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Expert Analysis

Important Developments For Federal Contractors

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With a recent string of Executive Orders signed by President Barack Obama and new rules published by the Department of Labor regarding employment practices of federal government contractors and subcontractors, it may seem overwhelming to keep track of all the new requirements. This month's column identifies and summarizes these important developments over the course of the last year and serves as a checklist for maintaining compliance.

Required Disclosures

On July 31, 2014, President Obama signed the Fair Pay and Safe Workplaces Executive Order to "crack[] down on federal contractors who put workers' safety and hard-earned pay at risk." Although the Federal Acquisition Regulation Council will propose regulations to implement it, the order imposes three significant requirements on federal contractors.

First, companies seeking new federal procurement contracts valued at $500,000 or more will be required to report "subject violations" that occurred within three years prior to bidding. A subject violation is any administrative merits determination, arbitral award or decision, or civil judgment rendered against the employer for any violation of 14 specific labor laws, including the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act, the Migrant and Seasonal Agricultural Worker Protection Act, the National Labor Relations Act, the Davis-Bacon Act (DBA), the Service Contract Act (SCA), Executive Order 11246, Section 503 of the Rehabilitation Act, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), the Family and Medical Leave Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans With Disabilities Act and Executive Order 13658, or any equivalent state laws.

After being awarded a contract, federal contractors will have an ongoing obligation to report any subject violations every six months. Based on this information, the contracting agency will determine whether any remedial measures are required, including contract termination or suspension and debarment from consideration for future contracts.

This disclosure requirement also extends to subcontractors whose contracts exceed $500,000 and services are not for "commercially available off-the-shelf items." Thus, prime contractors must impose on such subcontractors the duty to disclose any subject violations from the preceding three years, as well as a representation that the subcontractor will make the same ongoing disclosures every six months. In awarding a subcontract, the prime contractor is to take under consideration the subcontractor's self-reported violations.

Second, federal contracts worth more than $500,000 must include a provision requiring contractors to provide employees for whom they are required to maintain wage records under the FLSA, DBA, SCA or equivalent state laws with a document each pay period showing hours worked, overtime, pay and any additions or deductions from pay. Independent contractors performing work under a covered contract must be advised in writing of their independent contractor status. Prime contractors must ensure that subcontracts covered under the order also comply.

Third, for contracts and subcontracts that exceed $1 million, the order restricts the use of pre-dispute arbitration agreements for claims arising under Title VII or any tort related to or arising out of sexual assault or harassment. Contractors with covered contracts may arbi-

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trate such claims only if the employee voluntarily consents to arbitration after the dispute arises. Again, prime contractors are obligated to incorporate this requirement into subcontracts where the estimated value is $1 million or more.

The order is effective immediately, but it will not apply to new solicitations until the Federal Acquisition Regulation Council issues a final rule to implement the order. This is not expected to occur until 2016. In the meantime, federal contractors should begin to diligently record subject violations and evaluate their existing arbitration programs to determine how they will be impacted.

LGBT Protection

As federal contractors know, Executive Order 11246 prohibits federal contractors and subcontractors from discriminating against employees on the basis of race, color, religion, sex or national origin. Executive Order 13672, which became effective July 21, 2014, amended Executive Order 11246 by expressly adding sexual orientation and gender identity to the list of protected classes. Executive Order 13672, however, applies only to contracts entered into on or after July 21, 2014.

In addition, on Aug. 19, 2014, the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) issued Directive 2014-2, which interprets the longstanding prohibition against sex discrimination in Executive Order 11246 to include discrimination on the basis of gender identity and transgender status. This means federal contractors and subcontractors with contracts that pre-date July 21, 2014, can still be held liable for discrimination on the basis of gender identity and transgender status. The OFCCP stated the new directive is consistent with the Equal Employment Opportunity Commission's decision in *Macy v. Holder*, 2012 WL 1435995 (EEOC 2012), which found discrimination on the basis of an employee's gender identity and transgender status constitutes sex discrimination under Title VII.

Minimum Wage

On Oct. 1, 2014, the Labor De-partment announced its final rule raising the minimum wage for employees working on covered federal government contracts from $7.25 an hour to $10.10 an hour. The final rule implements Executive Order 13658 which was issued by President Obama in February 2014.

> On July 31, 2014, President Obama signed the Fair Pay and Safe Workplaces Executive Order to "crack[] down on federal contractors who put workers' safety and hard-earned pay at risk."

The final rule applies to "new contracts" with the federal government, provided the contract is a procurement contract for construction covered by the DBA, a contract for services covered by the SCA, a contract for concessions, or a contract in connection with federal property or lands and related to offering services for federal employees or the general public. In each case, the wages for workers under such contract are governed by the FLSA, SCA or DBA. A "new contract" is defined as a new or replacement contract awarded on or after Jan. 1, 2015.

The minimum wage requirement applies only to services specifically called for by the covered contract or other duties necessary to the performance of the contract. Employees who spend less than 20 percent of their workweek performing ancillary work in connection with a covered contract are excluded; however, if the worker directly performs any specific work called for by the contract, the exclusion will not apply.

Federal contractors must include in all covered subcontracts the specific minimum wage clause provided in the appendix to the final rule. Contractors must also provide notice of the applicable minimum wage to all workers performing work on or in connection with a covered contact; for workers whose wages are governed by the FLSA, the contractor must post the notice included as an appendix to the final rule.

VEVRAA Reporting

On Sept. 25, 2014, the Labor Department's Veterans' Employment and Training Service (VETS) issued a final rule to revise the regulations implementing the VEVRAA reporting requirements. Under VEVRAA, federal contractors and subcontractors covered by the law's affirmative action provisions must annually report the number of employees and new hires in their work force who are qualified veterans. Covered contractors and subcontractors will have to comply with the new reporting requirements beginning with the annual report filed in 2015.

The final rule renames the VETS-100A Report to VETS-4214 Report and provides that contractors can now report the total number of "protected veterans" in their work force in the aggregate, rather than by each category of veterans protected by the statute. "Protected veteran" is defined as a disabled veteran, a recently separated veteran, an active duty wartime or campaign badge veteran, or an Armed Forces service medal veteran. The prior rules required covered contractors to record the different subclasses of protected veterans.

Only government contracts and subcontracts of $100,000 or more entered into or modified on or after Dec. 1, 2003, give rise to the VETS-4212 Report Obligation.

Compliance Assistance

The OFCCP's final regulations implementing provisions of VEVRAA and Section 503 of the Rehabilitation Act, which expanded affirmative action

obligations covering veterans and individuals with disabilities, became effective on March 24, 2014. On March 21, 2014, the OFCCP announced the launch of two new databases to help federal contractors and subcontractors comply with the new regulations.

First, the OFCCP released the VEVRAA Benchmark Database. Under the new regulations for protected veterans, federal contractors with a covered contract of $100,000 or more are required to adopt a hiring benchmark for protected veterans. A contractor may either adopt the national benchmark based on the percentage of veterans in the civilian labor force or create its own individualized benchmark using five factors outlined in the OFCCP regulations: average percentage of veterans in the civil labor force over the preceding three years in the state where the contractor is located; the number of veterans who were participants in the "employment service delivery system" in the state where the contractor is located; the applicant and hiring ratio for the previous year; the contractor's recent effectiveness assessments of its recruitment efforts; and any other factors that would tend to affect availability of qualified protected veterans.

The VEVRAA Benchmark Database assists contractors by providing access to national and state data. For contractors adopting the national benchmark, the OFCCP will update the percentage annually and put it in the Benchmark Database. Notably, while the national labor force data available at the time the final regulations were issued reflected a hiring benchmark of 8 percent, the OFCCP set the hiring benchmark for veterans at 7.2 percent for 2014. For contractors who choose the individualized approach, the database contains relevant state data that contractors must consider.

Second, the OFCCP released the Disability and Veterans Community Resources Directory, which provides a non-exhaustive directory of groups and organizations that provide assistance with training, recruiting, and hiring veterans and individuals with disabilities.

The OFCCP also posted the Voluntary Self-Identification of Disability Form required by the final regulations implementing Section 503 of the Rehabilitation Act. Federal contractors and subcontractors must use this form for all solicitations of self-identification of disability status being conducted under the new regulations. Federal contractors and subcontractors must begin using this form at the start of their next affirmative action plan cycles after March 24, 2014.

For contracts and subcontracts that exceed $1 million, the Fair Pay and Safe Workplaces Executive Order restricts the use of predispute arbitration agreements for claims arising under Title VII or any tort related to or arising out of sexual assault or harassment.

New Audits

On Oct. 1, 2014, the OFCCP released its new compliance evaluation scheduling letter and accompanying Itemized Listing, which it will begin using for audits initiated on or after Oct. 16, 2014. The scheduling letter now identifies whether the contractor is being selected for a routine compliance review or a corporate management compliance evaluation. The Itemized Listing, which lists the data the contractor is required to submit along with its affirmative action plans, is significantly revised.

The Itemized Listing now attempts to incorporate the new requirements of VEVRAA and Section 503 of the Rehabilitation Act. For example, contractors will be required to submit results of their outreach and recruitment efforts for individuals with disabilities and protected veterans. Some other highlights include: employment activity data must be reported by individual race and ethnicity, rather than by "minority" and "non-minority" categories; contractors must submit individualized compensation data, including job title, job group and EEO-1 category; and, the definition of "compensation" now includes hours worked, incentive pay, merit increases, locality pay and overtime.

More to Come

In addition to the obligations set forth above, the OFCCP has published several proposed rules that would place additional requirements on federal contractors.

The OFCCP's controversial proposed Equal Pay Report Rule asks certain federal contractors and subcontractors (those with at least 100 employees and a covered contract of $50,000 or more) to provide an annual Equal Pay Report on employee compensation, including summary information on total W-2 compensation paid to employees by race, sex, ethnicity and specified job categories. The proposed rule was published in the Aug. 8, 2014, Federal Register and the period to comment on it has been extended until Jan. 5, 2014.

A second proposed rule would bar federal contractors from maintaining pay secrecy policies. Under the terms of the proposal, federal contractors and subcontractors may not fire or otherwise retaliate against employees or applicants for discussing, disclosing or inquiring about their compensation or that of another employee or applicant. The proposed rule was published in the Sept. 17, 2014, issue of the Federal Register with a 90-day period for public comment.