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32nd Annual

WEST COAST
OUNCE OF
PREVENTION
SEMINAR

May 18, 2016

“Oh, and Do This, Too”

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

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Fair Pay and Safe Workplaces



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Overview

- Proposed FAR provision and DOL guidance implementing the “Fair Pay and Safe Workplaces” Executive Order
 - published on May 28, 2015
- Proposed Rule and Guidance offer insight into the sweeping compliance and reporting obligations to be imposed on federal contractors
- Final FAR Rule and Guidance are expected to be issued in coming months



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Basic Requirement

- Contractors bidding on contracts valued over \$500,000 must disclose whether they have received any “administrative merits determinations,” “arbitral awards or decisions,” or “civil judgments” within the preceding three-year period for violation of enumerated federal labor laws and equivalent state laws



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Enumerated Federal Labor Laws

- Fair Labor Standards Act
- Occupational Safety and Health Act
- National Labor Relations Act
- Americans with Disabilities Act
- Family and Medical Leave Act
- Title VII of the Civil Rights Act
- Age Discrimination in Employment Act
- Davis-Bacon Act
- Service Contract Act
- Section 503 of the Rehabilitation Act
- Vietnam Era Veterans' Readjustment Assistance Act
- Migrant and Seasonal Agricultural Worker Protection Act
- Executive Order 11246 (Equal Employment Opportunity)
- Executive Order 13658 (Contractor Minimum Wage)



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Responsibility Determination

- Contracting Officer must consider the violations as well as “mitigating circumstances” and remedial measures in responsibility analysis of bidder
- Upon award, contractors must update disclosures and Contracting Officers must repeat the responsibility analysis every 6 months
 - Violations and updates entered into SAM
 - Basic information available in FAPIIS



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Agency Labor Compliance Advisors

- “Agency Labor Compliance Advisors” (ALCA) will help the Contracting Officer determine the appropriate response to address violations



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Unanswered Question: What is an Equivalent State Law?

- Other than OSHA-approved state plans, the “equivalent state law requirement” will not be implemented through this rulemaking
- FAR Council acknowledged that “there will be challenges associated with the implementation” of the state law requirement



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Unanswered Question: What About Subcontractors?

- Proposed rule requires contractors to obtain from subs the same labor compliance history disclosures
- However, FAR Council may apply the subcontracting requirements in phases to give contractors “time to acclimate themselves to their new responsibilities”



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What Can Companies Do To Prepare?

- Perform a 3-year look-back to identify reportable violations
- Develop information collection and reporting processes to identify potential violations and timely take remedial measures
- Consider messaging and outreach efforts in proposals and to SDOs



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Paid Sick Leave for Federal Contractors



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Procedural Overview

- Executive Order 13706 - September 2015
- DoL's NPRM - February 2016
 - April 12, 2016 – End of Comment Period
 - Follows brief extension granted by DoL
- September 30, 2016 – Deadline for Secretary of Labor to issue regulations
- January 1, 2017 – Final rule effective for “new contracts”



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Coverage – Types of 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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Coverage - 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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Implementation - Accruals

- Accrue one hour for every 30 hours worked or 56 hours per year granted up front
- Accrued sick leave carries over year-to-year
- Accrual can be limited to 56 hours in accrual year and 56 hours available at one time
 - Paid sick leave bank can exceed 56 hours if front loaded
 - If not front-loaded, have recurring “refill” issue
- “Reinstatement” of paid sick leave upon re-hire by same contractor or successor
 - Even if sick leave paid on employee’s separation
 - Can implicate pricing on bid for successor contract



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Enforcement & Remedies

- Enforcement
 - Contracting agency
 - Dept of Labor, Wage and Hour Division (WHD)
- Pay and/or benefits denied or lost because of the violation
- Other monetary losses as a direct result of the violation
- Appropriate equitable or other relief
 - liquidated damages equal to monetary relief
 - withholding payment on the contract
- Debarment for up to three years



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What Can Companies Do To Prepare?

- Recommend reviewing current Paid Time Off (PTO) policies for compliance
- Train HR personnel, supervisors, and managers on requirements
- Contract terms – add 56 hours paid sick leave to paid vacation required by covered contract to ensure PTO is sufficient



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Equal Pay Report and EEO-1 Reporting Revisions



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OFCCP Equal Pay Report

- Proposed Equal Pay Report
 - Would require annual reporting of W-2 wages and hours for all employees by EEO-1 category
 - Stated purpose to improve enforcement efforts and to provide “objective industry standards” for contractors
 - Substantial burden and minimal value
 - Data meaningless for enforcement purposes
 - “Standards” of little value to contracting community
 - Confidentiality concerns



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EEO-1 Revisions

- Process and Proposed Timeline
 - Not a proposed rule
 - Instead, EEOC is requesting OMB three-year approval of revised EEO-1 report under Paperwork Reduction Act
 - Public hearing and comment period



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EEO-1 Revisions

- Process and Proposed Timeline
 - Published in Federal Register: February 1, 2016
 - Public hearing: March 16, 2016
 - Comment period ended: April 1, 2016
 - Final form expected: September 2016
 - First submission due: September 30, 2017



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EEO-1 Revisions

- Substance of Proposed Changes
 - Adds 12 pay bands to each of the 10 EEO-1 Categories
 - Within each pay band, must disclose:
 - Hours worked
 - Number of employees
 - Race
 - Gender
 - Total of 3600 cells
- Burden Estimate
 - EEOC predicts 6.6 hours per employer per year
 - Plus one-time impact of 8 hours per employer
 - Claims current form requires just 3.4 hours of employer time



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EEO-1 Revisions

- Significance of Proposed Changes
 - Underestimates administrative burdens
 - Aggregate W-2 data not probative of actual discrimination
 - EEO-1 categories group dissimilar jobs
 - Undifferentiated elements of pay swept into W-2 earnings
 - Aggregate hours data – limited or no utility
 - FOIA issues – smaller employers



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What Can Companies Do To Prepare?

- Consider the impact that the additional reporting may have on current business practices
- Identify any “red flags” that could be identified by EEOC or OFCCP
- Address problem areas or compliance issues before reporting begins



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Other Compliance Considerations

- Prohibition on Contracting with Corporations with Felony Conviction or Delinquent Taxes
- Prohibitions Against Pay Secrecy Policies and Actions
- Final Anti-Human Trafficking FAR and DFARS Rules
- Contractor Employee Internal Confidentiality Agreements

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