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CLIENT ALERT

June 18, 2015

Proposed Regulations and Guidance Issued for Executive Order on Fair Pay and Safe Workplaces

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ALTHOUGH THE REGULATIONS ARE NOT FINAL AND MAY CHANGE, GOVERNMENT CONTRACTORS SHOULD TAKE STEPS NOW TO PREPARE FOR THE ANTICIPATED FINAL REGULATIONS UNDER THE EXECUTIVE ORDER.

On May 28, the Federal Acquisition Regulatory Council and the U.S. Department of Labor issued proposed regulations and guidance, respectively, for Executive Order 13673, Fair Pay and Safe Workplaces (the Executive Order), which was implemented by President Obama on July 31, 2014. The proposed regulations and guidance, which flesh out the requirements of the Executive Order, are open for public comment until July 27, 2015.

The Executive Order requires that:

- Federal government contractors that are bidding on a contract valued at more than $500,000 disclose violations of certain labor laws so that the government agencies contracting with such companies can evaluate whether a contractor is a "responsible source," meaning one that has a satisfactory record of integrity and business ethics

- Federal government contractors and subcontractors with contracts/subcontracts valued at more than $500,000 provide employees with information in writing about the hours they worked and the wages and overtime they earned, and that contractors and subcontractors provide written notice to each independent contractor, before the independent contractor begins work on the federal contract, that it treats the worker as an independent contractor (the so-called "paycheck transparency" provisions)

- Federal government contracts of $1 million or more contain a prohibition of pre-dispute arbitration agreements for claims arising under Title VII of the Civil Rights Act of 1964 and tort claims relating to sexual assault or harassment, unless an employee voluntarily invokes arbitration.

Requirement to Disclose Labor Law Violations

In perhaps the most controversial portion of the proposed regulations and guidance, contractors bidding on contracts that are estimated to exceed $500,000 would be required to disclose all adverse "administrative merits determinations, civil judgments and arbitral awards or decisions" arising under "labor laws" rendered during the three years preceding the date of the bid or proposal.[1] This disclosure requirement encompasses violations that occurred during that three-year period, even if the contractor was not performing or bidding on a federal contract at that time. If the contractor progresses to the responsibility determination phase of the process, it must provide additional information about the labor law violations, if any. If the contractor is awarded a contract, it is required to update its disclosure every six months. Contractors are obligated to request the same information from their subcontractors that bid on a subcontract valued at more than $500,000, except for a subcontract for commercially available off-the-shelf items.

The controversy over this requirement stems, in large part, from the very expansive definition of "administrative merits determinations." That term refers to seven categories of "notices or findings — whether final or subject to appeal or further review — issued by an enforcement agency following an investigation that indicates that the contractor or subcontractor violated any provision of the Labor Laws." As an example, under the proposed regulations, a contractor would be required to disclose a reasonable cause finding by the Equal Employment Opportunity Commission, which does not equate to a legal determination of liability. The proposed regulations and guidance require disclosure even of administrative merits determinations that a contractor or subcontractor is challenging or can still challenge in the future. This is problematic because it affects the due process rights of contractors by treating allegations as facts.

The proposed regulations and guidance direct contracting officers to evaluate the information supplied by contractors in assessing whether a contractor is a "responsible source" that should be awarded the contract at issue. Contracting officers will be assisted in this effort by Labor Compliance Advisors (LCAs), senior agency officials to be designated by each contracting agency, who will issue recommendations as to whether a contractor has a satisfactory record of integrity and business ethics. Serious, willful, repeated or pervasive violations are more likely to impact the assessment of a contractor's record of integrity and business ethics, and a single violation is unlikely to give rise to a determination that a contractor is not responsible, depending on the violation. Unfortunately, the proposed regulations and guidance contemplate a level of subjectivity that is bound to snare good, well-intentioned contractors, initially resulting in the loss of a contract and possibly being "blacklisted" with respect to future contracts.

Paycheck Transparency

The proposed regulations and guidance require that contractors and subcontractors provide each worker who is subject to the Fair Labor Standards Act, the Davis Bacon Act or the Service Contract Act with a written wage statement accompanying each paycheck, which lists the hours worked (regular and overtime), pay (regular and overtime), and any additions or deductions from pay. The wage statement must break down the regular and overtime hours worked on a weekly basis, even if employees are paid less frequently than weekly. For exempt employees, the statement does not need to include hours

worked if the contractor/subcontractor has informed the employee that he/she is exempt. If the contractor/subcontractor complies with a state law that has similar requirements (those states will be identified by the Department of Labor), then such compliance will satisfy the federal requirement. For contractors that do not already provide such information with employee paychecks, these new administrative requirements will be extremely cumbersome and will be costly to implement.

The paycheck transparency rules also mandate that contractors/subcontractors give independent contractors a stand-alone written document that notifies them of their independent contractor status before the independent contractor begins work on a new federal contract. That notification does not establish, however, that the worker is correctly classified as an independent contractor.

No Mandatory Arbitration of Title VII Claims

The proposed regulations and guidance require that, for federal contracts valued at more than $1,000,000, contractors must agree that arbitration of claims under Title VII or of claims for any tort arising out of sexual assault or harassment shall occur only with the voluntary consent of employees or independent contractors and only after such disputes arise. Contractors must include this requirement in their subcontracts that are expected to exceed $1 million. If this provision stands, it would impair significantly the ability of contractors to implement mandatory arbitration policies. With respect to Title VII and workplace harassment tort claims at least, arbitration could occur only if an employee or an independent contractor consents after a dispute has materialized.

Steps to Take Now

Although the regulations are not final and may be changed through the comment process, federal government contractors can take some steps now to prepare for the anticipated final regulations under the Executive Order:

- Implement systems for maintaining in a usable format the information that is required by the Executive Order, including a list and description of labor law violations and a list of independent contractors

- Review independent contractor arrangements to ensure that independent contractors are classified properly

- Ensure that the information required by the paycheck transparency provisions can be readily assembled

- Review arbitration policies and agreements, if any, for compliance with the prohibition against pre-dispute agreements to arbitrate Title VII and sexual harassment claims

- Consider developing a process for employees to consent to arbitration of Title VII and sexual harassment claims after a dispute arises.

Endnotes

1. "Labor laws" are identified as the Fair Labor Standards Act, the Occupational Safety and Health Act, the Migrant and Seasonal Agricultural Worker Protection Act, the National Labor Relations Act, the Davis Bacon Act, the Service Contract Act, Executive Order 11246, section 503 of the Rehabilitation Act, the Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Veterans' Readjustment Assistance Act of 1974, the Family and Medical Leave Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, Executive Order 13658, and equivalent state laws.