COMPLIANCE BULLETIN

Federal Contractors and Labor Law Violations

HIGHLIGHTS

- The Order is intended to ensure that federal contracts are awarded to compliant contractors.
- Contractors will be required to disclose their labor law compliance histories when submitting bids.
- The Order also requires more wage payment transparency and prohibits pre-dispute arbitration agreements.

IMPORTANT DATES

September 12, 2016
Pre-assessment process of contractor compliance begins

October 25, 2016
Mandatory disclosure and assessment of labor law compliance begins

January 1, 2017
Paycheck transparency becomes effective

Provided By:

Jaeger & Flynn Assoc., Inc.

OVERVIEW

On Aug. 25, 2016, the Department of Labor (DOL) and the Federal Acquisition Regulatory Council (FAR Council) issued a final rule and guidance implementing an executive order affecting federal contractors.

The Fair Pay and Safe Workplaces Executive Order (Order) was signed by President Barack Obama in 2014. Under the terms of the Order, federal agencies will require prospective contractors to disclose previous labor law violations when submitting bids for federal contracts. The Order also requires more wage payment transparency and prohibits pre-dispute arbitration agreements.

The Order is intended to ensure that federal contracts are awarded to compliant contractors. Contractors that fail to provide complete and accurate information may be subject to sanctions under the False Statements and the False Claims Acts.

ACTION STEPS

- ✓ Federal contractors and subcontractors should review the federal guidance to understand their upcoming disclosure obligations.
- ✓ Contractors may also apply for a voluntary pre-assessment of their compliance history with the DOL to increase their chances of receiving a federal contract award.

JAEGER & FLYNN ASSOCIATES, INC.
BENEFITS | HUMAN RESOURCES | RISK MANAGEMENT | INSURANCE

The Fair Pay and Safe Workplaces Executive Order (Executive Order 13673)

Existing law requires federal agencies to contract with "responsible sources." This means, among other things, that contracting officers have an obligation to award federal contracts to contractors that have "a satisfactory record of integrity and business ethics."

The Order was issued to improve the ability of contracting officers to act as good stewards of federal resources and to ensure that contractors that comply with federal labor laws, rather than non-compliant contractors, are allowed to provide services and products for the federal government.

The Order contains three main provisions:

- ✓ A mandate to disclose certain labor law violations;
- ✓ A requirement to adopt transparent payment practices; and
- ✓ A prohibition on pre-dispute mandatory arbitration provisions.

Implementation Timeline

Implementation of the Order will be phased in during the next few years, as shown in the table below:

Sept. 12, 2016	Pre-assessment begins. Contractors may request a voluntary DOL assessment of their labor compliance history, in anticipation of bids on future contracts but independent of any specific acquisition.
Oct. 25, 2016	The final rule takes effect. Mandatory disclosure and assessment of labor law compliance begins for all prime contractors under consideration for contracts with a total value greater than or equal to $50 million. The reporting disclosure period is initially limited to one year and will gradually increase to three years by Oct. 25, 2018.
Jan. 1, 2017	The Paycheck Transparency clause takes effect, requiring contractors to provide wage statements and notice of any independent contractor relationship to their covered workers.
April 25, 2017	The total contract value threshold for prime contracts requiring disclosure and assessment of labor law compliance is reduced to $500,000.
Oct. 25, 2017	Mandatory assessment begins for all subcontractors under consideration for subcontracts with a total value greater than or equal to $500,000.
Oct. 25, 2018	The reporting period, initially one year, will be gradually increased to three years.

Disclosures

The Order disclosure requirement applies to contractors and subcontractors with **covered contracts**. Under the order, affected contractors and subcontractors will have to disclose any labor law violation of specified laws and executive orders if:

- ✓ The violation resulted in an administrative merit determination, civil judgment, arbitration award or decision; and
- ✓ The violation took place within the preceding three years (though contractors will not have to disclose any decisions that were rendered against them prior to Oct. 25, 2015)

"Covered contracts" includes contracts for the procurement of goods and services (including construction) where the estimated value of the supplies acquired and services required is **more than $500,000**. "Covered contracts" may also include subcontracts if the estimated value of the supplies acquired and services required **exceeds $500,000** and the contract is not for commercially available off-the-shelf items. In general, subcontractors are subject to the same requirements as contractors. However, the value amounts referenced above will be phased in during the Order's implementation period (see table above).

When to Disclose?

During the initial part of the bidding process, contractors will only be required to indicate whether they have any disclosures to make. The contracting officers will consider the existence or absence of disclosures as one of many factors that ultimately determine which contractor will be awarded the contract.

At the later stages of the bidding process, the contracting officers will perform a responsibility assessment to ensure that the contractor has indeed "a satisfactory record of integrity and business ethics." During this stage of the process, contractors may receive a request to disclose the details of administrative decisions against them as well as an explanation of mitigating circumstances, an explanation of corrective actions the contractor may have taken as a result of the administrative decision, and any other information and details the contractor feels need to be considered.

After a federal contract is awarded, contractors are required to update their disclosures every six months. Updates in a contractor's compliance history may result in:

- ✓ Agreements requiring appropriate remedial measures;
- ✓ Compliance assistance;
- ✓ Resolving issues to avoid further violations; or
- ✓ Decisions to exercise certain contract options and contract termination privileges (with possible contractor suspension or debarment).

What to Disclose?

The Order requires contractors to disclose administrative merits determinations, civil judgments, and arbitral awards or decisions rendered for violations of the labor laws and executive orders indicated below. It is equally important to note that the Order does not require contractors to disclose criminal sanctions or any administrative determinations, judgments, awards or decisions mentioned of the laws mentioned below. Disclosures for applicable violations must be made even if the findings are not final or if they are under appeal.

Disclosures are limited to violations of the following labor laws and executive orders:

1. The Fair Labor Standards Act;
2. The Occupational Safety and Health Act of 1970;
3. The Migrant and Seasonal Agricultural Worker Protection Act;
4. The National Labor Relations Act;
5. The Davis-Bacon Act;
6. The Service Contract Act;
7. Executive Order 11246 (regarding Equal Employment Opportunity);
8. Section 503 of the Rehabilitation Act of 1973;

9. The Vietnam Era Veterans' Readjustment Assistance Act of 1974;
10. The Family and Medical Leave Act;
11. Title VII of the Civil Rights Act of 1964;
12. The Americans with Disabilities Act of 1990;
13. The Age Discrimination in Employment Act of 1967; and
14. Executive Order 13658 (regarding Establishing a Minimum Wage for Contractors).

The Order also indicates that contractors may be required to disclose violations of similar or equivalent state laws. The DOL will publish additional guidance on what this requirement entails at a later date.

Paycheck Transparency

The Order also requires contractors to become more transparent in their payment practices by:

- ✓ Including in each employee's wage statement the number of regular hours the employee worked, the number of overtime hours the employee worked, the employee's gross pay for the pay period and any information regarding additions and deductions made to or taken from the employee's wages; and
- ✓ Disclosing in writing to each worker whether he or she is being treated as an employee or an independent contractor.

The Order also requires contractors to include in their agreements with subcontractors a clause that requires subcontractors to implement the same paycheck transparency practices. When applicable, compliance with equivalent state laws will be considered compliance with this federal requirement.

Prohibited Pre-dispute Arbitration Agreements

The final requirement set out by the executive order is a prohibition on pre-dispute arbitration agreements. This requirement applies only to contracts where the estimated value of supplies acquired and services required is more than $1 million and claims that arise under Title VII of the Civil Rights Act or any tort related to sexual assault or harassment.

As a result, contractors can submit affected claims of discrimination, assault or harassment to arbitration only after receiving their employees' voluntary consent and after a dispute actually arises. As with the paycheck transparency requirement, contractors must include a clause in their agreements with subcontractors for subcontracts where the estimated value of the supplies acquired and services required exceeds $1 million.

However, the pre-dispute arbitration prohibition may not apply when:

- ✓ The contract or subcontract is for the acquisition of commercial items or commercially available off-the-shelf items;
- ✓ Employees are covered by any type of collective bargaining agreement negotiated between the contractor and a labor organization representing them; or
- ✓ Employees or independent contractors enter into a valid contract to arbitrate before the contractor or subcontractor bids on a covered contract (however, the prohibition applies if the contractor or subcontractor is permitted to change the terms of the contract with the employee or independent contractor, or when the contract is renegotiated or replaced).