

Fair Pay and Safe Workplaces
And other new rules:
Successful Compliance Strategies



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Objectives

- Fair Pay and Safe Workplaces
 - Review requirements
 - How it is supposed to work
 - Define “labor” violation
- Sick Leave for Government Contractors
- Compliance Strategies





Executive Order 13673

- **Effective October 25, 2016**
 - Phase-in implementation of mandatory disclosure of labor law compliance
 - Different disclosure requirement dates for prime contractors and subcontractors depending upon contract revenue
- **FAR 52.222-57**





Disclosure Requirement Effective Dates

- **October 25, 2016**
 - **Prime contractors bidding on contracts equal to or in excess of \$50 million**
 - **Disclosure of labor law violations dating back to October 25, 2015 until October 25, 2018**
 - **After October 25, 2018, disclosure of violations having occurred 3 years prior to date of solicitation**
 - **Arbitration prohibitions effective**





Employee Arbitration Agreements

- **Contractors should review pre-dispute arbitration agreements**
 - **Contractors with contracts in excess of \$1 million are prohibited from arbitrating Title VII disputes or torts relating to sexual harassment or sexual assault**
 - **Extends to subcontracts but excludes COTS items**
- **Final rule and Guidance exempt agreements entered before effective dates**
- **Supreme Court agreed to hear case seeking to bar employers from utilizing these types of agreements**





Disclosure Requirement Effective Dates

- **January 1, 2017**
 - **Paycheck Transparency clause effective**
 - **Requires contractors to provide wage statements with specified information to employees**
 - **Requires contractors to provide exempt employees and independent contractors notice of their employment status with the company**





Disclosure Requirement Effective Dates

- **April 25, 2017**
 - Effective mandatory disclosure requirement for prime contractors bidding on contracts equal to or in excess of \$500,000 for new solicitations
- **October 25, 2017**
 - Subcontractors under consideration for contracts with total value greater than \$500,000 required to undergo mandatory assessment by Department of Labor (DOL)
 - Subcontracts for commercially available off-the-shelf items not subject to final rule





Labor Violations Defined

- **Contractors should disclose:**
 - Civil judgements
 - Administrative merits determinations
 - Arbitration awards occurring as the result of a violation of 14 labor laws and state law equivalents
- **3 Stages of Disclosure**
 - Response to solicitation
 - Apparent awardee
 - During performance
- **FAR and DOL expected to release additional regulations regarding state law equivalents at a future date**





Federal Labor Laws

1. Fair Labor Standards Act
 2. Occupational Safety and Health Act
 3. Migrant and Seasonal Agricultural Worker Protection Act
 4. National Labor Relations Act
 5. Davis-Bacon Act
 6. Service Contract Act
 7. Executive Order 11246 of Sept. 24, 1965 (EEO)
 8. Family and Medical Leave Act
 9. Title VII of the Civil Rights Act
 10. Section 503 of the Rehabilitation Act of 1973 (prohibits disability discrimination)
 11. Vietnam Era Veteran's Readjustment Assistance Act
 12. Americans with Disabilities Act
 13. Age Discrimination in Employment Act
 14. Executive Order 13658 of Feb. 12, 2014 (contractor minimum wage)
- State law equivalents





Pre-Evaluation Process

- On September 12, 2016 DOL began accepting information from contractors to assess their DOL labor law compliance history **PRIOR** to engaging in the bidding process
 - Contractors submit form online to DOL for evaluation
 - Any information submitted to DOL may be subject to Freedom of Information Act (FOIA) requests and made public





Subcontractors

- **Prime Contractor must:**
 - **Require subcontractors to provide certification they are responsible**
 - **Prior to awarding subcontract**
 - **In limited circumstances, within 30 days after award is made**
 - **Does not apply to commercial off-the-shelf items**
 - **DOL to review compliance of subcontractors and subcontractor makes representation to the prime**





What is a reportable violation?

- **Civil Judgement/ Arbitral Award**
 - Award by a court or an arbitrator or arbitral panel in which it is determined that contractor violated labor laws. Includes a judgment or order that is not final or is still subject to appeal
- **Administrative Merits Determination: any determination made by an agency including:**
 - WH-56 from DOL
 - Letter indicating violations of Section 6 or 7 of FLSA
 - Letter/Notice assessing civil monetary penalties
 - Order from ALJ
 - OSHA citation
 - Imminent danger notice
 - Notice of abatement
 - Show cause notice from OFCCP
 - Letter of determination of reasonable cause or civil action filed by EEOC
 - NLRB complaint
- **Must report even if challenging determination**





What is a serious violation?

- **Affects more than 25% of workforce at a worksite**
- **\$5,000 in fines/penalties, \$10,000 in back wages, or injunctive relief**
- **Classified as serious under OSHA regulations**
- **Death or serious injury or violation of child labor laws**
- **Agency findings of pattern or practice of discrimination or systemic discrimination**
- **Interference with investigation or breach of material terms of agreement with enforcement agency**
- **Adverse employment action or harassment for the exercise of a right protected by labor laws**





What is a willful violation?

- Knowledge, reckless disregard, or plain indifference to whether conduct is prohibited
- Findings of willful misconduct if:
 - Agency classifies as willful
 - Two years of back wages
 - Liquidated or punitive damages
 - Contractor knew that the conduct was prohibited and showed reckless disregard or acted with indifference





What is a repeated violation?

- One or more violations of same or substantially similar requirement in past 3 years, except for:
 - A reversed or vacated violation cannot be used to render a subsequent violation as repeated
 - If a single investigation reveals violations of more than one labor law, such violations are not deemed repeated
 - An administrative merits determination must be adjudicated or uncontested to be used as predicate
- BUT, second violation need not be
- Company-wide basis
- Substantially similar determined by reviewing nature of violation and underlying obligation





Motivating Compliance

- **CO will ask apparent awardee with one or more labor violations to submit information that demonstrates mitigating circumstances or step taken to mitigate future risk of a violation**
- **Quick process**
- **Goal is compliance- Contractors not in compliance may be suspended and/or debarred as a last resort**





Pre-award Evaluation Engagement Process

- Supposed to occur within 3 days of award
- If contractor discloses labor law violation in bid and selected as apparent awardee
 - CO to request that the contractor provide information for consideration before making a responsibility determination
 - Referred to Agency Labor Compliance Advisor (ALCA) for evaluation of information provided by the contractor and provide recommendation to CO





Pre-award Evaluation Engagement Process (cont.)

- ALCA must consider whether violations are “serious, repeated, willful, or pervasive,” numerous, and whether contractor has taken remedial measures
- ALCA may find
 - Contractor is responsible and has a satisfactory record of labor compliance despite violation **OR**
 - Contractor needs to commit to improving record by entering into labor compliance agreement before or after CO makes the award **OR**
 - ALCA may recommend suspending and debarring official be notified that the contractor is not responsible
- CO has final discretion regarding responsibility determination





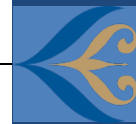
Disclosures During Performance

- Representations in SAM
- CO may:
 - Take no action
 - Refer to appropriate agency for compliance agreement
 - Not exercise option or terminate contract
 - Notify agency suspending and debarring official





PAID SICK LEAVE FINAL RULE





Paid Sick Leave

- **Final rule effective November 29, 2016**
- **Implements Executive Order 13706**
- **Requires certain parties that contract with the Federal Government to provide paid sick leave for their employees**
- **Sets forth requirements and restrictions governing accrual and use of paid sick leave**
- **Prohibits interference with or discrimination for exercise of rights under Executive Order**





Effective Dates

- **Effective for all new federal contracts on or after January 1, 2017 including**
 - Covered contracts that are added to the GSA Schedule in response to GSA schedule solicitations on or after January 1, 2017
 - Covered task orders issued pursuant to those contracts also deemed to be new contracts
- **All contractors taking advantage of temporary CBA exclusion must comply by January 1, 2020**
 - Exclusion applies to employees and not contract
- **Excludes individuals working on grants, contracts and agreements with Indian Tribes, contracts for construction that are not subject to the DBA and certain service contracts**





Employee

- Any person performing work on or in connection with a contract;
- covered by the SCA, DBA, FLSA, including salaried employees;
- Regardless of the contractual relationship (independent contractors too!)





Requirements

- 1 hour for every 30 hours worked
 - Excluding paid time off
 - Physical impossibility exception added to the minimum increment of 1 hour
- Cannot be capped at less than 56 hours (7 days) per year
- Can be carried from year to year
- Requires accrual to occur at the conclusion of each pay period or each month, whichever interval is shorter





Requirements (cont.)

- Contractors may
 - Estimate the portion of an employee's hours worked in connection with covered contracts
 - Contractor may have to provide verifiable information if requested and maintain records
 - Prorate amount of paid sick leave provided to employees depending upon accrual year start date option
 - Ask employees to make a reasonable effort to schedule foreseeable absences for paid sick leave
 - Require employees to provide documentation for absences of 3 or more consecutive full workdays





Requirements (cont.)

- Contractors may **NOT**
 - Require employees to provide extensive or detailed information about
 - the need to be absent from work or
 - the employees family or family-like relationship with the an individual for whom the employee is requesting care
 - Make an employee's use of paid sick leave contingent on employee's finding a replacement worker





Requirements

- **Final rule requires contractors to**
 - **Keep written records regarding employee paid sick leave requests, denials, unused sick leave employee financial payments and more (each pay period)**
 - **Maintain confidentiality requirements under Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act (ADA) for medical information contained in records**
- **Contractors may also retroactively deny and recoup any payments if employee provides insufficient certification or documentation pertaining to 3 or more consecutive work day absences**





And so much more...

- Increases to salary exemption from the FLSA
- Increase of minimum wage to \$10.20/ hr.
- Changes to EEO-1
- State law requirements
- Just to name a few...





Compliance Strategies

- Evaluate past labor compliance
- Identify potential risks
- Take any appropriate mitigating action
- Analyze current pay practices and employee agreements
- Be responsive to employee complaints (complaint procedure)
- Prepare for pre-award evaluation process
- Calculate cost impact and assess appropriate changes
- Will you engage in pre-award assessment?



QUESTIONS?

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