Agencies Publish Strict New Reporting Guidelines for Government Contractors

By Garen E. Dodge and Hilary A. Habib*

The U.S. Department of Labor and Federal Acquisition Regulatory Council recently published the Fair Pay and Safe Workplaces rule. The authors of this article provide an overview of the final rule.

On August 25, 2016, the U.S. Department of Labor ("DOL") and the Federal Acquisition Regulatory ("FAR") Council published "Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces'" ("the final rule").[1] Also referred to as the "blacklisting" rule, it imposes strict disclosure guidelines and requires that both prospective and existing contractors—as well as subcontractors—disclose violations of federal labor laws that resulted in administrative merits determinations, civil judgments, or arbitral awards or decisions. The final rule also requires that contractors and subcontractors disclose specific information to workers each pay period regarding their wages and prohibits contractors from requiring that their workers sign arbitration agreements that encompass Title VII violations and claims of sexual assault or harassment.

CONTRACTS AND ENTITIES COVERED UNDER THE FINAL RULE

The final rule applies to most federal contractors and subcontractors who engage in government contracts for goods and services. However, there are some important exclusions. Contracts valued at or under $500,000 are excluded from the final rule, as are subcontracts for goods that are "commercially available off-the-shelf" ("COTS") items.

Significantly, the final rule does not apply to entities affiliated with the contracting company, including any subsidiary of the company or the parent company. Thus, if one entity signs the contract, its parent and subsidiaries are not required to disclose violation to the government (if they do not sign their own contracts).

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[1] https://www.federalregister.gov/articles/2016/08/25/2016-19676/federal-acquisition-regulation-fair-pay-and-safe-workplaces.

The final rule does not require that subcontractors report violations to their prime contractor. Instead, the subcontractor must report any purported violation directly to the government.

VIOLATIONS TO BE DISCLOSED

Contractors and subcontractors are required to disclose violations of 14 federal laws:

- Fair Labor Standards Act
- Occupational Safety and Health Act (and state law equivalents)
- Family and Medical Leave Act
- National Labor Relations Act
- Davis-Bacon Act
- Title VII of the Civil Rights Act
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Executive Order 11246 (regarding equal employment opportunity)
- Vietnam Era Veterans' Readjustment Assistance Act
- Section 503 of the Rehabilitation Act (of 1973)
- Executive Order 13658 (which establishes a federal minimum wage for contractors)
- Service Contract Act
- Migrant and Seasonal Agricultural Worker Protection Act

Contractors and subcontractors *do not* have to report the state law equivalent of the above violations, aside from the state law equivalent of violations of the Occupation Safety and Health Act.

PAYCHECK TRANSPARENCY CLAUSE

The final rule contains a "paycheck transparency" clause, through which contractors and subcontractors are required to: (1) provide specific and detailed information on workers' paystubs, including information regarding overtime pay, deductions, and hours worked; (2) provide written notice to independent contractors of their classification status; and (3) provide written notice to exempt employees to inform them that they are exempt from receiving overtime compensation.

RESTRICTIONS ON ARBITRATION AGREEMENTS

The final rule prohibits contractors and subcontractors who engage in contracts exceeding $1,000,000 from entering into pre-dispute arbitration agreements with individuals that encompass claims under Title VII and tort claims for sexual assault or harassment. This provision does not apply to employees covered by union collective bargaining agreements. The provision also does not apply to arbitration agreements that were already in place, unless an employer reserves the ability to modify the parties' arbitration agreement.

SCHEDULE OF IMPLEMENTATION OF THE FINAL RULE

The final rule sets forth a "phased-in" reporting requirement as follows:

- *October 25, 2016*: Prime contractors are subject to reporting requirements when they submit a bid for a contract valued at $50 million or more. As of October 25, these contractors are only required to disclose one year of labor law compliance, but that monitoring and reporting obligation will gradually increase each year, and prime contractors will have to report a maximum of three years of their compliance history by October 25, 2018.
- *October 25, 2016*: Contractors and subcontractors whose contracts are valued at more than $1,000,000 are precluded from requiring that employees sign pre-dispute arbitration agreements which encompass Title VII claims and/or claims for sexual harassment or assault.
- *January 1, 2017*: The paycheck transparency clause (explained above) becomes effective.
- *April 25, 2017*: Prime contractors bidding on contracts valued at more than $500,000 must now comply with reporting requirements.
- *October 25, 2017*: Subcontractors bidding on subcontracts valued at more than $500,000 are subject to reporting requirements. This does not apply to subcontracts for commercially available off-the-shelf items.

PROACTIVE STEPS FOR CONTRACTORS

In light of the final rule and impending deadlines, it is important that contractors and subcontractors take steps to be in compliance with the regulations:

- Starting on September 12, 2016, a current or prospective government contractor may choose to participate in the DOL's pre-assessment of

labor law compliance. According to the DOL, through this program, the DOL will assess the severity of a contractor's labor law compliance. Thereafter, if a contractor that participated in the pre-assessment submits a government bid, the contracting officer and Agency Labor Compliance Advisor ("ALCA") may rely on the DOL's assessment (*i. e.* that the contractor has an acceptable compliance record), unless additional labor law violations have been disclosed.[2]

- Contractors and subcontractors should begin implementing procedures for monitoring and disclosing information required by the final rule. Specifically, it may be helpful for them to create information databases that track, manage, and store information that they will soon be required to report.
- Contractors should connect with subcontractors that they work with in order to ensure that they are aware of and working towards being in compliance with the new reporting requirements.
- To the extent contractors and subcontractors enter into arbitration agreements with their workers, they should review the agreements to ensure that they are in compliance with the final rule. If they determine that they would still like to arbitrate Title VII and tort claims regarding sexual harassment or assault, they should have workers sign arbitration agreements before October 25, 2016. After that date, they are no longer allowed to enter into such agreements with workers.
- Contractors and subcontractors should review labor and employment training and compliance programs to ensure that their workforce is well educated regarding applicable laws in order to reduce the chance of future violations.
- Due to the stringent new guidelines, it is encouraged that contractors and subcontractors contact an attorney to ensure that they are in compliance with the final rule in advance of upcoming deadlines.

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[2] Further information is available at https://www.dol.gov/asp/fairpayandsafeworkplaces/PreAssessment.htm.