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Fair Pay and Safe Workplaces Final Rule and Guidance for Federal Contractors Issued

On August 25, the FAR Council and the DOL issued the final rule and guidance for federal agencies in implementing the so-called "blacklisting" order. The order requires prospective federal contractors and their subcontractors to disclose past labor law violations during the competitive bidding process, imposes new paycheck transparency obligations on covered contractors, and restricts their use of mandatory arbitration agreements. Implementation will be phased in, starting on October 25, 2016. Contractors that do business with the government will want to familiarize themselves with the new requirements to ensure compliance.

Background

Signed by President Obama in July 2014, Executive Order 13673 (EO) — the so-called "blacklisting" order — requires federal contractors to disclose certain labor law violations during the federal procurement process. As part of the solicitation process, each contracting agency will require bidders on procurement contracts for goods and services (including construction) valued in excess of $500,000 to disclose any administrative merits determinations, arbitral awards or decisions, or civil judgments (referred to collectively as "labor law decisions") issued against them for violating certain labor laws within the preceding three years.

When fully implemented, contractors will have to report violations of the following 14 labor and employment laws and executive orders when submitting a bid on a covered contract:

- Fair Labor Standards Act (FLSA)
- Occupational Safety and Health Act of 1970 (OSHAct)
- Migrant and Seasonal Agricultural Worker Protection Act
- National Labor Relations Act (NLRA)
- Davis-Bacon Act (DBA)

- Service Contract Act (SCA)
- Executive Order 11246 (Equal Employment Opportunity)
- Section 503 of the Rehabilitation Act of 1973
- Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA)
- Family and Medical Leave Act (FMLA)
- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act of 1990 (ADA)
- Age Discrimination in Employment Act of 1967 (ADEA)
- Executive Order 13658 (Establishing a Minimum Wage for Contractors)
- Equivalent State laws

Agency labor compliance advisors (ALCAs) — a new position created by the EO — will consult with the contracting officers as they consider whether to award or extend a contract in light of the labor law decisions (including mitigating factors and remedial measures). The disclosure obligation continues post-award, requiring covered contractors to report every six months during the term of the contract.

In addition to the disclosure requirements, the EO imposes new paycheck transparency obligations on covered contractors. It also limits the use of mandatory arbitration agreements for Title VII claims or any tort involving sexual assault or harassment.

Final Rule and Guidance

On August 25, the Federal Acquisition Regulatory Council (FAR Council) issued the final rule implementing the EO as the DOL concurrently issued guidance interpreting key provisions of the rule. The proposed and final rules and guidance are substantially similar, but have some notable differences.

Covered Contractors

The final rule covers most federal contractors and subcontractors with contracts for goods and services (other than subcontracts for commercially available, off-the-shelf items) valued in excess of $500,000 over the term of the contract. The rule clarifies that its compliance obligations extend only to the legal entity submitting the bid and responsible for performing the contract — not to the bidder's parent, subsidiary or affiliates. Prime contractors and subcontractors that are part of a teaming arrangement as well as each member of a joint venture that is not a separate legal entity must separately comply with the reporting requirements. Covered contractors will be required to update their disclosures semi-annually.

FAR Council

The **FAR Council** assists in directing and coordinating government procurement policy and regulatory activities. In accordance with the Office of Federal Procurement Policy Act, the council consists of the Administrator of OMB's Office for Federal Procurement Policy, Secretary of Defense, Administrator of National Aeronautics and Space, and Administrator of General Services.

Pre-Assessment Process. The "pre-assessment process" allows contractors to review their compliance history and to have their record of labor law decisions assessed by an ALCA outside any government contracting opportunity. According to the guidance, this will allow contractors to confirm that their compliance record is satisfactory or how to address problems before bidding on a contract. Among other things, the ALCA will provide the contractor with advice on whether the disclosed violations are "serious," "repeated," "willful" or "pervasive" — categorizations that the final guidance discusses in detail. While this process does not replace the pre-award disclosure and assessment processes, it may be used by the contracting officer and ALCA in the pre-award assessment in determining that a contractor has a satisfactory compliance record.

Phased-In Implementation

Proposed compliance deadlines were extended in the final regulations, with a phased-in implementation schedule for certain new EO requirements.

Disclosure Requirement. Initially, the disclosure requirement will apply only to prime contractors, and cover a one-year period. The period will gradually increase to three years preceding the date of the offer, and apply to both prime contractors and subcontractors, on the following schedule:

- Starting October 25, 2016, prime contractors seeking covered contracts valued at $50 million or more will be required to disclose labor law violations for the period from October 25, 2015, to the date of the offer.
- Prime contractors' disclosure obligations will extend to contracts of $500,000 or more on April 25, 2017.
- Beginning October 25, 2017, subcontractors bidding on covered subcontracts valued at $500,000 or more (other than subcontracts for commercially available, off-the-shelf items) will be required to report their labor law violations from the previous year.
- After October 25, 2018, contractors and subcontractors will have to disclose violations for the three-year period preceding the date of the offer.

State law violations. Notably, the final rule temporarily eliminates the requirement to report violations of equivalent state laws. Rather, the DOL will address the requirement in a future rulemaking, and will propose a list of those laws that will be subject to a notice and comment period before taking effect.

No retroactivity. The preamble confirms that the disclosure requirement does not apply retroactively, and contractors will not have to disclose labor law decisions that were rendered against them more than one year prior to the final rule's effective date (or prior to October 25, 2015). Because the new contractor and subcontractor disclosure requirements are implemented through solicitation provisions and clauses in covered contracts, they only become effective in new solicitations or new contracts issued after the final rule takes effect.

Classified information. With respect to classified contracts, the rule makes clear that it "does not compel the disclosure of classified information."

Subcontractor reporting. Generally, subcontractors with subcontracts valued in excess of $500,000 (other than for commercially available off-the-shelf items) will be covered by the final rule and guidance starting on October 25, 2017, and will have the same disclosure requirements as prime contractors. Originally, subcontractors were to report their history of past labor law violations to their prime contractors. However, the guidance significantly modified subcontractor reporting, requiring potential subcontractors to disclose labor law violations directly to the DOL, which will analyze the violations. The subcontractor will then have to provide the analysis to the prime contractor to determine whether to do business with it.

Paycheck Transparency. Beginning January 1, 2017, contracting officers must include a new federal paycheck transparency clause in contracts valued at more than $500,000 (other than subcontracts for commercially available, off-the-shelf items). Covered contractors and subcontractors will be required to provide detailed, written wage statements to all individuals performing work under the contract for whom the contractor must maintain wage records under the FLSA, DBA, SCA or equivalent state laws. Notably, the paycheck transparency provisions would apply to every worker covered by those laws — whether classified as an employee or independent contractor.

For nonexempt workers, covered contractors will have to provide wage statements each pay period that list:

- Total hours worked
- Overtime hours
- Gross pay
- Rate and basis of pay
- Itemized additions to or deductions from pay (such as bonuses, awards, and shift differentials)

Hours worked information need not be provided for exempt workers, if the contractor provides written notice of exempt status before they perform work under a covered contract or in the first wage statement. With respect to independent contractors, covered contractors must provide written notice of their independent contractor status before work under a covered contract begins.

Required wage statements, exempt status notices, and independent contractor notices must be provided in English and in other languages in which a significant portion of the workforce is fluent. As the guidance confirms, the statements and notices may be provided electronically if the contractor regularly provides documents to their workers in that manner. It also makes clear that the pay transparency requirements may be satisfied by compliance with the wage statement requirements of any of the “Substantially Similar Wage Payment States” identified by the DOL: Alaska, California, Connecticut, the District of Columbia, Hawaii, New York and Oregon.

Arbitration Agreements. Although the EO generally prohibited certain contractors from maintaining mandatory arbitration agreements for Title VII claims or any tort involving sexual assault or harassment, it did allow for the arbitration of certain other claims with the voluntary post-dispute agreement of employees or independent contractors. Under the final rule, contractors and subcontractors with contracts valued at more than $1 million (other than subcontracts for the acquisition of commercial items) will be barred from requiring employees to enter into new agreements for the mandatory pre-dispute arbitration of Title VII, sexual assault or harassment claims, effective October 25, 2016. However, contractors may still require such agreements for other claims. Although the

new provision will not affect pre-existing arbitration agreements unless an employer has discretion to modify them, it will apply to agreements that are subsequently renegotiated or replaced.

Notably, the final rule says the restriction on pre-dispute arbitration agreements applies to all employees and independent contractors working for the contractor, not just those working on the contract that includes the new bar. The rule also makes clear that the new restriction applies only to the contracting entity, and not to its parents, subsidiaries or affiliates. It also does not apply to employees covered by a collective bargaining agreement.

Effective Date

The final rule will take effect on October 25, 2016, and the new requirements will be included in covered government solicitations and contracts issued after that date on a phased-in schedule. Phase-in of the new disclosure requirements will begin October 25, 2016. Paycheck transparency requirements will be included in solicitations and contracts beginning January 1, 2017. The restrictions on pre-dispute arbitration agreements will be required in new contracts, starting October 25, 2016.

In Closing

The "blacklisting" EO and the final rule implementing it impose new reporting, disclosure and paycheck transparency requirements on government contractors. Contractors that do — or seek to do — business with the government will want to familiarize themselves with the new requirements to ensure compliance.

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