

LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Government Contracts

THE IMPACT OF THE FAIR PAY AND SAFE WORKPLACES EXECUTIVE ORDER ON CONTRACT PROCUREMENT

By Nichole Atallah

This year has ushered in numerous new labor requirements for federal government contractors. The new executive orders and regulations include new hiring standards for veterans and the disabled, disclosing pay data for all employees to the Office of Federal Contract Compliance Programs (OFCCP) and implementing a new minimum wage; all on top of the tangled web of existing labor regulations. It is exactly this complicated web of labor laws, and the associated compliance challenges, which makes The Fair Pay and Safe Workplaces Executive Order (Fair Pay EO), issued by the White House in July, so worrisome.

The Fair Pay EO introduces new pre-award “responsibility” determinations for contractors with federal contracts over \$500,000 under a wide range of statutes including: the Service Contract Act (SCA), the Davis-Bacon Act (DBA), the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act; Title VII of the Civil Rights Act (Title VII); the Americans with Disabilities Act, the National Labor Relations Act, the new federal contractor minimum wage and state wage and hour laws, among others. Under the Fair Play EO, contractors are required to disclose any “administrative merits determination, arbitral award or decision, or civil judgment” rendered against it within the preceding three years with respect to various covered labor laws. The language of the Fair Play EO excludes civil settlements, likely because a civil settlement by its nature is not an admission of liability. These disclosures must be updated every six months. Should a contractor have even one violation, a contracting officer may deny a contractor the award as part of the responsibility determination. The contracting officer may also require contractors to take remedial measures to avoid future violations as a condition

of award or continuing performance. Companies with federal contracts over \$1 million dollars are additionally prohibited from requiring employees to enter into pre-dispute arbitration agreements.

There are also significant concerns regarding the Fair Play EO requirement to flow down the provisions to subcontractors. Given that contracting officers are unlikely to police subcontractor compliance, the Fair Play EO creates interesting questions about the extent to which a contractor is responsible for making responsibility determinations based on subcontractor labor violations and disclosures.

While the Fair Play EO clearly intends civil judgment and arbitral awards to be disclosed, it is unclear what type of action will be considered an “administrative merits determination.” This is important because the Department of Labor (DoL) often resolves wage and hour claims through initial administrative action. Many employers decide to pay assessed back wages, regardless of whether they believe they violated the law, in order to avoid the cost of proceeding to an administrative hearing. It is unclear whether payment of an administrative determination at the investigatory level would necessitate a disclosure. However, if it does, contractors may well decide to litigate the case, as opposed to resolving claims with DoL early, because of the risk that such a determination could lead to the loss of contract opportunities.

The implementation of the Fair Play EO will require an extensive undertaking. DoL and agency labor advisors do not yet know how they will incorporate yet another level of bureaucracy into their already full workloads. In response to added uncertainty in the contracting environment and fair contract administration concerns, there are efforts underway to challenge the Fair Play EO and prevent it from being

Continued on page 2

Published by

PM | **PILIERO
MAZZA** PLLC
ATTORNEYS AT LAW

Continued from page 1

implemented. However, while certain aspects of the Fair Pay EO will likely be challenged, contractors cannot afford to risk non-compliance. The stakes are simply too high.

The President directed the FAR Council to amend the FAR accordingly, with implementation expected in 2016. Assuming the FAR is amended by 2016, contractors need to be concerned about how they are handling labor violation complaints now as they will be required to disclose violations dating back to 2013. Whether the Fair Pay EO applies to your organization now or may in the future, you should take the following measures to prepare for its implementation:

1. Review internal labor compliance controls;
2. Evaluate current compliance with covered labor laws and determine areas of weakness, including employee classifications, overtime policies and auditing, and identifying SCA and/or DBA risks;
3. Identify any current arbitration agreements and evaluate their validity in spite of the Fair Play EO;
4. If you are currently involved in litigation, arbitration or agency investigations related to covered labor laws, you should carefully analyze how resolving the claim will impact contract procurement; and
5. Advocate for changes and/or elimination of the Fair Play EO before the FAR is amended by engaging the DoL, Congress and advocacy groups. □

About the Author: Nichole Atallah, an associate with PilieroMazza, primarily practices in the areas of labor and employment law and general litigation. Ms. Atallah counsels clients in a broad range of employment matters including compliance with Title VII, ADA, ADEA, FLSA, FMLA, SCA, and EEOC. She may be reached at natallah@pilieromazza.com.

The *Legal Advisor* is a periodic newsletter designed to inform clients and other interested persons about recent developments and issues relevant to federal contractors and commercial businesses. Nothing in the *Legal Advisor* constitutes legal advice, which can only be obtained as a result of personal consultation with an attorney. The information published here is believed to be accurate at the time of publication but is subject to change and does not purport to be a complete statement of all relevant issues.