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Federal Contracts Report™

Labor

Contractors Face Significant Compliance Burdens as Administration Tracks Effectiveness of Labor Regulations

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The past year brought a marked increase in regulatory activity in the labor and employment realm in the form of executive orders and final and proposed regulations published by the Department of Labor (''DOL''). Many of these regulations become effective this year and impose significant new requirements on federal contractors and subcontractors.

The orders and regulations sweep broadly. They affect both commercial and non-commercial contracts, and low applicability thresholds mean they will cover businesses with relatively small workforces and government contracts. With 2014 behind us, contractors and subcontractors should be working now to understand and implement these new requirements.

The new rules announced in 2014 can be (loosely) categorized into two types of measures: (1) substantive rules establishing policies that will have an impact on contractor personnel, and (2) rules that are effectively monitoring mechanisms — that is, new reporting requirements that reinforce, and in some cases toughen, the underlying substantive rules. The rules can be summarized as follows:

Substantive Rules.

■ *Executive Order 13658: Establishing a Minimum Wage for Contractors:* (effective January 1, 2015). The Order raises the hourly minimum wage to $10.10 for all workers on federal construction and service contracts, including subcontracts. Beginning January 1, 2016, and annually thereafter, the required minimum wage for covered contracts will be increased in tandem with the Consumer Price Index. Contractors and subcontractors must include the minimum wage contract clause in any covered subcontract. Prime contractors must require, as a condition of payment, that the subcontractor include the minimum wage in any lower-tier subcontracts.

■ *Executive Order 13665: Non-Retaliation for Pay Disclosure:* (proposed on September 17, 2014). Contractors may not ''discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.'' . The Order and the proposed implementing regulation assume that de facto or de jure prohibitions on discussing compensation lead to discrimination in pay between similarly situated employees. They include one significant exception: where an employee has access to compensation information of other employees as a part of his or her ''essential job function,'' he or she may not disclose such information to individuals who do not otherwise have access to the information. The proposed regulation invites comments on how to define ''essential job function,'' a term borrowed from the disability context.

■ *Executive Order 13672: Sexual Orientation and Gender Identity Protections:* (effective April 8, 2015). The Order prohibits discrimination ''on the bases of sexual orientation and gender identity in the federal contracting workforce.'' Although it is limited to federal contractors and subcontractors, the Order marked the first federal action to guarantee private-sector protections for LGBT employees. The new language must be inserted into the Equal Opportunity Clause by federal agencies in all covered contracts and by prime contractors into covered subcontracts. The new language will apply to contracts entered into or modified on or after April 8, 2015.

This Order complements a directive from the Office of Federal Contract Compliance Programs (a division of the DOL) which clarified that the DOL will treat claims of discrimination on the basis of gender identity and transgender status as claims of discrimination on the basis of sex. Both this Directive and the Order protect

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 ISSN 0014-9063

federal contractor employees against discrimination on the basis of gender identity. However, this directive became effective immediately, whereas the Order will not be effective until April 8 of this year.

Monitoring Rules.

■ *Final Rule: Section 503 Compliance:* (effective March 24, 2014). The Rule updates regulations implementing Section 503 of the Rehabilitation Act of 1973, which prohibits employment discrimination against disabled employees of federal contractors and subcontractors. Notably, the Rule establishes a nationwide ''7% utilization goal'' for qualified individuals with disabilities. Employers must apply the goal to each of their job groups, or to their entire workforce if the contractor has 100 or fewer employees. This goal is not intended to be a ''quota or a ceiling that limits or restricts the employment of individuals with disabilities,'' so contractors who fail to meet this goal will not have violated the regulation and will not technically be subjected to fines, penalties, or other sanctions. Nevertheless, contractors must file detailed reports and remedial action plans if they fail to meet the goal. Contractors must also conduct an ''annual utilization analysis,'' identify problem areas, and then ''develop and execute action-oriented programs designed to correct the problems,'' all of which may be subject to DOL audit.

■ *Final Rule: Veterans Employment Annual Reporting:* (effective October 27, 2014). The Rule created a new Federal Contractor Veterans' Employment Report (VETS-4212) to be filed by federal contractors and subcontractors in place of the VETS-100 and VETS-100A reports. VETS-4212 is intended to provide the government with more information about contractor employment of veterans, but in a more streamlined format designed to ease the compliance burden on businesses. Contractors and subcontractors will have to comply with the new reporting requirements beginning with annual reports filed in 2015. This rule follows the previous update to the same regulations which, among other things, established a ''benchmark'' for hiring veterans. The ''benchmark'' is less onerous than the ''utilization goal'' established by the Section 503 regulations, but the veterans-related regulations nonetheless mandate some additional data collection and recordkeeping. The updated regulations require contractors to collect data regarding their veteran hiring rates, and to invite applicants to self-identify as veterans, but they do not establish required actions for contractors who fail to meet the benchmark.

■ *Proposed Rule: Summary Reports on Employee Compensation:* (proposed on August 6, 2014). Although most contractors are required to provide employees a summary of their compensation, this Proposed Rule establishes additional requirements for mid-size and larger firms. The Rule, if implemented, will require federal contractors and subcontractors who (a) have more than 100 employees, and (b) hold a federal contract, subcontract or purchase order amounting to at least $50,000 which (c) runs at least 30 days, to submit a new form called an ''Equal Pay Report'' (''EPR'') to the OFCCP. This Rule is necessarily limited to those contractors who were already required to file an annual EEO-1 Report (applicable to contractors with more than 50 employees and contracts amounting to $50,000 or more). The EPR will consist of ''summary data on employee compensation by sex, race, ethnicity, specified job categories, and other relevant data points such as hours worked, and the number of employees.'' Contractors will be required to keep their Equal Pay Reports for at least two years following the date of the making of the report.

■ *Executive Order 13673: Fair Pay and Safe Workplaces:* (effective July 31, 2014). In many ways, this Order ties together the Administration's series of regulatory actions affecting the government contractors' employment practices. Among other things, the Order requires contractors making proposals for government contracts to disclose in their proposals to the government ''any administrative merits determination, arbitral award or decision, or civil judgment'' for violations of a comprehensive list of labor laws and executive orders. In making these disclosures, contractors must report any violations occurring over a three-year look-back period, and update the list of disclosures every six months. The Order also requires contractors and subcontractors to provide workers with certain information with their paychecks, including the number of hours worked, overtime hours, and rate of pay. Finally, the Order prohibits contractors and subcontractors from requiring arbitration of Title VII discrimination claims and sexual assault and harassment allegations.

Analysis. While all of the above rules will affect contractors in different ways and to different degrees, the second category of rules is likely to present the greatest compliance burden to contractors.

Generally, these particular rules do not create new policies that employers must institute in dealing with their employees. Instead, they establish or enhance the government's monitoring mechanisms for compliance with existing contractor regulations. Thus, the policies represent an effort on behalf of the administration to ensure that existing policies are effective in achieving the intended objectives — whether the objective is increased employment of individuals with disabilities, increased veteran employment, or equal pay among workers of different races and sexes.

Considering the context of today's largely divergent political climate, we anticipate that results gleaned from these tracking mechanisms could become valuable ammunition for those engaged in the ongoing debate surrounding the proliferation of government regulations on employers.

Instances where these tracking mechanisms show that the substantive rules are effective in achieving their intended objectives would likely support the administration's continued use of such measures, as well as arguments in favor of broader implementation. Conversely, a showing that the substantive rules are not producing the administration's intended results, while still imposing onerous compliance burdens, will bolster efforts to eliminate these types of measures.

Indeed, last year we already saw some challenges to the new regulations. In the spring of last year, a national construction trade organization unsuccessfully sued the DOL challenging the new Section 503 regulations. Both the district court and the influential Court of Appeals for the D.C. Circuit rejected the organization's argument that OFCCP lacked the authority to mandate such data collection or impose the utilization analysis requirements.

  FCR ISSN 0014-9063

But these new requirements will not just have broad policy implications, but real, immediate compliance obligations with real consequences for contractors who fail to comply. For example, under the Fair Pay and Safe Workplaces Executive Order, contractors can lose out on potential procurements if their disclosures show that the organization has repeatedly failed to comply with regulations in the past.

The Order will likely monitor and strengthen the enforcement of the more substantive rules promulgated last year — providing an added incentive for contractors to comply with measures such as the minimum wage or prohibitions against discrimination. In this way, even regulations that do not appear to impose significant new substantive obligations can have a significant impact.

In fact, these rules and other rules that are essentially ''attached'' to substantive rules, are arguably the most burdensome — requiring contractors to keep track of a significant amount of data, to determine when it is necessary to report that data to the government, and to minimize exposure to the risk that disclosing ''bad'' data could negatively affect the contractor's business.

Projections for 2015. Contractors can expect three over-arching developments in 2015.

First, with respect to the final rules, businesses will incur the first major compliance obligations. All of the regulations place great emphasis on process and procedure. In fact, at least in the near term, procedure is arguably *more* important than result in the veterans employment context, where contractors face penalties for failing to comply with recordkeeping obligations, but not for failing to meet the hiring benchmark.

Second, we can expect continued focus on anti-discrimination efforts. For example, on January 30 of this year, the OFCCP proposed an ''Updated Sex Discrimination Rule,'' which, among other things, expands the definition of sex discrimination to include ''gender-stereotyped assumptions''; imposes requirements for workplace accommodations for pregnant employees; and provides that woman and men must be given equal benefits, and the same terms regarding childcare leave.

Third, with respect to the proposed and forthcoming regulations, the administration will be drafting the detailed final rules. Businesses should take advantage of opportunities to participate in the rulemaking process. (With regard to the proposed Updated Sex Discrimination Rule, individuals and organizations may provide comments on or before March 31, 2015.) Contractors and subcontractors are well positioned to frame the debate by explaining the practical, economic impact of the proposals, as the DOL, FAR Council, and other agencies draft implementing regulations.