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What Federal Contractors with Employee Arbitration Agreements Need to Know Now

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Portions of the “Fair Pay and Safe Workplaces” Executive Order (E.O. 13673), often referred to as the “Blacklisting” or “Bad Actors” Executive Order, will take effect on October 25, 2016, and federal contractor employers are preparing for compliance with its reporting, disclosure, and paycheck transparency requirements. Federal contractors with existing arbitration agreements and those contemplating new ones are grappling with the E.O.’s mandate relating to pre-dispute arbitration provisions, which will become effective on October 25, 2016.

With respect to pre-dispute arbitration agreements, the E.O requires that certain federal solicitations, contracts, and subcontracts include an agreement by the contractor that the decision to arbitrate certain claims only will be made with the consent of the employee or independent contractor after the dispute arises. Specifically, contractors covered by the E.O. would have to agree not to use pre-dispute arbitration agreements that require arbitration of claims arising under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment.

On August 25, 2016, the Department of Labor published its Final Guidance and the Federal Acquisition Regulatory Council published its Final Rule implementing the E.O. (“Final Rule”). (For details of the Final Rule, see our article, DOL and FAR Council Publish Final ‘Fair Pay and Safe Workplaces’ Rules for Government

Contractors.)

Applicability of the E.O.'s Arbitration Provision

Contracts covered by the arbitration provision of the E.O. are those:

1. for which the estimated value of the supplies acquired and services required exceeds $1 million;

2. that are solicited or entered into on or after October 25, 2016; and

3. that do not involve the acquisition of "commercial items" or "commercially available off-the-shelf items" ("COTS").

Thus, the federal contract provision relating to arbitration agreements must be included in solicitations, contracts, and subcontracts for more than $1 million, that are solicited or entered into on or after October 25, 2016, and that are not for commercial items or COTs.

The restriction relating to pre-dispute arbitration agreements does not apply to employees or independent contractors who entered into arbitration agreements prior to the date the contractor bids on or enters a federal contract or subcontract covered by the E.O., provided that those pre-existing arbitration agreements do not contain provisions allowing the contractor to modify them. This exception ceases to apply when the pre-existing arbitration agreement with the employee or independent contractor is renegotiated or replaced.

The arbitration provision also does not apply to employees covered by a collective bargaining agreement.

Impact of the E.O.'s Arbitration Provision

Contractors remain free to require employees to enter into mandatory pre-dispute arbitration agreements for claims that do not arise under Title VII or torts relating to sexual assault or harassment. Similarly, contractors with existing arbitration agreements that cover claims arising under Title VII or any tort related to or arising out of sexual assault or harassment, and whose arbitration agreements by their terms cannot be changed, may continue to maintain and enforce those agreements unless and until the agreements are renegotiated or replaced.

Additionally, while the E.O. is silent on the breadth of its applicability, the Final Rule directs that the E.O.'s coverage applies to all employees and independent contractors working for the contractor, not just those employees working under the federal contract that includes the required contractual provision relating to pre-dispute arbitration agreements. The Final Rule also makes clear that the mandate relating to arbitration agreements applies only to the contracting entity itself, not parents, subsidiaries, or affiliates.

What To Do Now

The following are some steps that federal contractors should consider taking now:

1. Contractors should determine whether, on or after October 25, they plan to bid on and/or enter into federal contracts or subcontracts estimated to exceed $1 million that are not for commercial items or COTS.

2. Contractors should determine whether arbitration agreements currently in existence or entered into between now and the date after October 25, 2016 on which they are required to include the agreement not to arbitrate claims covered by the E.O. in a federal solicitation, contract, or subcontract permit the company to change their terms.

3. In order to fall within the exception to the E.O. for arbitration agreements already in place, contractors planning to enter into new arbitration agreements (e.g., with new hires) between now and October 25 or those intending to modify existing agreements should do so prior to the date after October 25 on which they are required to include the agreement not to arbitrate claims covered by the E.O. in a federal solicitation, contract, or subcontract.

4. Contractors planning to enter into new arbitration agreements or modify existing arbitration agreements after the date on which they are required to include the agreement not to arbitrate claims covered by the E.O. in a federal solicitation, contract, or subcontract should draft such arbitration agreements carefully.