Final Fair Pay and Safe Workplaces rule still imposes substantial burdens on federal contractors

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The Federal Acquisition Regulatory Council (FAR Council) and the US Department of Labor (DOL) simultaneously released, on August 24, a **final rule** and accompanying **guidance** implementing the Fair Pay and Safe Workplaces Executive Order signed by President Obama in July 2014. The final rule requires that companies bidding on federal contracts or subcontracts of at least $500,000 disclose violations of labor laws, to be taken into account by contracting officers in making their contract awards.

After issuing the proposed rule in May 2015, the FAR Council and the DOL received over 12,500 comments from a wide range of businesses and federal contractors, industry associations, and labor union and advocacy groups. While the final rule makes several noteworthy changes to the proposed version that will lessen the compliance burden on contractors, it still imposes substantial compliance obligations on all potential federal contractors.

The scope of the mandatory disclosures lies at the heart of the regulation. The final rule provides that companies seeking federal contracts must disclose any violations of 14 federal labor laws and Occupational Safety and Health Administration (OSHA)-approved state plans occurring in the past three years, under a phased-in approach. In addition to violations resulting in civil judgments and arbitral awards or decisions, companies also must disclose any "administrative merits determinations," including notices or findings following an investigation by enforcement agencies such as the Equal Employment Opportunity Commission (EEOC), OSHA, and the National Labor Relations Board (NLRB). Despite numerous comments objecting to the mandatory disclosure of such non-final agency determinations, which still may be subject to appeal or review, the final regulation does not change this definition from the proposed rule.

Like the proposed rule, the final rule retains the requirement that contractors publicly disclose certain information about labor law violations. Specifically, contractors must publish on the System for Award Management (SAM) the following information: the law violated, the case identification number, the date of award or decision, and the name of the body that made the decision. This requirement applies to arbitral awards as well. Contractors, however, are not required to publicly disclose their attempts to mitigate a particular labor issue or to take remedial actions.

In another holdover from the proposed rule, the final rule requires contractors and subcontractors to provide workers "paycheck transparency," notifying them at the start of performance of their status as independent contractors and, for employees, including certain information on their pay stubs each pay period, such as rate of pay, overtime hours, and any deductions. On contracts worth more than $1 million, contractors also must agree not to impose mandatory arbitration on workers who file Title VII discrimination or sexual harassment claims.

The final regulation departs from or clarifies aspects of the proposed version in several key respects:

- **Phased implementation.** The rule will be implemented in phases, initially becoming effective on October 25, 2016, only for prime contracts (not subcontracts) with a value of at least $50 million. Effective April 25, 2017, the dollar threshold for prime contractors drops to $500,000 and, effective October 25, 2017, the rule also becomes

applicable to subcontractors who meet the $500,000 threshold. In addition, disclosures initially will only need to cover the past year, extending to the previous three years by October 2018. By providing this tiered approach, the rule recognizes the practical challenges of establishing internal reporting systems and responds to numerous comments about the amount of time that will be required to comply with the rule.

- **Subcontractor disclosure to the DOL.** In a significant change from the proposed rule, the final rule requires subcontractors to disclose labor law violations directly to the DOL instead of their prime contractors. While the proposed rule made prime contractors responsible for tracking and reporting subcontractor disclosures, this change mitigates concerns about the sharing of proprietary information and reduces the burden on prime contractors.
- **Flexible duty to update.** The final rule, like the proposed rule, requires that contractors update their disclosures every six months. Instead of requiring that this update be on the semiannual anniversary date of contract award, however, the final rule allows contractors to file their report on any date before that six-month contract anniversary. This modification affords contractors flexibility to determine how to best minimize the burden of those disclosures, such as, for example, grouping reports from multiple contracts on two dates throughout the year.
- **Disclosures apply to contracting entity.** In the final rule, the mandatory disclosures apply to the legal entity that will be responsible for contract performance. In response to comments on this issue, the rule clarifies that it does not extend to subsidiaries, parent corporations, or affiliates.

With the final rule in place, all federal contractors, as well as any company considering becoming a federal contractor, should establish processes to address potential labor complaints and track all information that must be disclosed along with all mitigating efforts undertaken by the company. The DOL has offered to conduct, beginning the week of September 12, 2016, voluntary pre-assessments of companies' labor compliance records. The Dentons Government Contracts and Employment and Labor practice groups are available to advise you on this pre-assessment process and to assist you with your compliance responsibilities under the new regulation.

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