

"Fair Pay and Safe Workplaces" Final Rule and Guidance: What You Need to Know

Crowell & Moring LLP
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The webinar will begin shortly. You will not hear any audio until we begin. The slides and a recording of the webinar will be sent to you after the event.

Overview

- “Fair Pay and Safe Workplaces” E.O. issued on July 31, 2014.
- Proposed FAR provision and DOL guidance published on May 28, 2015. Over 10,000 comments received during the comment period.
- Final FAR Rule (81 Fed. Reg. 58562) and DOL Guidance (81 Fed. Reg. 58653) published on August 25, 2016.

Significant Changes

- Subcontractor Reporting
- Staggered Implementation
- Creation of DOL Pre-Assessment Process
- But many of issues that troubled industry (such as the broad definition of “administrative merits determinations”) remain unchanged in the final rule and guidance.

Bidding Entity

- Disclosure requirement applies to the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract.
- The legal entity that is the offeror does not include a parent corporation, a subsidiary corporation, or other affiliates.

Disclosure of “Violations”

1. Fair Labor Standards Act
2. Occupational Safety and Health Act
3. National Labor Relations Act
4. Americans with Disabilities Act
5. Family and Medical Leave Act
6. Title VII of the Civil Rights Act
7. Age Discrimination in Employment Act
8. Davis-Bacon Act
9. Service Contract Act
10. Section 503 of the Rehabilitation Act
11. Vietnam Era Veterans’ Readjustment Assistance Act
12. Migrant and Seasonal Agricultural Worker Protection Act
13. Executive Order 11246 (Equal Employment Opportunity)
14. Executive Order 13658 (Contractor Minimum Wage)

(FAR) 52.222-57—Representation Regarding Compliance with Labor Laws

Contractor bidding on covered contract must represent to the best of its knowledge and belief that:

[](1) There has been no administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the Offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter; or

[](2) There has been an administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the Offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.

Information to be Entered into SAM

- Labor law violated
- Case number, inspection number, charge number, docket number, or other unique identification number
- Date of administrative merits determination, judgment, award or decision
- Name of court, arbitrator(s), agency, board or commission
- Contractor *may* submit information on mitigating circumstances and remedial measures, including labor compliance agreements
- Basic information will be made publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS)

Responsibility Determination

- The final rule requires that a CO consider a prospective contractor's labor "violations" in determining whether that contractor has a satisfactory record of integrity and business ethics.
- The final rule requires the CO to review the data provided and request that the Agency Labor Compliance Advisor (ALCA) provide written analysis and advice within three days (or another time period determined by the contracting officer).
- CO must consider ALCA's recommendation, but the responsibility determination is CO's decision to make.

Mitigating Circumstances

- CO must consider mitigating circumstances and remedial measures such as labor compliance agreements.
- There is a hierarchy of mitigating circumstances.
 - Most important = the extent to which the contractor has remediated the violation and taken steps to prevent its recurrence.
 - Failure to remediate a violation may demonstrate disregard for legal obligations and workers.

Post-Award Reporting

- Final rule requires contractors, on a semiannual basis following an award, to provide through SAM or to the contracting officer as requested the same type of information provided pre-award but for new labor law decisions and updates to previously disclosed decisions.
- Contractors may elect to provide the certification on a semiannual basis through SAM. This is a departure from the proposed rule which required contractors to report under each separate contract every six months.

Past Performance

- The final rule includes language for COs to consider a contractor's compliance with labor laws (including adherence to labor compliance agreements) in their Contractor Performance Assessment Report (CPAR). FAR 42.1502(j)
- The rule also requires contracting officers to consider compliance with labor laws when past performance is an evaluation factor. FAR 22.2004–2(a)

FAR 52.222-58—Subcontractor Responsibility Matters Regarding Compliance with Labor Laws

- Effective Oct 25, 2017. Requires that primes obtain representations from all prospective subcontractors with subcontracts in excess of \$500,000 (other than COTS).
- If the sub indicates that it has “violations,” and the prime initiates a responsibility determination, the prime must require the sub to submit information regarding each covered labor law violation to DOL via a web portal.

Subcontractor Responsibility

- A prime can award a subcontract if the subcontractor represents that it has properly disclosed all covered “violations” and DOL has advised that no serious, repeated, willful, and/or pervasive labor law “violations.”

Or

- The subcontractor has been advised by DOL that it has serious, repeated, willful, and/or pervasive labor law “violations” and:
 - DOL has advised that a labor compliance agreement is not warranted.
 - the subcontractor has entered already into or has agreed to enter into a labor compliance agreement.
 - The subcontractor disagrees with DOL’s advice and provides the prime with information about the “violations” and an explanation for the basis of disagreement with DOL.

DOL Guidance

The FAR Rule and DOL Guidance were published simultaneously and must be read together.

- The Final Rule implements the proposed labor violation reporting obligations through the mandatory solicitation clause FAR 52.222-59—Compliance with Labor Laws
- Key definitions are found in the Guidance.
- For example, in order to determine whether “violations” are “pervasive” it is necessary to consult the DOL Guidance.

“Administrative Merits Determinations”

- Seven categories of “notices/findings” - exhaustive
- Issued by “enforcement agencies” after “investigation” – not necessarily after hearing
- May be final or be subject to appeal or further review
- DOL Wage and Hour Division
 - WH-56 “Summary of Unpaid Wages”, WH-103 “Employment of Minors”, WH-561 “Citation and Notification of Penalty” under OSH Act
 - Letter indicating violation of section 6, 7, or 14(c) of the FLSA or a violation of FMLA, SCA, DBA, EO 13658
 - “Letter, notice or other document assessing civil monetary penalties” or “an order of reference” filed with an ALJ
- OSHA or State Agency with OSHA-Approved State Plan
 - Citation, imminent danger notice, or notice of failure to abate or any State equivalent

“Administrative Merits Determinations”

- OFCCP
 - Show cause notice for failure to comply with EO 11246, Section 503 of the Rehabilitation Act, or VEVRAA
- EEOC
 - “Reasonable cause” determination or civil action filed on behalf of the EEOC
- NLRB
 - Complaint issued by any Regional Director
- Complaint with a federal or state court, administrative judge, or ALJ
 - Includes complaints for injunctive relief
- Order or finding of violation issued by administrative judge, ALJ, the DOL’s Administrative Review Board (“ARB”), OSH Review Commission or state equivalent, NLRB

“Civil Judgment”

- “Any judgment or order entered by any federal or state court” finding a violation of the Labor Laws
 - Includes injunctions, cases brought by private parties, partial grants of summary judgment
 - Excludes private settlements and ALJ decisions (unless and until affirmed by court)
 - Not limited to final judgments

“Arbitral Award or Decision”

- “Any award or order by an arbitrator or arbitral panel” finding a violation of any provision of the Labor Laws
 - Includes awards that are not final or are subject to being confirmed, modified or vacated by court
 - Includes private and confidential arbitral proceedings
 - Includes labor arbitration award

“Serious Violations”

- OSHA – citation designated as serious or non-citation violation that meets criteria below
- At Least 10 workers making up at least 25 percent of the Contractor's workforce at the worksite or overall
- \$5,000 Fines/Penalties, \$10,000 back pay
- Retaliation
- Pattern or practice or systemic discrimination
- Interference with agency's investigation
- Breach of LCA/violation of court/administrative order
- Violations that cause or contribute to death or serious injury
- Employment of a minor

“Willful Violations”

- OSHA – citation designated as willful
- FLSA – willful finding
- ADEA – liquidated damages
- Title VII/ADA – punitive damages for engaging in conduct with malice or reckless indifference
- Other Labor Laws – findings support knowledge, reckless disregard or plain indifference

“Repeated Violations”

- “Same or substantially similar” violations
 - Essential elements in common
 - Nature of violation and underlying obligation
 - statute-specific, exhaustive list of violations
- Separate proceedings/separate set of facts
- Three-year period
- Company-wide

“Pervasive Violations”

- No need for substantially similar
- Could all arise in a single proceeding
- Depends on size of contractor, nature of violation

Paycheck Transparency

- Requires contractors performing work on covered contracts and subcontracts to provide employees covered by the FLSA, DBA, and SCA with information concerning the individual's pay, hours worked, overtime hours, and any additions/deductions from the individual's pay.
- Also requires contractors to provide independent contractors with documentation informing them of their status as independent contractors.
- Paycheck transparency requirements will become effective on January 1, 2017.

Arbitration of Claims

- On contracts over \$1 million (other than those for commercial items), contractors must agree that the decision to arbitrate claims arising under Title VII or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise.
- Flows down to subcontracts exceeding \$1,000,000 other than for the acquisition of commercial items.
- The clause at FAR 52.222-61 that prohibits predispute arbitration agreements will be effective October 25, 2016.

Implementation Schedule

- Starting on October 25, 2016, the rule will only apply to contracts of at least \$50 million.
- Beginning on April 25, 2017, the rule will apply to contracts of at least \$500,000 except those for commercially available off-the-shelf (COTS).
- Subcontractors will not start reporting “violations” until October 25, 2017.

Disclosure Reporting Period

- The disclosure reporting period will initially be limited to one year.
- The reporting period will gradually increase over the next three (3) years with a full three-year reporting period required beginning on October 25, 2018.

Potential Legal Challenges and Congressional Action

- Challenges by a combination of companies and industry trade groups.
- Congress could impede the rule's implication through legislation, such as the 2017 NDAA.

Planning for Day-One Compliance

- Identify civil judgments, arbitral awards, AMDs since Oct 25, 2015.
- Establish policies and procedures to collect information about “violations” on a going forward basis.
- Determine if “violations” are willful, serious, pervasive, or repeated. Contractor should consider pulling together materials about mitigating factors and remedial measures.

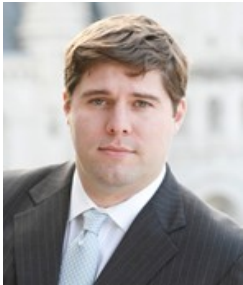
Monitor Development of DOL's Pre-Assessment Process

- DOL has created a voluntary “pre-assessment” process through which contractors can proactively have their labor compliance history reviewed before a specific acquisition.
- Participating in pre-assessment will be considered in future acquisitions as a mitigating factor.
- DOL is supposed to provide more information about the process the week of September 12.

Possible Previewing of “Violations” with SDOs

- Three different dynamics impacting SDO consideration of Fair Pay information create risk for contractors when reporting violation and mitigation information:
 1. SDOs receiving one-sided records are more likely to engage with the contractor either through Show Cause Letters or suspensions/proposed debarments.
 2. SDOs will eventually receive inquiries from oversight agencies such as offices of inspectors general, Congress, or others concerning their level of engagement with Fair Pay information.
 3. Labor compliance “violations” qualify for proposed debarment and/or suspension under FAR 9.406-2(c). Once one federal agency begins excluding or sending show cause letters based on Fair Pay data, others in the government are likely to follow suit.

Questions?



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