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Final Rule for Fair Pay and Safe Workplaces: Scant Relief for Federal Contractors

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The final rule makes agency allegations of employment law violations reportable events that could result in denied federal contracts or terminated existing contracts.

On August 25, the ***Federal Acquisition Regulatory Council (FAR Council)*** and the ***US Department of Labor (DOL)*** published the long-awaited and highly controversial final rule and guidance implementing US President Barack Obama's ***Executive Order 13673*** (the Order), ***Fair Pay and Safe Workplaces***.[1] The final rule's key takeaways and guidance are as follows:

- Effective Date: The final rule will take effect October 25, 2016, but offers contractors some relief by phasing in certain requirements.

- Applicability: The final rule will apply to all 1) prime contracts and 2) subcontracts expected to exceed $500,000, except those for commercially available off-the-shelf (COTS)[2] items. The final rule's labor violation reporting provisions initially will apply to solicitations and resulting contracts valued at $50 million or more, with the $500,000 threshold phasing in on April 24, 2017. The requirements apply to subcontractors beginning October 25, 2017, for subcontracts valued at $500,000 or more.

- Labor Reporting Violations: Contractors must check "yes" if they have had any reportable labor violations in the last three years (discussed in detail below). The final rule offers contractors a reprieve from the look-back period in the proposed rule and begins with a one-year look-back period to October 25, 2015, which gradually will expand to three years over time.

- Entity: The final rule clarifies that only the contracting entity and not parents, subsidiaries, or affiliates will be required to comply with the regulations.

- Subcontractor Assessments: Subcontractors may go directly to DOL for responsibility assessments that alleviate the need for prime contractors to make such determinations directly.

- Preassessments: Contractors and subcontractors that have labor law violations may consult

with DOL for a preassessment. Contracting officers and prime contractors may rely on the preassessment to make responsibility determinations.

- Paycheck Transparency and Arbitration Provisions: These provisions remain largely unchanged from the proposed rule.

As discussed in our prior LawFlash regarding the proposed rule that implemented the Order,[3] the regulations impose three potential new requirements for federal contractors and subcontractors: 1) labor violation reporting; 2) paycheck transparency; and 3) restrictions on arbitration agreements.

The final rule fails to resolve many of the contracting community's concerns in response to the proposed rule. Several significant administrative burdens imposed on contractors remain in the final rule, which potentially will cause significant delays in the procurement process because the final rule fails to address serious questions regarding whether the rule can be applied evenly and fairly. Another concern is the final rule's potential to cause loss of contracts and unwarranted initiation of debarment processes. The final rule was published simultaneously with the issuance of the DOL's Guidance for Executive Order 13673, Fair Pay and Safe Workplaces (DOL Guidance).[4]

Implementation of the Labor Violation Reporting Obligations

The final rule implements the proposed labor violation reporting obligations through three mandatory solicitation and contract clauses:

1. Federal Acquisition Regulation (FAR) 52.222-57—Representation Regarding Compliance with Labor Laws (Executive Order 13673) (Representation Clause)

2. FAR 52.222-58—Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673) (Subcontractor Responsibility)

3. FAR 52.222-59—Compliance with Labor Laws (Executive Order 13673) (Compliance with Labor Laws)

The final rule requires that, ultimately, contracting officers insert all three provisions in every solicitation and contract they expect to exceed $500,000, without exception.

The Representation Clause

The Representation Clause requires an offeror for a covered contract to state whether it has had any administrative merits determinations, arbitral awards or decisions, or civil judgments for any violation of multiple, specified labor laws[5] within the three-year period preceding the offer date or since October 25, 2015 (whichever is shorter). If the offeror answers "yes," the contracting officer may initiate a responsibility determination prior to award and request additional information relating to the labor violations. In such case, the offeror must provide the following in the System for Award Management (SAM) at www.sam.gov for each disclosed labor law violation:

- The labor law violated

- The case number, inspection number, charge number, docket number, or other unique

identification number

- The date rendered
- The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision

In addition, the contracting officer may request a copy of the administrative merits determination, arbitral award or decision, or civil judgment document. Further, the clause instructs the offeror to provide, in SAM, such additional information as the offeror deems necessary to demonstrate its responsibility. Such information includes mitigating factors, remedial measures, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Offerors may provide explanatory text and upload relevant documents. Offerors excepted from the SAM registration process must provide the required information directly to the contracting officer.

The Subcontractor Responsibility Clause

The final Subcontractor Responsibility clause, which takes effect October 25, 2017, requires that prime contractors obtain representations from all prospective subcontractors with subcontracts in excess of $500,000 (other than subcontractors selling COTS items) regarding whether they have had an administrative merits determination, arbitral award or decision, or civil judgment for any violation of the specified labor laws since October 25, 2015, or the three-year period preceding the offer date (whichever is shorter).

If a subcontractor responds “yes”, the prime contractor may initiate a responsibility determination for the prospective subcontractor. If the prime contractor initiates a responsibility determination, the prime contractor must require the subcontractor to submit information regarding each covered labor law violation to DOL and inform the prospective subcontractor of the right to provide DOL with information regarding mitigating factors and remedial measures. This is a significant and welcome departure from the proposed rule, which required that this information be provided directly to the contractor.

Importantly, the final rule differs from the proposed rule and eases the burden imposed on prime contractors to make subcontractor responsibility determinations. Specifically, the final rule permits a prime contractor to find a prospective subcontractor with violations responsible, and thus award a subcontract without substantively evaluating the significance of reported labor violations if the prospective subcontractor (a) represents to the prime contractor that it has properly disclosed all covered violations to DOL and (b) provides the prime contractor with the following information concerning DOL’s review and assessment of the prospective subcontractor’s data:

- The subcontractor has been advised by DOL that it has no serious, repeated, willful, and/or pervasive labor law violations.
- The subcontractor has been advised by DOL that it has serious, repeated, willful, and/or pervasive labor law violations and
    - (i) DOL has advised that a labor compliance agreement is not warranted,
    - (ii) the subcontractor has entered into a labor compliance agreement(s) with an

enforcement agency and states that it has not been notified by DOL that it is not complying with its agreement, or

- (iii) the subcontractor has agreed to enter into a labor compliance agreement or is considering a labor compliance agreement(s) with an enforcement agency to address all disclosed labor law violations that DOL has determined to be serious, willful, repeated, and/or pervasive and has not been notified by DOL that it has not entered into an agreement in a reasonable period.

If the prospective subcontractor disagrees with DOL's assessment, the final rule nevertheless permits the prime contractor to find the prospective subcontractor responsible and award the subcontract if the prospective subcontractor provides the prime contractor specified, detailed information about the violations, mitigating factors and remedial actions, DOL's assessment, and the basis for the prospective subcontractor's disagreement.

If the prime contractor determines that the subcontractor has a satisfactory record of integrity and business ethics based on the information provided or determines that because of a compelling reason, the contractor must proceed with a subcontract award, the prime contractor is required to notify the contracting officer in writing and provide the basis for its decision. However, although these provisions are less burdensome than those included in the proposed rule, contractors purchasing items that do not qualify as COTS will need to implement appropriate compliance programs to collect representations from their suppliers and ensure appropriate measures are taken if a proposed subcontractor checks "yes" to having labor violations..

The Compliance with Labor Laws Clause

The final Compliance with Labor Laws clause contains key definitions that establish (a) what constitutes a labor violation that prospective contractors and subcontractors need to report and (b) how the contracting officer should categorize reported violations to determine the effect of these violations on his or her determination of the prospective offeror's responsibility. Specifically, the clause defines "administrative merits determination," "pervasive violations," "repeated violation," "serious violation," and "willful violation" as follows:

- "Administrative merits determination" means certain notices or findings of labor law violations that an enforcement agency issued following an investigation. An administrative merits determination may be final or be subject to appeal or further review.[6] Agency findings that trigger disclosure include, but are not limited to, a complaint issued by a National Labor Relations Board's regional director, a reasonable cause determination from the US Equal Employment Opportunity Commission, a show cause notice from the Office of Federal Contract Compliance Programs, a citation from OSHA or an equivalent state agency, or a WH-56 Summary of Unpaid Wages form from the DOL's Wage and Hour Division.

- "Pervasive violations" mean labor law violations that bear on the assessment of a contractor's integrity and business ethics because they reflect the contractor's basic disregard for the labor laws, as demonstrated by a pattern of serious and/or willful violations, continuing violations, or numerous violations.[7]

- "Repeated violation" means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because the contractor had one or more additional

labor law violations of the same or a substantially similar requirement within the prior three years.[8]

- "Serious violation" means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because of the number of employees affected; the degree of risk imposed, or actual harm done by the violation; the amount of damages incurred or fines or penalties assessed; and/or other similar criteria.[9]

- "Willful violation" means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because the contractor acted with knowledge of, reckless disregard for, or plain indifference to the matter of whether its conduct was prohibited by one or more labor law requirements.[10]

The clause requires contractors, on a semiannual basis following an award, to provide through SAM or to the contracting officer as requested the same type of information provided preaward but for new labor law decisions and updates to previously disclosed decisions. Contractors may elect to provide the certification on a semiannual basis through SAM. This is a departure from the proposed rule, which required contractors to report under each separate contract every six months, potentially requiring perpetual reporting even if there were no new labor violations or updates available to report. The clause also requires contractors to ensure that prospective subcontractors provide information and that contractors engage in the same subcontractor responsibility decision process described with respect to the Subcontractor Responsibility clause discussed above. Finally, the clause requires that prime contractors ensure that subcontractors provide semiannual updates as well as notifications within five business days of any DOL determination that a subcontractor has not entered into a labor compliance agreement in a reasonable period or is not complying with an existing labor compliance agreement. Once the contractor receives updated subcontractor information, it is required to consider this information and "determine whether action [unspecified] is necessary."[11]

The Contract Process Under the Final Labor Reporting Rules

Prior to awarding a government contract, a contracting officer must make an affirmative responsibility determination that includes a determination that the apparent successful offeror or bidder has a satisfactory record of integrity and business ethics. The final rule requires that the contracting officer consider a prospective contractor's labor violations in determining whether that contractor has a satisfactory record of integrity and business ethics. Under the final rule, all employers bidding or submitting offers on a federal contract will initially provide a representation that there have been or have not been reportable labor violations. Thereafter, once the contracting officer has initiated a responsibility determination for the prospective contractor, if the employer has indicated covered labor violations, it will be required to provide detailed information regarding the violations and may provide information regarding mitigating circumstances and remedial measures.

The final rule requires the contracting officer to review the data provided and request that the Agency Labor Compliance Advisor (ALCA) provide written analysis and advice within three days (or another time period determined by the contracting officer). This analysis will address whether or under what circumstances the ALCA concludes that the prospective contractor's labor violation history demonstrates an unsatisfactory record of integrity and business ethics. Example circumstances include the need to negotiate a labor compliance agreement prior to or after a contract award, whether the ALCA supports notifying the suspending and debarring official, and whether the ALCA intends to make such notification.

The contracting officer is required to make the responsibility determination and consider the ALCA's analysis and advice, if timely, or use only available information and business judgment, if not. The contracting officer must consider the offeror for contract award notwithstanding disclosure of one or more labor violations, unless, after considering whether the violations are pervasive, repeated, serious, or willful, and notwithstanding the ALCA's analysis, the contracting officer determines that the offeror does not have a satisfactory record of integrity and business ethics.

Following an award, the ALCA continues to monitor SAM and the Federal Awardee Performance and Integrity Information System (FAPIIS) for new and updated labor violation information regarding the contractor. The ALCA also monitors the contractor's progress toward compliance with promised or existing labor compliance agreements. The ALCA notifies the contracting officer if, after considering this information, the ALCA determines that further consideration or contract action is warranted. After soliciting information from the contractor relating to mitigating factors/remedial measures and ALCA analysis and advice, the contracting officer is required to determine appropriate action to take, including continuation of the contract with no remedial action or exercise of contract remedies, such as the following:

- Written notification that a labor compliance agreement is warranted
- Election not to exercise a contract option
- Termination of the contract
- Notification to the agency that the official is suspended or debarred

Paycheck Notices—Wage Statement and Independent Contractor Notice

The final rule requires that contracting officers, beginning January 1, 2017, include in all contracts expected to exceed $500,000 FAR clause 52.222-60—Paycheck Transparency (Executive Order 13673). The Paycheck Transparency clause requires a contractor to provide individuals who perform work under the affected government contract with information about how their pay is calculated and their status as an employee or independent contractor. Under the clause, contractors will be required to provide workers with a written wage statement each pay period that includes information concerning each individual's hours worked, overtime hours, rate of pay, gross pay, and any additions to or deductions from pay. The wage statement provided to workers who are exempt from the FLSA's overtime compensation requirements does not need to include a record of hours worked if a contractor informs individuals of their exempt status. The wage statement must be provided to every worker subject to the FLSA, the Davis-Bacon Act, or the McNamara-O'Hara Service Contract Act, regardless of a contractor's classification of a worker as an employee or independent contractor.

Under the final rule, the hours worked and overtime hours contained in the wage statement must be broken down to correspond to the period for which overtime is calculated and paid. If the pay period is biweekly and the worker is entitled to overtime pay for hours worked that exceed 40 in a week, then the wage statement must provide a weekly breakdown that shows the hours worked and any overtime hours for the first week, as well as the hours worked and any overtime hours for the second week. Written notice to a worker is required—oral notice is not sufficient.

The final rule provides that these wage statement requirements shall be deemed to be fulfilled where a contractor is complying with state or local requirements determined by the secretary of DOL to be

substantially similar to those required under the clause.

In addition to the wage statement, the clause requires contractors to provide workers whom they treat as independent contractors with a document informing such an individual of his or her independent contractor status. The notice must be provided to each individual worker before a worker performs any work under the contract, and a new notice must be provided to an independent contractor each time he or she is engaged to perform work under a separate covered contract, regardless of whether the worker performs the same type of work. The notice must be separate from any independent contractor agreement between the contractor and the individual.

The Paycheck Transparency clause requires contractors to flow down the clause to all subcontracts in excess of $500,000, at all tiers, for other than COTS items.

Arbitration Provisions

The final rule leaves unchanged the proposed FAR clause (now numbered 52.222-61) that, with some exceptions, prohibits predispute agreements to arbitrate claims of employees and independent contractors arising under Title VII or any tort related to or arising out of sexual assault or harassment. The rule extends, to the covered contracts of all agencies, a similar requirement imposed on US Department of Defense contractors by the Franken Amendment implemented at DFARS 552.222-7006. The new contract clause will have significant consequences, even for companies that may in the future have only a single covered federal contract, because it potentially may alter terms of predispute arbitration agreements with class action waivers. The prohibition on its face is company-wide and not limited to employment agreements with individuals who perform work on government contracts. The clause is required in all contracts in excess of $1 million, except in those for "commercial items"—a term defined in the FAR.[12] Importantly, this provision preserves preexisting arbitration agreements unless an employer has discretion to modify the agreement. The provision will apply to any renegotiated or replacement agreement. It also does not apply to employees covered by a collective bargaining agreement.

The clause requires contractors to flow it down to all subcontracts in excess of $1 million, except subcontracts for commercial items.

When Will the New Requirements Take Effect?

The final rule takes effect October 25, 2016. The new requirements will be implemented through contract clauses inserted in covered government solicitations and contracts issued after that date on a schedule set forth in the rule.

- The Compliance with Labor Laws clause at FAR 52.222-59 is required in all new contracts valued at $50 million or more beginning October 25, 2016, and in all new contracts expected to exceed $500,000 beginning April 25, 2017.
- The Representation Clause at FAR 52.222-57 will be included whenever the Compliance with Labor Laws clause is included.
- The Subcontractor Responsibility clause at FAR 52.222-58 will be included in contracts beginning October 25, 2017.
- The clause at FAR 52.222-60 that requires paycheck transparency will be included in

solicitations and contracts beginning January 1, 2017.

- The clause at FAR 52.222-61 that prohibits predispute arbitration agreements is required in new contracts immediately, essentially making October 25, 2016, the effective date for the final rule, which is the earliest date a contractor could execute a contract containing the arbitration provisions.

Key Takeaways

With the issuance of the final rule, contractors likely to submit offers or bids on one or more covered government contracts should take the following actions:

- Establish policies and processes company-wide for identifying and collecting violations of labor laws as defined by the final rule.
- Establish policies and processes for identifying and providing information regarding mitigating factors and remedial actions taken.
- Establish policies and processes for evaluating subcontractor responsibility under the final rule and related clauses.
- Evaluate processes for issuing compliant wage statements and notices of independent contractor status (as appropriate) to individuals who work on a covered government contract.
- Evaluate the effect of the contractual prohibition on predispute arbitration claims on existing and future employment agreements.
- Incorporate the new clauses in existing subcontract flow-down clause matrices.
- Conduct training to help ensure compliance.

[1] See 81 Fed. Reg. 58562 (Aug. 25, 2016).

[2] A COTS item "[m]eans any item of supply (including construction material) that is (i) [a] commercial item [see note 4 below]; (ii) [s]old in substantial quantities in the commercial marketplace; and (ii) [o]ffered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace," excluding bulk cargo. 48 C.F.R. § 2.101.

[3] See here for more details

[4] https://www.dol.gov/asp/fairpayandsafeworkplaces.

[5]. The 14 covered federal employment laws are the Fair Labor Standards Act (FLSA); the Occupational Safety and Health Act; the Migrant and Seasonal Agricultural Worker Protection Act; the National Labor Relations Act; the Davis-Bacon Act; the McNamara-O'Hara Service Contract Act; Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity); Section 503 of the Rehabilitation Act; the Vietnam Era Veterans Readjustment Assistance Act; the Family and Medical Leave Act; Title VII of the Civil Rights Act; the Americans with Disabilities Act; the Age

Discrimination in Employment Act; and Executive Order 13658 (payment of minimum wages on federal contracts). Although the Order also covers equivalent state laws, with the exception of occupational safety and health "State Plans" that have been formally approved by the Occupational Safety and Health Administration, equivalent state laws are not covered in the current guidance and rule.

[6] The clause states that included notices and findings are determined by consulting section II.B. in the DOL Guidance.

[7] The clause states that to determine whether violations are pervasive, it is necessary to consult the DOL Guidance section III.A.4. and associated Appendix D.

[8] The clause states that to determine whether a particular violation(s) is repeated, it is necessary to consult the DOL Guidance section III.A.2. and associated Appendix B.

[9] The clause states that to determine whether a particular violation(s) is serious, it is necessary to consult the DOL Guidance section III.A.1. and associated Appendix A.

[10] The clause states that to determine whether a particular violation(s) is willful, it is necessary to consult the DOL Guidance section III.A.3. and associated Appendix C.

[11] The proposed rule provides examples of “action” as follows: requesting that the subcontractor pursue a new or enhanced labor compliance agreement, requiring other appropriate remedial measures, providing compliance assistance, resolving issues to avoid further violations, or not

continuing with the subcontract, if necessary.

[12]. A commercial item is defined as “[a]ny item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and (i) [h]as been sold, leased, or licensed to the general public; or (ii) [h]as been

offered for sale, lease, or license to the general public, including items with certain modifications and certain services. 48 C.F.R. § 2.101.

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