



## *New “Fair Pay and Safe Workplaces” Executive Order Places Unprecedented Demands on Federal Contractors*

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The requirements for doing business with the federal government continue to grow as President Obama issues another executive order directed at federal contractors. On July 31, 2014, President Obama signed Executive Order 13673, entitled Fair Pay and Safe Workplaces (the “Executive Order”), which imposes new obligations in three distinct areas: (1) required disclosures of certain labor and employment law violations; (2) required disclosures to employees and independent contractors of hours and other pay-related information; and (3) a prohibition on contractor use of pre-dispute arbitration agreements for certain employment-related disputes. According to a White House “fact sheet,” the new Executive Order is intended, among other things, to “encourage companies to settle existing [labor and employment] disputes,” and to make compliance with labor and employment laws more explicitly a part of the federal procurement process.

This Executive Order is effective immediately and will apply to all solicitations for federal contracts as set forth in final rules issued by the Federal Acquisition Regulation (“FAR”) Council. It will, however, be implemented on new contracts “in stages on a prioritized basis, during 2016,” according to the White House fact sheet. The proposed regulations by the FAR Council and related guidance from the Secretary of Labor will further outline the parameters of these new obligations. As contractors await the proposed regulations and guidance, they should at a minimum evaluate their existing or contemplated arbitration programs to determine whether, and if so how, they may be impacted by the Executive Order. This Client Alert summarizes the key sections of the Executive Order, and identifies issues that the proposed regulations will hopefully further clarify.

### **I. DISCLOSURE OF LABOR LAW COMPLIANCE**

#### **A. Contractors’ Disclosure Requirements**

Section 2 of the Executive Order requires companies seeking contracts of \$500,000 or more (“prospective contractors”) to disclose any “merits determination, arbitral award or decision, or civil judgment, as defined in guidance [to be] issued by the Department of Labor, rendered against the” prospective contractor within the preceding three years for violations of specified federal labor laws and yet to be determined state law equivalents. Once new FARs are issued, as part of the bidding process, prospective contractors will be required to make such reports on a website to be developed by the General Services Administration (“GSA”). The list of labor and employment laws covered by this requirement is substantial. It includes:

1. The Fair Labor Standards Act (FLSA);
2. The Occupational Safety and Health Act of 1970 (OSHA);
3. The Migrant and Seasonal Agricultural Worker Protection Act;
4. The National Labor Relations Act (NLRA);
5. The Davis-Bacon Act (40 U.S.C. chapter 31, subchapter IV);
6. The Service Contract Act (41 U.S.C. chapter 67);
7. Executive Order 11246;
8. Executive Order 13658 (Establishing a Minimum Wage for Contractors);
9. Section 503 of the Rehabilitation Act of 1973;
10. The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)<sup>1</sup>;
11. The Family and Medical Leave Act (FMLA);
12. Title VII of the Civil Rights Act of 1964;
13. The Americans with Disabilities Act of 1990 (ADA);
14. The Age Discrimination in Employment Act of 1967 (ADEA); and
15. Equivalent state laws, as defined in guidance issued by the Department of Labor (DOL).

Prospective contractors with such disclosures also will have the opportunity to disclose “any steps taken to correct the violations of or improve compliance” with the above labor laws or Executive Orders. Contracting agencies **must** consider this information, in consultation with their Labor Compliance Advisor (a position newly created in the Executive Order), in evaluating whether the prospective contractor “is a responsible source that has a satisfactory record of integrity and business ethics.” Even after the contract is awarded, the contractor must update its disclosure to the contracting agency every six months during the performance of the contract. Finally, as with many Executive Orders, this one includes “flow down” obligations, and contractors will be required to incorporate the disclosure requirement into its covered subcontracts.

## ***B. Subcontractors' Disclosure Requirements***

Subcontractors also are subject to the Executive Order if “the estimated value of the supplies acquired and services required exceeds \$500,000 and [the subcontract] is not for commercially available off-the-shelf items.” Covered subcontractors will have to disclose to contractors any administrative merits determination, arbitral award or decision, or civil judgment against them in the preceding three-year period for violations of the above labor laws or Executive Orders.

Disclosures of such violations would occur pre-award and during the performance of the contract. Contractors must consider the subcontractor's record and business ethics before awarding the subcontract, except for subcontracts that become effective within five days of contract execution, in which case contractors must review the information within thirty days of the subcontract award. Contractors must also receive and assess six-month updates from subcontractors during the performance of the contract.

## II. INCREASING PAY TRANSPARENCY

Contractors subject to section 2 of the Executive Order (i.e., disclosure of labor law compliance) must provide certain pay information to “individuals performing work under the contract for whom [the contractors] are required to maintain wage records” under the FLSA, Davis-Bacon Act, Service Contract Act, or equivalent state laws. Pursuant to section 5 of the Executive Order, contractors must furnish, every pay period, a document that provides the individual’s hours worked, overtime hours, pay, and any additions or deductions made from pay. The document furnished to exempt employees may exclude their hours worked if the contractor has informed the employees of their overtime exempt status. Independent contractors performing work under a covered contract under section 2 of the Executive Order (i.e., disclosure of labor law compliance) must be advised in writing of their status as an independent contractor. Contractors may fulfill their obligation to disclose pay information through compliance with state or local requirements that the Secretary of Labor deems are substantially similar. Many states do not have such requirements, however, so some contractors will be faced with “pay stub” requirements for the first time. Whether an electronic distribution of pay information will be permitted (as it is in some but not all states) remains to be seen.

As with other sections of the Executive Order, contractors must “flow down” the pay-information disclosure requirements in subcontracts covered under section 2 of the Executive Order (i.e., disclosure of labor law compliance).

## III. ARBITRABILITY OF CERTAIN EMPLOYMENT CLAIMS

Section 6 of the Executive Order limits contractors’ ability to use pre-dispute arbitration agreements for 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. This is similar to the Franken Amendment that has for a number of years imposed such a prohibition on contractors receiving funds under the Department of Defense appropriations bills. Contractors with contracts exceeding \$1 million in the estimated value of supplies or services required may only arbitrate such claims if employees or independent contractors voluntarily consent to arbitration after the dispute arises.

This prohibition on pre-dispute arbitration agreements does not apply in two circumstances. First, it does not apply to employees who are covered by a collective bargaining agreement between the contractor and a labor organization. Second, it does not apply to employees or independent contractors who consented to arbitration prior to the contractor or subcontractor bidding on a government contract covered by the Executive Order, unless the existing arbitration agreement permits the employer to change the terms of the arbitration agreement, or if the contract is renegotiated or replaced. Therefore, contractors with existing arbitration programs should evaluate them now, to determine whether they will survive the implementation of the Executive Order.

Contractors must incorporate the arbitration preclusion in subcontracts that exceed \$1 million in estimated value of supplies or services provided.

## IV. PROPOSED REGULATIONS AND GUIDANCE

Many questions remain. The full impact of Executive Order 13673 will await the FAR Council’s proposed regulations and the Secretary of Labor’s guidance.

The FAR Council will propose amendments to the Federal Acquisition Regulation to “identify considerations for determining whether serious, repeated, willful, or pervasive violations” of labor laws exist such that a contractor demonstrates “lack of integrity or business ethics.” A single violation of

law “in most cases” “may” not automatically give rise to a determination of lack of responsibility “depending upon the nature of the violation,” according to the Executive Order. What will result in a “lack of responsibility” determination, however, remains to be seen. Ultimately, if that is to be determined by Labor Compliance Advisors at each contracting agency, contractors may be subject to inconsistent interpretation across agencies.

The regulations also are required to ensure that “appropriate consideration” is given to contractors’ remedial measures or mitigating factors, including “any agreements by contractors or other corrective action taken to address violations.” The degree to which the procurement process will be used to obtain company agreements to adopt “remedial measures” or take other “corrective action” to address reported violations also remains to be seen. The Executive Order also directs that the proposed regulations must require contracting officers and Labor Compliance Advisors to pass information, as appropriate, to the agency’s suspending and debarring official. When and under what circumstances that is to occur will hopefully be addressed in the proposed regulations.

The Secretary of Labor will be developing guidance on standards for determining “serious, repeated, willful, or pervasive violations” of labor laws under Section 2 of the Executive Order. The Secretary will incorporate existing statutory standards. To the extent that existing standards do not exist, the Secretary will develop standards as follows:

- Violations “serious” in nature will include consideration of the number of employees affected; the degree of risk posed or actual harm done by the violation to the health, safety, or well-being of a worker; and the amount of damages incurred or fines or penalties assessed with regard to the violation.
- Violations “repeated” in nature will include consideration of whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past three years.
- Violations “willful” in nature will include consideration of whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by the requirements of the labor laws or Executive Orders in section 2 of the Executive Order.
- Violations “pervasive” in nature will include consideration of the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity.

The Executive Order does not provide further guidance on any regulations relating to the limitations on pre-dispute arbitration agreements.

## **V. WHAT NOW?**

There is little to do now until the proposed regulations are published. Then, interested constituencies will have the opportunity to provide comment. Although the Department of Labor guidance is not subject to notice and comment, it is unlikely to be issued before the final regulations because the guidance is supposed to relate to “implementation of any final rule issued by the FAR Council”. There are a number of unanswered questions that may or may not be addressed in the anticipated regulations and guidance, such as:

- Who will have access to the database of labor law violations to be established and maintained by the GSA?
- Will contractors have an opportunity to contest a “lack of responsibility” determination, or any finding of “serious, repeated, willful, or pervasive violations”?
- Will contractors be required to make “lack of responsibility determinations” as to its subcontractors, and, if so, under what standards and with what consequence? Will this obligation extend to monitoring a subcontractor after the subcontract is executed?
- What will be the precise wording of the required flow down language?

Finally, because the proposed regulations will likely not materially impact Section 6 of the Executive Order, contractors that use arbitration agreements or contemplating using them should evaluate their arbitration program. Now is the time to do so, before contractors bid on covered contracts.

We will continue to track these issues and provide an updated alert when the regulations are published. In the meantime, if you have questions please contact any of the attorneys listed below.

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*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

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<sup>1</sup> Contractors' VEVRAA obligations arise under 38 U.S.C. section 4212, but this section is oddly absent from the list of VEVRAA sections that require disclosure of any violations under the Executive Order. It is possible that the inclusion of “section 4214” was an inadvertent mistake, and rather was supposed to be “section 4212” because the former section requires the Federal Government to promote the maximum employment and job advancement opportunities to qualified veterans as prescribed by the Office of Personnel Management.

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