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NY Governor Directs Contractors Doing Business with or Bidding on State Contracts to Disclose Employee Salary Information to Identify Wage Disparities

On Jan. 9, 2017, New York Governor Andrew M. Cuomo signed [Executive Order 162](#), which requires state contracts and procurements entered into or issued as of June 1, 2017, to include new reporting obligations for contractors, subcontractors, and bidders. Employers seeking to contract with the State will be required to disclose, on at least a quarterly basis, job title and salary information for each employee performing work on a state contract. Employers unable to identify the specific individuals working on a state contract are required to disclose job title and salary information for their entire workforce.

The State already required the reporting of general workforce utilization data pertaining to state contracts through the Minority and Women-Owned Business Enterprise Program. The Executive Order states, however, that such data, which is disaggregated by race and gender, is inadequate to address the Governor's concerns related to discriminatory wage practices. While the Order does not explicitly require the new data to be disaggregated by race and gender, it is clear that the State would need such information to achieve the Executive Order's intended purpose of allowing the State to analyze whether wage disparities exist.

Risks, Burdens, and Outstanding Questions

It remains to be seen how the State will use the newly reported information because the Executive Order does not give guidance on whether the information will be analyzed or tracked. The Order also does not define what constitutes a wage disparity or whether the reported information could trigger a broader investigation. Moreover, given that the Legislature did not authorize the contractual requirements imposed by the Order, it is unclear whether the Governor has the legal authority to mandate such obligations via executive order.

In any event, the administrative burden imposed on contractors, subcontractors, and bidders could be substantial. It is not immediately clear how broadly the Order will be applied and whether employees having tangential exposure to

state contract work are covered. Also, tracking job title and salary information on a quarterly basis may be challenging depending on an employer's workforce size, staffing patterns, and turnover rates. Consequently, the Order could dissuade employers from contracting with the State because the disclosure requirements are too onerous or because it is impractical for certain employers to comply given the complexities of their workforce.

The Executive Order also raises significant issues under New York's Freedom of Information Law (FOIL), which provides that all records of a public agency are presumptively open to the public. Indeed, in one instance where insurers doing business in New York were required to submit employee names, job titles, and salaries to a state agency, a trial court ordered the agency to release the private employees' information. Such disclosure could substantially harm the competitive interests of an employer because it could result in competitors luring away a contractor's employees with more lucrative offers, or cutting salaries in order to become a successful bidder to a state contract.

Additionally, employees' privacy rights are implicated here and, as a result, they may decline to work on state contracts out of a concern that their private salary information will be publicly disclosed. For example, if there is only one employee with a given job title, then that employee's identity can be easily determined. Furthermore, if the State requires job title and salary information to be disaggregated by race and gender, as the Executive Order implies, then, ironically, the very individuals the Order seeks to protect may be the ones most vulnerable to public scrutiny.

As noted above, contractors, subcontractors, and bidders will likely face difficult questions upon the implementation of Executive Order 162. Greenberg Traurig's attorneys have a broad range of experience advising leading corporations and businesses that seek to navigate New York's complex legal landscape, and are available to assist entities in determining how to comply with the Executive Order.

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