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## DOL and FAR Issue Final Rule and Guidance on Executive Order 13673

### FAIR PAY AND SAFE WORKPLACES

Federal contractors and those businesses considering entering into federal contracts will want to be aware of a recent Executive Order that may have significant implications on their ability to contract with the federal government or be a subcontractor on a federal contract. On August 25, 2016 the Department of Labor (DOL) guidance and the Federal Acquisition Regulatory Council (FAR) published its final rule implementing a two-year old executive order signed by President Obama back on July 31, 2014. The Executive Order, entitled "Fair Pay and Safe Workplaces" but commonly referred to as the "Blacklisting" Order, requires both prospective and existing federal contractors and subcontractors to disclose labor law violations to the contracting agency, specifically "any administrative merits determination, arbitral award or decision, or civil judgment" under fourteen federal statutes, executive orders and state labor laws addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections.

The fourteen federal laws and executive orders covered by Executive Order 13673 are:

- Fair Labor Standards Act;
- Occupational Safety and Health Act;
- Migrant and Seasonal Agricultural Worker Protection Act;
- National Labor Relations Act;
- Davis Bacon Act;
- Service Contract Act;
- Executive Order 11246 (Equal Employment Opportunity);
- Section 503 of the Rehabilitation Act;
- Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA);
- Family and Medical Leave Act;
- Title VII of the Civil Rights Act;
- Americans with Disabilities Act;
- Age Discrimination in Employment Act (ADEA); and
- Executive Order 13658 (establishing a minimum wage for contractors).

(Also covered are OSHA-approved state plans.)

These FAR rules and DOL guidance will now require:

- Mandatory disclosure of labor law violations;
- Providing detailed wage statements to employees and notifying independent contractors of their status; and
- Prohibiting contractors from requiring their workers to sign arbitration agreements involving Title VII violations and sexual assault or harassment claims.

CONTINUED ON NEXT PAGE

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Implementation of the Executive Order will be phased in over the next two years. Below is an outline according to the effective dates:

#### SEPTEMBER 12, 2016: THE DOL TO COMMENCE VOLUNTARY "PRE-ASSESSMENTS".

- Contractors and prospective contractors may obtain on a voluntary basis, independent of a specific government contract, an assessment of their labor compliance history in anticipation of bidding on a future contract or acquisition. This may be done online at: [www.dol.gov/asp/fairpayandsafeworkplaces/PreAssessment.htm](http://www.dol.gov/asp/fairpayandsafeworkplaces/PreAssessment.htm)
- Why do this? It can be a proactive step to determine how the company's labor compliance history would be viewed. If there are labor law compliance concerns, there would be time to mitigate the issue(s) prior to bidding on a federal contract. If the DOL concludes that the contractor is in compliance, the contractor may use this determination when submitting a future bid, assuming no recent violations have occurred. Voluntary pre-assessment does not require contractors to register in SAM (System for Award Management) because there is no association with a specific contract.

#### OCTOBER 25, 2016: THE FINAL RULE IS EFFECTIVE.

- Prospective prime contractors who bid on contracts greater than \$50 million must make mandatory disclosures. Note: The dollar threshold will drop to \$500,000 six months from this date.
- Only contracting entities must comply with these regulations – not parents, subsidiaries, or affiliate companies.

However, if an entity has more than one location, covered labor law violations at all locations where the entity operates must be included for disclosure.

- The reporting disclosure period is one year. This means that effective October 25, 2016, contractors must disclose qualifying reportable decisions going back to October 25, 2015. Note: The disclosure period will increase from one to three years but this will also be phased in. For example, effective October 25, 2016, federal contractors are required to go back only one year to October 25, 2015 to report violations. Continuing to use the October 25, 2015 date, the look back period will increase each year by one year until October 25, 2018 when the three-year look back period becomes effective. Going forward, contractors and subcontractors must disclose violations for a three-year period from the date of disclosure.
- The following information must be disclosed
  - 1) Labor law violated,
  - 2) Docket number or case ID number,
  - 3) Date rendered, and
  - 4) Name of the court, arbitrator(s), agency, board or commission issuing the judgment.

*This information must be disclosed using the General Services Administration's System for Award Management (SAM). This system is currently used by federal contractors for other disclosures.*

*The violation does not necessarily have to be committed during the three-year disclosure period, but rather the date the decision was rendered must occur within the disclosure period.*

- Those awarded federal contracts will be required to update their labor law compliance disclosure every six months

during the performance of the awarded contract(s).

#### Prohibition on Mandatory Pre-Dispute Arbitration Agreements

- Contractors and subcontractors with contracts greater than \$1 million are prohibited from requiring their employees or independent contractors to enter into pre-dispute arbitration agreements for claims arising under Title VII or torts related to sexual assault or harassment, except where valid contracts already exist and remain unmodified. This does not apply to employees who are covered by any type of collective bargaining agreement.

#### JANUARY 1, 2017: THE PAYCHECK TRANSPARENCY CLAUSE IS EFFECTIVE.

There are two components to this clause: 1) providing a wage statement; and 2) providing notification to independent contractors.

##### Wage Statement

- Federal contractors with procurement contracts for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds \$500,000 must provide a document (wage statement) every pay period to each employee with information containing the individual's hours worked, overtime hours, rate of pay, gross pay, and an itemization of each addition to and deduction from the gross pay.
- For exempt employees, the document need not include a record of hours worked if the contractor notifies them in writing of their overtime exempt status.
- If a significant portion of the contractor's workforce is not fluent in English, the document provided

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notifying the workers of their status must also be in the language in which the significant portion of the workforce is fluent.

## Independent Contractor Notification

- For those individuals designated as independent contractors and not employees, the contractor must provide a document informing them of their independent contractor status.

## APRIL 25, 2017: THE DOLLAR THRESHOLD FOR PRIME CONTRACTS IS REDUCED TO \$500,000.

- Prospective prime contractors who bid on contracts greater than \$500,000 are now required to make disclosures. These regulations apply to new contracts and subcontracts for goods and services, including construction, where the value exceeds \$500,000.

## OCTOBER 25, 2017: MANDATORY ASSESSMENT AND DISCLOSURE BEGINS FOR SUBCONTRACTORS.

- All subcontractors who are under consideration for subcontracts greater than \$500,000 other than commercially available off-the-shelf (COTS) items, are required to make disclosures.
- Subcontractors will report their disclosures directly to the DOL. The DOL will conduct its review and assessment. The subcontractor will subsequently notify the contractor of the results of the DOL's review, which the prime contractor may then consider when evaluating the subcontractor.

## OCTOBER 25, 2018: THE REPORTING PERIOD EXPANDS FROM ONE YEAR TO THREE YEARS.

- As explained above, the three-year look back period is officially implemented. Effective this date, contractors and subcontractors must disclose qualifying reportable decisions for a three-year period from the date of disclosure.

## FUTURE DATES FOR ADDITIONAL COMPLIANCE

- Currently, only the fourteen federal laws and executive orders, as well as state OSHA plans, are covered under this executive order. The FAR council and DOL have indicated that they intend to issue a comprehensive listing of state laws that will also be covered under this executive order under which contractors will be required to disclose violations. As of now, this information has not been released.

## WHAT CAN CONTRACTORS DO TO PREPARE?

Contractors should evaluate how they will be affected by these requirements and consider what actions may be necessary for compliance. At a minimum, contractors should:

- Establish procedures and policies to track and record the required data. This information, when needed, may have to be produced in a relatively quick timeframe in order to remain competitive.
- Designate a person(s) who will be responsible for overseeing the process of gathering, documenting, and maintaining

data that must be disclosed.

- Begin compiling an internal list of labor law violations (since 10/25/15), noting specifically:
  - 1) Law violated,
  - 2) Docket number or Case ID number,
  - 3) Date of the decision of violation;
  - 4) Name of the body issuing the judgment.

Contractors should also document back-up information in case further details are requested, especially where additional explanations might show why the violations were not willful, severe or repeated. For example, when disclosing information in SAM, prospective contractors may include additional information and/or upload documents to explain mitigating factors and remedial measures (i.e., actions taken to address violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws). Note that this additional information will not be made public unless the contractor requests that it be made public.

Below, for your convenience and reference, is a link to the Fair Pay and Safe Workplaces Executive Order's Frequently Asked Questions (FAQ): <https://www.dol.gov/asp/fairpayandsafeworkplaces/FAQs.htm>

Please feel free to contact John Zandy at 203-498-4330 or Robin Martocci at 860-297-3710 if you have questions regarding this advisory.

*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*