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# DOL and FAR Council Publish Final 'Fair Pay and Safe Workplaces' Rules for Government Contractors

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The U.S. Department of Labor and the Federal Acquisition Regulatory ("FAR") Council have published the highly-anticipated final guidance and regulations implementing President Barack Obama's "Fair Pay and Safe Workplaces" Executive Order (E.O. 13673), often called the "Blacklisting" or "Bad Actors" Executive Order. Signed by President Obama in July 2014, the Executive Order's stated goal is to promote efficiency in government procurement by ensuring federal agencies contract only with "responsible" contractors who comply with federal and state workplace laws (see our articles, President Obama Signs Executive Order on Federal Contractor Blacklisting and 'Blacklisting' Rules for Government Contractors Proposed by Federal Agencies under Executive Order). The effective date of the regulations is October 25, 2016.

The Executive Order and proposed regulations and guidance set forth procedures requiring federal agency contracting officers to consider an employer's record of workplace law compliance when awarding contracts and subcontracts valued at more than $500,000. The relevant workplace laws on which employer compliance must be assessed remain unchanged in the final rules and include the following:

- Fair Labor Standards Act
- Occupational Safety and Health Act (and state law equivalents)

- Migrant and Seasonal Agricultural Worker Protection Act
- National Labor Relations Act
- Family and Medical Leave Act
- Davis-Bacon Act
- Service Contract Act
- Title VII of the Civil Rights Act
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Executive Order 11246 (affirmative action and equal employment opportunity)
- Vietnam Era Veterans' Readjustment Assistance Act
- Section 503 of the Rehabilitation Act
- Executive Order 13658 (federal contractor minimum wage)

The state law equivalents of these laws, which contractors will also be required to report on, will be subject to a future rulemaking. The exception to this is OSHA state law equivalents, which are subject to the reporting requirements set forth in the new final rules.

One notable distinction between the proposed and final guidance is the definition of "civil judgments," which the DOL revised to clarify that temporary restraining orders and offers of judgment pursuant to Federal Rule of Civil Procedure 68 are excluded and, therefore, not reportable.

## Effective Date and Timeframe of Reporting

Answering a big question raised by the proposed rules, the final regulations set out a phased-in reporting requirement with regular reporting beginning October 25, 2016, by contractors with workplace law violations received *within the first year preceding the start of a contract bid* (which will be phased in to a three-year look back period by October 25, 2018). Such contractors must make updated disclosures every six months thereafter for the duration of the contract. Notably, for bids on contracts valued at less than $50 million, contractors are not required to report violations as of the October 25, 2016, effective date under a six-month "no reporting" grace period ending on or about April 25, 2017.

## Subcontractor Reporting Obligations

Two additional big changes from the proposed regulations involve the reporting obligations for subcontractors. First, subcontractor reporting will begin one year later, on October 25, 2017. Second, subcontractors must report their labor violations directly to DOL and then must report back to the prime contractor

regarding the results of these disclosures. President Obama has signed an amendment to the Executive Order effectuating this reporting change.

## Reporting Entity Clarification

The final rules address a critical issue that was unclear in the proposed rules and guidance: the identity of the reporting entity for the purpose of "whose" violations must be reported. Under the final rules, the legal entity required to report its violations is that listed on the bid/offer or contract and not that entity's parent or other subsidiaries. A contracting entity that is a division of a corporation will be required to make disclosures regarding the corporation's compliance record.

## Assessment by Contracting Agency

Likely in response to public comments, the proposed regulations set out a more detailed and defined process for an assessment by contracting officers and designated "Labor Compliance Advisors" of the disclosures to determine whether the contractor has engaged in "serious, willful, repeated, and/or pervasive violations." The final rules set forth a process for contractors to receive notice of, and respond to, Agency recommendations prior to a final responsibility determination. There also is now a process by which contractors can, and are encouraged (but not required), to go to DOL for pre-assessment of their violations before bidding on contracts.

## Paycheck Transparency and Pre-Dispute Arbitration Agreements

Still intact are the other elements of the regulations and guidance involving paycheck transparency (hours worked, overtime hours (for non-exempt employees) by workweek and totaled for pay period, pay, deductions, identifying exempt employees and independent contractors). The final rules also preserve the prohibition on pre-dispute arbitration agreements to resolve Title VII of the Civil Rights Act and related tort claims for contracts of $1,000,000 or more. The effective date for pay transparency is January 1, 2017. The effective date for the arbitration prohibition provision is the same as the effective date for the final rule, October 25, 2016.