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NEWSLETTER

New Labor Executive Orders and Rules to Impose New Compliance Obligations on Contractors

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Contractors have long been subject to extensive, and unique, labor obligations specific to their performance under federal contracts. This summer, the Obama administration published new executive orders (EOs) and a proposed rule that will impose several additional labor obligations on federal contractors. EO 13673, called the Fair Pay and Safe Workplaces EO, requires contractors to report labor violations and notify workers of certain pay information, and limits the use of arbitration clauses in some employment agreements. EO 13672 modifies existing EOs to prohibit discrimination based on sexual orientation or gender identity. And the proposed rule, which implements an EO from earlier this year, requires contractors to pay workers at least $10.10 per hour under covered contracts.

Although the EOs and proposed rule set applicability dates in the future, contractors can (and indeed should) begin preparing for them now. In this article, we identify several key compliance areas for immediate contractor attention so that contractors will be ready for when the new obligations (ultimately) go into effect.

In preparing for the forthcoming compliance obligations, contractors should keep in mind that only some obligations may apply to them. The EOs and proposed rule each apply to different, but overlapping, subsets of federal contracts. For instance, the Fair Pay and Safe Workplaces EO applies the reporting and paycheck requirements to procurement contracts for goods and services (including construction) exceeding $500,000, and the arbitration limitations to contracts (other than for commercial items and commercial off-the-shelf items) exceeding $1 million. *See* 79 Fed. Reg. 43509 (Aug. 5, 2014). In

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contrast, EO 13672 modifies existing EOs that have long applied broadly to most contracts performed within the United States. *See* 79 Fed. Reg. 42971 (July 23, 2014). Finally, the proposed rule applies to contracts for construction and services subject to the Service Contract Act (SCA) or the Davis-Bacon Act (DBA), as well as to several narrow subsets of concession and other contracts. *See* 79 Fed. Reg. 34567 (June 17, 2014). Thus, in assessing their potential compliance obligations, contractors should consider which of these new obligations is likely to apply to them.

The Fair Pay EO poses several significant obligations. Perhaps most important, the EO requires contractors to report "any administrative merits determination, arbitral award or decision, or civil judgment" within the prior three years for any violation of any of over a dozen listed federal labor laws and their "equivalent state laws." The EO does not set minimums for the size, nature, or duration of any violations that can trigger the reporting obligation, does not limit the reporting obligation only to violations connected to the performance of federal contracts, and will require prime contractors to monitor subcontractor compliance with the EO and to include subcontract requirements obligating the subcontractor to disclose any covered violations to the prime contractor for evaluation.

To prepare, contractors can begin implementing systems to centrally track the covered types of labor-law violations and alleged violations. Contractors can begin considering now how they will (a) identify and assess all adverse labor-related determinations and allegations that could trigger the reporting requirement, and (b) report any such determinations as required by rules that, per the EO, will be promulgated by the Federal Acquisition Regulation ("FAR") Council and by related guidance to be published by the U.S. Department of Labor (DOL). Importantly, in developing systems to meet these obligations, contractors must ensure that the systems include capabilities for the required monitoring and reporting on their subcontractors.

In addition, the systems that contractors begin designing and implementing must be flexible. Although the Fair Pay EO imposes some clear requirements, the EO's text also leaves open significant questions that will not be answered until the DOL promulgates its interpretive guidance and the FAR Council publishes its rule. For example, many questions remain concerning the scope of the Fair Pay EO's reporting obligations (*e.g.,* must settlements reached under the federal and equivalent state laws enumerated in the EO be reported, or only matters that result in a final adjudication on the merits?) as well as the definition of key terms in the EO, such as "administrative merits determination" and the scope of "equivalent" state laws. Finally, questions still remain as to the DOL and FAR Council implementation timeline and process. In other words, the obligations under this EO may take some time to fully form.

On the other hand, the effort to implement a federal minimum wage is far more advanced and ready to go into full effect in January 2015. Like the Fair Pay EO, the minimum-wage rule also will require contractors performing under contracts covered by the new rule to undertake comprehensive assessments of their workforces and additional systems (separate from those described above for the Fair Pay EO) to ensure full compliance with the new federal minimum-wage requirements. But whereas the Fair Pay EO will necessitate centralized tracking of common elements for contracts and labor-law violations, contractors may need to perform analysis for each contract potentially covered by the new federal minimum-wage rules to determine which employees are subject to the minimum wage.

DOL's proposed rule clearly defines (broadly) which *contracts* are covered, but leaves uncertain for now which *employees* must receive at least the minimum wage. The proposed rule requires the minimum wage for employees who are charged directly to SCA- and DBA-covered contracts (and the other covered contracts), and also, critically, for certain indirect-charge employees who work "in connection with" covered contracts and on "duties necessary to the performance of the contract." The proposed rule offers little guidance on the scope of personnel within the contractor organization that qualify as sufficiently "in connection with" a covered contract and thus will be entitled to receive compensation at no less than the new federal minimum wage ($10.10 per hour). We do expect that contractors will receive more clarity from DOL's final rule on the types of contractor employees who work "in connection with" a covered contract, but regardless contractors should prepare their systems to evaluate indirect-charge employees on a contract-by-contract basis in order to assess the full scope of obligations under the new federal minimum-wage rule.

Contractors should also prepare to ensure they seek all price adjustments available on account of the new minimum wage and be sure to take into account the impact of the new federal wage on proposal pricing. Although contractors should already have systems for seeking price adjustments for any increases in wages and fringe benefits specified in their SCA and DBA wage determinations, now contractors must ensure these systems also track, calculate, and seek price adjustments (where appropriate) for cost increases attributable to the new, higher minimum wages. (Note: A significant number of SCA and DBA wage determinations specify prevailing wages below $10.10 for one or more labor categories.) In addition, although the FAR class-deviation clause (see below) recognizes that contractors will be entitled to seek equitable adjustments for future annual increases to the federal minimum wage, further guidance is necessary to identify the mechanism and processes available to contractors to seek such an adjustment. Finally, the potential impact of the new federal minimum wage on contract pricing efforts could be significant. DOL is unlikely to revise existing wage determinations to make all listed wage rates at least $10.10 beginning in 2015, so contractors need to educate their personnel on the potential requirements to pay at the $10.10 rate to covered personnel irrespective whether an SCA or DBA wage determination contains a wage rate lower than the $10.10 federal minimum wage.

The new obligations imposed by EO 13672 may be the most straightforward to implement: contractors are already required by existing EOs to prohibit discrimination based on race, gender, religion, and other factors. Contractors should update their policies, programs, and systems to encompass gender identity and sexual orientation, and should begin training employees on these new obligations.

Finally, for all three new sets of obligations, contractors should prepare for piecemeal implementation. By their text, the Fair Pay EO's provisions will apply after the FAR Council publishes final rules implementing the EO; the minimum wage will be required for contracts awarded based on solicitations issued after January 1, 2015; and the prohibitions on gender-identity and sexual-orientation discrimination will be effective after DOL publishes implementing/updating rules. However, contractors may see one or more these obligations imposed in individual contracts ahead of these schedules. Both civilian and defense agencies have already issued class deviations that allow agencies to insert the minimum-wage requirement in solicitations issued before January 1, 2015, though payment of the minimum wage still will not be required until January 1

regardless of the contract award date. Contractors also may see any of these new obligations imposed via individual contracts through special clauses, a mechanism that has reportedly been used by agencies for prior labor-related EOs issued by the Obama administration.

Overall, these two new EOs and the proposed rule leave little doubt that contractors should start to think now about how they will comply with what could be significant and potentially burdensome labor obligations that will begin applying in the future. The compliance mechanisms needed require careful thought, and they may be difficult to stand up quickly. Still, with planning—and perhaps most importantly, flexibility—contractors should be ready to comply with these obligations, however and whenever they take their final form.