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Federal Contractors Face Significant Challenges Under Fair Pay and Safe Workplaces Final Rule

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Last week, the Federal Acquisition Regulatory Council (FAR Council) released its Final Rule implementing President Obama's 2014 Fair Pay and Safe Workplaces Executive Order. At the same time, the U.S. Department of Labor (DOL) released its Final Guidance on the rule. In short, the rule requires federal contractors to attest to whether they have had any labor law violations when bidding on covered federal contracts. Federal contracting agencies may then assess a contractor's overall record of compliance with labor laws when awarding federal contracts. The rule also places new reporting and notification burdens on contractors. Contractors need to take action immediately — the Final Rule goes into effect on October 25, 2016.

Background on the Rule

On July 31, 2014, President Obama issued Executive Order 13673, called Fair Pay and Safe Workplaces. The stated purpose of the Order is to "improve contractor compliance with labor laws in order to increase economy and efficiency in Federal contracting." Some outside the government have called it the "blacklisting" order.

A FAR proposed rule and DOL proposed guidance was published in May of 2015. Through an extended public comment period, more than 12,500 comments were submitted. After considering the comments, the proposed rule was changed in a few ways, as noted below, before the Final Rule was issued.

Public Disclosure of Labor Law Violations

Contractors will be required to disclose violations of 14 federal labor laws and executive orders and state equivalents. Those laws range from the Fair Labor Standards Act and the Occupational Safety and Health Act to the Service Contract Act and the Family and Medical Leave Act. It also requires disclosure of violations of Executive Order 13658 which establishes a minimum wage for contractors and Executive Order 11246 which governs Equal Employment Opportunity.

Under the Final Rule, contractors must publicly disclose certain basic information about covered violations, including the law violated, the case identification number, the date of the decision finding a violation, and the

name of the body that made the decision. The disclosure requirement applies not only to civil judgments and administrative merits determinations, but also arbitral awards, including awards that are not final or still subject to court review. The Final Rule does not, however, require contractors to publicly disclose documents showing mitigating factors, remedial measures, and other steps taken to comply with labor laws.

Contractors will be required to update their labor law violation reports every six months. The update may be filed on any date before the six-month contract anniversary date.

Subcontractor Reporting Directly to DOL

In a significant change from the proposed rule, subcontractors will be required to report their labor law violations directly to the DOL rather than to the prime contractor. The subcontractor then makes a statement to the prime contractor regarding DOL's response to its disclosure. This somewhat contorted pathway for consideration of subcontractors' disclosed violations, bouncing from DOL back to the sub and then up to the prime and then to the contracting officer, may prove unwieldy, so it remains to be seen how that process will work and whether it will work efficiently. The new FAR rule is not required to be “flowed down” from primes to subs until October 25, 2017. Prudent prime contractors, however, may require their subcontractors to comply with these provisions before then. Prudent subcontractors, therefore, should take steps now to be sure they can comply with the new requirements.

Paycheck Transparency and Arbitration Restrictions

Starting on January 1, 2017, the “paycheck transparency” provisions take effect. Among other things, contractors will be required to provide notices to workers about their status as independent contractors and whether they are exempt from overtime pay. Employers also must provide a wage statement each pay period to all individuals performing work under the contract detailing the number of hours worked, overtime hours, pay, and any additions or deductions from pay. This covers every worker on the contract who is subject to the FLSA, all laborers and mechanics subject to the DBA, and all service employees covered by the SCA, regardless of the contractor's classification of the worker as an employee or independent contractor. Such wage statements may be provided electronically if the worker can access it through a computer or system made available by the contractor.

These pay notices may be problematic for contractors who have not previously focused on proper classification of their workers. In light of new overtime regulations going into effect on December 1, 2016, and the DOL's ongoing attention to alleged worker misclassifications, contractors should review how they treat *all* workers to ensure proper classification.

The Final Rule also prohibits certain large contractors from requiring employees to arbitrate certain civil rights claims. Contractors with contracts for goods or services worth more than $1 million may not enter into agreements with employees requiring mandatory arbitration of Title VII

claims or any tort arising out of sexual assault or harassment. Arbitration of such claims could occur only if the employee who filed a claim voluntarily agrees to arbitration *after* the dispute arose.

Reporting Does Not Extend to Affiliates

In one bit of good news, the Final Rule makes it clear that the reporting requirements do not extend to corporate parents, subsidiaries or affiliated companies. Instead, it is limited to the contracting party only.

Phase-In Periods

In a significant change from the proposed rule, the Final Rule provides that the disclosure requirements will be "phased in" over time. On October 25, 2016, the disclosure requirements will become effective as to prime contracts valued at $50 million or more. On April 25, 2017, those requirements will apply to prime contracts valued at $500,000 or more. Subcontracts will not be covered until October 25, 2017.

In addition, the disclosure rules begin by requiring disclosure of labor law violations only from the past year. By October 25, 2018, the "look back" period will stretch to violations from the previous three years.

Tips For Contractors To Take Now

The new rules contain many new requirements and all federal contractors (primes and subs) should get ready now for the implementation to begin on October 25, 2016. Steps to take now include:

- Review classifications of exempt workers and independent contractors and revise the status for any misclassified workers;
- Ensure your capabilities to produce required wage statements to covered workers;
- If you are a contractor pursuing or performing a federal government contract estimated to exceed $1 million and you require mandatory arbitration agreements with employees, revise your arbitration agreements to carve out Title VII claims and other torts arising out of sexual assaults or harassment;
- Gather information about any covered labor law violations from the past year to determine what may need to be disclosed with any new bids; and
- Review your compliance with the 14 labor laws, and their state-law equivalents, so as to minimize any violations that will be reportable in the future.

Being prepared to comply with the Final Rule now will reduce the headaches and scrambling you'll encounter when you prepare to bid on your next federal contract. If you have any questions, please contact the authors at CLucy@hollandhart.com, SGutierrez@hollandhart.com, or MDMaloney@hollandhart.com, or the Holland & Hart attorney with whom you typically work.