

“Fair Pay and Safe Workplaces” Executive Order

Professional Services Council
Program on Labor Policy and
Executive Orders

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Introduction

- Recent Executive Orders on Labor Policy
- “Fair Pay and Safe Workplaces” Executive Order
 - Key Provisions
 - Timeline for Implementation
- Discussion of What the Order May Mean for Federal Contractors
- Questions

Recent Executive Orders on Labor Policy

- Recent Executive Orders on Labor Policy
- Executive Order vs. Legislation
 - Frustrated by lack of Congressional action
 - Effort to show progress on Administration priorities
- Not a New Phenomenon
 - Clinton era so-called “blacklisting”

“Fair Pay and Safe Workplaces” Executive Order

What will the E.O. mean for Federal contractors?

- “[The] order seeks to **increase efficiency and cost savings** in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws.”
 - The White House (July 31, 2104)
- “Companies that violate labor laws will now have a **tougher time doing business with the government.**”
 - Washington Post (Aug. 10, 2014)
- “The real point of the order is to establish mechanisms **for interest groups to roll over employers** who don't accede to their demands.”
 - Wall Street Journal (August 8, 2014)

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors

What will the E.O. mean for Federal contractors?

- Sets the stage for the FAR Council and agencies to prepare and issue guidance and regulations to implement substantive provisions.
- Potentially creating several new obligations for contractors and subcontractors doing business with the Federal government.
- Including ...

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Prior to Award.

- Contractors bidding on procurement contracts in excess of \$500,000 required to “represent, to the best of the [their] knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment” rendered against the contractor within the preceding 3-year period for violations of a slew of labor laws (including the FLSA, Service Contract Act, Davis-Bacon, ADA, ADEA, FMLA, NLRA, OSHA, Title VII of the Civil Rights Act and others, as well as equivalent State laws).
- This information factored into the CO’s responsibility determination (i.e., “whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics”).
- Contractors required to disclose similar information for *subcontractors* on subcontracts (other than COTS items) valued over \$500,000.
- Contractors required to include provisions in their subcontracts requiring *subcontractors* to disclose and update such information.

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Post Award.

- During contract performance, contractors performing work on covered contracts and subcontracts required to provide updated information every 6 months.
- Information brought to the attention of the CO or the Labor Compliance Advisor may result in Government action
 - “includ[ing] agreements requiring appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations, as well as remedies such as decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official.”

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Labor Compliance Advisors.

- Federal agencies required to designate a senior agency official to be a “Labor Compliance Advisor”
- LCA tasked with facilitating contractor compliance with labor laws, which includes
 - “helping agency officials determine the appropriate response to address violations of the requirements of the labor laws” and
 - “coordinat[ing] assistance for agency contractors seeking help in addressing and preventing labor violations”
 - but also includes “as appropriate” sending information to agency suspending and debarring officials.

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Paycheck Transparency.

- Contractors performing work on covered contracts and subcontracts required to provide employees covered by the FLSA, the Davis Bacon Act, the Service Contract Act, or “equivalent” state laws, with information concerning the individual’s pay, hours worked, overtime hours, if applicable, and any additions made to or deductions made from the individual’s pay.

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Dispute Resolution.

- Contractors performing work on contracts valued over \$1 million required to “agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 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.”
- This requirement, like the requirements noted above, would also apply to subcontracts where the estimated value of the subcontract meets the dollar threshold.
- This element is essentially an expansion of the “Franken Amendment” to contractors other than DoD contractors and subcontractors that meet the dollar threshold.

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Effective Dates.

- Effective dates of new requirements will be driven by regulations and guidance issued by the FAR Council and several other agencies (primarily the DOL).
- White House “Fact Sheet” indicates that implementation will occur “on new contracts in stages, on a prioritized basis, during 2016.”

What to do now about the “Fair Pay and Safe Workplaces” E.O.?

- The sky is not falling – yet.
 - Timeline for implementation is 2016.
 - Unlike some E.O.s, no “within 90 days...” language here.
- Depending upon circumstances, conduct internal review regarding labor law compliance and/or current arbitration agreements to assess potential impact of the order.
- Monitor and participate in public comment period on proposed regulations.
- Monitor potential legal challenges.

Conclusion



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