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NEWSLETTER

View from Our Clients: Ready for Fair Pay and Safe Workplaces but Concerns Still Linger, Even with Recent Injunction

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Government Contracts Issue Update

The federal government had planned to start applying Executive Order 13673, Fair Pay and Safe Workplaces, last week. The EO and implementing FAR Rule and Department of Labor Guidance promised significant new compliance burdens, principally through requirements to report certain types of findings that contractors have violated specified labor laws. But just before the Fair Pay requirements were slated to begin phase-in, a federal district court in Texas enjoined almost the entire implementation nationwide, and on October 25 the Office of Federal Contract Compliance Programs directed federal agencies "to take all steps necessary" to comply with the court's order and not to implement the new requirements "until receiving further direction."

The Government will likely appeal the preliminary injunction and then defend the entire regime vigorously at the district court. So the Fair Pay requirements continue to loom as a potential major compliance obligation. Against this background, we spoke to clients about what they have done to prepare for Fair Pay and, in light of the preliminary injunction, what their plans are going forward.

Biggest Fears about the Fair Pay Requirements

Our clients' foremost concern is the one question that the hundreds of pages in the Federal Register could not answer: how would the system actually work? They expressed concern about practical compliance issues, ranging from the "absolute apparent unfettered

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discretion" of the Agency Labor Compliance Advisors (ALCAs) in their analyses of reported violations, to the difficulty that government personnel would face in mastering the Fair Pay requirements given their "sheer volume." These contractors fear being stuck in a vicious cycle of misapplied labor laws, misunderstood facts, and misused (but essentially unchallengeable) discretion.

Other concerns arose as well. Clients expressed concern that they would be hamstrung in contesting allegations or adverse preliminary findings, no matter how unmeritorious, because of the risk that reportable "labor law decisions" would lead directly to blacklisting by risk-averse contracting officers and higher-tier contractors. To that end, one client saw private litigants in particular as perhaps having "undue leverage" to extract settlements of dubious claims by explicitly invoking the benefits of avoiding a labor law decision that would be reportable under Fair Pay.

Clients with high proposal volumes noted that their own internal Fair Pay systems would be new and relatively untested once compliance requirements go into effect. They are not sure whether their systems for distributing notices to proposal teams about labor law decisions would work as intended and as needed, for example.

Preparations for Compliance

Reports of clients' preparations for Fair Pay were as varied as their industries and business models. But we found one perhaps unsurprising constant: clients that operate in a more decentralized organizational structure reported expending much more effort to locate, analyze and coordinate the records needed for Fair Pay compliance. (These companies regularly noted that they had never previously been required to consolidate these records.) These companies identified multiple functions and data sources with potentially relevant information needed for compliance, with some separated organizationally, geographically, or both. Attempting to obtain relevant records extended proposal preparation time in these circumstances, though this extra effort did provide a helpful gauge of the future burdens to be expected if and when the Fair Pay requirements finally "go live."

Challenges in Preparing

Clients reported challenges establishing a uniform baseline of information and documents across all covered labor laws. In many cases, different departments track and keep records on actual and potential violations. These departments have varying styles, processes, needs, and constituencies. Consequently, different departments within an organization often varied in what records they kept, how they kept them, and how willing they were to share them outside the department. Developing the common informational baseline, an effort usually headed by the law department, often took multiple requests and clarifications.

In contrast, other contractors—even of similar size and revenue—expended much less effort because the contractors already had consolidated labor and employment practices. But before any conclusions are drawn about the relative benefits or tradeoffs of a centralized labor/employment function within a company, note that none of our survey participants reported consolidating these practices in response to the Fair Pay EO and rulemaking; they had long been consolidated so as to best satisfy existing corporate business needs and

practices.

Some clients with decentralized systems discovered a related but unexpected challenge: determining which corporate legal entity was involved in a particular matter. Such determinations matter because the Fair Pay Final Rule required disclosing only those labor law decisions rendered against the legal entity seeking or performing a covered federal contract or subcontract. These clients found that decisions and underlying documents might refer to "Contractor" but not specify which particular affiliate was involved, "Contractor Co.," "Contractor, Inc." or "Contractor, LLC." The distinctions were not always apparent to the responsible contractor functions, and resolving the underlying allegations had often not required confirming or documenting the legal entity involved. As a result, multi-entity clients in some cases had to work backwards through a documentary chain to determine which entity was involved and thus might have to report particular labor law decisions upon being subject to the Fair Pay requirements.

Subcontractor Management

While their own preparations varied, contractors have been near-uniform in deferring preparation for managing covered subcontracts and being a covered subcontractor. They welcomed the Final Rule's planned phase-in of the Fair Pay reporting requirements to cover subcontracts awarded under prime contracts solicited beginning on October 25, 2017. They planned to avail themselves of the extra time to revise and finalize their own internal processes while pursuing and performing contracts as prime contractors, then turn next year to outreach up and down the supply chain. Clients did not report taking these plans off their calendars, most likely because of the uncertainty about whether, for how long, and in what form the injunction will remain in effect.

The Injunction, and What's Next

Contractors we surveyed, not surprisingly, unanimously agreed with the preliminary injunction. They agree with the U.S. District Court for the Eastern District of Texas that the EO and implementation reflect executive overreach, irrational rulemaking, and disregard for the underlying statutory schemes. One client noted in particular that with the "consequences" already available for "poor legal compliance" (e.g., suspension and debarment) and public reporting of violations already in place, the Fair Pay regime undermined contractors' ability to "litigate, appeal, and/or resolve" through mutual agreement any allegations "to the fullest extent" allowed by the covered labor laws. The Fair Pay EO had, in other words, rewritten the laws' balancing of interests as passed by Congress and signed into law by the President.

As for what comes next, contractors expect to pause, but not dismantle, their Fair Pay compliance initiatives. As one example, contractors plan to leave in place newly centralized tracking of potential and actual decisions finding violations of covered labor laws. They also plan to address active and future allegations with an eye towards the Fair Pay consequences and compliance efforts. Although these contractors are hopeful that the injunction will ultimately become permanent, or that a new administration will redirect focus to efforts that have at least a plausible chance of improving compliance with labor and employment laws, the contractors remain on standby to lead Fair Pay implementation in case that possibility ever comes to pass.

For more information, please contact a Wiley Rein attorney.