



32nd Annual

**OUNCE OF
PREVENTION
SEMINAR**

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“Oh, and Do This, Too”

Executive Actions Impose Ever- Expanding Labor-Related Burdens on Contractors

Trina Fairley Barlow

Jason Crawford

Kris Meade

Rebecca Springer



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Fair Pay and Safe Workplaces

Status

- May 2015: FAR Council and DOL issued proposed rule and guidance.
- May 4, 2016: Draft final rule and guidance arrived at the Office of Information and Regulatory Affairs (“OIRA”).
- OIRA is supposed to complete its review within 90 calendar days.



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New Requirements

- Contractors bidding on contracts valued over \$500,000 to disclose whether they have received any “administrative merits determinations,” “arbitral awards or decisions,” or “civil judgments” within the preceding three-year period for 14 enumerated labor laws.
- CO required to consider disclosures as part of responsibility determinations.



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Day-One Readiness

- Proposed Rule imposes a 3-year look-back
- Start gathering relevant information about “violations”
- Coordinate with compliance, HR, IT, Legal
- If necessary, prepare description of any mitigating factors and remedial measures



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Key Unknowns

- **Timing:** High likelihood of litigation – impact on implementation
- **State Law:** In a departure from the EO, the only “equivalent state laws” identified in proposed rule are OSHA-approved state plans. More to come?
- **Reporting of Subs:** Proposed rule requires contractors to obtain from subs the same labor compliance history disclosures. Change in Final Rule?



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Paid Sick Leave Covered Contracts

- Service contracts under the Service Contract Act
 - Prime contracts \$2,500+; subcontracts no threshold
- Construction contracts under the Davis-Bacon Act
 - Prime contracts \$2,000+; subcontracts no threshold
- “Concessions contracts” – purpose is to provide food, lodging, etc.
- Contracts for services on federal property - lessees
- Same as Executive Order 13658 (minimum wage for contractors)



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Paid Sick Leave Covered Employees

- All employees working on or “in connection with” a covered contract or subcontract
- Both non-exempt and exempt – includes supervisors and managers
- Exception: No coverage for employees who work less than 20% of the time in connection with a covered contract in a work week



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Paid Sick Leave Requirements

- Accrue one hour for every 30 hours worked or 56 hours per year granted up front
- Accrued leave carries over year to year
- “Reinstatement” of paid sick leave required upon re-hire by same contractor or successor



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FLSA Final Regulations

- Issued May 18, 2016
- “Salary level” increased to \$913 per week or \$47,476 annually
- “Salary level” will be updated every three years
- No changes to the “job duties” test
- Employers have until December 1, 2016 to comply with the new regulations.



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Next Steps for Contractors

- Identify employees who will need to be re-classified
- Analyze financial impact of change
- Consider impact of new FLSA salary thresholds on other legal obligations
 - E.g., Service Contract Act
 - E.g., Executive Order 13658
- Carefully and precisely track hours worked for non-exempt employees



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Joint Employer Liability

- National Labor Relations Board
 - *Browning-Ferris Industries*
 - Announced a new and broader standard for determining “joint employer” liability
 - Discarded 30 years of NLRB precedent
 - Actual control not required
 - “Indirect control” and “reservation of rights” may be sufficient to create joint employer liability



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Joint Employer Liability

- Department of Labor
 - Issued Administrative Interpretation (No. 2016)
 - Confirmed that the FLSA and MSPA cover “joint employment.”
 - Definition of “employ” is broad under these statutes.
 - Provides guidance on the scenarios in which joint employment will be found.
 - Adopted the “economic realities” test for analyzing vertical employment relationships.



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Considerations for Contractors

- Assessment of how, if at all, these broader definitions of “joint employment” impact business models.
- Weighing and understanding the impact of “reservation of rights” clauses.
- Understanding and minimizing risks associated with a “joint employer” finding.



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EEO-1 Report Revisions

- Status
 - Comments submitted to DOL; OMB approval required
 - Implementation for 2017 reporting cycle
- Key Provisions
 - Adds 12 pay bands to each of the 10 EEO-1 Categories
 - Within each pay band, must disclose number of employees and hours worked by race and gender
 - Report data based upon 12-month W-2 earnings
 - Substantial time and expense; little value



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EEO-1 Report Revisions

- Impact on Your Organization
 - HR, IT and Legal
- What to Do Now
 - Budget for necessary IT infrastructure
- Unknowns
 - Rescission by next administration?
 - Legal challenges?



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Pay Equity Initiatives

- Status
 - Focus of Obama administration
 - State Laws – CA, NY
- What to Do Now
 - Privileged compensation analyses
 - Develop supporting documentation



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OFCCP Compliance

Status

- Intensified enforcement efforts
 - Focus on compensation and hiring
- Inter-office coordination/global resolutions
- Black box approach

What To Do Now

- Conduct privileged compensation analyses
- Monitor adverse impact
- Coordinate compliance/audit responses
 - HR, IT, Legal
 - Across establishments

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Contacts



Kris Meade
Partner
202-624-2854
kmeade@crowell.com



Trina Fairley Barlow
Partner
202-624-2830
tbarlow@crowell.com



Rebecca Springer
Counsel
202-624-2569
rspringer@crowell.com



Jason Crawford
Associate
202-624-2562
jcrawford@crowell.com