



## Labor & Employment/Government Contracts ADVISORY ■

**JUNE 5, 2015**

### Proposed Regulations and DOL Guidance Issued on Fair Pay and Safe Workplaces Order

On May 28, 2015, the Federal Acquisition Regulatory (FAR) Council and Department of Labor (DOL) issued proposed regulations and guidance, respectively, to implement the Fair Pay and Safe Workplaces Executive Order that President Obama signed in July 2014 requiring prospective federal contractors to disclose prior labor law violations for federal agencies to consider when awarding contracts. Both the proposed FAR Council regulations and the proposed DOL guidance are subject to a 60-day comment period, after which the FAR Council and the DOL will consider whether to make changes based upon comments received and subsequently issue final regulations and guidance. Comments may be sent to Tiffany Jones, U.S. Department of Labor, Room S-2312, 200 Constitution Avenue NW, Washington, DC 20210.

The Fair Pay and Safe Workplaces Executive Order (Executive Order 13673), covered in a previous advisory, requires companies bidding on federal contracts for goods and services of \$500,000 or more to report administrative merits determinations, arbitral awards or decisions, and civil judgments rendered against them during the preceding three-year period for violations of any of 14 identified federal labor laws and state law equivalents. The Order provides for agency officials called labor compliance advisors to assess the reported violations and designate them as serious, repeated, willful or pervasive. The Order does not define what constitutes a reportable violation or how exactly the information should be used by the agency in making procurement decisions. The proposed regulations and guidance attempt to flesh out these issues.

#### **Reportable Violations**

**Administrative merits determination** is defined in the proposed regulations as certain notices or findings of labor law violations issued by an enforcement agency following an investigation. Essentially, the definition includes everything from initial findings after investigations (e.g., EEOC "cause" determinations) to the results of final administrative appeals (e.g., Administrative Review Board decisions). It includes notices or findings made by agencies after investigations even though such notices or findings have not been submitted to a tribunal for adjudication or are subject to appeal or further review. The DOL guidance provides a list of seven categories of documents, notices and findings from enforcement agencies that constitute administrative merits determinations that must be reported. It includes, among other things, notices of alleged violations from the DOL's Wage and Hour Division, citations issued by the Occupational Safety and Health Administration (OSHA) and state equivalents, show cause notices

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from the Office of Federal Contract Compliance Programs (OFCCP), reasonable cause determinations by the Equal Employment Opportunity Commission (EEOC) and complaints issued by the National Labor Relations Board (NLRB). Additionally, the guidance provides that lawsuits and other complaints filed by an enforcement agency alleging violations of any of the enumerated labor laws also constitute reportable administrative merits determinations. Employee complaints made to enforcement agencies, such as charges of discrimination filed with the EEOC, are not administrative merits determinations.

**Arbitral award or decision** is defined as an arbitrator or panel determination that a labor law violation occurred or that enjoined or restrained a violation of labor law. It includes determinations that are not final or are subject to being confirmed, modified or vacated by a court, and those resulting from private or confidential proceedings.

**Civil judgment** is defined as any judgment or order entered by any federal or state court in which the court determined that a labor law violation occurred or enjoined or restrained the company from violating a labor law. It includes a judgment or order that is not final or is subject to appeal. The DOL guidance provides that the definition of civil judgments includes consent judgments and default judgments, but does not include private settlements where the lawsuit is dismissed by the court without any judgment being entered.

Contractors and prospective contractors are required to report violations that occurred during the three-year period preceding the contract bid or proposal, even if the underlying conduct occurred more than three years prior to the bidding process, and even if the contractor is in the process of appealing the determination, award or judgment. If, at the time of reporting, a determination, award or judgment has been reversed or vacated in its entirety, the contractor is not required to report it. If awarded a government contract, the contractor is required to update its reporting at semiannual intervals during performance of a contract. The Executive Order directs the DOL to establish a single website that will serve as the portal for all reporting requirements related to the Order.

## **Serious, Repeated, Willful or Pervasive Violations**

**Serious violations.** The DOL guidance provides an exhaustive list of nine types of violations that are considered serious for purposes of the Fair Pay and Safe Workplaces Order, including OSHA citations designated as serious, violations of anti-retaliation provisions in labor laws, findings of a pattern or practice of discrimination, interference with an agency investigation, violations affecting 25 percent of workers at a worksite and violations resulting in penalties of \$5,000, back wages of \$10,000 or injunctive relief.

**Willful violations.** The DOL guidance provides a list of five types of violations that are considered willful, including violations of the Occupational Safety and Health (OSH) Act, Fair Labor Standards Act (FLSA), Title VII, Americans with Disabilities Act (ADA) or Age Discrimination in Employment Act (ADEA) where the contractor knew, showed reckless disregard for or acted with plain indifference to whether its conduct was prohibited by law.

**Repeated violations.** The proposed regulations and guidance provide that a violation is repeated if it is the same as or substantially similar to one or more other reportable violations by the contractor. The DOL guidance provides examples of repeated violations under several of the labor laws. For antidiscrimination laws, for example, violations are substantially similar if they involved the same or an overlapping protected status even if the type of adverse employment action is different. A determination that a company is discriminating against women in promotions is a repeated violation if there has been a prior finding that the company fired or failed to hire a woman because of her sex. However, a finding of race discrimination following a finding of sex discrimination does not constitute a repeated violation.

***Pervasive violations.*** Violations are pervasive if the contractor demonstrates a pattern of serious or willful violations, continuing violations or numerous violations. Violations must be multiple to be pervasive and may involve higher-level management officials. Pervasive violations may arise in the same proceeding or investigation, for example, if a company receives multiple serious OSH Act citations in a single location. The DOL guidance does not specify a numerical threshold for determining whether violations are pervasive and seeks comments regarding how best to assess the number of a contractor's violations in light of its size.

## **Assessment of Violations**

Neither the FAR Council regulation nor the DOL guidance sets a clear template or standard for assessment of violations or determination of any impact the violations will have on awarding contracts. The DOL's guidance states that each contractor's disclosed violations will be evaluated on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor and any mitigating factors. The DOL notes that certain types of violations are particularly concerning, including pervasive violations, violations that are reflected in final orders, violations related to the death of an employee, violations involving retaliation or whistleblowing and violations where the amount of penalties or damages awarded is greater than \$100,000. The DOL also notes—in an attempt to promote settlement with enforcement agencies—that agreements entered into by contractors with enforcement agencies will be given "particular weight" in assessing a contractor's remediation of violations.

## **Paycheck Transparency**

In addition to the reporting obligations, the proposed regulations and guidance address additional recordkeeping and paycheck transparency obligations imposed by the Executive Order. The Executive Order requires that contractors and subcontractors provide each employee performing work under the contract with a wage statement each pay period containing the employee's hours worked, overtime hours, pay and any additions or deductions from pay; the new regulations and guidance provide more specific details. With respect to employees who are exempt from the FLSA's overtime requirements, the wage statement need not include a record of hours worked if the contractor informs the individual in writing that the worker is exempt. The DOL guidance states that the department will post on its website a list of states with substantially similar wage statement requirements that satisfy the requirements of the Order.

For any individual performing work under the federal contract as an independent contractor, the guidance clarifies that the contractor must provide written notice to the worker of his status as an independent contractor.

## **Pre-Dispute Arbitration Agreements**

Finally, the Executive Order requires that federal contracts exceeding \$1 million contain a clause whereby the contractor agrees not to enter into pre-dispute arbitration agreements with employees for claims arising under Title VII or any tort related to or arising out of sexual assault or harassment. The required contract clause states that any agreement to arbitrate these claims must be made only with the "voluntary consent" of the employee and only after the dispute to be arbitrated arises. Significantly, this prohibition does not apply to valid arbitration agreements entered into before the contractor bids on a contract exceeding \$1 million after the FAR Council regulations become effective, so long as the arbitration agreement does not permit the contractor to change the terms of the arbitration agreement. Contractors who plan to bid on large contracts, therefore, would be well advised to consider whether they want to implement or improve arbitration agreements (and ensure they are "valid") before the regulations

are finalized and implemented. The prohibition on mandatory arbitration does not apply to employees covered by a collective bargaining agreement. The DOL guidance does not address this aspect of the Order or proposed regulations.

The FAR Council regulations and DOL guidance are open for public comment for 60 days. The DOL has indicated that it will publish a second guidance to address additional issues, including identifying state laws that are equivalent to the 14 federal labor laws for which violations must be reported.

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