can't discipline employees for talking about pay. But now we have to determine whether the second reason given by the manager is a valid workplace rule that the contractor can rely on in asserting the workplace rule defense.

Just like in the prior scenario, where the contractor refused to pay (Jen) and (James) for the 15 minutes they were late, the contractor claiming that it is suspending (Jen) here in part because she was late coming back from break both this week and last week. So again yes, this is a valid workplace rule because the contractor can generally discipline employees for returning late from a break, and this rule doesn't intend to prohibit employees from discussing pay.

And then we also have to figure out whether the workplace rule was applied consistently. But here, we don't really know if it was. The manager mentioned that (Jen) had also been late before, but based on the facts we have, it's not clear whether employees are consistently and uniformly suspended for being late from break during a two-week span. So we just don't have enough information right now to know this.

But let's assume that OFCCP finds the suspension is uniformly and consistently applied for employees who are late from break repeatedly, and that the contractor now has a valid reason pursuant to the workplace rule defense for suspending (Jen). But remember, (Jen's) manager told her that the

suspension was also due to the fact that she had asked (James) how much he gets paid. So we have both a valid reason and a discriminatory reason for the suspension.

This is an example of a case that OFCCP could analyze under a motivating factor framework. And the contractor could be held liable for discrimination if it was demonstrated that (Jen's) manager suspended her at least in part because she inquired about pay.

Chris Seely: But what types of relief would be available in a case like this where discussing pay was only one of the factors that motivated discipline?

(Jennifer Fry): In a case where OFCCP was able to show that discrimination was a motivating factor but was not the determinative factor, OFCCP would be able to make a conjunctive or declaratory relief, meaning that OFCCP could take a declaration from the court that the contractor had violated the regulation and would require a contractor to change its practices to prevent discrimination from motivating its managers in the future.

However, OFCCP would not be able to seek back pay or reinstatement.

Chris Seely: All right. Great. That's the end of our scenarios. Let's go ahead and move to the next slide.

During the compliance evaluation, OFCCP will verify that the new equal opportunity clause is included in subcontracts and will ask to see the prescribed pay transparency non-discrimination provision in employee manuals and handbooks.

OFCCP will also be inspecting to determine whether a contractor posts the prescribed pay transparency non-discrimination provision electronically or in hard copy for all job applicants and employees to access. Also, during a compliance evaluation, OFCCP may interview a contractor's employees to determine if there is possible discrimination attributed to a worker's inquiries, discussions, or disclosures to compensation.

If we uncover potential discrimination, then we will investigate further, which may include interviewing job applicants and employees.

But while compliance evaluations are one way that we enforce Executive Order 11246, we also accept complaints that allege discrimination. Employees and applicants for employment with covered federal contractors may file complaints of discrimination alleging that a contractor violated the Executive Order by taking adverse action against them for discussing, inquiring, or disclosing the compensation of an employee or applicant. And OFCCP will investigate both individual and group complaints that allege such discrimination.

We expect to update our complaint form to include this new protected basis along with the sexual orientation and gender identity by 2017 when the current OMB approved form expires. In the meantime, complainants may write in pay secrecy or pay transparency in the section that asks them why they think their employer discriminated against them. Or, complainants can explain the reason why they think they were discriminated against in the narrative portion of the complaint form.

And also, additional information about filing complaints with OFCCP is on our Web site. Let's go to the next slide. I believe it's our last slide.

So before we depart, I wanted to go over a few points, and then we'll get to some of your questions and answers.

Contractors must comply with the provisions of the final rule when they enter into or modify contracts or subcontracts on or after the final rule's January 11th, 2016 effective date. In addition to amending the Equal Opportunity clause, federal contractors must incorporate the pay transparency non-discrimination provision into manuals and handbooks.

Contractors must also disseminate the pay transparency non-discrimination provision to employees and job applicants by posting it electronically or in a conspicuous place.

Lastly, the rule provides contractors with two defenses to an allegation of discrimination. There's a general workplace rule defense, and the essential job functions defense.

That last point brings us to the end of this portion of the webinar. So at this point, Brenda, I'll go ahead and turn it over to you.

Brenda Stewart: Ok, Chris. Thank you. That was quite a lot of information from both you and Jennifer. And as you said, we are now at the Q&A part of our webinar. Many of you have already submitted questions through the chat function. And some of those questions we addressed while we were actually on the slide that was relevant to that question. So, we'll take - I'm sorry. Go ahead.

Chris Seely: I would say great. That's great.

Brenda Stewart: Yes. I thought it was, too. So we're going to take a short three-minute break. That will allow our presenters and other OFCCP people that are participating

in this webinar to compile their questions, to go through the questions so that we can prepare answers for you. So we're going to put you on hold and ask that you come back in three minutes. It looks like it is 2:56pm. So we will start back at 2:59.