Final Rule Implementing Fair Pay and Safe Workplaces Executive Order Published

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08.29.2016

On August 25, 2016, the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) collectively issued a Final Rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 13673, as amended, which is referred to as ?Fair Pay and Safe Workplaces? (the ?Order?). The Order was signed by President Barack Obama on July 31, 2014.

The final regulations will go into effect on October 25, 2016 and will affect contractors and subcontractors of the federal government, as explained in more detail below. The main premise behind the Order and the implementing regulations is that the federal government should enter into contracts only with ?responsible? contractors that have a ?satisfactory record? of business integrity and that abide by the law, including labor laws, such as Title VII of the Civil Rights Act, the National Labor Relations Act, and other laws that govern the workplace. During the public comment period preceding the issuance of the Final Rule, businesses and business organizations expressed concerns that the Order could ?blacklist? them from doing business with the federal government. Ultimately, the government determined that the need to ensure integrity in its contracting process outweighed those concerns.

The Order contains three main sections. The first part of the Order requires companies who are bidding on a federal contract to disclose to the government?s contracting officer whether, in the prior three (3) years, they received any adverse administrative merits determinations, civil judgments, arbitral awards or other adverse decisions for violations of certain enumerated Labor Laws.[1] Upon such disclosure, the contracting officer will require the company to submit information regarding the Labor Law adverse decision(s) and will afford the company an opportunity to provide such additional information as the prospective contractor deems necessary to demonstrate its responsibility, including mitigating factors and other remedial measures taken to address the violations. If the contract is awarded, the contractor must update the information semiannually in the System for Award Management (SAM).

The Order requires federal subcontractors to first report their labor violations directly to the Department of Labor, which will issue advice pertaining to the severity of the Labor Law violations. The subcontractor must then report back to the prime contractor with the Labor Law disclosures and the DOL?s advice. Prime contractors will be required to consider the DOL?s analysis as they make their own ?responsibility? determinations on prospective subcontractors for subcontracts at any tier estimated to exceed $500,000, except for subcontracts for commercially available off-the-shelf items.

The second part of the Order pertains to pay transparency. It requires employers to give all employees who work on covered federal contracts and subcontracts a wage statement that contains detailed information concerning that individual?s hours worked, overtime hours, regular and overtime pay, and any additions made to or deductions made from pay by work week and totaled by pay period. It also instructs covered contractors and subcontractors to inform an individual in writing if the individual is being treated as an independent contractor rather than an employee. This notification must be provided by the company at the time the independent contractor relationship with the individual is established or prior to the time that the individual begins to perform work on that federal contract or subcontract.

The third part of the Order prohibits companies with federal contracts of $1 million or more from requiring employees to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment (this prohibition does not apply to existing contracts). An agreement to arbitrate such claims may be made only with the voluntary consent of employees or independent contractors and only after such disputes arise.

There is a staggered implementation of the Order. The Final Rule goes into effect on October 25, 2016. As of October 25, 2016, the mandatory disclosure and assessment of labor law compliance begins for all prime contractors under consideration for contracts with a total value greater than or equal to $50 million. The reporting disclosure period initially is limited to one (1) year and will gradually increase to three (3) years by October 25, 2018. On April 25, 2017, the total contract value threshold for prime contracts requiring disclosure and assessment of labor law compliance is reduced from $50 million to $500,000. Then, on October 25, 2017, the mandatory assessment begins for all subcontractors under consideration for subcontracts with a total value greater than or equal to $500,000. On January 1, 2017, the paycheck transparency clause takes effect, requiring contractors to provide wage statements and notice of any independent contractor relationship to their covered workers. The prohibition on pre-dispute arbitration provisions goes into effect on October 25, 2016.

Although the Final Rule is implemented in phases, companies that do business or seek to do business with the federal government should start to develop a method to track reportable Labor Law violations. Those companies should also ensure that pay statement details contain all of the requisite disclosures, and they should create a written notice that advises whether a worker is an employee or independent contractor. Finally, federal contractors and subcontractors who normally use arbitration provisions in their employment agreements should develop separate agreements for those employees who work on covered contracts that omit pre-dispute arbitration clauses.

[1] These ?Labor Laws? include: (A) the Fair Labor Standards Act; (B) the Occupational Safety and Health Act; (C) the Migrant and Seasonal Agricultural Worker Protection Act; (D) the National Labor Relations Act; (E) the Davis-Bacon Act; (F) the Service Contract Act; (G) Executive Order 11246 (Equal Employment Opportunity); (H) section 503 of the Rehabilitation Act of 1973; (I) the Vietnam Era Veterans' Readjustment Assistance Act of 1974; (J) the Family and Medical Leave Act; (K) Title VII of the Civil Rights Act of 1964; (L) the Americans with Disabilities Act of 1990; (M) the Age Discrimination in Employment Act of 1967; and (N) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors). The state law equivalents of these laws, which contractors also will be required to report on, will be subject to a future rulemaking. The exception to this is OSHA state law equivalents, which are subject to the reporting requirements set forth in the new final rules.

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