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*Government Contracts*

## Final Rule for Federal Contractors Still Raises Serious Concerns, Lawyers Say

Contractors grappling with the final rule on the Fair Pay and Safe Workplaces executive order have more time but the same compliance headaches, attorneys say.

On the positive side for prime government contractors, they are not responsible under the final rule for reporting labor law violations by subcontractors, as the proposed rule has provided, Debbie Berkowitz, who until 2013 was chief of staff at the Department of Labor's Occupational Safety and Health Administration, told Bloomberg BNA Sept. 8. Instead, subcontractors are to report their own violations directly to the Department pf Labor.

''I think that's a minor change,'' Roger King, senior labor and employment counsel for the HR Policy Association, told Bloomberg BNA Sept. 8. That's because the prime contractors still have to do due diligence on all their subcontractors' violations ''when putting together a bid,'' he said.

The effective dates in the final rule are Oct. 25 for prime contractors to make disclosures on solicitations and resulting contracts with an estimated value of at least $50 million; April 25, 2017, for prime contractors to make the disclosures for solicitations and resulting contracts worth $500,000 and up; and Oct. 25, 2017, for subcontractors.

Berkowitz, now a senior fellow at the National Employment Law Project, noted that the final rule ''makes clear that the goal is not to prevent companies from getting contracts, but to bring them into compliance.''

**Grim View from Management.** But things look very different from the management side of the table. ''We have already seen many of the agencies use this blacklisting rule as blackmail to get stronger settlements with contractors who don't want reportable violations in the first place,'' Ilyse W. Schuman, a shareholder in Littler Mendelson P.C. and co-chair of its Workplace Policy Institute, said Sept. 8.

''What is really of concern to the contractor community is how broadly these, quote, 'violations' have been defined,'' she said, pointing to the fact that contractors will have to disclose administrative merits determinations ''that are not final and still subject to appeal,'' as well as awards or decisions from arbitration and civil judgments.

Such required disclosures could cause ''damage to the contractor's reputation,'' Schuman warned.

Moreover, Jason Crawford, an associate at Crowell & Moring, told Bloomberg BNA in a Sept. 8 e-mail that there will be other major challenges for covered contractors, who ''are going to have to design new processes and policies in order to comply with the reporting requirement. Contractors will need to implement systems that can capture information about administrative merits determinations, civil judgments, and arbitral awards on a continuing basis. This is easier said than done because most companies have not been collecting information about these 14 labor laws in a single database.''

''Not only will contractors need to capture basic information, but they will also need to collect information about remedial measures and mitigating circumstances,'' he said.

In another change from the proposed rule, in the final rule ''the Department of Labor also created a voluntary 'pre-assessment' process through which contractors can proactively have their labor compliance history reviewed before a specific acquisition,'' Steve McBrady, Partner at Crowell & Moring, told Bloomberg BNA in a Sept. 8 e-mail. ''DOL is supposed to provide more information about the process the week of Sept. 12, but there is a real risk that this pre-assessment–in practice–will result in efforts to force contractors into settlements in order to avoid potential exclusion.''

That view was echoed Sept. 8 by Linda M. Jackson, a shareholder and co-chair of Littler's Government Contractors Industry Group. ''It's an interesting offer, but it feels like the risk may outweigh the reward,'' she said, suggesting that contractors self audit.

The fact that the final rule ''requires contractors to identify themselves as violators even though you're still contesting the violations'' is a violation of the First Amendment and due process rights, and is one of the reasons Littler is preparing a lawsuit to challenge it, Maury Baskin, a Littler shareholder, said. He said the lawsuit is ''imminent, and could be filed as early as next week.''

The Littler attorneys were speaking during a webinar sponsored by the law firm.

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