Federal Contractors and Subcontractors Subject to yet More Mandatory Disclosure Requirements

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New FAR Rules and U.S. Department of Labor Guidance Implement the Long-Anticipated (and Much-Dreaded) Fair Pay and Safe Workplaces Executive Order

Burdensome disclosure obligations, pay transparency, and other affirmative requirements as a condition of doing business with the federal government continue. Sound familiar? The trend continues with new Federal Acquisition Regulation ("FAR") rules and accompanying U.S. Department of Labor ("DOL") guidance issued on August 25, 2016, implementing the Fair Pay and Safe Workplaces Executive Order. In a nutshell – boiling down over 800 pages of rulemaking materials – the rules will soon require:

- **Mandatory disclosure of labor law violations** by contractors and subcontractors bidding on contracts valued over $500,000 – initially for violations occurring from October 25, 2015, to the date of offer submittal, and eventually dating back three years from the date of the offer;
- **Increased paycheck transparency for employees** in the form of more detailed wage statements issued each pay period;
- **Notification to independent contractors** of their independent contractor status prior to beginning work on each covered contract; and
- **A prohibition on mandatory pre-dispute arbitration agreements** covering discrimination or sexual assault and harassment claims.

Since the Fair Pay and Safe Workplaces Executive Order was signed on July 31, 2014, its requirements have been considered controversial. Aside from the requirements' anticipated complexity, they also pose the risk of impacting contract awards on even alleged labor violations addressing wage and hour, collective bargaining, family and medical leave, equal employment opportunity, civil rights, and safety violations. Although the various requirements will be phased in over time, even those companies (including firms considering entering the federal marketplace at any tier) that do not presently fall under the scope of the new rules should carefully review the requirements and their internal systems *now* in order to lay the necessary groundwork for compliance.

Mandatory Disclosure of Labor Law Violations

The new provisions to be added at FAR Subpart 22.20 (and to the list of standard representations and certifications) impose on contractors and subcontractors an obligation to disclose recent violations of a large number of wide-ranging labor laws. As mentioned, the rules will be phased in over time to allow companies some time to digest the requirements and to establish mechanisms for gathering and tracking the relevant information.

Who must make the disclosure?When the rules become effective on October 25, 2016, only prime contractors bidding on contracts valued at $50 million or more will be subject to the reporting requirement through new clauses to be implemented at FAR 52.222-57, -58, and -59. Six months later, on April 25, 2017, the dollar threshold will be lowered to $500,000 and the disclosure obligation will still be limited to prime contractors. On October 25, 2017, the requirements will be extended to also cover subcontractors at any tier bidding on contracts valued at more than $500,000, with the exception of subcontracts for commercially available off-the-shelf ("COTS") items.

Prime contractors will *not* be responsible for collecting and assessing their subcontractors' disclosures; instead, subcontractors will be required to make their own disclosures directly to the DOL. Subcontractors must then report to the prime contractor the DOL's response to their disclosure, and in turn, the prime contractor must consider the DOL's response in making its own determination of the subcontractor's present responsibility when making its award decision.

The final rules clarify that disclosures will not be required for corporate parents, subsidiaries, or other affiliates, and will be confined to the legal entity in whose name a bid or proposal is submitted. However, each member firm of a joint venture submitting a bid must comply with the reporting requirements. The final rules also make clear that the disclosure requirements apply to the entire legal entity (including all divisions and locations) and not just to violations involving the particular employees working on a covered contract.

What must be disclosed? The breadth of the disclosure requirement covers violations of the following 14 federal labor laws and executive orders:

- The Fair Labor Standards Act
- The Occupational Safety and Health Act of 1970
- The Migrant and Seasonal Agricultural Worker Protection Act
- The National Labor Relations Act
- 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act
- 41 U.S.C. chapter 67, formerly known as the Service Contract Act
- E.O. 11246 (Equal Employment Opportunity)
- Section 503 of the Rehabilitation Act of 1973
- The Vietnam Era Veterans' Readjustment Assistance Acts of 1972 and 1974
- The Family and Medical Leave Act
- Title VII of the Civil Rights Act of 1964
- The Americans with Disabilities Act of 1990
- The Age Discrimination in Employment Act of 1967
- E.O. 13658 (Establishing a Minimum Wage for Contractors)

Also covered are Occupational Safety and Health Administration ("OSHA")-approved state plans. Although the disclosure requirement will be further extended to certain state laws at a future date following a notice and comment period, companies that have their primary operations in states where most employment-related claims are made under *state* laws (e.g., California, Massachusetts, and New Jersey) are temporarily sheltered from the full impact of

the disclosure obligations due to the low incidence of claims under federal labor laws in those states.

Reportable violations are broadly defined and include administrative merit determinations, arbitral awards or decisions, and civil judgments, which means that the scope of the disclosure obligation is broad enough to cover complaints filed by enforcement agencies as well as notices and findings that are not yet final and may be subject to appeal or further review. The particular information that must be disclosed includes (i) the law violated, (ii) the case identification number, (iii) the date of the decision finding a violation, and (iv) the name of the body making that decision. All such information will be publicly available in the Federal Awardee Performance and Integrity Information System ("FAPIIS").

What will be the impact of making the disclosure?Prime contractors must make their disclosures in the System for Award Management ("SAM"), and those disclosures will be examined by agencies when evaluating an offeror's past performance during the agency's award decision. To provide greater context regarding any reported violations, companies are also invited to disclose any related mitigating factors and remedial efforts undertaken that reflect on questions of the contractor's integrity, business ethics, and present responsibility.

All companies will have an ongoing duty to update their disclosures at least every six months.

Increased Paycheck Transparency for Employees and Notification to Independent Contractors

Although the mandatory disclosure obligation in the new rules is attracting the most attention and causing the most consternation, additional requirements embedded in the Fair Pay and Safe Workplaces rules cannot be overlooked by contractors.

The first of these additional provisions is the "paycheck transparency" requirement, which will require that all employees working on a federal contract or subcontract receive detailed pay stubs or wage statements that allow them to more readily assess and verify the accuracy of what they are being paid. The wage statements issued each pay period must include the following data elements: (i) total number of hours worked, (ii) total number of overtime hours, (iii) rate of pay, (iv) gross pay, and (v) an itemization of each addition to or deduction from the employee's gross pay (similar to requirements already in effect in some states, including California, New York, and Connecticut, as well as the District of Columbia). Furthering the theme of transparency, companies will also have to provide independent contractors with a notice explicitly informing them of their independent contractor status prior to beginning work on each covered contract. Notably, this written notification must be provided separately from any independent contractor agreement entered into between the contractor and the individual.

These requirements, to be implemented in a new clause at FAR 52.222-60, will come into effect on January 1, 2017, and will apply to all contractors and subcontractors with contracts valued over $500,000, with the exception only of subcontracts for COTS items.

Prohibition on Mandatory Pre-Dispute Arbitration Agreements

Last, the new rules prohibit contractors and subcontractors with noncommercial item contracts of $1 million or more from entering into mandatory pre-dispute arbitration agreements with employees or independent contractors covering claims under Title VII of the Civil Rights Act of 1964 or any tort claims arising out of sexual assault or harassment. Under this provision, contractors must agree that the decision to arbitrate such claims will be made only with the voluntary consent of the individual *after* any dispute regarding a covered claim arises. Importantly, this rule applies to *all* employees and independent contractors, not just those working directly on a covered contract. This clause will thus have a significant impact

on all companies with even a single covered contract because it may negate – for all employees and independent contractors – pre-dispute arbitration agreements containing broad class action waivers. This obligation does not apply to contracts for the acquisition of commercial items.

This prohibition, to be implemented in a new clause at FAR 52.222-61, goes into effect on October 25, 2016.

You've Read This Alert…Now What Do You Do?

Simply being aware that these new rules are coming down the pike is not enough in the face of the potential attendant compliance challenges. As mentioned above, even companies that may not be subject to all of the Fair Pay and Safe Workplaces provisions until the full scope of the rules is phased in should make the investment of time and resources now to get in front of the requirements. In particular, the rules require that companies will need to take these steps:

- Identify and collect basic information on any violations related to the above-listed federal labor laws, executive orders, and OSHA-approved state plans since October 25, 2015.
- Carefully review all solicitations and contracts that may be covered by the new rules.
- Review current procedures and policies to ensure compliance with labor laws, and stay abreast of recent developments regarding best practices and compliance obligations.
- Establish processes to (i) track any future violations that may trigger a disclosure obligation and (ii) promptly implement remedial measures in the event of a violation so as to minimize the likelihood that a disclosure may result in an adverse responsibility determination that could jeopardize an award decision.
- Regarding the additional affirmative requirements imposed by the new rules (i) for employees who perform work under each covered contract, review designations as either exempt or nonexempt from overtime under the Fair Labor Standards Act, for compliance both with these new rules and with the DOL's Final Overtime Rule going into effect on December 1, 2016; (ii) update wage statements to ensure all required details are included for all covered employees during each pay period; (iii) draft proper independent contractor notices; and (iv) review all arbitration agreements to make sure they do not run afoul of the new restrictions.

Putting in the requisite legwork in advance can only help to lessen the burden once the rules are in full swing, and can give companies ready to comply an edge in bidding against their less-prepared competitors.