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Fair Pay Rule Remains 'Solution In Search Of Problem'

By **Daniel Wilson**

Law360, Nashville (August 24, 2016, 9:29 PM ET) -- The final version of the contentious Fair Pay and Safe Workplaces rule addresses only peripheral concerns raised by federal contractors, leaving behind massive costs and compliance burdens that may stymie competition in the federal contracting arena and hurt taxpayers.

Under the rule, released Wednesday and set to go into effect in October, current and prospective federal contractors and subcontractors must disclose recent violations of federal labor law to contracting officers, as well as related remedial efforts, to be taken into account in decisions on the award or extension of contracts.

The proposed version of the rule, issued in May 2015 and stemming from a July 2014 executive order, was hit with extensive criticism from contractors in the thousands of comments that poured in both on the Federal Acquisition Regulatory Council's rule and related guidance from the U.S. Department of Labor.

In response, the agencies made a number of changes to the final rule, such as clarifying the role agency "labor compliance advisers" will play in the determination process, allowing subcontractors to report directly to the DOL — alleviating some concerns about the sharing of proprietary information — and choosing to phase in aspects of its implementation over the next three years.

"I think that [phase-in is] really important, because we're working with a lot of contractors on how to implement these regulations and creating workflows and work processes on how there's going to be a sharing of information relating to the violations before they occur and also once they occur … but also, even more importantly, how to gain control over the decisions that are made in connection with these potential violations, even before the violation,"Proskauer Rose LLP partner Connie Bertram said.

But many other concerns were not addressed, and the overarching impression given in the nearly 880 pages of the combined rule and guidance is that the rule remains a "solution in search of a problem," several attorneys said, arguing it applies a hefty cost and compliance burden on contractors without much, if any, reciprocal benefit.

Concerns from the Senate Health, Education, Labor and Pensions Committee about labor violations by federal contractors that ultimately led to the rule, via the underlying executive order, covered only two areas of labor law, argued Seyfarth Shaw LLP senior counsel Larry Lorber, a former director at theOffice of Federal Contract Compliance Programs.

But rather than focus on only the specific areas of law covered in the related Senate report, the final rule and the executive order that the rule stems from instead cover violations of 14 different labor laws, Lorber noted.

“This is sort of taking that [report] and running with it in a way that I think wreaks havoc," he said. "There's a need for some government responsibility … and this is not a responsible response. You're creating this enormous bureaucracy."

There are already available remedies to cover violations of the relevant labor laws, as well as existing suspension and debarment remedies available to contracting agencies, making much of the rule’s purported aim effectively superfluous, several attorneys claimed.

And agency arguments that the rule will promote “economy and efficiency” are belied by estimated compliance burdens of a little over $474 million in the first year of the rule alone — with similar annualized costs to follow — in return for what the agencies had conceded was likely to be only a "very limited" number of non-responsibility determinations that would see companies excluded from consideration for contracts, Wiley Rein LLP partner Scott McCaleb argued.

“Contrary to the rule's language — and they lean on this consistently — neither the rule nor the guidance promotes economy or efficiency in government procurement,” he said. “Instead, they impose massive costs and record-keeping and disclosure obligations on large and small businesses alike.”

Although some may argue that contractors have already had to comply with violation reporting requirements for years, McCaleb said, those requirements cover fraud claims and other crimes and offenses involving dishonesty, which touch directly on contractors' ethics, and many labor violations are “simply not of the same ilk.”

Several attorneys also noted that the final rule continues to require contractors to report “administrative merits determinations” from labor agencies, which are often not final adjudications, as violations, and to make their violation disclosures public. Contractors and bidders can continue to keep their arguments seeking to mitigate the issue private, although the form that agencies expect those documents to come in remains unclear, Bertram said.

And the rule continues to give broad discretion to contracting officers to decide whether violations are “serious, willful, repeated [or] pervasive” and thus could lead to a company's being barred from federal contracting, a murky standard that contractors and attorneys have argued could open companies up to potential federal “blacklisting” even for otherwise minor violations.

“‘Pervasive’ is not in any statute,” Lorber said. “So what does that mean?”

As well as this broad discretion, contracting officers and agency labor compliance advisers are also being given broad responsibilities, which may place unfair burdens on those officers and result in inconsistent practices and decisions across agencies, attorneys claimed.

“You could safely say, there is not a lawyer in Washington who is an expert on all 14 of those labor laws, so to expect contracting officers to have mastery of those 14 labor laws … puts an enormous strain on the acquisition workforce as well as the contractors,” Crowell & Moring LLP partner Steve McBrady said.

Another risk stemming from the rule is that contractors, or potential contractors, decide that the reporting burdens aren't worth the potential federal business available to them and decline to bid on federal contracts, lessening the amount of competition and ultimately driving up costs to taxpayers, several attorneys noted, with small businesses particularly likely to make that choice to opt out.

It will also change the calculus for contractors when deciding how to handle claims of labor law violations, encouraging early settlements on labor law issues — or, vice versa, encouraging companies to fight to the end when they may have otherwise been inclined to settle — and giving agencies significant leverage in related negotiations.

Unhappiness over the rule is highly likely to lead to litigation, and there are also moves afoot in Congress to at least mitigate the impact of the rule — for instance amendments to proposed versions of the 2017 National Defense Authorization Act that would exempt defense contractors from the rule, attorneys noted.

In the meantime, companies can take several steps to help prepare for the rule, such as putting procedures in place to address internal complaints before they become violations, designating an advocate who can compellingly tell their side of the story, and adjusting the "risk management matrix" that addresses when, and how, to litigate labor-related claims, Bertram noted.

"When you had a claim before, you're looking at the cost to litigate, what's the likelihood of success, what's the likelihood of publicity, what's the likelihood of impact on other employees and how much can I settle for," she said. "Now you're going to have to think about, 'Well, if I litigate, is it going to be considered a violation?' and if it would be considered as a more serious violation that would trigger a responsibilities determination."

--Editing by Mark Lebetkin and Aaron Pelc.
