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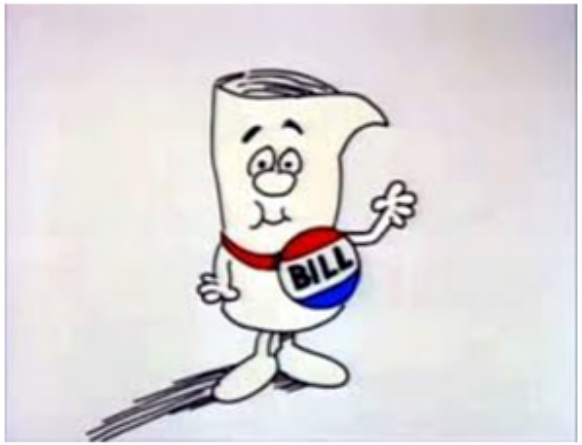
The Fair Pay and Safe Workplaces Executive Order: What Will Come to Pass, and When?

Kris Meade
Rebecca Springer
Jason Crawford

Who Needs Congress Anyway?

"I'm just a bill, yes I'm only a bill, and I got as far as Capitol Hill. Well, now I'm stuck in committee …"



"I'm an executive order, and I pretty much just happen."

Fair Pay and Safe Workplaces EO

- Administration issued EO 13673 on July 31, 2014.
- The stated purpose of the EO is to ensure that "parties who contract with the Federal government . . . understand and comply with labor laws."
- The FAR Council will issue a final rule and the Department of Labor ("DOL") will develop guidance to help contracting officers make these newly required determinations.

Key Provisions: Pre-award

- Contractors required to represent 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 certain labor laws.
- EO lists 14 federal statutes: including the FLSA, Service Contract Act, Davis-Bacon, ADA, ADEA, FMLA, NLRA, OSHA, Title VII of the Civil Rights Act, EO 11246
- EO also applies to violations of "equivalent State laws"

Key Provisions: Pre-award

- EO requires that COs consider—as part of the responsibility determination—whether an offeror has a satisfactory record of integrity and business ethics.
- Prime contractors required to include provisions in their subcontracts requiring *subcontractors* to disclose and update such information.
- Prime Contractors then required to disclose similar information for *subcontractors.*

Key Provisions: Post Award

- During contract performance, contractors—and subcontractors—required to provide updated information every 6 months.

- Information brought to the attention of the government can result in remedial measures, decisions not to exercise an option, contract termination, or referral to the agency SDO.

"Labor Compliance Advisors"

- Each federal agency required to designate a senior agency official to be a "Labor Compliance Advisor"
- Duties
  - Facilitate contractor compliance with labor laws
  - Help agency officials determine the appropriate response to address violations of the requirements of the labor laws.
- On March 5, DOL and OMB issued a memorandum directing all agencies to designate a senior agency official no later than 90 days after the issuance of the memorandum.

Dispute Resolution

Dispute Resolution.

- On contracts >$1 million, contractors required to agree that the decision to arbitrate claims arising under Title VII or any tort related to sexual assault or harassment may only be made with the voluntary consent after such disputes arise.
  - Applies to subcontractors where the estimated value meets the dollar threshold.
- This element is essentially an expansion of the "Franken Amendment" to contractors other than DoD contractors.

Practical Implications

- Huge data collection burden—a large government contractor could have thousands of sub-contractors.
- Alter the relationship between prime and subcontractors. Will primes learn information that they could use against subs in future bid protests?
- Threatens to grind procurement process to a halt
  - FY 2014 - almost 100,000 contract actions.
  - The EO will require the government to take multiple steps for each of these contract actions before award…and then repeat the steps every six months.

Check the Box Exercise?

- At a budget hearing in March, Labor Secretary Perez downplayed the reporting requirements as a simple "check the box" exercise for "the vast majority" of contractors.
- The reality is that there will be enormous amount of data that federal contractors will have to collect and analyze.
- There's the possibility of FCA and False Statements liability arising out of the required certification.

Status

Office of Management and Budget

- On March 6, 2015, the proposed rule and proposed guidance were submitted to the Office of Information and Regulatory Affairs ("OIRA") for regulatory review.
- OIRA is supposed to complete its review within 90 calendar days of when it receives the proposed rule.
- The review process can be extended once, by no more than 30 calendar days.

OIRA's Options

- Consistent without change.
- Consistent with change—some substantive changes.
- Returned—OIRA has serious concerns with the agency's proposed rule and does not approve the publication of the notice of proposed rulemaking ("NPRM").
- The proposed rule is published in the *Federal Register* in the form of an NPRM.

Response from Industry

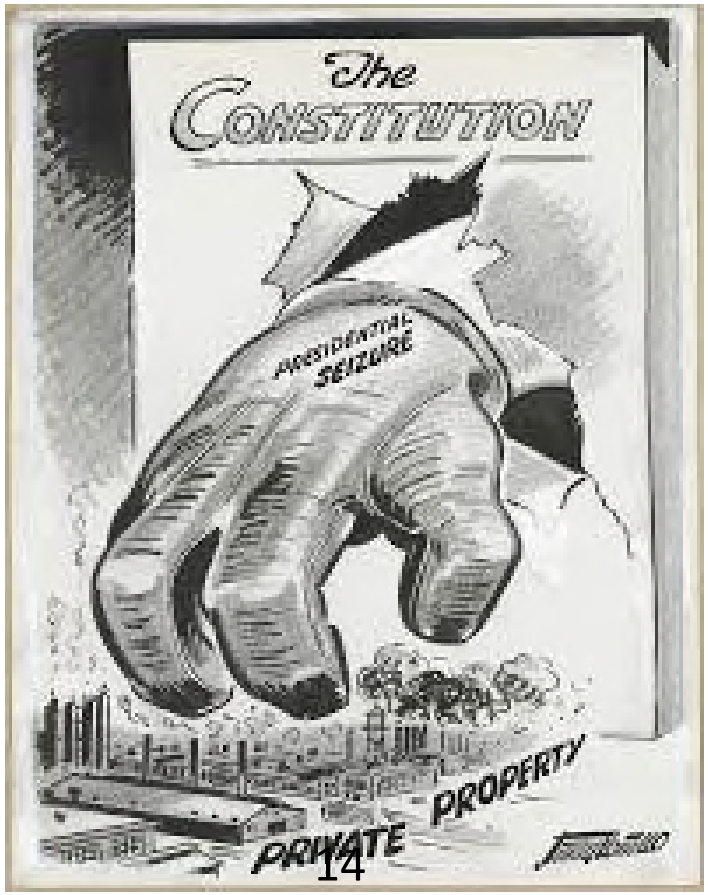
- Outside counsel to the Chamber of Commerce, the CEO of the Professional Services Council, and C&M Chair Angela Styles testified before the House Subcommittee on Workforce Protections.
- Congress could invalidate EO by passing a statute, but this is unlikely.
- Contractors have participated in “listening sessions” with OMB, DOL, and senior White House officials.

Potential Legal Challenge

Only two executive orders have been invalidated by the courts:

- Steel Seizure (1952)
- *Reich* (1996)

EO 13673 issued pursuant to the Procurement Act of 1949. Seeks to increase efficiency and cost savings by ensuring that contractors understand and comply with labor laws.



Chamber of Commerce v. Napolitano

- Challenged EO 13465 - requires contractors to use the E-Verify system to determine employment eligibility.
- Standard - Courts will uphold EOs if there is a requisite "nexus" between the EO and the Procurement Act's goals.
- Deference to the executive branch — even when the explanation is conclusory or speculative.
- District Court of Maryland - accepted the President's rationale that contractors will become more efficient and dependable because contractors that "adopt rigorous employment eligibility confirmation policies are much less likely to face immigration enforcement actions."

Chamber of Commerce v. Reich

- Challenged EO 12954 - Directed Labor Secretary to promulgate regulations providing for the debarment of contractors who hired permanent replacements for striking workers.
- The right to hire permanent replacements was firmly established under the National Labor Relations Act ("NLRA").
- D.C. Circuit - EO was invalid because it conflicted with NLRA provisions.

Grounds for Legal Challenge

- An EO cannot have the force of law if it is in conflict with an express statutory provision. There are at least three areas where EO 13673 may conflict with existing law.
  - Alters the remedial schemes that Congress has established for the underlying labor statutes.
  - Conflicts with the existing suspension and debarment procedures established under FAR Subpart 9.4
  - Conflicts with Federal Arbitration Act

Conflict with Federal Arbitration Act

- FAA – Permits employers to resolve specific types of employee disputes through arbitration, including through pre-dispute agreements.
- The EO tracks language from an Amendment that was included in DoD appropriations legislation in FY 2010
  - No enforcement actions under the DoD bill
  - No act of Congress has applied these limitations to any other set of federal contractors.

Challenge to Final Rule Implementing EO

- Under the APA, a reviewing court can set aside rules that the agency finds unlawful. A court reviewing the validity of final rules typically asks the following three questions:
  1. Was the final rule promulgated in excess of statutory authority;
  2. Is the rule arbitrary, capricious or otherwise not in accordance with law; and
  3. Did the agency follow the appropriate APA procedures?

Lessons learned from the "Blacklisting Rule"

- Argued that Final Rule conflicted with provisions of FASA because the rule required certification regarding violations of labor laws in connection with proposals for commercial item contracts.
- The FAR Council failed to submit a cost-benefit analysis along with an assessment of the costs and benefits of any reasonable alternatives.
- The Contractor Responsibility rule was defeated—but not in court.

Potential Political Solutions

- Defunding option?
- 2016 elections a mere 19 months away. . .

Questions?

Kris Meade
202-624-2854
kmeade@crowell.com

Rebecca Springer
202-624-2569
rspringer@crowell.com

Jason Crawford
202-624-2562
jcrawford@crowell.com