Keeping Up with Federal Labor Laws

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As the public has come to understand in the post-election flurry of political maneuvering, the president of the United States has (arguably) broad power to act via executive order so long as it does not violate the Constitution or statutory or common law.

Since 1900, sitting presidents have issued an average of 44 executive orders per year. Some are very high-profile, such as President Obama's recent one addressing immigration; most, however, do not garner nearly the same level of attention. Nevertheless, they still ultimately have the force of law and can have sweeping impacts. That is certainly the case with the Fair Pay and Safe Workplaces executive order, which President Obama issued on July 31.

The order applies to all federal contracts for the procurement of goods and services, including construction, where the value of the contract exceeds $500,000. Federal contractors will now have significant new reporting obligations, and prime contractors will also have significant new policing and record-collection obligations, to ensure that their subcontractors are complying with the order's new requirements. The consequences of failure to properly report the information sought could be significant and devastating for contractors.

All federal contracting agencies must now require, as part of any solicitation, that offerers represent whether they have had any adverse determinations, awards, decisions or judgments within the prior three-year period arising from a host of federal labor laws or their state equivalents. This information is then used as part of the agency's determination, prior to award of any contract, whether the contractor is a "responsible" bidder or offerer.

The laws that are part of this new reporting requirement include the Occupational Safety and Health Act, the Davis-Bacon (prevailing wage) Act, the National Labor Relations Act, the equal employment opportunity executive order of 1965, the Civil Rights Act of 1964, the Family and Medical Leave Act, the Americans with Disabilities Act and others. Additionally, any violation of any equivalent state law must also be reported, even though the requirement to report applies only to federal contracts.

In addition, all contractors must require their subcontractors with over $500,000 in value to provide the same information to the contractor, looking back three years prior to the contract award. Also, the contractor must, in consultation with the agency, make a determination whether the subcontractor "is a responsible source that has a satisfactory record of integrity and business ethics." The subcontractor must update the information every six months.

After the contract is awarded, every contractor must provide the contracting agency with an update of all of the contractor's and its subcontractors' information. If the contractor or a subcontractor is found to have violated one of the applicable laws in the prior six months, the agency must consider taking corrective action. That corrective action could be an agreement that the contractor or subcontractor take remedial actions, or that the contractor or subcontractor avail itself of "compliance assistance" depending on the nature of the violation, or it could be a decision by the agency not to exercise an option on a contract, termination of the contract, or in some cases a referral to the agency's suspending and debarring official.

The order also requires that each agency create a new position of "labor compliance advisor" to "consult" with contractors as to whether corrective action should be taken with respect to a subcontractor.

The order requires that the Federal Acquisition Regulations (FAR) be amended to reflect the intent of the order, and requires the Department of Labor to issue guidance to help agencies determine what violations of the various labor laws constitute "serious, willful or pervasive" violations of the labor laws. The order also directs the creation of a database within the Office of Management and Budget to track the adverse determinations contemplated in the order, to be used by contracting officers in evaluating the information given them by contractors and subcontractors, and by contractors in submitting information to contracting agencies.

The order also bars the use of most mandatory pre-dispute arbitration agreements in disputes with employees exceeding $1 million that arise from claims of sexual assault or harassment or claims arising from Title VII of the Civil Rights Act, which governs equal employment opportunities.

The order will take effect in 2016, after rules have been written to implement it. The reporting requirements look back three years, meaning that we are already within the window for compiling and reporting the required information. Any contractor that does business with the federal government should first ensure that it is acting in compliance with the various labor laws that are listed in the executive order.

In the event that a contractor finds itself in a dispute involving one of these laws, or a state equivalent, that contractor should now account for the reporting requirements imposed by this executive order, and the potential for an adverse responsibility determination, when evaluating how to approach the dispute. And finally, contractors should keep careful records and prepare to report the applicable information once final rules are written and the order is implemented in 2016.

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