Government Contracts
& Disputes

June 23, 2015

# DOL Invites Comments on Requirement That Bidders Disclose Employment Law Violations

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*President Obama's Executive Order 13673, called the Fair Pay and Safe Workplaces Order, uses the prospect of gaining or losing an edge in winning government contracts to provide a powerful incentive for employers to comply with a broad range of employment laws. On May 28, 2015, the Department of Labor (DOL) published a Proposed Guidance on implementation of the Order and invited the public to submit comments by July 27, 2015. Because aspects of the proposed guidance create compliance burdens for government contractors and could unfairly place some government contractors at a disadvantage in the procurement process, the contractor community would be prudent to submit comments that may lead to changes in the final guidance.*

The proposed guidance has three principal components. First, it would require federal contractors to report to contracting officers whether there has been any administrative merits determination, civil judgment, or arbitral award or decision rendered against them during the preceding three-year period for violations of any of 14 identified federal employment laws and executive orders or equivalent State laws. The fourteen identified federal laws for which reports must be made are the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the National Labor Relations Act (NLRA), the Occupational Safety and Health Act (OSHA), the Davis-Bacon Act, the Service Contract Act, Executive Order 11246 (Equal Employment Opportunity), Section 503 of the Rehabilitation Act, the Vietnam Era Readjustment Assistance Act (VEVRAA), the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), and Executive Order 13658 (Establishing a Minimum Wage for Contractors).

Second, it would require contractors to receive and evaluate such reports from their subcontractors where the estimated value of the supplies acquired and services required in the subcontract exceeds $500,000 and the subcontract is not for commercially available off-the-shelf items.

Third, it would implement the paycheck transparency provisions of the Order by instituting written notice requirements to employees and independent contractors that lists the components of the individual's compensation and explains their classification as a non-exempt employee, an exempt employee, or an independent contractor.

As currently proposed, each of the components of this guidance includes ambiguities and imposes heightened compliance obligations on contractors beyond those necessary to achieve the objectives of the Order. If contractors highlight problematic areas of the proposed guidance to the Department of Labor through the comment process, the final guidance may offer more clarity and ease certain of the burdens in the provisions of the proposed guidance.

**Broad definition of adverse merits determination gives settlement leverage to plaintiffs.**

The core of the first component of the proposed guidance is the requirement that government contractors bidding for procurement contracts for goods and services, including construction, with an estimated value of $500,000 or more, must disclose to contracting officers "any administrative merits determination, civil judgment, or arbitral award or decision" rendered against the contractor for violations of any of the 14 identified federal labor laws or executive orders or any equivalent State laws (the Labor Laws). Contractors may also report mitigating factors and steps taken to correct the violations. Based on this information, contracting officers, in consultation with their agency's Labor Compliance Advisor (LCA), will evaluate the information to determine "if a contractor is a responsible source with a satisfactory record of integrity and business ethics" eligible for a contract award. These disclosures must be made when the contractor first submits a bid, at the pre-award stage, and semi-annually during the performance of the covered procurement contract.

Because of the wide range of covered Labor Laws, the proposed guidance includes a variety of adverse merits decisions as a trigger for the Labor Law violation disclosure requirement, depending on the issuing agency or relevant adjudication forum. For example, an "administrative merits determination" includes the issuance from the DOL's Wage and Hour Division of a letter indicating a violation of the FLSA, FMLA, Service Contract Act, or Davis-Bacon Act, or the issuance of a "WH-56 Summary of Unpaid Wages" form. This presents a challenge to government contractors that identify and voluntarily correct misclassifications or unpaid wages or fringe benefits and that seek a release of such claims from affected employees. Waivers of federal wage claims are only enforceable if supervised by a court or by the DOL, and employers can request that the DOL supervise self-initiated corrective back payments in order to obtain such releases. In those instances, the DOL generally reviews the calculation of back wages and can issue a "WH-56 Summary of Unpaid Wages" form memorializing those calculations. In that circumstance, under the proposed guidance, the employer's voluntary self-corrective efforts would have to be disclosed as a Labor Law violation in any procurement contract bid for the next three years.

With respect to the Equal Employment Opportunity Commission, the proposed guidance states that an "administrative merits determination" includes the issuance of a letter of determination of reasonable cause to believe that an unlawful employment practice took place. These letters are not binding on employers, although the EEOC will invite employers to enter into a conciliation agreement if a "reasonable cause" determination letter is issued. The EEOC can also choose to initiate a lawsuit against the respondent employer if the employer fails to conciliate, but some courts in some jurisdictions exclude EEOC letters of determination from evidence on a variety of grounds. Under the proposed guidance, however, government contractor employers would have more reason to fear issuance of a "reasonable cause" determination letter, and many may agree to mediate and settle EEOC charges they regard as unfounded in order to avoid the risk of having to disclose a Labor Law violation in the procurement process.

With respect to the Office of Federal Contract Compliance Programs (OFCCP), the proposed guidance states that a "show cause notice" for failure to comply with Executive Order 11246, VEVRAA, or the Rehabilitation Act will constitute an "administrative merits determination." On the one hand, this is good news for government contractors, as the Labor Law violation disclosure requirement would not be triggered by the OFCCP's issuance of a Notice of Violation—a common outcome in compliance reviews for relatively minor findings of technical non-compliance. On the other hand, if the contractor disagrees with terms of the OFCCP's suggested conciliation agreement, the OFCCP would have much more leverage under the proposed guidance in negotiations of conciliation agreement terms, because mere issuance of a "show cause notice" will place the government contractor at a competitive disadvantage in bidding for procurement contracts.

The proposed guidance is clear that "administrative merits determinations that must be reported under the Order include an administrative merits determination that the contractor or subcontractor is challenging, can still challenge, or is otherwise subject to further review." Adverse civil judgments from federal or state courts must also be reported as a Labor Law violation, even if the judgment or order "is not final or is subject to appeal." In addition, even private and confidential arbitration awards and decisions are subject to the Labor Law violation reporting requirement under the proposed guidance, regardless of whether the "award or decision is subject to further review in the same proceeding, is not final, or is subject to being confirmed, modified, or vacated by a court."

The proposed guidance provides that, if a contractor has reported a Labor Law violation and there are further proceedings, contractors must report new determinations or decisions "even if they arise from a violation of the Labor Laws that was already reported." If the subsequent decision upholds or does not completely review or vacate the finding a violation, the contractor should thereafter "report only the administrative merits determination, civil judgment, or arbitral award or decision that is the most recent at the time of reporting." This rule would add a vexing tactical element to a contractor's decision of whether to appeal. Because the Labor Law violation reporting requirement covers a rolling three-year period, any unsuccessful appeal would extend the period in which the underlying violation has to be reported for three years from the date of the subsequent decision. For example, an underlying violation would need to be reported for a total period of four years from the initial adverse finding if an unsuccessful appeal process resulted in a decision being issued one year after the initial adverse finding. If a contractor does not challenge or appeal an adverse Labor Law determination, however, then the contractor will more quickly be free of the Labor Law violation reporting requirement relating to the underlying violation. A fairer approach for contractors would entail requiring updates on subsequent decisions but measuring the three-year reporting period in all cases from the first adverse finding relating to the underlying violation.

The ultimate purpose of these reports is to enable contracting officers to determine whether Labor Law violations should render a contractor ineligible for a procurement contract. Contractors would have the right to soften the assessment of reported violations by presenting evidence of mitigating factors, including attempts to remediate the violation or evidence of a significant period of compliance following one or more violations. Conversely, contracting officers are instructed under the proposed guidance to give more weight to Labor Law violations that are "serious, repeated, willful, or pervasive." Any violation entailing injunctive relief imposed by an enforcement agency, court or arbitrator would be deemed "serious," as would any violation resulting in an assessment of at least $5,000 in fines or penalties or $10,000 or more in back wages (including compensatory damages and FLSA liquidated damages). Any violation entailing a finding of retaliation against workers would also be regarded as "serious." Claims of retaliation are rising: According to the EEOC's Fiscal Year 2014 data, over 42 percent of all charges filed with the EEOC included a retaliation charge, with nearly 38,000 EEOC retaliation charges filed in FY 2014.[1] Only 2.9

[1] *See* press release.

percent of private-sector retaliation charges resulted in the EEOC issuing a "reasonable cause" determination letter, however.[2] Willful or repeated violations would also be given more weight, as would "pervasive" violations. The proposed guidance's standard for "pervasive" violations would encompass findings of multiple violations of Labor Laws, even if they arise in the same proceeding or investigation, and also would include consideration of whether higher-level management officials gave either explicit or implicit approval to the practice. Under these proposed standards, any contractor that is subject to an adverse finding on a Labor Law claim would be likely to become highly litigation averse in order to avoid losing out on eligibility for future procurement contracts. Moreover, all but the smallest wage claims would carry with them risk of ineligibility, due to the proposed guidance's definition of "serious" violations.

**Subcontractor reporting requirement imposes substantial burdens and presents practical challenges.**

Like most obligations applicable to federal contractors, the Order imposed similar obligations on covered subcontractors to federal contractors. The proposed guidance includes an obligation that federal contractors flow down the Labor Law violation reporting requirements to covered subcontractors, but subcontractor would not make their reports to the federal government agency. Rather, the proposed guidance provides that contractors must require their subcontractors to report Labor Law violations to the contractor, and the contractors must "make the same assessments regarding subcontractors and their violations of the Labor Laws as contracting agencies must make of contractors." The proposed guidance does not explain how contractors should evaluate the seriousness of these evaluations or determine whether subcontractors have reported fully reported all relevant Labor Law violations. This endeavor is likely to present major administrative burdens on contractors and result in inconsistencies as to how different contractors evaluate similar violations. The proposed guidance comments that "the FAR Council is considering allowing contractors to direct their subcontractors to report their violations to the Department, which would then assess the violations." This alternative approach would be likely to result in much more consistent and efficient evaluation of information from subcontractors. Regardless of the final form of the implementing guidance, however, contractors have been duly alerted that they will jeopardize their chances of successfully winning procurement contractors if they ignore the Labor Law compliance records of their subcontractors.

**Paycheck Transparency provisions may entail new payroll processing procedures.**

The final component of the proposed guidance does not directly relate to the procurement process. Rather, the proposed guidance implements the Order's requirement that, for non-exempt employees, all contractors and subcontractors must "document" (in writing, either in paper or electronically) "information concerning that individual's hours worked, overtime hours, pay and any additions made to or deductions from pay." The wage statement must be issued every pay period and include, by workweek, the total number of hours worked and overtime hours broken down to correspond to the period for which overtime is calculated and paid. A similar written wage statement must be provided to all exempt employees each pay period, except that the statement can omit a record of hours worked if the employer has provided "written notice to the worker stating that the worker is exempt from the FLSA's overtime compensation requirements."

If the worker is an independent contractor, the contractor does not need to provide wage statements. Instead, before the worker performs any work under a procurement contract, the contractor must provide a

[2] *See BNA Daily Labor Report*, "EEOC Ponders Ways to Curb Retaliation Against Workers Who Pursue Bias Claims," 116 DLR AA-1 (June 17, 2015).

written document (electronically or in paper form) informing the worker of his or her independent contractor status. This notice must be separate from any contract between the worker and the contractor.

If a contractor engages an independent contractor to perform services under more than one procurement contract, the proposed guidance would require that a separate notice of independent contractor status be required for each covered procurement contract or subcontract: "the notice provided is specific to a particular covered contract regardless of whether the worker performs the same type of work on another covered contract."

These requirements are not especially onerous, and many contractors' existing practices may already satisfy the proposed guidance. Contractors that do not already follow these practices, however, should update their payment practices to meet these standards.

**Conclusion**

The Order and the proposed guidance signal the importance to the Obama administration of Labor Law compliance by the federal contracting community. The provisions of the proposed guidance raise the stakes considerably for government contractors facing potential employment law claims or agency reviews, and, if finalized, will entail significant new compliance burdens for contractors. Because the DOL has invited the public to submit comments, any contractor who objects to the scope or particular implementation method of the Order has an opportunity to make those concerns known to the DOL, provided that the comments are submitted on or before July 27, 2015. Contractors who wish to have assistance or guidance with the comment submission process may wish to contact their legal counsel.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the attorneys below.

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