



Political Law Alert

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New York Issues Draft Guidance on New Contractor Salary Disclosure Requirement, Seeks Public Comment

On June 1, 2017, the state of New York's Department of Economic Development (the department) issued draft forms and guidance to capture employee salary information from New York state contractors and subcontractors pursuant to Gov. Andrew Cuomo's Executive Order 162 (the order). The department will accept comments through June 30, 2017. Our April 24, 2017 mailing discusses the order and its requirement that state contractors and subcontractors disclose the salaries of employees who work on state contracts. As previously noted, the potential disclosure of sensitive employee salary information raises serious privacy and employee relations concerns.

The draft guidance answers the following questions:

When is the form due? The disclosure requirement applies to covered contracts executed on or after June 1, 2017. The guidance states that the first reports will be due on schedules established by each contracting agency, but no earlier than January 1, 2018.

Who is exempt? The guidance permits a state agency to determine, at its discretion, whether requiring compensation data from a contractor is appropriate depending on the nature of the contracted work to be provided, the extent to which the workforce is readily identifiable and other factors. The guidelines specify the classes of contractors and contracts that generally will be exempt, including:

- a contractor performing work on a state contract exclusively with employees who are located outside of New York state;
- any banking or financial institution engaged solely in processing financial transactions;
- any recipient of a grant;
- any contractor engaged solely in licensing intellectual property to a state agency or authority;
- any contractor organized in a country other than the United States;
- contracts for staffing a state agency, debt service, utilities, and staff benefits, as well as certain other chargebacks and special departmental charges; and
- contracts for goods or services with the state Department of Law or Department of Audit and Control.

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What must be disclosed? Contrary to the plain language of the order, the guidance clarifies that only compensation for time worked on a covered state contract must be disclosed. However, given that the form requires both hours worked and compensation for those hours to be disclosed, total compensation for an employee could be derived from such information. Disclosable compensation includes that which is included in Box 1 on an employee's W-2.

The guidance permits reporting of compensation data in the aggregate, but only where two or more employees share gender, race/ethnicity (in categories set forth in the form's instructions), and Standardized Occupational Classification Code, which is used by the federal government to accumulate occupational data and promulgated by the U.S. Bureau of Labor Statistics. Where these factors are not shared, data must be reported on an individualized basis. Neither employee names nor corporate titles must be included, but rather only the employee's Standard Occupation Classification Code.

If a company can determine the hours worked on a state contract by some employees, but cannot determine hours worked by other employees because of the nature of the work performed, it need only report data for those employees whose time worked it can determine. That is, if the company can provide hours and compensation information for at least one employee working on a state contract, then it need not provide hours or compensation information for those employees working on the contract whose hours it cannot determine. On the other hand, if hours cannot be determined for any employee working on the contract, the guidance instructs a company to report total compensation for all employees working on the state contract. An example of where hours cannot be determined is a call center, where employees provide services for multiple clients simultaneously.

Will the information provided be confidential? The guidance notes that the state will notify a filer should the filer's disclosures be the subject of a Freedom of Information Law request, and that the state will "protect the confidentiality of Report data to the maximum extent possible" pursuant to the Freedom of Information Law and the trade secrets exemption thereto.

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