wiley

ALERT

Update: Analysis of Fair Pay and Safe Workplaces Final Rule and Guidance

August 25, 2016

The final Federal Acquisition Regulation (FAR) Rule and final U.S. Department of Labor (DOL) Guidance implementing Executive Order 13673, Fair Pay and Safe Workplaces, have now been published in the Federal Register. Although the FAR Council and DOL made some changes (as described below), both the Final Rule and Guidance remain largely as proposed. The Final Rule's central requirements (disclosing labor-law violations) will take effect October 25, 2016, when covered solicitations must start including a new representation at FAR 52.222-57 and new clause at FAR 52.222-59. The Final Rule's limitations on arbitration agreements take effect the same day, while the "paycheck transparency" provisions take effect January 1, 2017.

This alert provides our analysis of the Final Rule and Guidance as well as practical measures for these significant new compliance obligations. In addition, Wiley Rein will offer a special webinar next week on those practical measures, and more. Details to follow.

As background on the requirements for reporting and disclosing, the Final Rule requires contractors and subcontractors when competing for and performing certain federal contracts to disclose findings of violations of 14 federal labor laws and executive orders, as well as equivalent state laws, rendered in the past three years. (The Final Rule refers to these findings as "labor law decisions.") The requirements apply to prime contracts estimated to exceed $500,000 and subcontracts at any tier estimated to exceed $500,000, excluding subcontracts for commercially available off-the-shelf (COTS) items. The Final Rule also tasks contracting officers and new Agency Labor Compliance Advisors (ALCAs) with a coordinated analysis of any disclosed labor law decisions when the contracting officer makes a pre-award responsibility determination for covered prime contracts,

Authors

Scott M. McCaleb
Partner
202.719.3193
smccaleb@wiley.law

Eric W. Leonard
Partner
202.719.7185
eleonard@wiley.law

Craig Smith
Partner
202.719.7297
csmith@wiley.law

Practice Areas

Employment & Labor

Employment and Labor Standards Issues in Government Contracting

Government Contracts

as well as during contract performance; parallel analysis is required for subcontractors. The Final Guidance defines key terms used in the Final Rule, including the types of labor law decisions ("administrative merits determinations," "arbitral awards or decisions," and "civil judgments") that can trigger a reporting obligation.

For the requirements concerning labor law decisions, the Final Rule includes the following changes and clarifications from the proposed version published in May 2015 (and analyzed here):

- **Phase-in for Prime Contracts.** The Final Rule limits application during the first six months (October 25, 2016, to April 24, 2017) to solicitations issued on or after October 25, 2016 for prime contracts expected to exceed $50 million, and resulting contracts. Starting April 25, 2017, the requirements will apply to solicitations issued on or after October 25, 2016 for prime contracts expected to exceed $500,000, and resulting contracts.
- **Phase-in for Subcontracts.** The Final Rule delays application to subcontracts of any value until October 25, 2017. Until that date, prime contractors will not be required to flow down the FAR clause or otherwise impose the relevant requirements. Contractors should bear in mind that firms pursuing any covered *prime* contracts solicited starting October 25, 2016, will be subject to shouldering the burdens of data collection and related obligations immediately, regardless of the phase-in for any subcontract opportunities.
- **Phase-in for Reporting Period.** The three-year look-back period that was originally proposed will be phased in. When the Final Rule becomes effective on October 25, 2016, contractors will have to report labor law decisions rendered since October 25, 2015. Beginning on October 25, 2018, contractors will be responsible for reporting labor law decisions rendered during the prior three years; the reporting period will no longer be anchored to October 25, 2015.
- **Change in Subcontractor Review and Analysis.** The Final Rule tasks DOL, instead of prime contractors, with assessing subcontractor disclosures of labor law decisions, once subcontract coverage is phased in. The Final Rule provides for a complex routing of information from the subcontractor to DOL then back to the subcontractor and up to the prime contractor for a responsibility determination. If the subcontractor disagrees with DOL's analysis, the subcontractor must provide the underlying information and documents to the prime contractor for another analysis. And if the prime contractor disagrees with DOL's analysis, the prime contractor must provide a written explanation to the contracting officer.
- **Semi-Annual Reporting.** The Final Rule allows contractors to synchronize semi-annual reporting across contracts, instead of filing reports at exactly six-month intervals for each covered prime contract and subcontract.
- **No Reporting of Classified Matters.** The Final Rule's preamble states that the Rule does not compel the disclosure of classified information, though the Final Rule offers no further guidance.
- **Reporting of Confidential Matters Required.** The Final Rule's preamble states that confidential arbitrations are not exempt from reporting requirements.

- **No Affiliate Coverage.** The Final Rule's preamble clarifies that reporting obligations are limited to the legal entity submitting proposals and entering into contracts; disclosures are not required for corporate parents, subsidiaries, or other affiliates.
- **No Retroactive Application.** The Final Rule's preamble states that the requirements will not apply to contract options for contracts that do not incorporate the new FAR 52.222-59 clause. In practice, this should mean no application to contracts existing on October 25, 2016, or to those solicited before October 25, 2016, but awarded after that date.
- **Expanded Past Performance Assessments.** For contracts that incorporate FAR 52.222-59, the Final Rule requires past-performance evaluations to include "an assessment of [the] contractor's labor violation information," including the violations themselves, remedial measures, and management of subcontractors' violations.
- **"Preassessment."** The Final Rule (and Guidance) invites contractors to contact DOL for a "preassessment" of labor law decisions starting the week of September 12, 2016. The limited information from DOL suggests a process by which DOL will review and provide guidance on labor law decisions outside of the procurement process and ALCA/contracting officer review. Contractors should be sure to understand the full program, and all attendant risks, before considering a submission.

The Final Rule and Guidance have retained several onerous provisions from the proposed versions:

- The Final Guidance leaves virtually unchanged the broad definitions of the reportable labor law decisions: administrative merits determinations, civil judgments, and arbitral awards or decisions. In particular, the Final Guidance continues to define administrative merits determinations as including many preliminary agency findings made on incomplete records not yet at a stage in which they are subject to challenge by contractors or review by a neutral fact-finder.
- The Final Guidance leaves equally unchanged the broad and overlapping definitions of "serious," "willful," "pervasive," and "repeated" violations. For example, the Final Guidance maintains a threshold for "serious" violations of over $10,000 in back wages owed. That threshold does not take into account the nature of the findings or the number of employees involved.
- The Final Rule still repeatedly emphasizes, as a tool for mitigating violations reflected in labor law decisions, the consideration of undefined "labor compliance agreements," which seem akin to Administrative Agreements used in suspension and debarment contexts.
- The Final Guidance continues to treat decisions on appeal as "new" findings of violations unless those decisions are in favor of the contractor on every single issue. This practice means that many appeal decisions will extend contractors' reporting obligations for yet another three years past when the underlying conduct occurred.
- The Final Guidance still has not defined the "equivalent state laws" aside from state workplace-safety plans approved by the Occupational Safety and Health Administration, leaving contractor compliance systems in flux indefinitely because the scope of reporting obligations has not yet been

fully defined.

- The Final Rule adds no exceptions or other relief for commercial-item contractors or small businesses. The obligations will continue to apply to all prime contracts over $500,000 and all subcontracts (other than COTS) over $500,000, subject to the phase-ins above.

As noted above, all potentially covered contractors should begin preparing to comply with these obligations beginning with contracts solicited on October 25, 2016. Even for companies that perform only subcontracts, they should likewise be prepared for these obligations on October 25 because prime contractors could well flow down the FAR clause to subcontractors starting before the phase-in period ends.

Contractors can and should act now to prepare for the October 25 effective date, by considering the following steps:

- Developing workflows and identifying functions within the organization that will be responsible for fulfilling the Final Rule's requirements.
- Creating databases and systems for tracking, storing, and reporting relevant data and documents.
- Preparing responses in advance for future disclosures of labor law decisions, including discussion of mitigating factors and remedial measures.
- Communicating with subcontractors to ensure they are aware of the impact the Final Rule and Guidance will have and to minimize any delay to subcontracting processes.
- Modifying teaming agreements and subcontracts to address representations and the various circumstances that could arise concerning subcontractors' labor law decisions.
- Preparing to respond to contracting agencies and/or higher-tier contractors that attempt to incorporate the disclosure requirements retroactively.
- Establishing processes and standards for disclosing required information concerning classified contracts and other contracts subject to restrictions on information sharing and disclosure.
- Training employees across functions (including human resources, legal, information technology, business development, contracts management, and subcontracts/supply-chain management) on the Final Rule's requirements to ensure awareness among personnel who may be impacted.

We will address these compliance activities and more in our upcoming webinar. The webinar will also address the paycheck transparency and arbitration provisions in the Final Rule and Guidance.

Finally, contractors may be able to expect challenges to the Final Rule and Guidance. In fact, they have already faced several limits on implementation. The FY 2016 Omnibus Appropriations Act excluded funding for a new DOL Office of Labor Compliance that was supposed to have a critical role in coordinating application of the Final Rule and Guidance. In addition, both the U.S. House of Representatives and U.S. Senate versions of the FY 2017 National Defense Authorization Act have included provisions to limit Fair Pay application—as have other legislative initiatives introduced this year. It remains to be seen whether and how any of these initiatives reach the President's desk and are signed into law.