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Fair Pay-Safe Workplaces: The "On-Hold" Rules and Guidance

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FAR Council Rules and DOL Guidance implementing the controversial Fair Pay-Safe Workplaces Executive Order (EO 13673) were scheduled to go into effect on October 25, 2016 under a phased in approach. As a refresher for those already familiar with the EO, it contains three distinct requirements: the disclosure or "blacklisting" requirements, the paycheck transparency requirements, and the arbitration restrictions.[1] However, as a result of a nationwide preliminary injunction issued by the U.S. District Court for the Eastern District of Texas, both the disclosure requirement and arbitration restrictions are on hold pending further litigation. The paycheck transparency provisions will go into effect on January 1, 2017 as scheduled. Contractors should prepare for the paycheck transparency requirements, which are discussed in detail in RJO's article "*Blacklisting Provisions and Arbitration Restrictions of 'Fair Pay and Safe Workplaces' Rules On Hold …For Now: Paycheck Transparency Provisions Go Into Effect January 1, 2017*."

In addition, because a preliminary injunction is an early step in the litigation process that is designed to preserve the status quo pending full adjudication of the merits, contractors should not assume that the enjoined rules will disappear. Government contractors unfamiliar with the enjoined rules and guidelines would be wise to familiarize themselves with their requirements in the event these rules become effective or are later implemented in a modified form.

The Enjoined "Blacklisting" Rules

The EO's most controversial requirements – which are currently enjoined - are its "Compliance with Labor Laws," or "Blacklisting" provisions. As discussed below, these provisions – if they survive litigation – contemplate a phased implementation of rules based on contract value which will impose significant new requirements on contractors and

[1] Under the EO the disclosure and paycheck transparency requirements apply to procurement contracts where the value of goods or services exceeds $500,000, except for ***sub-contracts*** for commercial off the shelf items (COTS). The arbitration restrictions apply to procurement contracts for goods or services exceeding $1 million, except for COTS contracts and subcontracts. The requirements do not apply to grants or cooperative agreements.

subcontractors, beginning at the initial bidding stage and continuing throughout performance of any covered contract. Below is a detailed summary of the regulations' requirements as currently written.

Required Disclosures When Bidding

At the pre-award stage of a covered contract, the prospective contractor must represent whether any "**Labor Law decisions"** have been rendered against it during the past three years (but not earlier than October 25, 2015). The prospective contractor has a duty to update its initial representation prior to award if there is any change.

"Labor Law decisions" include **administrative merits determinations**, **arbitral awards or decisions**, and **civil judgments**, for violations of the following labor laws:

- The Fair Labor Standards Act (FLSA)
- the Occupational Safety and Health Act of 1970 (OSH Act) and any OSHA approved State Plan
- the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
- the National Labor Relations Act (NLRA)
- the Davis-Bacon Act (DBA)
- the Service Contract Act (SCA)
- Executive Order 11246 (Equal Employment Opportunity)
- Section 503 of the Rehabilitation Act
- the Vietnam Era Veterans' Readjustment Assistance Acts of 1972 and 1974
- the Family and Medical Leave Act (FMLA)
- Title VII of the Civil Rights Act of 1964
- the Americans with Disabilities Act of 1990 (ADA)
- the Age Discrimination in Employment Act of 1967 (ADEA)
- Executive Order 13658 (Minimum Wage for Contractors)

State law violations need not be reported (except for violations of OSHA approved State Plans) until supplementary DOL guidance and a FAR rule are issued adding "state-law equivalents" of these enumerated federal labor laws for which disclosure will be required.

"**Administrative merits determination"** are broadly defined to include "notices or findings—*whether final or subject to appeal or further review*—issued by an enforcement agency following an investigation that indicated that the contractor or subcontractor violated any provision of the Labor Laws." (Emphasis added.) The DOL Guidance provides an "exhaustive list" of categories of documents that meet this definition, including, WH-56 "Summary of Unpaid Wages" (a DOL Wage and Hour Division Form); OSHA citations (including those issued by state agencies administering an OSHA approved state plan); show cause notices issued by OFCCP; reasonable cause findings by EEOC, and complaints issued by a Regional Director of the NLRB. The broad definition of an "administrative merits determination" was a significant focus of the Court's order granting preliminary injunction.

If the rules are amended in light of the pending litigation, we would expect this definition to be an area of significant revision.

"Arbitral awards or decisions" include "any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the contractor violated any provision of the Labor Laws, or enjoined or restrained the contractor from violating any provision of the Labor Laws." Notably, *this includes awards and decisions in private or confidential arbitral proceedings*, and awards and decisions that are subject to further review.

"**Civil judgments"** include "any judgment or order entered by any Federal or State court in which the court determined that the contractor violated any provision of the Labor Laws, or enjoined or restrained the contractor from violating any provision of the Labor Laws." Civil judgments or orders that are not final or are subject to appeal, preliminary injunctions (but not a temporary restraining order), consent judgments and default judgments are included. However, a private settlement where the lawsuit is dismissed by the court without any judgment being entered is not a civil judgment under the rules. Nor is an accepted offer of judgment pursuant to the Federal Rule of Civil Procedure 68.

Disclosures In Advance of Responsibility Determination

If the contractor reaches the stage in the process at which a responsibility determination is initiated, the contractor must disclose in SAM the following additional information about each Labor Law decision, which will also be publicly available through FAPIIS:

- the Labor Law that was violated;
- the case number, inspection number, charge number, docket number, or other unique identification number;
- the date that the determination, judgment, award, or decision was rendered; and
- the name of the court, arbitrator(s), agency, board, or commission that rendered the decision.

The contractor may provide (via SAM) additional information about mitigating factors and remedial measures, such as steps taken to correct violations. Additional information can also include that the contractor is challenging or appealing an adverse Labor Law decision. This additional information provided by the contractor would not be made public unless the contractor indicates that it wants the information to be public.

DOL Advisor Assessment, Labor Compliance Agreements and Contracting Officer Responsibility Determinations

The contracting officer has the ultimate responsibility and discretion to determine whether the contractor has a satisfactory record of integrity and business ethics and is a responsible source. However, DOL Agency Labor Compliance Advisors (ALCAs), using a three-step process, would provide pre-award advice to contracting officers:

Step One: *Evaluation and Classification of Labor Law Violations*

In the first step, an ALCA reviews all of the contractor's violations to determine if any are "serious, repeated, willful, or pervasive." The DOL Guidance contains detailed classification criteria for these categories.

"Serious" violations will be found if:

- The violation affected at least 10 workers, and the affected workers made up 25 percent or more of the contractor's workforce at the worksite or the contractor's workforce overall;
- Fines and penalties of at least $5,000 or back wages of at least $10,000 were found due;
- The contractor's conduct caused or contributed to the death or serious injury of one or more workers;
- The contractor employed a minor who was too young to be legally employed or in violation of a Hazardous Occupations Order;
- An OSHA violation will be deemed to be serious if the violation was designated as "serious" under the OSH Act (or an equivalent State designation), or if the contractor was issued a notice of failure to abate, imminent danger notice or "serious" designated violation under an OSH Act or OSHA approved State Plan;
- The contractor retaliated against one or more workers for exercising any right protected by any of the Labor Laws;
- The contractor engaged in a pattern or practice of discrimination or systemic discrimination;
- The contractor interfered with the enforcement agency's investigation;
- The contractor breached the material terms of any agreement or settlement entered into with an enforcement agency, or violated any court order or any administrative order by an enforcement agency.

"Repeated" violations are generally defined to exist where the same legal entity has a violation that is the same as or "substantially similar" to a prior violation of the Labor Laws, the prior violation was the subject of a separate investigation or proceeding, arose from a separate set of facts, and became uncontested or adjudicated within the previous three years. The DOL Guidance provides an exhaustive statute by statute list of "substantially similar" violations. OSHA violations which are designated "repeated" or "repeat" and which became uncontested or adjudicated in the previous 3 years are considered "repeated" under the EO.

"Willful" depends on the statute that is the source of the violation:

- FLSA minimum wage, overtime and child labor violations are "willful" if an administrative merits determination "sought or assessed" back wages greater than two years or assessed civil monetary penalties for a willful violation; or if a there was a civil judgment or arbitral award finding that the violation was "willful."
- An ADEA violation is "willful" if liquidated damages were assessed or awarded.

- A Title VII violation is "willful" if punitive damages were assessed or awarded.
- OSHA violations are "willful" if the citation or equivalent State document was designated as willful or any equivalent State-law designation (e.g., "knowing").
- Violations of other Labor Laws are "willful" if "it is readily ascertainable from the findings … that the contractor knew that its conduct was prohibited by the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited…".

"Pervasive" violations exist if the ALCA finds that the violations "reflect a basic disregard by the contractor for the Labor Laws as demonstrated by a pattern of serious and/or willful violations, continuing violations, or numerous violations." For smaller companies, a smaller number of violations may be sufficient for a finding of pervasiveness, while for large companies, pervasive violations will typically require either a greater number of violations or violations affecting a significant number or percentage of a company's workforce. Also relevant is the involvement of higher-level management officials in the violation.

Step Two: *Weighing Violations and Mitigating Factors*

In this step, the ALCA analyzes any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors, and also consider undisclosed Labor Law decisions that become known from another source, *e.g.*, the contracting officer, workers or their representatives, or an enforcement agency. While the DOL cautions that this second step is "not mechanistic", the DOL Guidance lists certain factors that support a finding of a satisfactory record, such as where the contractor:

- remediated the violation(s) and took steps to prevent recurrence;
- has only a single disclosed violation, or a low number of violations relative to its size;
- implemented a safety-and-health management program, a collectively-bargained grievance procedure, or other compliance program;
- violated a recently changed legal or regulatory provision;
- had "good faith" or "reasonable grounds" for believing its conduct was legal; and
- maintained a long period of compliance following any violations.

Conversely, factors that weigh against a conclusion that a contractor has a satisfactory record of Labor Law compliance include, but are not limited to:

- pervasive violations;
- violations that fall into two or more of the serious, willful, and/or repeated categories;
- violations related to the death of an employee;
- violations involving retaliatory termination of employment;
- violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite;

- violations where the amount of back wages, penalties, and other damages awarded is greater than $100,000;
- violations where injunctive relief is granted; and
- violations that are reflected in final orders.

Step Three: *Advice Provided to the Contracting Officer*

In this final step, the ALCA provides advice to the contracting officer regarding the contractor's record of Labor Law compliance and whether a labor compliance agreement or other action is warranted. If a contractor enters into a labor compliance agreement, the entry will be noted in FAPIIS. Ultimately, however, the contracting officer is the decision maker with the responsibility and discretion to determine whether the contractor has a satisfactory record of integrity and business ethics and is a responsible source.

Post-Award Duty to Update

Post award, the contractor must update its disclosures every 6 months in the SAM database. The contracting officer will use this information to determine whether to exercise any contract remedy, including refusal to exercise an option, termination of the contract, or notification to the agency suspending and debarring official.

Subcontractor Disclosure Requirements

The disclosure rules would apply to subcontracts where the estimated value of a subcontract exceeds $500,000. Notably, ***subcontracts*** for COTS (commercially available off-the-shelf items) are excluded from the disclosure requirements. ***Contracts for COTS are not excluded.*** The disclosure rules for subcontractors are similar to those for prime contractors: a subcontractor's initial representation is made to the contractor; detailed disclosures are made to DOL (not directly to the contractor) via the DOL website. DOL advises the subcontractor of its assessment, which the subcontractor then provides to the contractor for use in its responsibility determination. Subcontractors must update disclosures to DOL every six months.

DOL Pre Assessment Opportunity

Prior to bidding on covered contracts, contractors and subcontracts could seek pre-assessment of their Labor Law compliance record from the DOL. DOL has suggested that pre-assessment will help companies determine whether a contractor's violations have been "serious, repeated, willful, or pervasive" —determinations which can be fatal to a bidder's viability. Contact information and additional guidance regarding the pre-assessment program can be found at *http://www.dol.gov/fairpayandsafeworkplaces*. DOL has not updated the informational page about pre-assessment in light of the preliminary injunction, but it is doubtful that these processes could continue while the rules are subject to injunction.

Phased Implementation of Disclosure Requirements

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Phased Implementation of Disclosure Requirements

Under the rules as currently written the disclosure requirements would be phased-in to covered contracts over time. Of course, while the preliminary injunction is in place, all of these dates are on hold.

October 25, 2016: disclosure requirements were to be included in solicitations for contracts valued at $50,000,000 or more and would apply to prime contractors only.

April 25, 2017: disclosure requirements would be included in solicitations for contracts valued at $500,000 or more and would continue to apply only to prime contractors;
October 25, 2017: disclosure requirements would apply to subcontractors with subcontracts valued at $500,000 or more;

Date to be determined: requirements to disclose "equivalent" state law violations – other than OSHA-approved state plans- would be required when additional guidance and FAR rules are implemented.

Enjoined "Complaint and Dispute Transparency" Requirement

Under the "Complaint and Dispute Transparency" requirement, contractors or subcontractors for goods or services exceeding $1 million in value cannot force employees to agree to pre-dispute arbitration of claims for violations of Title VII of the Civil Rights Act of 1964, or tort claims arising out of sexual assault or harassment. COTS contracts and subcontracts, and contracts subject to collective bargaining agreements, are excluded from this requirement. These rules were set to go into effect on October 25, 2016, but are currently enjoined.

Conclusion

Contractors and subcontractors must be prepared for the Paycheck Transparency requirements of the EO, Rules and Guidance, which go into effect on January 1, 2017. If the Court's current preliminary injunction is lifted, the blacklisting provisions will become effective and impose significant burdens on contractors and subcontractors, burdens which will only increase as phased-in implementation casts a broader net to capture more contractors and subcontractors and supplemental rules require disclosures of violations of "equivalent" state laws. Despite the current injunction, all federal contractors and subcontractors would be wise to ensure that they are prepared for compliance in the event these rules, or some modified version of these rules, become effective.

The case in which the preliminary injunction was issued is *Associated Builders and Contractors of Southeast Texas, et, al v. Anne Rung, Administrator, Office of Federal Procurement Policy, Office of Management and Budget, et al.* (Case No. 1:16-CV-425).

See the Final Rule, issued by the FAR Council, and Final Guidance issued by the Department of Labor (DOL).

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If you have any questions regarding the material in this update, please contact the Rogers Joseph O'Donnell attorney with whom you regularly work, or the authors of this legal update.

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