

Labor and Employment Alert

August 29, 2016

Key Points

- While making some welcomed changes to the proposed rule, the final rule leaves many of the significant burdens and costs associated with requiring contractors and subcontractors to disclose various labor violations to the government. The government's assessment of these violations can result in significant consequences, including denial of awards, termination of existing contracts, referral to enforcement agencies, or suspension and debarment proceedings.
- The final rule also prohibits certain contractors from entering predispute arbitration agreements covering Title VII and tort claims for sexual harassment/assault, and it mandates new pay notice requirements.
- Contractors and subcontractors should take action now to ensure compliance with the new regulations implementing the so-called "blacklisting" Executive Order and to avoid potential labor violations that must be reported to the government.
- You may attend one of our upcoming training sessions to learn practical steps for compliance.



Final Rule on the Fair Pay and Safe Workplaces Executive Order Revealed

On August 25, 2016, the Department of Labor (DOL) and the Federal Acquisition Regulatory (FAR) Council issued the long-awaited [final rule](#) and [guidance](#) (the "Final Rule") implementing Executive Order No. 13673, the Fair Pay and Safe Workplaces Executive Order (the "Order"). Initially signed by President Obama in July 2014, the Order requires contractors and subcontractors to disclose various labor law violations to the government to consider before awarding federal contracts. As [we previously discussed](#), the proposed rule for the Order was issued on May 28, 2015. The contractor community, business groups and certain members of Congress immediately objected to the rule, citing the imposition of unnecessary burdens and costs and the numerous unresolved practical issues that left contractors wondering how the rule would be implemented. The Final Rule, while making changes to address some of those concerns, still leaves a number of problematic requirements unchanged.

The Final Rule becomes effective on October 25, 2016, but certain requirements will be gradually phased in over the next three years. Undoubtedly, the rule will face legal challenges from various contractor,

business and political groups, but the outcome of those actions may not be seen for some time. In the meantime, contractors need to implement plans and processes for complying with these new requirements to avoid potentially losing future solicitations.

Overview of Final Rule

The Final Rule requires contractors and subcontractors bidding on contracts with an estimated value of \$500,000 or more to disclose to the government violations under 14 federal labor statutes and state law equivalents. Labor law violations have been broadly defined to include any administrative determinations, arbitral awards and civil judgments that occurred within the three-year period immediately preceding the date of the disclosure. Contracting officers, with input from the newly created position at each agency called an “agency labor compliance advisor” (ALCA), must assess those violations (along with any mitigating evidence provided by the contractor) to determine whether the contractor is responsible and has a satisfactory record of integrity and business ethics sufficient to receive a federal contract. When making these determinations, contracting officers have the discretion to deny contract awards; terminate performance of a covered contract; refer contractors to enforcement agencies, such as the DOL or Equal Employment Opportunity Commission (EEOC), for investigation; or refer them for suspension and debarment. After the contract is awarded, contractors must update their disclosures every six months during the contract with any new labor violations that occurred since the last disclosure. The contracting officer (with input from the ALCA) must assess these new violations to determine whether the contractor can continue to perform the contract.

Subcontractors bidding on covered contracts must submit labor violations to the DOL following a process similar to the prime contractor disclosures. The DOL will assess the subcontractor’s violations and make a recommendation for the subcontractor to provide to the prime contractor. The prime contractor can use that recommendation to determine whether to award the subcontract.

The Final Rule also prohibits contractors with contracts in excess of \$1 million from entering predispute arbitration agreements with employees for Title VII and tort claims for sexual harassment and assault. This requirement does not affect arbitration agreements that are signed before October 25, 2016, so long as those agreements do not permit the contractor to make changes to the terms of the contract and are not renegotiated or replaced after the effective date of the Final Rule. Finally, the Final Rule requires contractors to provide certain written notifications to employees and independent contractors, including notifying independent contractors of their status; informing employees who are exempt from the Fair Labor Standards Act (FLSA) of their exempt status; and providing notifications each pay period to employees reflecting the hours worked, overtime, pay and deductions.

Gradual Implementation of Requirements

Some requirements under the Final Rule will be implemented on a phased-in schedule starting October 25, 2016. For the first six months, the requirements for prime contractors to disclose their labor law violations will apply only to solicitations of \$50 million or more. Starting April 25, 2017, prime contractors bidding on solicitations of \$500,000 or more must disclose their labor violations. The subcontractor disclosure requirements will be delayed until October 25, 2017.

The government will also gradually implement the three-year lookback period for labor violations to be reported. Until October 25, 2017, contractors will have to disclose only violations that occurred within the year preceding the date when they submit a bid for a covered solicitation. Starting October 25, 2017, the lookback period will increase to two years, and, starting October 25, 2018, the three-year period begins.

The Final Rule also delays implementation of the paycheck transparency requirements until January 1, 2017. However, the prohibition on predispute arbitration agreements will start on October 25, 2016.

Significant Changes to the Proposed Rule

The Final Rule addressed some problematic issues in the proposed rule, including:

- **DOL to Track and Provide Advice on Subcontractor Violations:** Under the proposed rule, prime contractors were tasked with assessing their subcontractor's labor violations before awarding covered subcontracts and continuing to monitor those violations on a semiannual basis. Many in the contractor community were concerned that prime contractors were ill-equipped to conduct these assessments and that tracking these violations would be overly burdensome and costly, particularly for contractors with hundreds of subcontractors. The Final Rule eases some of the concerns by requiring subcontractors to report their violations directly to the DOL (rather than the prime contractors) and requiring the DOL to provide a recommendation for subcontractors to provide to prime contractors on the subcontractors' labor law violations. Although prime contractors will still be responsible for determining whether the subcontractor is qualified to be awarded the subcontract, the Final Rule states that prime contractors "can rely" on the DOL's recommendations.
- **State Law Equivalents Not Reportable for Now:** The proposed rule required contractors to disclose violations under 14 different federal labor laws, as well as their "state law equivalents." Because the proposed rule failed to identify which "state law equivalents" would be covered, many commenters requested greater clarity on the types of state violations to track and report. In the Final Rule, the government punts on this issue, stating that "[d]isclosure and consideration of decisions concerning other equivalent State law violations will not go into effect until the DOL and FAR Council seek public comment on additional Guidance and rulemaking." For now, the only state law violations that must be reported are violations of state plans approved by the Occupational Safety and Health Administration (OSHA).
- **Preaward Assessment Available:** The DOL will start offering a preaward assessment of contractor's labor violations and compliance as early as September 12, 2016. During these assessments, contractors can discuss their compliance and violations with the DOL before bidding on contracts to seek its advice on whether any of the violations are potentially problematic. These assessments are not binding on the contracting officers and ALCAs who are ultimately responsible for determining whether the contractor can be awarded the contract. Although they can rely on the DOL's assessment so long as there have not been any changes in the number or scope of the violations at the time the violations are submitted in response to a solicitation, it remains to be seen whether ALCAs or contracting officers will actually do so. Notably absent from the Final Rule is any assurance

that the DOL will not use information provided to it by potential contractors as part of a preaward assessment for enforcement purposes.

Unresolved Issues

Despite some of the welcomed changes, the Final Rule still leaves a number of the problematic issues unresolved:

- **Must Disclose Administrative Merits Determinations:** The proposed rule would have required contractors and subcontractors to disclose “administrative merits determinations,” which were broadly defined to include notices or findings issued by an federal enforcement agency following an investigation, including Form WH-56 or letters from the DOL’s Wage and Hour Division indicating violations of the FLSA or Family and Medical Leave Act, show-cause notices from the Office of Federal Contract Compliance Programs citations from OSHA, complaints filed by the regional director of the National Labor Relations Board and reasonable-cause determinations by the EEOC. Many contractors had concerns about reporting these decisions because they are mere allegations that have not been through a formal adjudication process where a contractor has been afforded due process. In the Final Rule, the government rejected these concerns, noting that the “proposed definition is consistent with the Order and delegated authority [and is] . . . limited . . . to a finite number of findings, notices, and documents.” The government also dismissed the concern that contractors could be denied awards based on administrative determinations that are later overturned, finding that there is a “very low percentage of administrative merits determinations that are later overturned or vacated.”
- **Not Enough Guidance or Time to Make Appropriate Responsibility Determinations:** The proposed rule contemplated that contracting officers would consult with the ALCA on contractor labor law violations, and any mitigating evidence that contractors submit, to determine whether those violations were serious, repeated, willful, and/or pervasive. The ALCA would then have three days to review all the information and recommend to the contracting officer whether to award the contract. Many contractors feared that the tight time-frames and vague standards for assessing violations provided ALCAs and contracting officers with too much discretion for weighing those violations, which could result in inconsistent applications and arbitrary determinations. Although the government acknowledged that these case-by-case assessments “may result in different decisions,” it claimed that the sufficient guidance in the Final Rule and that ability to collaborate with the DOL and other ALCAs would assist them with making proper assessments and avoiding inconsistent determinations. The government also stated that the timing for responsibility determinations was adequate, since the contracting officers could proceed if the ALCA did not provide input within the three business days or could request more time. It is unrealistic, however, to believe that ALCAs and contracting officers, many of whom have little or no labor law experience, can assess and provide thoughtful recommendations of various violations under 14 different labor laws in such a short time-frame.
- **Third-Party Reporting:** Many commenters were concerned that the proposed rule allowed ALCAs and contracting officers to consider information obtained by “other sources” concerning contractors’ labor violations. They noted that third parties may report violations that are being resolved, or lack

merit altogether, to gain tactical advantages in their disputes with contractors (e.g., unions seeking to organize a contractor may have an incentive to report meritless labor violations to exert pressure on contractors). The Final Rule disregards these concerns and confirms that the government will consider information from employees, worker representatives, community groups and even competitors during the preaward and postaward assessment process.

- **Labor Compliance Agreements:** The proposed rule contemplated that contracting officers in coordination with ALCAs would request contractors to sign Labor Compliance Agreements (LCAs) if they determined that the contractor was not responsible to obtain the contract. Many were concerned that the government would aim to have contractors (even with minor violations) enter LCAs before awarding contracts as a way to force the government's compliance agenda on contractors. A number of commenters also noted that the Final Rule failed to delineate the circumstances under which these would be sought and provide details on the scope of these agreements, including their length, content and remedial measures, or what would occur if the contractor breached the agreement. The Final Rule provides little guidance on the details of LCAs instead stating that these will be subject to negotiation with ALCAs, and it does not specify what consequences contractors would face if they breached the agreement.
- **Public Availability:** The proposed rule contemplated that information initially submitted by contractors to the government would be publicly available through the Federal Awardee Performance and Integrity Information System (FAPIIS), which includes contractors' self-reported information on the laws violated, the case identification/docket numbers, dates of the decisions and the names of the bodies issuing the determinations or judgments, and whether the contractor has entered an LCA. Contractors were concerned that this type of information could be used against them (e.g., by plaintiffs' attorneys or competitors) and could have a negative effect on their businesses and reputations, especially if those violations were later overturned. However, the Final Rule continues to require information initially disclosed by contractors to be publicly available on FAPIIS. Moreover, although the Final Rule provides that actual details of an LCA will not be available on FAPIIS, it does not foreclose the possibility that those agreements could be disclosed publicly, stating that the "enforcement agencies that negotiate labor compliance agreements have the discretion to make the agreements . . . publicly available." Third parties may also be able to access some of this information through the Freedom of Information Act, which was recently changed to make it more difficult for the government to limit the release of information.

Legal Challenges

Contractors and business groups will undoubtedly bring various legal challenges against the Final Rule. Lawmakers may also try to limit the applicability of certain parts of the rule, as several members of Congress have done recently by issuing an amendment to the 2017 Defense Authorization Act seeking to exempt contracts with the Department of Defense from the Final Rule. Obviously, the outcome of the presidential and congressional elections this November could also affect whether the rule will survive. In any case, contractors will likely have to prepare and start complying well before any of the challenges or events take place.

Practical Implications

Contractors should create and implement plans now for compliance with the Final Rule. Contractors that have not already created a system for tracking and reporting labor violations should immediately begin that process. Many contractors, particularly larger companies, have several different departments that are responsible for labor compliance and disputes. It will take time to identify key stakeholders and amass the necessary information into a cohesive system that can be quickly compiled for timely submission of bids. Contractors should also consider appointing a position or team to handle these disclosures, respond to requests from the government concerning their labor violations, and negotiate and ensure compliance with an LCA should the government require one. It will be imperative to have a quick turnaround responding to inquiries from the contracting officer or ALCA that is not only accurate, but presents a consistent message about the contractor's labor compliance and disputes across the various agencies. Achieving this will require certain internal stakeholders to take ownership of that piece now. Contractors should also reassess their litigation strategies in light of the rule. In certain instances, it may make more sense to settle matters or appeal decisions based on the nature of the violations that must be disclosed, particularly if those disputes could affect the contractors' ability to win contracts.

Of course, the best way to minimize the impact of this rule is for contractors to assess their labor compliance and take proactive steps to decrease the number of potential violations that must be reported. As a practical matter, contractors should conduct privileged audits of their employment practices to uncover and fix potential vulnerabilities now. In addition, contractors should review their internal complaint reporting systems and provide effective training and policies to ensure that complaints can be adequately addressed and potentially resolved before they result in an agency investigation or legal dispute.

Training

Akin Gump Strauss Hauer & Feld LLP will be hosting training sessions in the coming weeks to advise contractors and subcontractors on practical steps for compliance with the Final Rule. Details on those sessions will be available soon.

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