

**Proposed FAR Rule and DOL Guidance for
Implementing “Fair Pay and Safe Workplaces”**

**Crowell & Moring LLP
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Overview

- Proposed FAR provision and DOL guidance implementing the “Fair Pay and Safe Workplaces” E.O. published on May 28, 2015
- Proposed Rule and Guidance offer insight into the significant potential compliance and reporting burdens
- 60-day comment period closes on July 27, 2015
- New requirements not likely to take effect until final Rule and Guidance are issued in late 2015 or early 2016

Rule Relies Heavily on Guidance

- Proposed FAR Rule (80 Fed. Reg. 30548) and DOL Guidance (80 Fed. Reg. 30574)
 - Published under separate notice on the same day so that respondents can “consider the documents holistically in addition to offering comment on the specifics of each document”
- The documents must be read together
 - The Proposed Rule adds a new subpart (subpart 22.20) to the FAR – Guidance will be “incorporated” into the Rule
 - Real “meat” is found in the Guidance

Process – Identifying Violations

- Initial Representation and Certification
 - Must certify on behalf of bidding entity and must report violations for all of entity’s worksites
 - Contractor bidding on contract valued at \$500,000 or more must certify to “best of [its] knowledge and belief”
 - [] “There has been no administrative merits determination, arbitral award or decision, or civil judgment rendered against offeror” for “violations of labor laws” within the three years preceding the bid
 - [] “There has been an administrative merits determination, arbitral award or decision, or civil judgment rendered against offeror” for “violations of labor laws” within the three years preceding the bid

Process – Identifying Violations

- Responsibility Determination Stage - Disclosure of Further Information
 - If contractor reported a violation, must enter into the System for Award Management (SAM) the following for each violation:
 - 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

Process – Identifying Violations

- Updates required if contractor wins award
 - Provide updated information in SAM every six months during performance of contract
- Basic information will be made publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS)

Responsibility Determination

- The CO shall then request “that the ALCA provide written advice and recommendations within three business days of the request...”
- CO must consider ALCA’s recommendation, but the Proposed Rule reaffirms that the responsibility determination is CO’s decision to make

Responsibility Determination

ALCA can make one of three recommendations:

1. Contractor “could be found to have a satisfactory record of integrity and business ethics”
2. Contractor could be found to have such a record “if the process to enter into a labor compliance agreement” with the DOL is initiated
3. Contractor does not have a satisfactory record of integrity and business ethics and “the agency Suspending and Debarring Official should be notified...”

Responsibility Determination

- CO must consider “mitigating circumstances and remedial measures such as *labor compliance agreements*”
 - “Labor compliance agreements” – agreements between contractor and Federal enforcement agency to address “appropriate remedial measures . . . [and] steps to resolve issues to increase compliance with the labor laws”
 - Term used repeatedly in Proposed Rule and Guidance

“Mitigating Circumstances”

- 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”
 - Whether contractor has “only had a single violation”
 - Whether number of “violations is low relative to the size of the contractor” – no standards

“Mitigating Circumstances”

- Hierarchy of Mitigating Circumstances (cont.)
 - Whether contractor implemented safety and health program, grievance procedures, monitoring arrangements, or other compliance programs to foster a corporate culture of reporting without repercussions
 - Whether violation is traced to recent legal or regulatory change
 - Whether contractor made efforts to ascertain its legal obligations and follow the law
 - Whether a significant compliance period followed violations – e.g., clean record for 2.5 years

“Equivalent State Law” Not Defined

- Despite the length of the Proposed Rule and Guidance, one of the biggest questions about the E.O. remains unanswered
- Other than the OSHA-approved state plans, the “equivalent state law requirement” will not be implemented through this rulemaking
- FAR Council acknowledged that “there will be challenges associated with the implementation” of the state law requirement

What about Subcontractors?

- As written, the proposed rule requires contractors to obtain from subs the same labor compliance history that they must themselves disclose
- However, FAR Council is considering applying the subcontracting requirements in phases in order to give contractors “time to acclimate themselves to their new responsibilities”

Important Definitions

- Administrative Merits Determinations
- Civil Judgments
- Arbitral Awards or Decisions
- Serious Violations
- Willful Violations
- Repeated Violations
- Pervasive Violations

“Administrative Merits Determinations”

- Seven categories of “notices/findings” - exhaustive
- Issued by “enforcement agencies” after “investigation” – not necessarily after hearing
- 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
 - Include labor arbitration award?

“Serious Violations”

- OSHA – citation designated as serious, failure to abate violation or imminent danger notice
- 25% or more of the workforce at site impacted
- \$5,000 Fines/Penalties, \$10,000 back pay, or injunctive relief
- Adverse employment action or unlawful harassment
- Pattern or practice or systemic discrimination
- Interference with agency’s investigation
- Breach of agreement/violation of court or administrative order
- Violations of law that cause or contribute to death or serious injury
- Employment of a minor

“Willful Violations”

- OSHA – citation designated as willful
- FLSA – willful finding or back pay indicates willful violation
- 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
- Separate proceedings
- 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

Evaluation of Contractor Performance

- FAR Council considering supplemental language that would make labor law compliance part of the performance evaluation
- For example, if DOL raised concerns that a contractor had not met the terms of an existing labor compliance agreement, this could affect a contractor's past performance evaluation
- In other words, if this supplemental language is included, compliance with labor laws will become both a responsibility matter and evaluation criterion

Questions?



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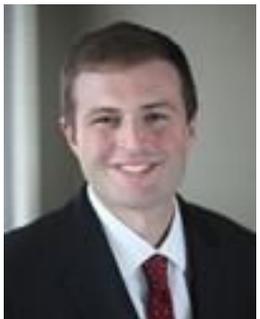
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