Federal Contractors To Be Burdened With Additional Disclosure Requirements If Government Has Its Say

Insights
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The U.S. Labor Department (DOL) and three federal agencies (the Department of Defense, the General Services Administration and NASA) recently issued two proposed documents relating to the implementation of Executive Order 13673, better known as the Fair Pay and Safe Workplaces Executive Order. If enacted, these proposals would be problematic and burdensome for federal contractors; those who wish to have their voices heard on the matter have a July 27, 2015 deadline to submit comments on both documents.

The three contracting agencies issued a proposed rule amending the Federal Acquisition Regulations (FAR) intending to ensure federal agencies contract with only those contractors that they find to be "responsible sources," i.e. those with a satisfactory record of integrity and business ethics. Under the proposed rule, affected contractors and subcontractors will be required to:

1. disclose labor law violations within the past three years;
2. notify workers performing under the contract how their pay is being calculated each pay period;
3. notify independent contractors that they are being treated as such; and
4. refrain from entering into certain pre-dispute arbitration agreements with employees or independent contractors.

The document also outlines how contracting officers, in consultation with "agency labor compliance advisors" – new positions created by the Order – will determine whether a contractor is a "responsible source." If not, the proposal provides rules on how they can become one (e.g., requiring certain remedial measures, including a compliance agreement) or whether the contractor will instead be referred for suspension and debarment.

Forced Public Disclosure Of Violations

Perhaps the most onerous and problematic of the proposed requirements is that federal contractors will be required to disclose labor law violations which have occurred within the past three years. The proposed disclosure requirements are dense and complex; the following Frequently Asked Questions will help sort through the most common concerns raised by this portion of the proposed Rule.

Which contracts would be subject to the new disclosure rules?
The disclosure requirements would apply to any contract that is expected to be more than $500,000.00, and any subcontract, except those for commercial off-the-shelf items, of the same threshold.

What would have to be disclosed?
The proposed Rule would require disclosure of any a) administrative merits determinations, b) arbitral awards or decisions, and c) civil judgments which have occurred within the past three years and which relate to any of 14 enumerated federal laws and "equivalent state laws." Whether a particular action falls into any of these categories is to be determined by reference to a DOL Guidance, which was issued simultaneously with the proposed Rule. As expected, the DOL proposed definitions are broad.

The Guidance sets out which specific communications from an agency will meet the definition of an "administrative merits determination." It includes the following:

- an OSHA citation;
- a show cause notice from the OFCCP;
- a reasonable cause determination issued by the EEOC;
- any complaint issued by the National Labor Relations Board; or
- a Wage and Hour Division Summary of Unpaid Wages or a letter indicating an investigation disclosed a violation of the Fair Labor Standards Act (FLSA), Service Contract Act (SCA), Davis-Bacon Act (DBA) or E.O. 13658.

Significantly, these administrative merits determinations occur before there has been an adjudication or adversarial process; for example, a complaint issued by the NLRB where there has not yet been a trial before an administrative law judge, or an OSHA citation which is subject to being contested. On the positive side, the list set out in the proposed Guidance is said to be exhaustive and, if it does not fall within one of the seven categories enumerated, it does not constitute an administrative merits determination.

The definitions of "arbitral award or decision" and "civil judgment" also make clear that they apply to matters which are not yet final, although at least these determinations are issued after a hearing, trial, or motion practice where the employer has had the opportunity to present its case before a neutral third party.

Finally, pursuant to the Executive Order, the DOL is also to identify state laws that are equivalent to the 14 federal laws enumerated as part of the disclosure requirements in the Executive Order. This proposed Guidance states that OSHA-approved state plans are "equivalent state laws," but defers identifying other equivalent state laws to publication in a later document.

What are the possible consequences of the disclosures?

The proposed Guidance indicates that disclosed violations that are deemed to be "serious, willful, repeated or pervasive" will be considered as evidence that the contractor lacks the integrity and business ethics to contract with the federal government, possibly leading to disbarment.

As defined in the proposed Guidance, "serious" violations include those where fines and penalties of at least $5,000.00 are assessed, where back wages of at least $10,000.00 are due, where the contractor takes an adverse employment action, or where the contractor was responsible for unlawful harassment against "one or more workers" for exercising any right protected by any of the labor laws.

"Willful" violations include those where minimum wage or overtime violations went back further than two years, where liquidated damages were assessed on an age discrimination action, where a contractor knew that its conduct was prohibited by any of the labor laws, or where a contractor showed reckless disregard for or acted with plain indifference to whether its conduct was prohibited.

The definition of "repeated" is also broad. The proposed Guidance includes situations where an entity had one or more additional violations of the same or "substantially similar" nature in the past three years, on a companywide basis. For example, a Title VII violation of hiring on the basis of race would form a predicate for a Title VII violation of termination on the basis of race. Also a finding of retaliation under one statute would be a predicate for another retaliation violation under any other statute, and failure to pay overtime in one case would be a predicate for failure to pay minimum wages in another case. Importantly, if the first violation is simply an administrative merits determination, the proposed Guidance states it cannot form a predicate for a second violation unless it has either been adjudicated or uncontested.

The proposed Guidance defines violations as "pervasive" if they reflect a basic disregard for the labor laws as demonstrated by a pattern of serious and willful violations, continuing violations or numerous violations. While there must be multiple violations to be pervasive, the number of violations required before it rises to the level of pervasive depends on the size of the contractor. The DOL states it is specifically seeking input from interested parties on how to assess the number of a contractor's violations in relation to its size for this purpose.

Which disclosures would be most challenging to overcome?

The proposed Guidance cites the following as raising "particular concerns" regarding the contractor's compliance with labor laws: pervasive violations; violations that meet two or more of the categories of serious, repeated and willful violations; and "violations of particular gravity." The good news for employers is that the proposal also states that the extent to which a contractor has "remediated" a labor law violation will be an important mitigating factor.

Generally this would not only involve making affected workers whole, but also include demonstrated efforts to prevent similar violations in the future. Another mitigating factor to be considered would

efforts to prevent similar violations in the future. Another mitigating factor to be considered would be whether the contractor entered into a labor compliance agreement with the agency enforcing the law.

What about relationships with subcontractors?

If the proposals are enacted as currently written, contractors would be required to obtain similar disclosures from affected subcontractors, evaluate such disclosures, and proceed with determinations on whether or not to award a subcontract. The proposed rule would create specific clauses dealing with all the requirements and procedures that must be inserted in the solicitations for contracts by the contracting agency and in contracts entered into by the agency.

The proposed rule also states that the subcontractor disclosures will be phased in and it seeks input on possible phase-in approaches. It also seeks input on allowing contractors to decide whether to require subcontractors to disclose violations directly to them or, alternatively, to the Department of Labor, which would then make the assessment as to whether the subcontractor is a responsible source.

How often would the disclosures need to be made?

If a contract is awarded, contractor disclosures would have to be updated semi-annually; subcontractor disclosures do not need to be updated.

Who would have access to the disclosures?

All of the information disclosed would be publicly available, available for anyone to see.

Employers Would Also Face Additional Obligations

Besides the disclosure requirements, the proposed Guidance presents several other obligations for employers. It would require the contractor to provide a wage statement each pay period for every worker subject to the FLSA, the DBA, the SCA, or any equivalent state laws regardless of the contractor's or subcontractor's classification of the worker as an employee or independent contractor.

While compliance with state or local notice requirements that are "substantially similar" would be acceptable, the DOL has not yet determined which ones are substantially similar. The proposed Guidance is seeking input from stakeholders on how to determine whether a jurisdiction's requirements are substantially similar.

The proposal would also prohibit pre-dispute arbitration agreements relating to Title VII and certain tort claims, but only for to contracts and subcontracts whose value is expected to exceed $1,000,000.00. The proposal has exceptions for collective bargaining agreements and individual contracts entered into prior to the offer or contract, but excludes those private contracts that could be unilaterally changed by the employer (as many arbitration agreements with nonunion employees can be).

The Proposals Are Problematic

The proposed rule and the proposed Guidance will be problematic for government contractors and subcontractors for several reasons. First, the disclosures will provide a publicly available collection of every "violation" the company has been charged with in the last three years. Second, the definitions of labor law violations are broad, encompassing many claims which have been decided well before a fair hearing is held. Third, pressure to be rated a "responsible source" may force contractors and subcontractors to enter into "labor compliance agreements" with the DOL or other enforcement agency for asserted violations they might otherwise seek to vigorously contest. Finally, semi-annual updating of asserted violations will be burdensome, as will requiring disclosures from prospective subcontractors and evaluating the information before awarding a subcontract.

Comment Deadline Is Approaching

It is important for interested contractors to provide comments by the July 27 deadline. Contractors may comment individually or contact their industry associations, chambers of commerce, or similar stakeholder organizations to offer criticisms and make recommendations for more workable alternatives. If you choose to submit comments directly, be aware that your submission will become part of the public record.

For more information on this subject, please visit our OFCCP Practice Group website at www.fisherphillips.com or contact your regular Fisher Phillips attorney. For help or advice about submitting a comment on the proposed regulation, contact either Tom Rebel (404-240-4255) or Cheryl Behymer (803-740-7671).

This Legal Alert provides an overview of proposed federal rules and guidance. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People

Thomas Paul Rebel
Senior Counsel

404.240.4255
Email

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