Fair Pay and Safe Workplace Executive Order – Final Rule

UPDATE: A preliminary injunction was issued October 24, 2016 that blocks most of the Fair Pay and Safe Workplaces Executive Order from going into effect as planned on October 27, 2016. It is anticipated that the injunction will be appealed by the government and so the matter is not settled. SMACNA will continue to monitor the situation and report on new developments.

On August 25, 2016, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration (FAR Council) released the final rule implementing the “Fair Pay and Safe Workplaces” Executive Order (Executive Order). The Executive Order calls for federal agencies to consider a contractor’s compliance with labor law as part of its responsibility determination when awarding procurement contracts for goods and services (including construction). According to the Executive Order, identifying contractors with “track records of compliance” will “reduce execution delays and avoid distractions” caused by non-compliant contractors.

Under the Executive Order, the contracting agency will consider whether any administrative merits determinations, arbitral awards or decisions, or civil judgments have been rendered against the contractor in the preceding three years for violations of the following labor laws:

- Fair Labor Standards Act (FLSA)
- Occupational Safety and Health Act (OSHA)
- Migrant and Seasonal Agricultural Worker Protection Act
- National Labor Relations Act (NLRA)
- 40 U.S.C. Chp. 31, Subchp. IV (Davis-Bacon Act)
- 41 U.S.C. Chp. 67 (Service Contract Act)
- Executive Order 11246 (Equal Employment Opportunity)
- Section 503 of the Rehabilitation Act
- Vietnam Era Veteran’s Readjustment Assistance Act
- Family and Medical Leave Act (FMLA)
- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- Executive Order 13658 (Establishing a Minimum Wage for Contractors)
- Equivalent State laws, as defined by the Department of Labor

Below is a summary of the key provisions of Executive Order as set forth in the final rule and guidance issued by the Department of Labor (DOL).

i. Disclosures by a Contractor to the Contracting Agency

When bidding on federal procurement contracts covered by the Executive Order, prospective contractors will only attest whether they have or have not had violations of the covered labor
laws resulting in administrative merits determinations, civil judgments or arbitral awards or decisions within the reporting period. The DOL guidance defines these items as:

1. **Administrative Merits Determinations**: In order to provide clarity regarding the violations that covered contractors and subcontractors must disclose, the guidance provides a complete list of documents issued by each of the relevant enforcement agencies that constitute administrative merits determinations. Each of these is a written document issued to employers following an investigation by the relevant enforcement agency — i.e., DOL’s Wage and Hour Division, Occupational Safety and Health Administration, or Office of Federal Contract Compliance Programs; the National Labor Relations Board; or the Equal Employment Opportunity Commission — and a finding by the enforcement agency that one of the labor laws identified in the Executive Order has been violated.

2. **Civil Judgments**: These include any judgment or order issued by a court finding that an employer has violated one or more of the covered labor laws, or enjoining or restraining the employer from violating one or more of those laws.

3. **Arbitral Awards or Decisions**: These include any award or decision by an arbitrator or arbitral panel finding that an employer has violated one of the covered labor laws, or enjoining or restraining the employer from violating one or more of those laws.

A copy of the list of documents which must be disclosed as an administrative merits determination is attached here as “Exhibit A”. The list provided is an exhaustive one, meaning that if a document does not fall within one of the seven categories set out, it will not be considered to be an “administrative merits determination” for purposes of the Order.

Only if a contracting officer initiates a responsibility determination regarding the prospective contractor will it have to disclose additional information about its labor violations (unless the contractor has already submitted such information for another bid and nothing has changed since then). At the same time, the prospective contractor will have the opportunity to provide additional information as it deems necessary to demonstrate its responsibility, such as mitigating circumstances, remedial measures and other steps taken to achieve compliance with the relevant labor law(s).

**ii. Disclosures by a Subcontractor to the Contractor**

Once the regulations go into effect for subcontractors on October 27, 2017, subcontractors will also have disclosure requirements. Before awarding a subcontract where the estimated value of the supplies and services (including construction) exceeds $500,000, subcontractors must disclose to the DOL whether any administrative merits determinations, arbitral awards or decisions, or civil judgments have been rendered against them in the preceding three years. Subcontractors must inform their prime contractors of the results of DOL’s analysis. Post-award, the contractor must obtain disclosure updates from the subcontractor every six months.

**iii. Are All Violations Weighed Equally Against a Contractor?**
The guidance and regulations direct contracting officers to consider only the most egregious violations. The guidance then provides direction on weighing the relative severity of violations. Things that would be treated as “egregious” are pervasive violations (violations falling into two or more of the four categories set forth in the regulations) and violations of particular gravity (such as terminating employees in retaliation for exercising their rights under the covered labor laws, or violations related to an employee’s death).

The guidance also permits mitigating factors to be considered when weighing violations, including good faith efforts to remedy past violations, internal processes for expeditiously and fairly addressing reports of violations, and/or plans to proactively prevent future violations.

Types of violations set forth in the regulations are:

1. **Serious**: The guidance incorporates the Occupational Safety and Health Act’s definition of “serious” and for the remaining labor laws defines the elements that make a violation serious. In doing so, the guidance considers factors such as the number and/or percentage of employees affected; the degree of risk posed or actual harm done by the violation to the health, safety or well-being of a worker; and the amount of damages incurred or penalties assessed.

2. **Repeated**: “Repeated” violations are two or more labor law violations within the preceding three years that are the same or substantially similar. Whether violations are substantially similar turns on the nature of both the violations themselves and the underlying legal obligations. In order to provide clarity regarding which violations will be considered repeated, the guidance includes an exhaustive list of related violations by statute that would be considered repeated.

3. **Willful**: For the Occupational Safety and Health Act, the Fair Labor Standards Act, and several anti-discrimination laws, there are existing standards for determining whether violations are “willful”, and the guidance adopts those existing standards for purposes of those statutes. For each of the remaining statutes, a violation is willful if the employer knew that its conduct was prohibited by one or more of the covered labor laws, or showed reckless disregard for, or acted with plain indifference to, whether the covered labor laws prohibited its conduct.

4. **Pervasive**: “Pervasive” violations are the most severe. Violations are pervasive if they reflect a basic disregard by the employer for the covered labor laws, as demonstrated by a pattern of violations, continuing violations, or numerous violations. Among the factors to be considered in determining whether violations are pervasive are the size of the contractor relative to the number of violations and the extent of higher-level management’s involvement.

iv. **The Pre-Award and Post-Award Consequences of Labor Law Violations**

A violation of labor law may prevent a contractor from receiving a federal contract. A contracting agency can also refer the matter to the agency’s suspending and debarring official.
Post-award, a contracting agency that obtains information about a violation of labor law must consider whether any action against the contractor is necessary. Likewise, if a contractor obtains information about a subcontractor’s violation of labor law, the contractor must consider whether any action against the subcontractor is necessary.

The Executive Order lists possible actions such as “remedial measures, compliance assistance, and resolving issues to prevent further violations”. For contractors, the contracting agency can also use remedies like “decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official”.

v. **Additional Requirements Created by the Executive Order**

Besides requiring disclosure of labor law violations, the Executive Order includes the following post-award requirements for contractors and subcontractors.

**Paycheck Transparency**: Contractors and subcontractors subject to the Executive Order’s disclosure provisions must provide employees with a document each pay period showing the number of hours worked, overtime, hours, pay, and any additions or deductions.

**Dispute Resolution**: With two exceptions, contractors and subcontractors holding contracts for supplies acquired and services required with an estimated value that exceeds $1 million agree to limit contracts to arbitrate certain claims. The Executive Order requires contractors to agree that the decision to arbitrate claims arising “under Title VII of the Civil Rights Act or any tort related to or arising out of sexual assault or harassment” may only be made with the voluntary consent of employees or independent contractors after the dispute arises.

*Exception 1: Employees covered by a collective bargaining agreement negotiated between the contractor and labor organization are exempted.*

*Exception 2: To the extent valid contracts to arbitrate already exist, this provision does not apply unless the contractor is permitted to change the terms of the contract or the contract is renegotiated or replaced.*

vi. **Phased-in Implementation**

The implementation schedule for the final rule reflects, to some degree, the immense challenges that implementation of these new rules will place on both the government and contractors.

1. For the first year that the regulations are effective (beginning October 25, 2016), only prime contractors must make disclosures. Subcontractors will not be required to start making disclosures until October 25, 2017.
2. For the first six months that the rule is effective, disclosure requirements will only be included in solicitations valued at $50 million or more. Disclosure requirements will be included in solicitations valued at $500,000 or more beginning on April 25, 2017.
3. The initial period for which labor violations must be disclosed is limited to one year and will gradually increase to three years by October 25, 2018.

4. The rule’s paycheck transparency requirements will become effective January 1, 2017.

5. The Executive Order provides that contractors and subcontractors will also be required to disclose violations of state labor laws that are equivalent to the 14 federal labor laws identified in the Order, and directs the DOL to provide guidance as to which state laws are equivalent. This requirement will be phased in at a later time, with the exception of OSHA-approved state plans, which are included in the guidance and regulations issued today.

Once fully implemented, the regulations will apply to new contracts and subcontracts for goods and services, including construction, where the estimated value exceeds $500,000 over the life of the contract. Note that they will not apply to contracts for commercially available off-the-shelf (“COTS”) items.

Bottom Line
There are potentially added consequences for contractors who find themselves subject to labor and workplace violations of state and federal law if they work on federal contracts. Federal contractors will need to have a procedure in place to ensure violations of labor law are tracked and reported as necessary. Prime contractors will need to start complying with the law almost immediately; sub-contractors have another year to put the proper documentation and procedures in place.
Exhibit A
Documents, Notices, and Findings from Enforcement Agencies that Constitute the
Administrative Merits Determinations

From the Department’s Wage and Hour Division:
- a WH-56 “Summary of Unpaid Wages” form;
- a letter indicating that an investigation disclosed a violation of sections six or seven of the FLSA or a violation of the FMLA, SCA, DBA, or Executive Order 13658;
- a WH-103 “Employment of Minors Contrary to The Fair Labor Standards Act” notice;
- a letter, notice, or other document assessing civil monetary penalties;
- a letter that recites violations concerning the payment of special minimum wages to workers with disabilities under section 14(c) of the FLSA or revokes a certificate that authorized the payment of special minimum wages;
- a WH-561 “Citation and Notification of Penalty” for violations under the OSH Act’s field sanitation or temporary labor camp standards;
- an order of reference filed with an administrative law judge.

From the Department’s Occupational Safety and Health Administration (OSHA) or Any State Agency Designated to Administer an OSHA-approved State Plan:
- a citation;
- an imminent danger notice;
- a notice of failure to abate; or
- any state equivalent.

From the Department’s Office of Federal Contract Compliance Programs:
- a show cause notice for failure to comply with the requirements of Executive Order 11246, Section 503 of the Rehabilitation Act, the Vietnam Era Veterans’ Readjustment Assistance Act of 1972, or the Vietnam Era Veterans’ Readjustment Assistance Act of 1974.

From the Equal Employment Opportunity Commission (the EEOC):
- a letter of determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring; or
- a civil action filed on behalf of the EEOC.

From the National Labor Relations Board:
- a complaint issued by any Regional Director;
- a complaint filed by, or on behalf of, an enforcement agency with a federal or state court, an administrative judge, or an administrative law judge alleging that the contractor or subcontractor violated any provision of the labor laws; or
- any order or finding from any administrative judge, administrative law judge, the Department’s Administrative Review Board, the Occupational Safety and Health Review Commission or state equivalent, or the National Labor Relations Board that the contractor or subcontractor violated any provision of the labor laws.