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GOVERNMENT RELEASES FINAL RULE IMPLEMENTING "BLACKLISTING" LAW

Insights
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The final rule and guidance implementing the Fair Pay and Safe Workplaces Executive Order, signed by President Barack Obama in July 2014 and finally published on August 25, 2016, remain almost as burdensome and problematic as they were when originally proposed. They will impact many federal contractors and require immediate attention to ensure full compliance, which for some will be required as soon as October 2016.

Often referred to as the "blacklisting" law, the Executive Order requires prospective and existing contractors to disclose violations of 14 federal labor laws plus state equivalents, requires them to provide certain information each pay period to enable workers to verify the accuracy of their pay, and prohibits certain contractors from using predispute arbitration agreements to address sexual assault and civil rights claims.

The rule from the Federal Acquisition Regulatory Council (U.S. Department of Defense, U.S. General Services Administration and NASA) and guidance from the U.S. Department of Labor (USDOL) are designed to assist agencies in implementing the Executive Order. They detail procedures for making the disclosures, assessing violations, developing conditions for further consideration of bids, and providing required notices to workers.

The final rule and guidance remain burdensome and problematic for several reasons. First, they create a publicly available repository of contractor violations. They also require the contracting officer to determine whether a contractor is a "responsible source" based on violations that

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may not be final or are subject to appeal. Moreover, contracting officers wield the power to require bidders with records deemed less-than-satisfactory to commit to a labor compliance agreement in order for their bids to be considered. Although some minor changes were made to the proposals between the initial release and ultimate finalization, the overall effect remains the same.

Disclosure Of Violations
The disclosure requirement applies to the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for the performance of the contract (generally not to parent corporations, subsidiaries or affiliates).

Information to be ProvidedOfferors must disclose whether, in the past three years, any labor law decision was rendered against them, regardless of when the underlying conduct occurred. The laws covered are those identified in the Executive Order:

- Fair Labor Standards Act (FLSA);
- Occupational Safety and Health Act (OSHA);
- Migrant and Seasonal Agricultural Worker Protection Act;
- National Labor Relations Act (NLRA);
- Davis-Bacon Act;
- Service Contract Act;
- Executive Order 11246;
- Section 503 of the Rehabilitation Act of 1973;
- Vietnam Era Veterans' Readjustment Assistance Act;
- Family and Medical Leave Act (FMLA);
- Title VII of the Civil Rights Act of 1964;
- Americans with Disabilities Act of 1990 (ADA);
- Age Discrimination in Employment Act of 1967 (ADEA);
- Executive Order 13658 (establishing a Minimum Wage for Contractors); and

- equivalent state laws.

Initially, the only equivalent state laws at issue will be OSHA-approved State Plans, which can be found at www.osha.gov/dcsp/osp/approved_state_plans.html. The USDOL will further identify state law equivalents in a later guidance.

Administrative merits determinations, arbitration awards, and civil judgments must be reported. These terms are broadly defined and include decisions that are not final or are subject to appeal. Contractors must identify the following detail about each matter: the specific labor law violated; the case number or other identification number; the date rendered; and the name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision.

This information will be stored in a database available to the public. Contractors may also submit information on mitigating factors and remedial measures taken, but that information will not be made public without the contractor's authorization.

ProcessIn a nutshell, the information will be used as follows. An agency labor compliance advisor (ALCA) will review the information and make a recommendation to the contracting officer regarding the contractor's labor law compliance. The ALCA could (a) determine compliance to be satisfactory, (b) recommend that a bidder with a less-than-completely-satisfactory record be required to commit to a labor compliance agreement before or after the contract is awarded, or (c) find the record unsatisfactory and conclude that the agency's suspending and debarring official should be notified. Only those violations considered serious, repeated, willful, or pervasive will be considered. While the final rule and the guidance narrowed the definitions of these terms somewhat from the initial proposal, they remain quite comprehensive.

The contracting officer will then consider the ALCA's recommendation and make a responsibility determination. Disclosure of labor law violations does not automatically render the prospective contractor nonresponsible. If the contracting officer requires a labor compliance agreement, the contractor must respond whether it intends to negotiate such an agreement.

The rule as initially proposed would have required prospective subcontractors to make their disclosures to the prime contractor for assessment. In a welcome change, the final rule requires prospective subcontractors to disclose their labor law violations directly to the USDOL. However, the prime contractor determines whether the subcontractor is a responsible source. The USDOL provides advice to the subcontractor regarding its labor law compliance which the subcontractor passes on to the prime contractor to consider in making its determination.

If a subcontractor disagrees with the agency's assessment of violations, the subcontractor must provide information about its violations and why it disagrees to the prime contractor. The rule covers subcontracts at any tier estimated to exceed $500,000 other than for commercially available off-the-shelf items.

Contractors and subcontractors must submit new or updated information prior to award and must update their disclosures in the database twice a year post-award. The ALCA will monitor the database, may receive information from other sources (e.g., other government agencies, the public), and may recommend a contract remedy. This could include requiring a labor compliance agreement, electing not to exercise an option, or terminating the contract altogether.

Pre-AssessmentPrior to bidding, a contractor may voluntarily request an assessment of their record of labor law compliance. More information about this option is to be provided by the USDOL in the next few weeks.

Phased ImplementationFrom October 25, 2016 through April 24, 2017, only prospective prime contractors bidding on solicitations issued on or after October 25, 2016 for contracts valued at $50 million or more are required to make disclosures. Thereafter, the rule becomes effective for bidders on contracts of $500,000 or more. Subcontractors will not be required to begin making disclosures until October 25, 2017.

Contractors must disclose labor law violation determinations made during the period beginning on October 25, 2016 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.

Pay Transparency
Two additional requirements apply to contractors with

contracts of more than $500,000 or subcontracts that exceed $500,000 other than for commercially available off-the-shelf items.

First, they must provide a wage statement every pay period to all individuals performing work under the contract or subcontract that includes: (i) the total number of hours worked in the pay period; (ii) the number of hours that were overtime; (iii) the rate of pay; (iv) gross pay; and (v) any additions to or deductions from gross pay. Exempt employees need not be provided this statement if they are informed of their exempt status before they perform any work under a covered contract or in their first wage statement under the contract.

Second, such contractors and subcontractors must provide notice to workers who are treated as independent contractors informing them of that status. The notice must be provided when the relationship is established or before the worker begins to perform work on the government contract or subcontract.

Notices may be provided by paper format or electronically. These requirements will be inserted in solicitations beginning January 1, 2017, and in resultant contracts.

Arbitration Clauses
Contractors with contracts and subcontracts for non-commercial items over $1 million must agree that a decision to arbitrate claims under Title VII or any tort related to sexual assault or harassment be made only with voluntary consent of employees or independent contractors obtained *after* such disputes arise. Limited exceptions are recognized for employees covered by collective bargaining agreements and, in some situations, where an arbitration agreement was entered into prior to bidding on a covered contract.

What Should Employers Do Now?
As a result of this new blacklisting rule and guidance, we encourage federal contractors to reassess their litigation strategy and overall defense philosophy. In our litigious society, employers sometimes decide not to fight claims of labor law violations, calculating them to be too costly from an administrative and financial perspective. Going forward, however, given this significant change, federal contractors may find they cannot afford to avoid the inevitable fight and possible appeal.

For more information, visit our website at www.fisherphillips.com or contact your Fisher Phillips attorney or any member of our Affirmative Action and Federal Contract Compliance Practice Group.

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