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August 11, 2014

Executive Order Places New Disclosure Obligations on Contractors, Limits Employment Arbitration Agreements

On July 31, 2014, President Obama issued Executive Order 13673 (the "Executive Order"), significantly expanding the disclosure obligations of companies bidding for federal contracts, and imposing penalties against contractors who engage in labor law violations. The Executive Order also limits a federal contractor's ability to enter into pre-dispute arbitration agreements with employees and requires certain disclosures on a federal contractor's employees' paychecks.

Heavy Disclosure Burdens on Contractors

The Executive Order requires all contractors bidding on federal agency contracts for services or goods (except certain retail goods) in excess of $500,000 to disclose all civil judgments, administrative merits decisions, and arbitral awards or decisions from the prior three years finding violations of any of fourteen different federal labor laws and Executive Orders, as well as their state law analogs, including violations of the National Labor Relations Act, wage and hour laws, anti-discrimination laws, family and medical leave laws and workplace health and safety laws. Contractors that disclose violations will be given an opportunity to present any corrective action they have taken to remedy violations and improve compliance. Additionally, contractors must update the required disclosures every six months during the term of the contract.

The Executive Order also directs each agency to appoint a Labor Compliance Advisor ("LCA"), who – in conjunction with

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contracting officers – will determine whether a federal contractor is a "responsible source that has a satisfactory record of integrity and business ethics" in light of the disclosed violations, pursuant to rules to be developed by the Federal Acquisition Regulatory Council.

The Executive Order places similar requirements on subcontractors. However, under the Executive Order, prime contractors will have the burden of reviewing disclosures, assessing whether the subcontractor is a "responsible source," processing the subcontractor's six-month disclosure updates, and determining whether remedial action is appropriate. Although prime contractors may consult the Department of Labor and agency LCAs in these determinations, the Order indicates that prime contractors will bear primary responsibility for responding to their major subcontractors' noncompliance with state and federal labor laws.

Labor Violations can be Grounds for Denial of a Contract

The Executive Order directs contracting officers and LCAs to determine whether any contractor's labor law violations are "serious, repeated, willful, or pervasive," and whether subsequent remedial measures were appropriate. An "appropriate response" to contractor violations, under the Order, may include agreements to undertake specific remedial actions, denying or exercising an option on a contract, terminating a contract, or referring the contractor to the agency's suspending and debarring official. The Federal Acquisition Regulatory Council has been directed to develop uniform federal guidelines for determining whether labor violations constitute "serious, repeated, willful, or pervasive" offenses.

Web Portal for Required Disclosures

The Executive Order directs the Administrator of General Services to develop a website for submission of the required disclosures. It does not specify whether these disclosures will be publicly available, but requires the LCAs to report on their efforts to promote labor law compliance and responses to federal contractors' serious, repeated, willful, or pervasive violations of state and federal labor laws.

Certain Pre-Dispute Arbitration Agreements Prohibited

Under the Franken Amendment, defense contractors receiving contracts in excess of $1 million are prohibited from entering into pre-dispute arbitration agreements that require workers to arbitrate claims under Title VII, or torts related to sexual assault or harassment. The new Executive Order provides for a similar restriction on pre-dispute arbitration agreements in all federal contracts, regardless of their funding source, and prohibits any employer seeking federal contracts or subcontracts of $1 million or more from enforcing pre-dispute agreements to arbitrate any employee or independent contractor claims arising under Title VII of the civil rights act or tort claims related to sexual assault or harassment.

The prohibition on enforcing pre-dispute arbitration agreements contains exceptions for employees who are subject to a collective bargaining agreement, and employees or independent contractors who entered a valid pre-dispute agreement to arbitrate prior to the contractor or subcontractor bidding on a contract covered by the Executive Order. However, the latter exception would not apply if an employer has the ability to unilaterally amend the contract or if the contract is renegotiated or replaced.

Other Mandatory Disclosures

The Executive Order also imposes requirements, similar to those under some state laws, that employees working on contracts or subcontracts valued in excess of $500,000 be given a statement of wages each pay period, detailing hours worked and overtime hours, pay, and any additions or deductions from pay. The requirement to record employees' hours does not apply to overtime-exempt employees if the employees are informed of their exempt status, or to independent contractors who are informed in writing that the employer considers them independent contractors.

Effective Date

The Federal Acquisition Regulatory Council must now propose regulations subject to public notice and comment to implement the Executive Order, and the Department of Labor will issue guidance on assessing whether labor violations are "serious, repeated, willful, or pervasive." The White House expects that the Executive Order will be implemented on a prioritized basis beginning in 2016.

The new requirements will increase the complications involved in bids on federal contracts, and may require certain employers to revisit employment contracts or arbitration agreements, and to formulate potentially public commentary on how it has remedied past findings of labor violations. If you have any questions about how to proceed, or would like more detailed information about the new Executive Order, please contact Nick Bauer at (212) 758-7793 or any other attorney at the Firm.