

How to Prepare for the “Fair Pay and Safe Workplaces” Proposed Rule and Accompanying Guidance

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Overview

- ❖ New "labor law violation" disclosure requirements and resulting contracting officer responsibility determinations
- ❖ Unique role of "Labor Compliance Advisors"
- ❖ Paycheck transparency and independent contractor notice requirements
- ❖ Limitation on companywide arbitration plans
- ❖ FAR implementation

Executive Order 13673

Fair Pay and Safe Workplaces

◆ Signed by POTUS on July 31, 2014

◆ Purpose

- ▶ To ensure compliance with labor laws for those who contract with the federal government
- ▶ To help government employers to identify and contract with only “responsible” companies having a history of labor law compliance (i.e., those with a “satisfactory record of integrity and business ethics”) and to avoid those with a history of non-compliance

Executive Order 13673

Fair Pay and Safe Workplaces

❖ How does the Order ensure compliance or aid contracting officers?

▶ With New General Disclosure Requirements

- Certain contractors and subcontractors must disclose applicable administrative merits determinations, civil judgments, and arbitral awards or decisions for the previous 3 years.
- Such contractors must also provide semi-annual updates during the performance of the covered contract.

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Fair Pay and Safe Workplaces

❖ Who must disclose?

- ▶ Any contractor that responds to a solicitation for a procurement contract for goods and services, including construction, where the estimated value of the supplies acquired or services required exceeds \$500,000 (“covered procurement contract”)
- ▶ Any subcontractor performing a subcontract that would be a covered procurement contract except for contracts for commercially available off-the-shelf items

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Fair Pay and Safe Workplaces

- ❖ **What exactly must be disclosed by contractors or subcontractors subject to the Order?**
 - ▶ Any “administrative merits determinations, civil judgments, or arbitral awards or decisions” against the contractor or subcontractor indicating a violation of any of the 14 identified labor laws or state equivalents (the “Labor Laws”)
 - FLSA
 - OSHA
 - Migrant and Seasonal Agricultural Worker Protection Act
 - NLRA
 - Davis-Bacon Act
 - Service Contract Act
 - EO 11246 (Prohibiting Discrimination by Federal Contractors)
 - Section 503 of the Rehabilitation Act or the ADA
 - Vietnam Era Veterans’ Readjustment Assistance Act
 - FMLA
 - Title VII
 - ADEA
 - EO 13658 (Minimum Wage for Federal Contractors)

Executive Order 13673

Fair Pay and Safe Workplaces

- ❖ **Again, what exactly must be disclosed by contractors or subcontractors subject to the Order?**
 - ▶ On May 28, 2015, the Obama Administration issued guidance to help clarify the disclosure and other requirements with the
 - **Department of Labor (“DOL”) Guidance**; and
 - **Federal Acquisition Regulation (“FAR”) Proposed Rule** (which incorporates the DOL Guidance)

DOL Guidance Goals

- ❖ To define key terms that trigger reporting requirements:
 - ▶ Administrative Merits Determination
 - ▶ Civil Judgment
 - ▶ Arbitral Award or Decision
- ❖ To provide Labor Compliance Advisors (“LCA”) with guidance for assessing violations, including mitigating factors to consider
- ❖ To provide guidance on the Order’s paycheck transparency provisions

DOL Guidance Key Terms

❖ Administrative Merits Determination

- ▶ A notice, finding, or other document stating that Labor Laws have been violated when issued by any agency that administers the federal labor laws (or a state agency *administering* identified* equivalent state laws)
- ▶ The determination need not be final and may still be challengeable or in the process of being challenged.

DOL Guidance Key Terms

❖ Administrative Merits Determination

▶ This includes*:

- **A WH-56 “Summary of Unpaid Wages” form (Wage & Hour settlements)**
- A letter or notice from the Wage & Hour Division indicating violations of the FLSA, FMLA, SCA, DBA, or EO 13658 or assessing civil monetary penalties
- Any citation, imminent danger notice, or notice of failure to abate from OSHA (or a state equivalent)
- A show cause notice from the Office of Federal Contract Compliance for a failure to comply with the Labor Laws
- A civil action filed on behalf of the EEOC or a letter of determination that reasonable cause exists that an unlawful employment practice has occurred or is occurring
- **A complaint issued by any Regional Director of the NLRB**
- A complaint* filed by or on behalf of an enforcement agency with a federal or State court, an administrative judge, or an ALJ alleging that the **contractor or subcontractor** violated any provision of the Labor Laws
- Any order from an ALJ, the OSH Review Commission, or NLRB that a violation of the Labor Laws occurred

DOL Guidance Key Terms

❖ **Administrative Merits Determination**

▶ This does not include:

- Employee (or private party) complaints made to enforcement agencies or filed with federal or state courts

DOL Guidance Key Terms

◆ Civil Judgment

- ▶ Means any judgment or order
- ▶ entered by any federal or State court
- ▶ in which the court determined that the contractor or subcontractor violated any provision of the Labor Laws
- ▶ or enjoined or restrained such person from violating the Labor Laws (including partial summary judgment or preliminary injunction)

DOL Guidance Key Terms

◆ Civil Judgment

- ▶ This includes a judgment that is not final and subject to appeal.
- ▶ This does not include:
 - Any judgments or orders issued by an ALJ or other administrative tribunal (though it would constitute an administrative merits determination)
 - Any **private settlement** where the lawsuit is dismissed by the court without any judgment being entered

DOL Guidance Key Terms

❖ **Arbitral Award or Decision**

- ▶ Means any award or order by an arbitrator or arbitral panel in which the arbitrator or panel determined that the contractor or subcontractor violated any provision of the Labor Laws or enjoined or restrained such violations
- ▶ This includes an award that is not final or is subject to being confirmed, modified, or vacated.

DOL Guidance Key Terms

❖ Successive Decisions Based on the Same Underlying Violation

▶ The scenario:

- If a contractor or subcontractor appeals or challenges an administrative merits decision, civil judgment, and/or arbitral award or decision, there may be successive decisions that arise from the same underlying violation.

▶ The rules:

- A contractor or subcontractor need not report a violation if at the time of disclosure/reporting the determination of a Labor Law violation has been reversed or vacated in its entirety.
- But if the decision is later reversed or reinstated, the decision must be reported.
- If successive decisions uphold a violation (or do not completely reverse or vacate the original), the contractor or subcontractor need only report the most recent decision.

DOL Guidance Key Terms

❖ **Successive Decisions Based on the Same Underlying Violation**

▶ **Exceptions:**

- If only part of a decision is challenged or appealed, the contractor or subcontractor must report (and continue to report) both the original and the subsequent decision
- If the original decision was reported prior to the contractor or subcontractor being awarded a contract, a successive decision affirming the earlier decision must again be reported when it updates its disclosures semi-annually

DOL Guidance

❖ How will my disclosures be used or evaluated?

- ▶ The Order requires each agency to designate a senior official to be a Labor Compliance Advisor (“LCA”) to assist contracting officers in evaluating reported violations.
- ▶ The contracting officer, with the advice of the LCA, must determine whether the reported violations are:
 - Serious,
 - Repeated,
 - Willful, or
 - Pervasive
- ▶ Based on these assessments, the contracting officer will then determine whether to award a contract, to exercise an option, to terminate a contract, or to refer the contractor to the agency suspending and debarring official.

DOL Guidance Key Terms

❖ Serious

- ▶ A violation is “serious” if it involves at least one of the following:
 - An OSHA (or State equivalent) citation as serious, a notice of failure to abate, or an imminent danger notice
 - If 25% or more of the contractor or subcontractor’s workforce at a single worksite was affected
 - If the violation(s) resulted in \$5,000 or more in fines and penalties in total or \$10,000 or more in back wages in total
 - MSPA or Child Labor Violations that cause or contribute to death or serious injury
 - Employment of Minors who are too young to be legally employed or in violation of a Hazardous Occupations Order
 - Adverse employment actions or unlawful harassment for exercising rights under Labor Laws (interference with rights)
 - Pattern or Practice of Discrimination or Systemic Discrimination
 - Interference with Investigations
 - Material breaches and violations of settlements, agreements, or orders

DOL Guidance Key Terms

❖ Serious

- ▶ A violation is “serious” if it involves at least one of the following:
 - **If the violation(s) resulted in \$5,000 or more in fines and penalties in total or \$10,000 or more in back wages in total**
 - Fines and penalties are based on the assessed amount only.
 - Fines and penalties do not include:
 - » back wages, compensatory damages, liquidated damages under the FLSA, or statutory damages under MSPA
 - Fines and penalties include:
 - » liquidated damages under the ADEA and punitive damages
 - Back wages include:
 - » compensatory damages, liquidated damages under the FLSA, and statutory damages under MSPA

DOL Guidance Key Terms

◆ Willful

▶ A violation is willful if:

- A citation was issued by OSHA (or a State equivalent), which designated the violation as willful and the violation was not subsequently vacated
- An administrative merits determination sought or assessed back wages for greater than 2 years or assessed civil penalties for a willful violation of the FLSA (or Equal Pay Act) or if there was a judgment or award finding the same
- An agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation of the ADEA
- An agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation of Title VII or the ADA
- An agency, court, arbitrator, or arbitral panel found that a contractor or subcontractor knew or showed reckless disregard that its conduct was prohibited by the Labor Laws or showed reckless disregard or plain indifference to the Labor Laws whether its conduct was prohibited or not

DOL Guidance Key Terms

◆ Repeated Violations

- ▶ A violation is “repeated” if it is the same as or substantially similar to one or more other violations of the Labor Laws (in the past 3 years) by the contractor or subcontractor
 - “Substantially Similar” means essential elements in common. It does not refer to the same Labor Law violation but the same or similar underlying obligation or conduct (or involving the same protected category of employees).

DOL Guidance Key Terms

◆ Repeated Violations

▶ General Rules:

- The two violations must be within the 3 year reporting period.
- The violation must be the result of separate investigations or proceedings.
- A prior judgment, award, decision, or determination that has been reversed or vacated cannot be the basis for a repeated violation.
- A prior administrative merits cannot serve as the basis for a repeated violation if it is contested or has not been adjudicated.*
- Repeated violations may be considered on a company-wide basis.

DOL Guidance Key Terms

❖ Pervasive Violations

- ▶ Violations are “pervasive” if they reflect a basic disregard for Labor Laws as demonstrated by a pattern of serious or willful violations, continuing violations, or numerous violations.

DOL Guidance Key Terms

❖ Pervasive Violations

▶ General Rules:

- There must be multiple violations to be pervasive, but they need not be the same or substantially similar.
- They may also arise based on conduct from the same proceeding or investigation.
- There is no numeric threshold for pervasive violations, but generally, for large companies, more violations or a greater impact on the workforce will be required.
- If the violations occur over a period of years, the violation is more likely to be considered pervasive, as it may indicate a failure to make efforts to change unlawful practices.

DOL Guidance

❖ So which violations are the most serious?

- ▶ Pervasive
- ▶ Violations that fall into 2 or more categories
- ▶ Violations reflected in final orders
- ▶ Violations of “Particular Gravity”
 - Death of an Employee
 - Termination of an Employee for exercising rights under the Labor Laws
 - Violations that detrimentally impact conditions of all or nearly all of the workforce
 - Violations where the amount of back wages, penalties, and other damages is greater than \$100,000

❖ Minor violations of workplace safety and wage and hour requirements should not trigger specific actions beyond those required to correct the violation.

DOL Guidance

- ❖ **Are there any mitigating factors that a contracting officer or LCA must consider when evaluating my company's disclosed violations?**

DOL Guidance

❖ Mitigating Factors

- ▶ The extent to which a contractor or subcontractor has remedied the violation and taken steps to prevent its recurrence
 - Including entering a labor compliance agreement
- ▶ Whether there has only been a single violation
- ▶ The number of violations relative to the size of the contractor
- ▶ Implementation of a safety and health program
- ▶ Whether there has been a recent legal or regulatory change
- ▶ Facts showing good-faith efforts to comply
- ▶ Steady period of compliance following violations
- ▶ And contractors and subcontractors may indicate whether a reported violation is in the process of being challenged

DOL Guidance

❖ Paycheck Transparency Provisions

▶ Wage Statement

- The Order requires contracting agencies to provide a wage statement to all individuals performing work for the contractor or subcontractor if required to maintain wage records pursuant to the FLSA, DBA, SCA, or equivalent State laws.

DOL Guidance

❖ Paycheck Transparency Provisions

▶ General Wage Statement Rules

- A wage statement must be issued regardless of whether the individual is characterized as an employee or an independent contractor.
- The document may be provided electronically if the contractor or subcontractor regularly provides documents to workers electronically.
- The wage statement must be issued every pay period and include the total number of hours worked that were overtime hours.
- The statement of hours must be broken down by week.
- The statement must also describe gross pay and each deduction from gross pay.
- Contractors and subcontractors do not have to report overtime hours for workers who are exempt under the FLSA but only if the workers are given written notice.
- The requirements shall be fulfilled where a contractor or subcontractor is complying with State or local requirements that the DOL has determined are “substantially similar” to the Order’s requirements.*

DOL Guidance

❖ Paycheck Transparency Provisions

▶ Independent Contractors

- The Order requires contractors and subcontractors to provide independent contractors with a notice informing the individual of his or her independent contractor status.
- The document must be separate from any contract entered into by the individual and the contractor or subcontractor and must be provided each time he or she is engaged to perform work under a covered contract.
- The notice is specific to each covered contract.

DOL Guidance

❖ Arbitration Agreements

- ▶ Section 6 of the Order requires contractors to agree that the decision to arbitrate claims arising under Title VII or any tort related to or arising out of sexual assault or harassment shall only be made with the voluntary consent of employees or independent contractors **after** such dispute arises.

❖ Exceptions:

- ▶ Prime or subcontracts of \$1M or less
- ▶ Contracts and subcontracts for commercial items
- ▶ Where employees are covered by a CBA negotiated between contractor and labor organization representing employees

Overview of Proposed FAR Rule

- ❖ Incorporates DOL's Guidance and further delineates, through policy statements, solicitation provisions, and contract clauses how, when, and to whom disclosures be made
- ❖ Describes CO responsibilities and contractors in assessing disclosed violations
- ❖ Describes role of ALCAs in supporting COs and contractors in making responsibility determinations, and identifies when agency SDOs should be notified
- ❖ Implements Paycheck Transparency and Arbitration of Contractor Employee Claims provisions

FAR Implementation

- ❖ Proposes to add FAR subpart 22.20, Fair Pay and Safe Workplaces
- ❖ FAR 22.2002 adds definitions based on DOL's guidance (also appear at 52.222-BB, Compliance with Labor Laws)
- ❖ FAR 22.2003 states general policy from E.O.
- ❖ FAR 22.2004 (-1 to -4) detail compliance with labor law requirements
- ❖ FAR 22.2005 & 2006 discuss Paycheck Transparency and Arbitration of Contractor Employees Claims
- ❖ FAR 22.2007 lists solicitation provisions and contract clauses

Compliance with Labor Laws: Pre-Award

- ❖ FAR 22.2004, 52.222-AA, Representation Regarding Compliance with Labor Laws (and 52.212-3(q)) , 52.222-AB, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws implement Section 2(a) of the E.O.
- ❖ Disclosure Steps (prime contract level):
 - ▶ (1) Initial Representation in Bids over \$500K:
 - **Identify each** administrative merits decision, civil judgment, and arbitral award or decision from the **previous 3 years**
 - Complete the representations and certifications in the System for Award Management (SAM)
 - Later in the solicitation, identify if the representations are still current
 - ▶ (2) Pre-Award Reporting / Responsibility Determination
 - If CO initiates responsibility determination, contractor must provide **details** for each decision identified in SAM
 - Contractor also provide any mitigating factors or remedial measures taken
 - CO request ALCA to make recommendation as to contractor's efforts to comply with labor laws
 - CO then makes responsibility determination.
 - ▶ NOTE: disclosure of basic information about the labor violations will be made publicly available in FAPIIS

Compliance with Labor Laws: Pre-Award

- ❖ For subcontracts over \$500K (except COTS), subcontractors (at all tiers) must make similar disclosures to prime contractor and prime contractor must determine if subcontractor is responsible source prior to making subcontract award.
 - ▶ Prime has discretion in managing this requirement (i.e., may perform it for all subcontract tiers or flow down requirement to subcontractors).
- ❖ Evaluation must be complete:
 - ▶ For subcontracts effective at time of prime contract awards, within 30 days after of subcontract award.
 - ▶ For all other subcontracts, prior to subcontract award.
- ❖ DOL will provide assistance in subcontractor review upon request, but limits role of CO and ALCA to simply providing access to DOL.
- ❖ Proposed rule indicates this requirement will be phased in over time “so that contractors and subcontractors have time to acclimate themselves to their new responsibilities”

Role of ALCAs

- ❖ FAR 22.2004-2 & -3 implement Section 3 of E.O. by explaining role of ALCA and relationship with CO (see also new FAR 22.104)
- ❖ ALCA will receive violation and mitigation information via SAM or Contracting Officer
- ❖ Provide recommendation as to contractor's efforts to comply with labor laws within 3 business days of request from CO, of:
 - ▶ Could be found to have a satisfactory record of integrity and business ethics;
 - ▶ Could be ... if the process to enter into or enhance a labor compliance agreement is initiated; OR
 - ▶ Could be found NOT to have ... and the SDO should be notified
- ❖ Recommendation is supposed to be based on factors identified in DOL Guidance
- ❖ CO then makes a judgment of contractor responsibility

Compliance with Labor Laws: Post-Award

- ❖ FAR 52.222-BB, Compliance with Labor Laws implements Section 2(b)(i) and (iii) of E.O.
- ❖ Prime and subcontractors are required to continue to disclose, semi-annually, whether there have been any labor law violations.
 - ▶ Subcontractor also required to disclose within 5 business days of receipt any DOL notification that it has not entered into a labor compliance agreement, or is not meeting terms of existing agreement
- ❖ For new information after award, CO, in consultation with ALCA, shall consider and the following actions:
 - ▶ No action required, continue the contract;
 - ▶ Refer matter to DOL for action;
 - ▶ Do not exercise an option year;
 - ▶ Terminate the contract; or
 - ▶ Notify agency SDO if there are such serious, repeated ,willful or pervasive labor violations that the violations demonstrate a lack of integrity or business ethics of the contractors

Paycheck Transparency

- ❖ FAR 22.2005 and 52.222-XX implement Section 5 of E.O.
- ❖ Applies to contracts and subcontracts over \$500K (no COTS subcontracts)
- ❖ Wage statement consistent with DOL Guidance
- ❖ Requirements deemed fulfilled if contractor is complying with State or local requirements that DOL determines are substantially similar
- ❖ Must provide independent contractor notice prior to commencement of work or at the time a contract is established with individual

Arbitration of Contractor Employee Claims

- ❖ FAR 22.2006 and 52.222-YY implement Section 6 of E.O.
- ❖ Requires contractors to agree that the decision to arbitrate claims arising under Title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment shall only be made with the voluntary consent of employees or independent contractors after such dispute arises.

Arbitration of Contractor Employee Claims

◆ Exceptions:

- ▶ Prime or subcontracts of \$1M or less
- ▶ Contracts and subcontracts for commercial items
- ▶ Where employees are covered by a CBA negotiated between contractor and labor organization representing employees
- ▶ Certain pre-existing arbitration agreements identified in FAR 52.222-YY

Next Steps

- ❖ Comments are due on DOL Guidance and Proposed FAR Rule on or before July 27, 2015
- ❖ FAR Rule identifies several areas for comment, including how to deal with subcontractor reporting requirements to prime contractors
- ❖ If final rule mirrors proposed rule, update HR reporting and SAM verification system to capture/catalog labor law violations for disclosure purposes

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