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Government Contracts

Fair Pay Rule Implementation Keeps Contractors and Their Lawyers Hopping

Federal contractors and their attorneys are feeling a growing sense of urgency as the first deadline approaches to comply with the Fair Pay and Safe Workplaces rule.

None of the 12 other Obama administration actions that contractors have faced over the past eight years has presented anything close to the challenges of the fair pay rule, government contracts attorneys said.

When submitting bids for new contracts over a certain size, contractors and subcontractors, beginning Oct. 25, will have to disclose violations of 14 labor and employment laws and their state-law equivalents. They'll need to conduct rigorous audits of hiring practices, terminations, payroll policies, adherence to disability and leave laws, and compliance with the National Labor Relations Act, the Occupational Safety and Health Act of 1970 and the Family and Medical Leave Act, for starters. This is in response to presidential concerns about contractors that have promoted unsafe workplaces, and have become less effective as a result.

And they'll need to repeat this reporting process every six months — or face potential suspensions or debarments if they run afoul of the laws at any point while the contract is being fulfilled.

''This is an entirely new regulatory scheme,'' Josh Alloy, a counsel with Arnold & Porter in Washington who focuses on government contracts, labor and employment, told Bloomberg BNA. ''It's a huge, huge undertaking.''

'A Cross-Disciplinary Effort.' Since the full rules and guidance were issued Aug. 24, big-firm attorneys have been occupied getting the word out to their clients in advance of the rule taking effect. They've issued alerts; written blog posts, client advisories and full articles; hosted webinars and seminars; and coached clients directly.

''This is high noon to be implementing a compliance program,'' Stephen McBrady, a partner with Crowell & Moring's government contracts group, told Bloomberg BNA. ''It's truly become a cross-disciplinary effort for both contractors and attorneys.''

That means lawyers from Crowell's labor and employment group and its government contracts practice — including those who sub-specialize in suspensions and debarments, bid protests and False Claims Act cases — have been working closely together, McBrady said.

Clients likewise have responded by preparing their acquisition and procurement professionals, human resources and payroll teams, in-house attorneys and outside counsel, and others, to deal with the added work.

McBrady said he's received more client calls from contractors regarding implementation of the fair pay rule than on any issue since the federal budget sequestration in 2013. Crowell's Sept. 7 webinar titled ''Fair Pay and Safe Workplaces Final Rule and Guidance: What You Need to Know,'' involved a half-dozen attorneys — and attracted almost 500 live viewers, close to a firm record, he said.

Crowell is far from the only law firm or legal or consulting group holding webinars to prepare for the fair pay rule. Law firm Holland & Knight held a fair pay webinar Oct. 5, and Mayer Brown is set to hold one Oct. 18. The public accounting firm Dixon Hughes Goodman held a webinar on the topic Oct. 12. The American Bar Association will follow on Oct. 27.

For its part, the Department of Labor (DOL) has put together a web presentation on the rule, and also has posted a frequently asked questions page.

Blank Rome's 15-lawyer government contracts practice group also has ramped up during the fair pay preparation phase, Justin Chiarodo, a firm partner and vice chair of the group, told Bloomberg BNA. ''Every one of us has been involved in this,'' he said. ''Every one.''

A Phased Approach. When unveiling his order, President Barack Obama stressed that it was in the interest of taxpayers and federal contract workers to select contractors that had clean labor records.

''Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government,'' Obama wrote.

In the year preceding Obama's July 31, 2014, issuance of the fair pay executive order, the labor coalition Good Jobs Nation organized a campaign that included several one-day strikes by federal contract workers demanding that the president do more to ensure workplaces standards for government contractors.

The contractor community has taken a dim view of the order, saying that the regulation would hinder contractor productivity, drive prices up, and push some businesses out of the federal market altogether.

A group of 20 trade associations including the U.S. Chamber of Commerce and other prominent groups that represent federal contractors wrote to the leaders of the House and Senate Armed Services Committees on July 13, expressing their opposition to the fair pay

rule and urging them to pass a provision in the 2017 National Defense Authorization Act to limit its applicability.

More than 900 comments were made on the proposed rule (that number reached 12,600 including mass mailings), including many from contractors and their representatives. As a result, the administration made several concessions in its final rule, including a requirement that subcontractors report labor violations directly to DOL, as opposed to their prime contractor.

In addition, DOL, recognizing the scope of what it might take to comply with the regulation, decided to phase in the fair pay rule rather than drop it on companies all at once.

Taking Full Effect. The Fair Pay and Safe Workplaces rule begins to take full effect Oct. 25, with mandatory disclosures of labor law violations going back one year to Oct. 25, 2015. At that time, the rule will take effect for prime contractors being considered for contracts with a total value of $50 million or more. On April 25, 2017, the contract value threshold for prime contractors will shrink to $500,000. And on Oct. 25, 2017, that same rule, including the $500,000 total, will extend to subcontractors.

The process that allows current and prospective federal contract bidders to ask DOL for an assessment of their labor violation history — called pre-assessment — began Sept. 12. DOL suggests that pre-assessment will help companies determine whether a contractor's violations have been ''serious, repeated, willful, or pervasive'' — factors that can determine a bidder's viability. A DOL spokesman did not respond to a request asking how many contractors had asked to be pre-assessed over the past month.

The fair pay rule isn't solely about labor law violations. Beginning next Jan. 1, contractors and subcontractors also will need to provide workers with paychecks that include hours worked and overtime pay. And beginning Oct. 25 of this year, they must also, in contracts of at least $1 million, allow workers to decide whether they wish to arbitrate sexual assault claims or claims arising under Title VII of the Civil Rights Act of 1964, instead of taking those claims to court.

Getting Ready. The fair pay final rule, and DOL's guidance to help decipher it, total about 191,000 words as laid out on 483 pages. It's a lot to digest, even for old hands in the world of federal regulations.

Their attorneys suggest they take the following steps — starting now if possible.

First, if they haven't already done this, companies should anoint someone as a fair pay rule compliance point person. ''Somebody should own the process,'' Chiarodo said. For larger contractors, that person should corral a team of colleagues, including people from human resources, payroll, contracts management, as well as in-house and outside legal counsel. ''They all need these functions working together,'' he said.

Smaller businesses might face additional challenges, given that individual officials often wear several hats. Regardless, the new point person needs to ensure a communications regimen is in place to meet layers of compliance.

Contractors also will need to develop procedures to collect relevant information on labor violations that the company may have committed since Oct. 25, 2015, Alloy and Arnold & Porter partners Ronald Lee and Craig Holman, chair of the firm's government contracts and national security practices, noted in an Aug. 26 client advisory. At the same time, they'll need to ''implement processes to track, gather, and report future violations, along with any mitigating information,'' they wrote.

Companies that do business with the government should think about developing self-audit routines to ensure that they comply with each of the applicable labor laws — and remain so, the Arnold & Porter attorneys suggested.

This means contractors purchasing items that don't qualify as commercial off-the-shelf (COTS) will need to collect representations from their suppliers — and ensure that ''appropriate measures are taken'' if a proposed subcontractor tells the contractors it has had labor violations, McBrady and three Crowell & Moring colleagues, partner David Robbins and associates Laura Baker and Jason Crawford, wrote in an article in The Government Contractor.

Finally, companies need to understand that compliance requirements will be ongoing for each new contract. The final rule requires agency contracting officers to repeat their ''responsibility'' determinations, including their analysis of labor law violations, every six months during the performance of the contract. That means, to avoid possible punishments leading up to suspension and debarment, contractors will need to be ever-vigilant.

''You're never really going to stop doing this,'' Chiarodo said. ''This is the new routine.''

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