

CLIENT ALERT

DOL Issues Proposed Guidance for the Fair Pay and Safe Workplaces Executive Order

JUNE 8, 2015

On May 19, 2015, the Department of Labor (DOL or Department) issued a lengthy proposed guidance on Executive Order 13673, the Fair Pay and Safe Workplaces Executive Order (the Order). The Order requires certain federal contractors and subcontractors to disclose labor violations and efforts to correct them with the stated aim of ensuring that only responsible and compliant contractors are awarded taxpayer-funded contracts. The proposed guidance provides a roadmap to contractors and contracting officers for compliance with the Order. See our client briefing, [President Obama Issues Fair Pay and Safe Workplaces Executive Order](#), covering the issuance of the Order.

Who Does The Guidance Cover

The proposed guidance covers contractors and subcontractors performing or bidding on federal contracts or subcontracts where the value of services or supplies provided is in excess of \$500,000.

What Must Be Disclosed

The Order requires companies applying for federal contracts disclose – before the awarding of the contract – any administrative merits determination, arbitral award or decision, or civil judgment entered against it within the last three years involving any of the 14 covered labor law violations or equivalent state laws. The relevant three-year period is the three-year period preceding the date of the offer (*i.e.*, the contract bid or proposal), even if the contractor or subcontractor was not performing or bidding on a covered contract during that time. Once a qualifying contract is awarded, the contractor must update its disclosures on a semi-annual basis, and include provisions in any of its subcontracts requiring that the subcontractor also provide disclosures.

As defined by the guidance, an administrative merits determination means any one of a number of documents, notices and findings issued by enforcement agencies following an investigation that concludes that the contractor violated any of the covered laws. The guidance provides a detailed and exhaustive list of documents that constitute an administrative merits determination. If a document is not specifically identified in the guidance, it will not be considered an administrative merits determination. Examples of an administrative merits determination include an

EEOC letter of determination, a complaint issued by a Regional Director of the NLRB, and notice from the DOL's Wage and Hour Division assessing civil penalties. A complaint filed by a private party in a federal or state court, or with enforcement agencies (*i.e.*, "a complaint for failure to pay overtime wages filed with the DOL's Wage and Hour Division or a charge of discrimination filed with the EEOC") represents allegations made by a plaintiff and not an enforcement agency, and are not considered administrative merits determinations.

A civil judgment, for the purposes of the Order, means any judgment or order by any federal or state court where the court determined that the contractor violated any of the covered laws- including those that may be subject to further review or appeal. Any award or order by an arbitrator that determines the contractor violated any of the covered laws must also be disclosed. Private settlements of alleged violations, however, are not included in the administrative merits definition.

Effect on Arbitration of Certain Employment Claims

Federal contracts that have an estimated value exceeding \$1 million will now include clauses requiring that contractors agree not to enter into any pre-dispute agreements to arbitrate claims arising under Title VII or any tort related to or arising out of sexual assault or harassment. In these cases, an agreement to arbitrate such claims may only be made with the voluntary consent of employees or independent contractors **after** such disputes arise.

Paycheck Transparency

The Order also contains two paycheck transparency requirements. First, the Order requires that covered contractors and subcontractors provide employees working on federal contracts with certain information – a "wage statement" – with each paycheck to ensure paycheck "transparency." The wage statement must contain the total number of hours worked, overtime hours, pay, and any additions made to or deductions made from pay in each pay period. Wage statements provided to workers who have no entitlement to overtime compensation under the FLSA need not include a record of hours worked so long as the employer informs the worker of their exempt status. Second, the Order provides that if a contractor or subcontractor is treating an individual performing work under a covered contract as an independent contractor, and not an employee, it must provide a document informing the individual of this status.

Serious, Repeated, Willful, and Pervasive Violations

The guidance provides instruction to contracting officers in weighing the disclosed labor law violations. Each contractor's disclosed violations are to be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. Those that are "serious," "repeated," "willful," or "pervasive" violations will be weighted heavily in the assessment of a contractor's integrity and business ethics.

The guidance provides an exhaustive list of categories of labor law violations that may be serious under the Order, and includes those that result in fines or penalties of \$5,000 or back wages of \$10,000, adverse employment actions for whistleblowers exercising rights protected by labor law, and violations where 25 percent of the workforce is affected. A violation will be deemed willful where the contractor knew that its conduct was prohibited by the labor laws or showed reckless disregard or indifference to the law. For a violation to be repeated, it must be the same or substantially similar to another violation within the last three years. Finally, violations are pervasive if they reflect a basic disregard for the labor laws – demonstrated by a pattern of serious or willful violations, repeated violations, or numerous violations. Whether violations are deemed pervasive will also depend on the size of the company.

Mitigating Factors

Contracting officers are instructed to consider all facts and circumstances of a violation, including mitigating factors. The guidance instructs that the most important mitigating factor will be the extent to which the contractor has remediated the violation and has taken steps to prevent its recurrence. Other mitigating factors under the guidance include having only one violation, a low number of violations relative to the size of the company, implementation of safety and health programs, good faith, and a significant period of compliance following violations.

The DOL will be seeking public comments on the proposed guidance for 60 days. After the comment period has ended, the Department will publish its final guidance in the Federal Register.

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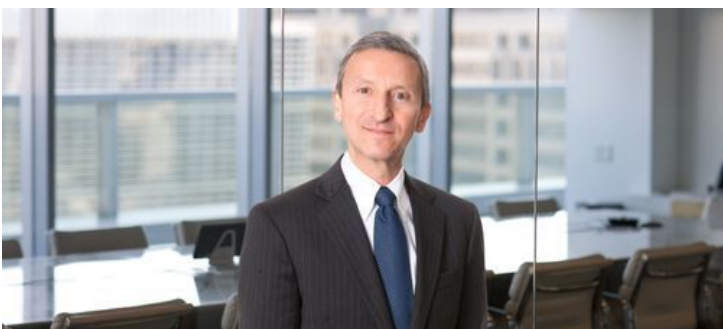
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