

White House Continues Push For Contractor Labor Rules



Law360, New York (September 17, 2014, 10:08 AM ET) -- Over the past several months, the Obama administration has shown increased interest in ensuring that federal contractors maintain strict compliance with labor requirements if they wish to remain eligible for federal contracting. President Obama has issued two executive orders addressing: (1) the disclosure of labor violations; and (2) assurances that contractor employees are not subject to retaliation for discussing or disclosing their own compensation or the compensation of another employee or applicant.

Although regulations have not yet been promulgated for either executive order, on Sept. 15, the Office of Federal Contract Compliance Programs issued a proposed rule addressing the compensation disclosure requirements. Together, the two executive orders require contractors to review and revise their internal policies to ensure compliance with these new requirements.

In this article, we summarize the key provisions of the two orders and identify likely impacts for companies that do business with the federal government.

"Fair Pay and Safe Workplaces" Executive Order

On July 31, 2014, President Obama signed Executive Order 13673, titled "Fair Pay and Safe Workplaces," which will place significant new burdens on government contractors. The fair pay executive order requires contractors to disclose in their proposals to the government "any administrative merits determination, arbitral award or decision, or civil judgment" for violations of a comprehensive list of labor laws and executive orders. Offerors must account for violations over a three-year look-back period, and they must update the list of disclosures every six months. Contractors will submit their reports to a "single website," which the administrator of the U.S. General Services Administration will build in consultation with other agencies.

Responsibility Determinations

Contracting officers are required to evaluate these labor law violations in making a responsibility determination. Actionable violations are those that are “serious, repeated, willful, or pervasive.” Contractors must make similar responsibility determinations for subcontractors if the estimated value of the subcontract will exceed \$500,000. This subcontractor review does not apply to commercially available off-the-shelf items.

Contracting officers must allow offerors the “opportunity to disclose any steps taken to correct the violations of or improve compliance with the labor laws.” The fair pay executive order cautions that a single violation will not necessarily lead to an adverse determination; the categories of “repeated” and “pervasive” support that caveat. The order also instructs contracting officers to consider mitigating circumstances, including an offeror’s remedial efforts. However, the broad definitions of “serious” and “willful” present risks that a single incident of noncompliance could nevertheless lead to an adverse determination. “Willful” violations, for example, include known violations and violations that resulted from “reckless disregard” or “plain indifference.”

Labor Compliance Advisers

Each agency must designate a senior official as a labor compliance adviser. Prior to making an award, the contracting officer must consult with the labor compliance adviser to determine whether an offeror “has a satisfactory record of integrity and business ethics.”

Restrictions on Arbitration Agreements

The fair pay executive order puts an end to many mandatory arbitration provisions. In effect, the order extends to nondefense contracts the same restrictions on arbitration provisions that have applied to U.S. Department of Defense contractors since 2009. Companies with federal contracts of \$1 million or more may not demand that their employees enter into arbitration agreements for disputes arising out of Title VII of the Civil Rights Act, or for torts related to sexual assault or harassment. Agreements to arbitrate these matters “may only be made with the voluntary consent of employees or independent contractors after such disputes arise.” The executive order carves out some exceptions for collective bargaining agreements and valid arbitration provisions that were in place before a company bids on a contract covered by the order.

Pay and Hour Reports

Contractors must give employees information concerning hours worked, overtime hours, pay and additions to or deductions from pay. Contractors also must substantiate any decision to classify a worker as an independent contractor. Although independent contractors need not receive the full pay and hour report, they must receive a document explaining and justifying their independent contractor status.

The compliance burdens associated with generating these reports could be more substantial than the fair pay executive order suggests. The rules for tabulating employees and hours can vary across different regulatory contexts, exposing employers to the risks associated with maintaining multiple lists of personnel and their hours worked. For example, recent regulations under the Affordable Care Act include complex rules for determining whether personnel are “employees” for purposes of determining whether the ACA’s shared responsibility excise taxes apply. To maintain accurate and efficient record systems, contractors must pay close attention to the regulatory requirements in several areas of employment and benefits law.

Rulemaking

The order directs the Federal Acquisition Regulatory Council to propose amendments to the FAR to implement the provisions of the fair pay executive order. The proposed regulations will include a rule to “ensure that contracting officers and labor compliance advisers send information, as appropriate, to the agency suspending and debarring official, in accordance with agency procedures.” The fair pay executive order also directs the secretary of labor to develop standards for determining whether violations are “serious,” “repeated,” “willful” or “pervasive.”

"Nonretaliation for Disclosure of Compensation Information" Executive Order and Proposed Rule

On April 8, 2014, President Obama issued Executive Order 13665, which amends Section 202 of Executive Order 11246 “to prohibit Federal contractors from discharging or discriminating in any other way against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant.” On Sept. 15, 2014, the OFCCP issued a notice of proposed rulemaking to implement the order. The proposed rule would apply to all federal contractors with contracts over \$10,000 in value, which are entered into or modified on or after the effective date of the rule. In addition to direct procurement contracts, the proposed rule also would apply to federally assisted construction contracts.

The Rationale for the Executive Order

The pay secrecy executive order is directed at the pay gap that exists between men and women in the workplace, especially as to some women of color and for the “working poor and the middle class” The proposed rule notes that among the possible factors contributing to the continuing pay gap is the “prevalence of workplace prohibitions against discussing compensation.” In promulgating this rule, OFCCP believes that eliminating such prohibitions could result in several productivity benefits for contractors, including increased productivity from more motivated workers, increased worker trust in management, and reductions in the number of baseless discrimination claims from employees who lack accurate information (because they could not discuss compensation openly). The proposed rule notes that such discussions also could lead to increased wage payments to workers, which could impact the net costs that the government pays on certain contracts.

Regulatory Revisions

Under the proposed rule, federal contracting agencies will be required to add a specific nondiscrimination provision regarding compensation disclosure to the mandatory equal opportunity clauses in agency contracts. The proposed change would require that contractors refrain from retaliating against employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees. It does not apply to employees who improperly disclose compensation information to which they had access as part of their “essential job function” (for example, human resource professionals). Those employees may only disclose compensation information in furtherance of an investigation, proceeding, or similar action. The proposed rule requires contractors to incorporate this nondiscrimination provision into their existing employee handbooks and manuals and to disseminate the nondiscrimination provision to employees and applicants.

In addition to modifying the equal opportunity clauses, the proposed rule adds a number of newly defined terms to the regulations implementing the requirements of Executive Order 11246, including “compensation,” “compensation information,” and “essential job function.” In particular, the OFCCP is seeking comments on the definition of “essential job function.” As currently drafted, the proposed rule

adopts the definition from Section 503 of the Rehabilitation Act. The goal of the Rehabilitation Act is to provide equal opportunity to individuals with disabilities and to provide for reasonable accommodations that allow a disabled employee to perform the essential functions of the job. OFCCP recognizes that not all of the factors considered under Section 503 are relevant to the proposed rule, and the agency is seeking comments on what factors should be considered in determining when an employee's "essential job function" gives him or her access to compensation information.

Violations of the pay secrecy prohibitions carry the same penalties as any other violation of Executive Order 11246. These penalties include cancellation, termination or suspension of contracts, debarment from future contracts, and/or referral to the U.S. Department of Justice for appropriate civil or criminal proceedings.

Impact Analysis

Both executive orders impose significant compliance burdens on contractors. The duty to self-report labor violations is likely to present attractive grounds for bid protests. It also could spur additional litigation from workers who become aware of violations for the first time as a result of these disclosures. Similarly, the pay secrecy proposed rule provides insight into the types of changes that contractors must initiate to comply with the pay secrecy executive order. Noncompliance invites serious consequences, as would any other violation of the equal opportunity requirements for federal contractors.

Although the fair pay executive order states that it is "effective immediately" for purposes of developing the new rules, an accompanying fact sheet from the White House explains that the order will "be implemented on new contracts in stages, on a prioritized basis, during 2016," in accordance with FAR Council and U.S. Department of Labor rulemaking. Some experts have indicated that the Obama administration is likely to face challenges in establishing the infrastructure and administrative regime needed to implement the order. Others have suggested that the order is vulnerable to challenge in court.

In any event, contractors are well advised to develop a comprehensive strategy to track and collect the relevant employment and compliance data, adjust their negotiation strategies in agreements where mandatory arbitration provisions would have been standard, and develop both offensive and defensive plans for using the disclosures of information about employment-related claims and violations.

Although the pay secrecy executive order was effective immediately, it also noted that the Department of Labor was charged with proposing regulations within 160 days of the date of the order. The OFCCP will be accepting comments on the proposed rule for 90 days, after which the Department of Labor expects to issue a final rule.

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