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ALERT

President Obama Issues Executive Order On a Host of Labor Law Related Issues, Including Reporting, Wage Information, and Arbitration

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Yesterday, President Obama continued his Administration's trend of promoting policy through Executive Orders aimed at the government contracting community. The President signed the "Fair Pay and Safe Workplaces" Executive Order which requires covered federal contractors to report violations of labor laws for their covered prime and subcontracts, ensure that wage information is provided to their employees, and not use pre-dispute arbitration provisions for some employment disputes. The Executive Order also requires agencies to factor in labor law compliance in the award of new contracts. Contractors covered by the Executive Order can expect to shoulder substantial new reporting obligations and other duties, such as applying new factors for consideration in evaluating new potential subcontractors.

Reporting Requirements. For new federal procurement contracts valued at more than $500,000, the order requires offerors to represent whether there has been any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance to be issued by the U.S. Department of Labor (DOL), rendered against the offeror within the preceding three-year period for violations of a variety of federal laws and Executive Orders, including the Fair Labor Standards Act, the Davis-Bacon Act, the Service Contract Act, the National Labor Relations Act, Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act, as well as equivalent state statutes.

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Practice Areas

Employment & Labor

Employment and Labor Standards Issues in Government Contracting

Government Contracts

Prior to making a contract award, the Contracting Officer (CO) is required, as part of the preaward responsibility determination required by FAR subpart 9.1, to provide offerors that make such a representation an opportunity to disclose any steps taken to correct the violations of or improve compliance with the applicable labor laws, including any agreements entered into with an enforcement agency. During performance of the contract, covered contractors must update their reported information and provide the updated labor law compliance information for covered subcontracts (discussed below). If negative information is reported during performance, the CO is required to consider whether action is necessary, including, for example, agreements requiring appropriate remedial measures, compliance assistance, a determination to not exercise an option, contract termination, or referral to the agency suspending and debarring official.

Pre- and post-award representations will be made in the Federal Awardee Performance and Integrity Information System (FAPIIS). In addition, the General Services Administration, in consultation with other relevant agencies, is charged with developing a single website for federal contractors to use for all contract reporting requirements related to this order, as well as any other contract reporting requirements to the extent practicable.

Labor Compliance Advisors. Each agency is required to designate a senior official as a Labor Compliance Advisor to provide guidance on whether a contractor's actions rise to the level of a lack of integrity or business ethics, a responsibility factor under FAR 9.104-1. The advisor is charged with working with the acquisition workforce, agency officials, and agency contractors to promote greater awareness and understanding of labor law requirements, supporting COs with review of contractor disclosures of labor law violations, assisting agency officials in determining the appropriate response to address violations of the requirements of the labor laws, and making referrals to agency suspending and debarring officials as appropriate, among other things.

Subcontracts. For any subcontract over $500,000 that is not for commercially available off-the-shelf items (COTS), prime contractors are required to represent to the CO that the prime contractor will require each subcontractor to disclose any administrative merits determination, arbitral award or decision, or civil judgment rendered against the subcontractor within the preceding three-year period for violations of the applicable labor laws and update the information every six months. In addition, prior to awarding a subcontract, prime contractors must represent that they will consider the labor law compliance information submitted by a prospective subcontractor in determining whether a subcontractor is a responsible source that has a satisfactory record of integrity and business ethics, except for subcontracts that are awarded or become effective within five days of contract execution, in which case the information may be reviewed within 30 days of subcontract award.

Arbitration Provisions. Except for commercial item and COTS contracts, for contracts over $1 million, agencies are required to include provisions in solicitations and clauses in contracts providing that the decision to arbitrate claims arising under Title VII of the Civil Rights Act of 1964 or sexual assault or harassment claims may be made only with the voluntary consent of employees or independent contractors after such disputes arise. Contractors are required to incorporate this requirement into subcontracts where the estimated value of

the supplies or services exceeds $1 million. Additional exceptions apply to employees subject to collective bargaining agreements and those subject to a valid pre-existing arbitration agreement.

Wage Information. Although many contractor employees already receive information on their wages with their paychecks, the order requires contractors to give employees information concerning hours worked, overtime hours, pay, and any additions to or deductions made from their pay to help employees determine whether their paychecks are accurate. Prime contractors are required to flow down this requirement to covered subcontracts. If the contractor is treating an individual performing work under a covered contract or subcontract as an independent contractor, the contractor must inform the individual of this status.

Federal Acquisition Regulations (FAR) and DOL Regulations. To ensure consistent application, the FAR Council, in consultation with DOL, the Office of Management and Budget, relevant enforcement agencies, and contracting agencies, is instructed to propose amendments to the FAR to identify "considerations for determining whether serious, repeated, willful, or pervasive violations" of the applicable labor laws demonstrate a lack of integrity or business ethics. These considerations would apply to the integrity and business ethics determinations made by both COs and contractors (regarding subcontractors). Under the order, the proposed regulations are to provide that (i) as a general matter, a single violation of law may not necessarily give rise to a determination of lack of responsibility, depending on the nature of the violation and after consultation with the agency; (ii) appropriate consideration will be given to any remedial measures or mitigating factors, including any agreements by contractors or other corrective action taken to address violations; and (iii) COs and Labor Compliance Advisors will send information, as appropriate, to the agency suspending and debarring official, in accordance with agency procedures. The FAR Council is also instructed to develop any other necessary implementing regulations. DOL, in turn, is instructed to develop guidance for agency officials to use in assessing whether violations are "serious" and demonstrate a lack of integrity or business ethics, among other things.

This latest Executive Order follows several Executive Orders imposing obligations on contractors related to labor and employment issues: a June 21, 2014 Executive Order that amends Executive Orders 11478 and 11246 to prohibit discrimination in employment based on sexual orientation and gender identity, an April 8, 2014 Executive Order that prohibits retaliation against contractor employees who share compensation information, and a February 12, 2014 Executive Order establishing a minimum wage for employees of federal government contractors.

For those contractors who may have past labor law violations, caution and a focus on remediation may be in order. Although COs have always been required to consider a contractor's record of integrity and business ethics prior to making a contract award, with the increased focus on labor law violations in particular, contractors who may have labor law violations in their history should be alert to any signs that this increased scrutiny is resulting in a form of "*de facto* debarment"—or preclusion from contracting without the procedural protections in FAR subpart 9.4—and be prepared to provide evidence of any remediation to prevent non-responsibility determinations. But even contractors without labor law violations in their past will be affected. These contractors also must implement these latest requirements in their human resources, purchasing system,

contract management, and compliance departments to ensure that they properly report labor law compliance, obtain similar compliance information from covered subcontractors, provide required wage information, and adhere to restrictions on arbitration provisions.