



## Government Contracts / Labor & Employment ADVISORY ■

**AUGUST 8, 2014**

### New Executive Order Requires Federal Contractors to Report Past Labor & Employment Violations

On July 31, 2014, President Obama signed the [Fair Pay and Safe Workplaces Executive Order](#), which requires prospective federal contractors to disclose prior labor law violations for federal agencies to consider when awarding contracts. The Fair Pay and Safe Workplaces Executive Order is the most recent of more than 40 executive actions taken by President Obama since January in furtherance of the White House's self-proclaimed "year of action."

#### **What contracts are subject to the new disclosure requirement?**

The Fair Pay and Safe Workplaces Executive Order applies to new federal procurement contracts for goods and services, including construction, when the estimated value of the supplies acquired and services required exceeds \$500,000.

#### **When does the Executive Order take effect?**

Although the Executive Order declares that it is effective immediately, a [fact sheet](#) published by the White House states the Executive Order is expected to be implemented on new contracts in stages, on a prioritized basis, during 2016.

#### **What types of labor and employment violations must be reported?**

The Executive Order requires companies bidding on covered federal contracts to report any administrative merits determinations, arbitral awards or decisions, and civil judgments rendered against the contractor within the preceding three years for violations of any of the following federal labor laws or equivalent state laws:

- Fair Labor Standards Act (FLSA)
- Occupational Safety and Health Act (OSHA)
- Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
- National Labor Relations Act (NLRA)
- Davis-Bacon Act (DBA)
- McNamara-O'Hara Service Contract Act (SCA)
- Executive Order 11246 (non-discrimination, including LGBT)

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- Section 503 of the Rehabilitation Act
- Vietnam Veterans' Readjustment Assistance Act (VEVRAA)
- Family and Medical Leave Act (FMLA)
- Title VII of the Civil Rights Act
- American with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- Executive Order 13658 (minimum wage)

### **Is there an ongoing duty to report violations?**

Yes. Once a contract subject to the Executive Order is awarded, the contractor (and any applicable subcontractors) must update reported violations every six months.

### **How will federal agencies use the reported information?**

Each agency must designate an agency official as a "Labor Compliance Advisor." The Labor Compliance Advisor will, among other responsibilities, assist the contracting officer in assessing whether the reported violations are serious, repeated, willful or pervasive; evaluating the steps the contractor has taken to correct violations and improve compliance; and determining the appropriate agency response, which may include requiring remedial measures, deciding not to award a contract, terminating a contract or referring the matter to the agency suspending and debarment official.

While the Executive Order does not specify how or to what extent contracting agencies are to use the reported information when making contract award decisions, the directive is likely to have a significant impact on the ability of federal contractors to win and keep federal contracts. As a result, the Executive Order will likely incentivize federal contractors to settle labor and employment disputes prior to a final adjudication on the merits.

### **What are the consequences of failing to report?**

The Executive Order does not specifically state the consequences if a contractor fails to disclose labor violations or otherwise fails to comply with the requirements of the Order. However, it does contemplate that when a contracting officer learns information about a contractor's or subcontractor's labor violations, the contracting officer must, in consultation with the Labor Compliance Advisor, consider whether remedial action is necessary.

Contractors must understand that failure to report may be considered material to the contracting officer's decision to award, renew or pay under a contract, which means that failure to collect accurate information and timely report it poses the risk of protest, contract termination or even suspension, debarment and False Claims Act liability.

### **What about reporting subcontractor violations?**

The Executive Order requires that for any subcontract of \$500,000 or more, the prime contractor must require the subcontractor to report violations of the above-listed labor laws. It also requires the prime contractor to represent to the agency that the subcontractor made the required disclosures and that based on the information disclosed, the prime contractor has determined the subcontractor to be a "responsible source that has a satisfactory record of integrity and business ethics."

## Will any guidance or regulations be issued?

Yes. The Executive Order directs the Federal Acquisition Regulation (FAR) Council to issue new regulations implementing the Executive Order's requirements, including new contract provisions that must be included in future federal contracts and contract solicitations. Additionally, the Executive Order directs the Secretary of Labor to issue guidance to (1) define what constitutes an administrative merits determination, arbitral award or decision or civil judgment that requires reporting; (2) identify state law violations that require reporting; and (3) assist agencies in determining whether administrative merits determinations, arbitral awards or decisions or civil judgments were issued for serious, repeated, willful or pervasive violations for purposes of implementation of the required FAR Council regulations. The Executive Order also directs the Administrator of General Services to develop a website for federal contractors to use for all related reporting requirements.

## What additional requirements does the Executive Order impose?

In addition to requiring disclosure of labor law violations, the Executive Order also mandates the following:

- It requires that contractors and subcontractors provide each employee performing work under the federal contract with a document each pay period indicating the employee's hours worked, overtime hours, pay and any additions or deductions from pay. In complying with this requirement with respect to employees who are exempt from FLSA's overtime requirements, the document need not include a record of hours worked if the contractor informs the individuals of their overtime exempt status.
- For any individual performing work under the federal contract as an independent contractor, the Executive Order requires the federal contractor to provide documentation to the individual indicating that status.
- For any contracts or subcontracts where the estimated value of the supplies acquired and services required exceeds \$1 million, the Executive Order obligates the contractor or subcontractor to agree not to require any employees or independent contractors to enter into a pre-dispute arbitration agreement that covers 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. The requirement does not apply to employees covered by a collective bargaining agreement. Department of Defense contractors have been subject to similar prohibitions on pre-dispute arbitration agreements for several years.

The Fair Pay and Safe Workplaces Executive Order is the latest in a string of directives from President Obama imposing additional employment-related obligations on federal contractors. The President's prior executive actions related to federal contractors include raising the minimum wage for employees working on federal contracts to \$10.10/hour, prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity and prohibiting federal contractors from retaliating against employees who discuss compensation information. *To view our prior advisories on these topics, click [here](#) and [here](#).*

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