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STAY CURRENT

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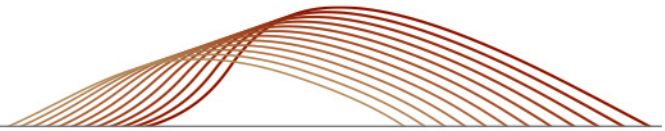
Going Out with a Roar: Final Regulations and Guidance Issued Under Fair Pay and Safe Workplaces Executive Order

By Federal Contractor Compliance Practice Group

With only a few months left in his Administration, one of President Obama's compliance initiatives impacting federal contractors is coming closer to fruition with the issuance of the FAR Council's Final Rule and the Department of Labor's Final Guidance implementing the Fair Pay and Safe Workplaces Executive Order ("FPSW EO"). As we previously reported, here and here, the FPSW EO is the most far reaching of the many Executive Orders and new regulations impacting federal contractors since the President took office. There will certainly be legal challenges to aspects of the FPSW EO, the Final Rule and the Guidance (*see* Section VII below), and those proceedings will likely be protracted. Meanwhile, however, contractors must immediately start to plan for compliance as the Final Rule and Guidance becomes effective on October 25, 2016, subject to a phase in period explained below.

This Alert provides: (a) a summary of the FPSW EO; (b) an overview of key changes from the proposed rule and guidance previously reported on; (c) an outline of critical aspects of the Final Guidance; and (d) a list of the most significant compliance challenges facing contractors and subcontractors.

The Paul Hastings' Federal Contractor Compliance practice group will host a teleconference on October 13, 2016 to provide additional insights and advice about meeting the challenges to compliance with the FPSW Final Rule and Guidance. You can register now for that teleconference and you will receive additional information and reminders in the upcoming weeks.



I. Summary of the FPSW EO

There are three key aspects to the FPSW EO:

- **Disclosure**: Section 2 requires companies seeking contracts of $500,000 or more ("prospective contractors") to disclose any "merits determination, arbitral award or decision, or civil judgment, as defined in the DOL Guidance, rendered against the" prospective contractor within the preceding three years, for violations of 14 specified federal labor laws and yet to be determined state law equivalents.

- **Pay Transparency**: Contractors subject to section 2 must provide certain pay information to "individuals performing work under the contract for whom [the contractors] are required to maintain wage records" under the FLSA, Davis-Bacon Act, Service Contract Act, or equivalent state laws, according to section 5. This includes, for every pay period, the individual's hours worked, overtime hours, pay, and any additions or deductions made from pay. The document furnished to exempt employees may exclude their hours worked if the contractor has informed the employees of their overtime exempt status. Covered contractors must also advise all independent contractors performing work under the contract in writing of their status as an independent contractor. Contractors may fulfill their obligation to disclose pay information by complying with state or local requirements deemed substantially similar by the Secretary of Labor. Many states do not have such requirements, so some contractors will be faced with "pay stub" requirements for the first time.

- **Pre-Dispute Arbitration**: Section 6 limits certain contractors' and subcontractors' ability to use pre-dispute arbitration agreements for claims arising under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment. This is similar to the Franken Amendment that has for a number of years imposed such a limit on contractors receiving funds under the Department of Defense appropriations bills. It applies to contracts exceeding $1 million in the estimated value of supplies or services, except for contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items.

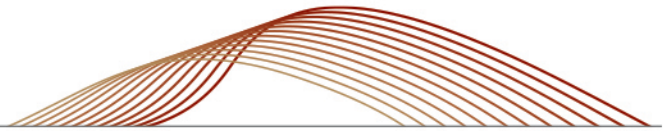
  Significantly, this limitation does not apply to employees who are covered by a collective bargaining agreement, or to employees or independent contractors who consented to a pre-dispute arbitration agreement prior to the employer bidding on a government contract covered by the Executive Order, unless the existing agreement permits the employer to change the terms of the arbitration agreement or the contract is renegotiated or replaced.[1]

  Although the Final Rule addresses this requirement, the Final Guidance does not.[2]

II. Significant Changes to the Proposed Rule and Guidance

The proposed rule and guidance were both the subject of extensive comments. The following were among the material changes made in the Final Rule and Guidance, in response to those comments:

- **Phase-In**: The FAR Council recognized that contractors and subcontractors were not previously obligated to track and report "labor law violations," and that they will need time to build necessary reporting systems. So the Final Rule provides a phase-in to the reporting requirements. When the rule takes effect on October 25, 2016, the reporting period will be limited to one year—i.e., back to October 26, 2015—and it will grow to three years by



October 25, 2018. In addition, no disclosure will be required from prime contractors for the first six months (through April 24, 2017), ***except*** for prospective contractors bidding on solicitations issued after October 25, 2016 where the contract is valued in excess of $50 million. Federal Acquisition Regulation; Fair Pay and Safe Workplaces ("Final Rule"), 81 Fed. Reg. 58,562, 58,566 (Aug. 25, 2016) (to be codified at 48 C.F.R. pts. 1, 4, 9, 17, 22, 42, and 52).

Subcontractors will not be required to disclose labor law violations until one year after the rules become effective and only with respect to work performed on federal contracts awarded pursuant to solicitations issued after October 25, 2016. Final Rule, at 58,566.

- **Subcontractor Reporting**: The proposed rule and guidance specifically invited comments on whether prime contractors should be required to receive and monitor the disclosures of their subcontractors (as the proposed rule and guidance described). In response to strong contractor community objections, these requirements were eliminated. The Final Rule requires subcontractors to make the required disclosures directly to the DOL. Subcontractors will then be responsible for informing the prime contractor of the response by DOL to their disclosures. Still, the prime contractor will have to evaluate the DOL response i.e., "evaluat[e] the integrity and business ethics of subcontractors." Final Rule, at 58,566.

- **Public Disclosure of Labor Law Decision**: Because it is specifically set forth in the FPSW EO itself, the Final Rule and Guidance do not change the requirement that certain basic information regarding a contractor's covered violations—the law violated, the case number, the date of the decision, and the name of the body making the decision—will be publicly available, despite strong contractor community objections. Whether additional documentation submitted by the contractor that demonstrates the mitigating factors, remedial measures, and other steps taken to achieve compliance will be made publicly available is within the contractors' discretion. Final Rule, at 58,567.

- **Role of Agency Labor Compliance Advisors**: The Final Rule adds language enumerating the Agency Labor Compliance Advisor's ("ALCA") responsibility to encourage contractors that may have violations to work with DOL or other relevant enforcement agencies to address the violations as soon as practicable. Additionally, the final rule requires contracting officers to consider compliance with labor laws when past performance is an evaluation factor. Final Rule, at 58,567.

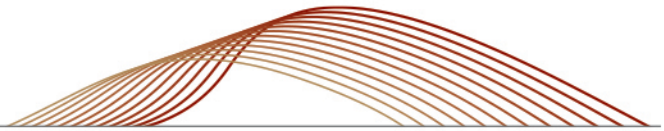
III. Labor Law Disclosures

A. Pre-award Disclosures

The Final Guidance elaborates on the FPSW's requirement that prospective contractors and subcontractors must disclose certain violations of Labor Laws for the preceding three years before a contract (or subcontract) with an executive agency is awarded.

1. Prime Contractors

Contractors' disclosures vary by contract stage. At the initial stage, contractors must disclose, to the best of their knowledge and belief, whether they have had any adverse Labor Law decisions (i.e., "administrative merits determinations," "civil judgments," and "arbitral awards or decisions")[3] in the preceding three-year period. Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" ("Guidance"), 81 Fed. Reg. 58653, 58722 (Aug. 25, 2016). Before October 25, 2018, and



subject to a phase-in process, the three-year look-back period for disclosing Labor Law decisions applies to the "period beginning on October 25, 2015, to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter." *Guidance, at 58,741.* At this initial stage, no further information needs to be submitted.

If the contractor reaches the second stage in the contracting process where a responsibility determination is required, then the contractor must provide more detailed disclosure of its Labor Law violations in the System for Award Management ("SAM"), unless exempted from SAM registration. Specifically, for each administrative merits determination, civil judgment, or arbitral award or decision that must be disclosed, the contractor must provide:

- the Labor Law that was violated;
- the case number, inspection number, charge number, docket number, or other unique identification number;
- the date that the determination, judgment, award, or decision was rendered; and
- the name of the court, arbitrator(s), agency, board, or commission that rendered it. Final Rule, at 58,646.

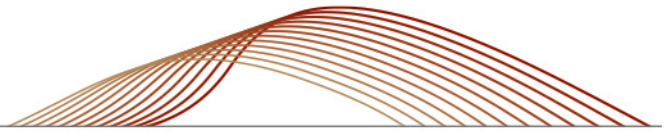
During this second stage, contractors may provide additional information in SAM about mitigating factors and remedial measures to achieve compliance with the Labor Laws, including any agreements entered into with an enforcement agency, as well as the contractors' challenges to the Labor Law violations. The "most important mitigating factor will be the extent to which the contractor has remediated the violation(s) and taken steps that will prevent recurrence in the future." Guidance, at 58,733. This additional information on mitigation and remediation will not be made public unless the contractor determines that it wants the information to be public. If provided, the contractor's corrective action must be taken into consideration in determining whether it is a "responsible source with a satisfactory record of integrity and business ethics." Guidance, at 58,718.

2. Subcontractors

Prospective subcontractors have similar pre-award disclosure requirements as prime contractors. Subcontractors must initially disclose to contractors whether they have any Labor Law violations for the preceding three years. Guidance, at 58,737. In addition, subcontractors must disclose to the Department the same detailed information that prime contractors must disclose during the second stage of the pre-award stage, as described above. The Department can then provide advice to the subcontractor regarding its record of Labor Law compliance. The subcontractor, in turn, must provide the Department's advice to the prime contractor in determining whether the subcontractor is a responsible source. If the Department fails to provide advice to the subcontractor within three business days of its detailed disclosure, and the Department had not previously advised the subcontractor that it needed to enter into a Labor Compliance Agreement, the prime contractor may proceed in making its determination based on available information and business judgment. Guidance, at 58,738.

B. Pre-award Assessment and Advice

After contractors and subcontractors submit their pre-award disclosures, the pre-award assessment process begins, which can impact whether they receive the procurement contract. There are two types of government officials who control this process, the Agency Labor Compliance Advisor ("ALCA") and



the contracting officer. An ALCA's assessment of and advice regarding a contractor's Labor Law violations involves a three-step process:

1. Review of all of the contractor's violations to decide whether any are "serious," "repeated," "willful," or "pervasive;"

2. Evaluation of any serious, repeated, willful, or pervasive violations against the totality of the circumstances; and then

3. Preparation of a written analysis and advice memo to the contracting officer regarding the contractor's record of compliance, including whether a Labor Compliance Agreement or other action is warranted.

Guidance, at 58,672. Informed by the ALCA's analysis and advice, the contracting officer makes the responsibility determination, i.e., whether the contractor is a responsible source to whom a contract may be awarded. The steps of this evaluative process are discussed in greater detail below. *Guidance*. at 58673.

1. Classifying Labor Law Violations

In the first step of the pre-award assessment and advice process, the ALCA reviews all of the contractor's violations to determine if any should be classified as serious, repeated, willful, or pervasive. All Labor Law violations, as defined by the final guidance, must be disclosed, whether or not they involve violations that are serious, repeated, willful, or pervasive. Whether they fit within any or all of these four categories, depends upon definitions included in the Final Guidance and will be determined by the ALCAs during their classification review.[4]

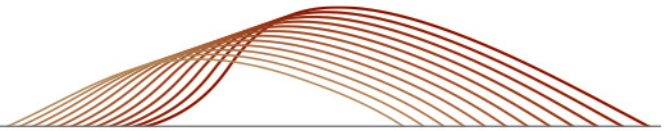
a. Serious Violations

Of the 14 Labor Laws covered by the Order, only the Occupational Safety and Health Act ("OSHA") provides a standard for what constitutes a "serious" violation. As a result, the final guidance explains that serious violations are divided into two categories: (a) citation OSHA violations, and (b) all other violations of the Labor Laws, including non-citation OSHA violations. The separate treatment of OSHA citations is carried over to the other violation categories.

In accordance with OSHA, ALCAs will classify a violation as serious "if there is a substantial probability that [the hazard created by the violation could result in] death or serious physical harm . . . unless the employer did not, and could not with the exercise of reasonable diligence, know" of the existence of the violation. Guidance, at 58,674–75. Likewise, a violation will be classified as serious if the contractor was issued a notice of failure to abate an OSH Act or OSHA-approved State Plan violation, or if the contractor was issued an imminent danger notice or an equivalent State notice under the OSH Act or an OSHA-approved State Plan.

For violations of the Labor Laws other than OSH Act or OSHA-approved State Plan violations that are enforced through citations and equivalent State documents, violations are serious if they meet one of the following criteria:

- The violation affected at least 10 workers, and the affected workers made up 25 percent or more of the contractor's workforce at the worksite or 25 percent or more of the contractor's workforce overall;



- Fines and penalties of at least $5,000 or back wages of at least $10,000 were due;
- The contractor's conduct caused or contributed to the death or serious injury of one or more workers;
- The contractor employed a minor who was too young to be legally employed or in violation of a Hazardous Occupations Order;
- The contractor was issued a notice of failure to abate an OSH Act or OSHA-approved State Plan violation; or the contractor was issued an imminent danger notice or an equivalent State notice under the OSH Act or an OSHA-approved State Plan;
- The contractor retaliated against one or more workers for exercising any right protected by any of the Labor Laws;
- The contractor engaged in a pattern or practice of discrimination or systemic discrimination;
- The contractor interfered with the enforcement agency's investigation; or
- The contractor breached the material terms of any agreement or settlement entered into with an enforcement agency, or violated any court order, any administrative order by an enforcement agency, or any arbitral award.

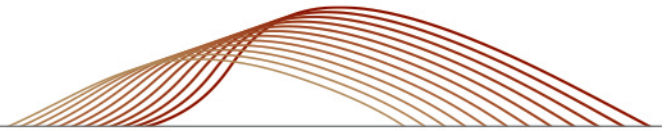
Guidance, at 58,675–82.

b. Repeated Violations

The analysis for classifying violations as "repeated" maintains the OSHA-citation/other Labor Law violations framework. An OSH Act or OSHA-approved State Plan violation that was enforced through a cited OSHA violation will be repeated under the Order if OSHA or the relevant State Plan agency originally designated the citation as repeated, repeat, or any similar State designation and the prior violation became a final order of the OSHRC or equivalent State agency within the preceding three years.

For all other Labor Law violations, there are four material elements to the "repeated" violation analysis:

- Substantially similar: The "repeated" acted must be substantially similar to a prior violation. In response to concerns regarding the vagueness of the phrase "substantially similar," the Final Guidance sets forth a statute-specific, exhaustive list of violations that are substantially similar to each other. Guidance, at 58,727, 58,748–56
- Separate Investigation or Proceeding: The "repeated" act must be based upon a separate set of facts from those underlying the prior violation.
- Uncontested or Adjudicated: The prior Labor Law violation must be uncontested or adjudicated.
  - An uncontested violation is a violation that is reflected in: (a) a Labor Law decision that the contractor has not contested or challenged within the time limit provided in the Labor Law decision or otherwise required by law; or (b) a Labor Law decision following



which the contractor agrees to at least some of the relief sought by the agency in its enforcement action. Guidance, at 58,728.

- An adjudicated violation is one that is reflected in: (a) a civil judgment, (b) an arbitral award or decision, or (c) an administrative merits determination that constitutes a final agency order by an administrative adjudicative authority following a proceeding in which the contractor had an opportunity to present evidence or arguments on its behalf. Guidance, at 58,728.

- 3-Year Look-Back: For a violation to be classified as "repeated," the prior violation must have become uncontested or adjudicated no more than three years prior to the date of the repeated violation—the 3-year look-back period. There are two relevant 3-year look-back periods: (1) the three years back from the date of the contractor's offer; and (2) the three years back from any Labor Law violation falling within the first look-back period described above. The Final Guidance provides the following example:

> If the contractor's offer is dated March 1, 2019, then the contractor must disclose all Labor Law decisions within the 3-year disclosure period prior to the date of the offer, between March 1, 2016, and March 1, 2019. However, if one of the contractor's disclosed decisions is dated June 8, 2018, then the 3-year look-back period for determining whether that violation identified in the decision should be classified as repeated extends back to June 8, 2015.

Guidance, at 58,728.

c. Willful Violations

The *Guidance* defines "willful" violations for five Labor Laws:

- OSH Act/OSHA-approved State Plan: Violations that are enforced through citations or equivalent State documents, the citation or equivalent State document was designated as willful or any equivalent State designation (e.g., "knowing");

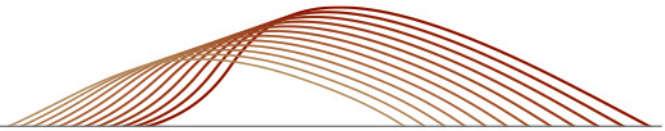
- FLSA: Administrative merits determination sought or assessed back wages for greater than two years or sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding that the contractor's violation was willful;

- ADEA: Enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages; and

- Title VII/ADA: Enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual.

Guidance, at 58,730.

In addition, the Rule contains a residual criterion for all other Labor Laws, stating that a violation would be willful if "the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel" support a conclusion that the contractor . . . "knew that its conduct was prohibited by any of the Labor



Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws." Guidance, at 58,730.

d. Pervasive Violations

The fourth and final category of violation is reserved for those contractors with a "basic disregard" for their obligations under the Labor Laws. In the Guidance, the Agency states that it anticipates this final classification being used "sparingly." Guidance, at 58,690. The analysis of pervasive violations involves a "flexible" standard, according to the DOL, which will turn on one or more of several variables, namely:

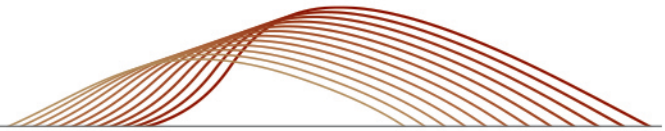
- The number of violations. The Rule states that the "[v]iolations must be multiple to be pervasive."
- The size of the contractor. This factor reflects the reality that larger companies are expected to have a greater number of violations overall than smaller companies. Nonetheless, an employer's size does not automatically excuse any violations, and this is only one factor in assessing whether violations are pervasive.
- The involvement of high-level management. The DOL flagged this factor on the rationale that the participation of high-level management sends a message to the workforce that future violations will be tolerated and may even dissuade workers from reporting violations or raising complaints.

Guidance, at 58,732–33.

The DOL kept the definition of these four categories—serious, repeated, willful, or pervasive—largely intact from the proposed guidance, despite numerous comments challenging their scope, objectivity, and definition. The Final Rule and Guidance stress, however, that the classification of a contractor's violation as serious, repeated, willful, or pervasive does not mean that the contractor loses an award. Rather, it screens out trivial or inadvertent violations, allowing the Agency to focus on the more serious ones, which still must be weighed and balanced against the totality of the circumstances. Guidance, at 58689–58692.

2. ALCA's Assessment: Weighing Labor Law Violations and Mitigating Factors

The next step in the process is the ALCA's evaluation of any serious, repeated, willful, or pervasive violations (other violations are not included in the evaluation), including consideration of mitigating factors that weigh in favor of a satisfactory record of Labor Law compliance. That evaluation leads to her/his advice and recommendation to the contracting officer. Depending upon the totality of the circumstances, this assessment may include a recommendation that the contractor's violations should be addressed through preventative actions such as a Labor Compliance Agreement. Guidance, at 58,692. In the Final Guidance, the DOL rejected concerns that ALCAs would not have the "capacity" to make the legally complex determinations required in assessing violations. The Final Guidance is intentionally specific and detailed precisely to guide ALCAs in classifying and assessing violations, including the specific factors to consider when analyzing the totality of the circumstances, according to the Agency. Along the same lines, the DOL also rejected concerns that ALCAs would have too much discretion in interpreting ambiguous and subjective factors involved in the weighing process. The DOL explained that the FAR has always provided contracting officers with "significant flexibility" in



assessing a contractor's responsibility, and it does not believe that the new process provides any more discretion or subjectivity than is exercised with the existing process. Guidance, at 58,691.

The Final Guidance retained the non-exhaustive list of mitigating factors from the proposed guidance, with no substantive changes.[5] Thus, the most important mitigating factors will typically be:

- The remediation efforts;
- The number of violations;
- The period of compliance;
- The violations relative to size; and
- The implementation of compliance programs.

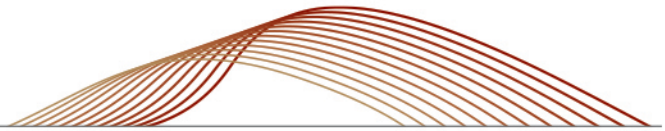
Guidance, at 58,734. The DOL again confirmed that remediation efforts (actions to "correct the violation and prevent its recurrence") generally will be the most important mitigating factor. Remediation may also include among other things "measures taken to make affected employees whole," and ALCAs may not second-guess whether settlements with enforcement agencies provide "make-whole relief" and must give credit to such agreements for adequately correcting violations. ALCAs also may consider "future-oriented measures that go beyond the minimum specifically required under the Labor Laws—whether voluntarily, through a settlement with an enforcement agency, or through a Labor Compliance Agreement negotiated at the suggestion of an ALCA." The DOL rejected the criticism that crediting efforts that exceed legal requirements will confuse contractor obligations; instead, the agency asserted that these type of enhanced preventative measures (such as specific changes in business operations or policies, assessment by outside consultants, internal compliance audits) are "exactly the type of policies and practices that increase efficiency in Federal contracting by limiting the likelihood that violations will occur during the subsequent performance of a Federal contract." Guidance, at 58,693.

The DOL also reinforced that "generally" a single violation would not be dispositive; however, it cautioned that "a single violation may merit advice that a Labor Compliance Agreement is needed because of the violation's severity and because the harm has not been remediated." Guidance, at 58,692. Similarly, the existence of a settlement agreement for prior violations or other evidence of remediation efforts does not override the ALCA's assessment of the violations. Guidance, at 58,693.

The Final Guidance also clarified that contractors may submit information showing that a violation occurred "due to agency error" (such as "the failure to include a required contract clause or wage determination" language in a contract) or under other circumstances that show the contractor's "belief that it had justifiable reasons for committing a Labor Law violation." This information will be considered as possible mitigating factors in the weighing process. Guidance, at 58,694.

3. ALCA's Written Advice

The final step of the ALCA's three-step process is the written analysis and advice to the contracting officer regarding whether a Labor Compliance Agreement or other action is warranted. The ALCA will have a default three business days to provide a responsibility assessment and written advice and recommendation to a contracting officer. The final FAR rule retains the possibility for the contracting officer to provide the ALCA with "another time period" for submitting the advice.



See FAR 22.2004-2(b)(2)(i). If the contracting officer does not receive timely advice, the officer must proceed with the responsibility determination using available information. The ALCA's advice must include a determination that the contractor's record of labor law compliance falls into one of five categories:

- supports a finding of satisfactory record of integrity and business ethics;
- supports a finding of satisfactory record if the contractor commits to negotiating a Labor Compliance Agreement or other remedial action after the award;
- could support a finding of satisfactory record if the contractor commits to negotiating a Labor Compliance Agreement or other remedial action prior to the award;
- could support a finding of satisfactory record if the contractor enters into a Labor Compliance Agreement prior to the award; or
- does not support a finding of satisfactory record of compliance.

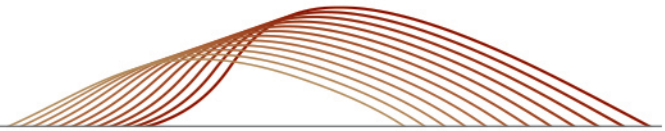
Guidance, at 58,735. The recommendation must be accompanied by a written analysis that sets for the classification of each violation, mitigating factors, or remedial measures, and any information the ALCA found relevant. For any recommendations regarding a Labor Compliance Agreement, the ALCA must include the rationale for the timing of the recommendation and information regarding the agency or agencies that would enter into the agreement with the contractor. If the ALCA advises that the record does not support a finding of compliance, the ALCA should include the basis for the conclusion. Based on the ALCA's assessment and advice, the contracting officer makes the final determination as to whether the contractor is a responsible source. Guidance, at 58,723.

C. Post-award Disclosure and Assessment

During the performance of the covered contract, contractors must provide to OFCCP semi-annual updates regarding new Labor Law Decisions and updates to previously reported or provided information. Covered contractors may select any date within the first six months of a covered contract to make their first semi-annual update, which allows those with multiple contracts to provide their semi-annual updates at the same time rather than on separate dates for each contract.

The Final Rule instructs ALCAs to follow a similar assessment process for post-award assessments as it must for pre-award assessments. Contractors raised concerns during the notice and comment period about the disruptions resulting from, and potential misuse of, assessing a contractor's responsibility in the middle of the performance of a contract rather than at the renewal stage. The Final Guidance downplays these concerns by suggesting that post-award assessments are not dissimilar from the existing FAR requirements where a contracting officer receives concerning information about a contractor during contract performance. Guidance, at 58,702.

But the burden on covered contractors remains high. In the middle of performing a contract, and after their semi-annual disclosure, ALCAs may (through a contracting officer) request from contractors additional documentation regarding the new Labor Law Decisions in the contractor's updated disclosure. Covered contractors will likely be inclined to supplement these submissions with documentation regarding remedial measures, mitigating factors, and explanations. The Final Rule provides that disclosures of mitigating information will only be made public at the contractor's request. Final Rule, at 58,647.



D. Subcontractor Responsibility

The Final Rule imposes obligations on all subcontractors at any tier with subcontracts estimated to exceed $500,000, excluding COTS items. Among the major departures from the Proposed Rule is the requirement that subcontractors disclose details regarding their Labor Law Decisions directly to DOL for its assessment and review, rather than to the prime contractors. Subcontractors will then provide a statement to the prime contractor regarding DOL's response to its disclosures, which the prime contractor must consider when evaluating the integrity and business ethics of subcontractors. However, if a subcontractor disagrees with or has concerns about the DOL's assessment, it must then provide information about its Labor Law Decisions to the prime contractor, along with its rationale for disagreement. Guidance, at 58,737–38.

E. Pre-assessment

The Final Guidance invites prospective and covered contractors to volunteer to have their record of Labor Law Decisions assessed by the Department. According to the guidance, this pre-assessment process will allow contractors to confirm that their record of Labor Law compliance is satisfactory or, if it is not, will provide them with information about how to address any problems before bidding on a contract. During the pre-assessment process, the ALCA will provide the contractor with an analysis similar to that which they provide to contracting officers during the pre-award process. This will include advice regarding whether the disclosed violations are serious, repeated, willful, or pervasive, and whether a Labor Compliance Agreement is warranted. Guidance, at 58,739.

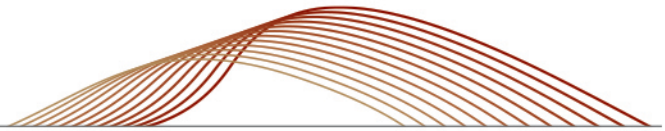
The Final Guidance provides that the pre-assessment process will not "circumvent or replace" the pre-award disclosure and assessment processes. However, when engaging in the pre-award assessment, the contracting officer and ALCA may rely on the Department's pre-assessment that a contractor has a satisfactory record of Labor Law compliance (unless additional Labor Law Decisions have been disclosed). Guidance, at 58,703.

IV. Paycheck Transparency

The Final Rule leaves intact the requirement that covered contractors provide certain pay information to any person performing work under the contract who is subject to the wage records requirements of the FLSA, Davis-Bacon Act, Service Contract Act, or equivalent state laws identified in the Final Guidance.

Each pay period, covered contractors must provide to each non-exempt employee a wage statement listing the hours he or she worked, overtime hours, gross pay, rate of pay, and an itemization of any additions made to or deductions from pay (including but not limited to bonuses, awards, and shift differentials). Deductions include but are not limited to those required by law (e.g., withholdings for taxes) and voluntary deductions (e.g., contributions to retirement accounts or health insurance premiums). If workers are not paid by the hour, covered contractors must indicate on their wage statements the monetary amount paid to them on a per-day, per-week, per-piece, or other basis. Covered contractors do not need to include in the wage statements the specific overtime rate of pay. If the contractor's pay period is broader than the period for which overtime pay is calculated, it must include a breakdown of overtime hours by each overtime period. Guidance, at 58,739–40.

Covered contractors do not need to provide a record of hours worked to their exempt workers, so long as they provide those workers with written notice of their exempt status either before they perform work under a covered contract or in the worker's first wage statement under the contract. If a nonexempt worker becomes exempt, covered contractors must provide notice of their changed status



either prior to providing a wage statement without hours information or on the first wage statement after the change. Guidance, at 58,740.

Before the commencement of work or when the contractor established a contract with independent contractors, covered contractors must provide to all independent contractors performing work under a covered contract written notice of their independent contractor status. The independent contractor notice must be separate from any contract between the covered contractor and independent contractor. Guidance, at 58,740.

If a significant portion of a covered contractor's workforce is not fluent in English, contractors must provide the wage statements, exempt status notices, and independent contractor notices in English and in the language(s) in which the significant portion of the workforce is fluent. Guidance, at 58,740, n.122.

These paycheck transparency requirements may also be fulfilled by covered contractors that must comply with state or local requirements which are "substantially similar" to the requirements in the Final Rule. The Final Rule defines "substantially similar" requirements as those which require wage statements to include the essential elements of overtime hours or earnings, total hours, gross pay, and any additions made to or deductions taken from gross pay. As a result, the Substantially Similar Wage Payment States are: Alaska, California, Connecticut, the District of Columbia, Hawaii, New York, and Oregon. Guidance, at 58,704–05.

Covered contractors who regularly provide documents to their works electronically may provide the required wage statements, exempt status notices, and independent contractor notices electronically. Guidance, at 58,707.

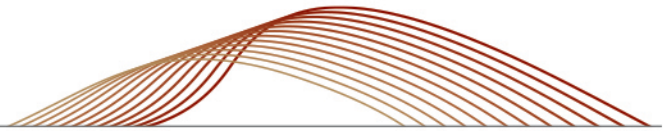
V. Arbitration of Employee Claims

The Final Rule provides that the FPSW EO requires contractors, on contracts exceeding $1,000,000, to agree that the decision to arbitrate claims arising under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, be made only with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions. The EO excepts from this requirement contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items. Final Rule, at 58644.

VI. Effective Date and Phase-In

The Final Rule is effective beginning October 25, 2016, but will be phased in over time to alleviate concerns expressed by the contractor community. For six months following the effective date, the disclosure requirements will only apply to solicitations valued at or above $50 million. Effective on April 25, 2017, the disclosure requirements will apply to all solicitations valued at or above $500,000. Guidance, at 58,741.

The disclosure reporting period will increase over time. Initially, contractors will only need to disclose Labor Law Decisions from the prior year. The reporting period will gradually increase to three years by October 25, 2018. Additionally, subcontractors need not make any disclosures under the Final Rule until October 25, 2017. The paycheck transparency requirements become effective January 1, 2017. Guidance, at 58,741.



VII. Will the Final Rule and Guidance Withstand Legal Challenge?

The FPSW EO has been controversial since its initial promulgation. Indeed, legislative efforts to limit the reach of its disclosure requirements continue, and it is nearly certain that its implementation will be challenged in litigation. Contractors can anticipate that the U.S. Chamber of Commerce, the Human Resources Professionals Association ("HRPA"), and a coalition of other business groups will challenge the FPSW EO on a variety of legal grounds, including but not necessarily limited to, that it, along with the Final Rule and the Final Guidance:

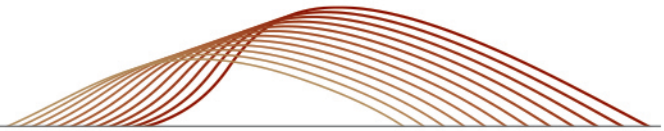
- do not have the nexus to "economy and efficiency" in government procurement that courts have required for Executive action taken under the Procurement Act and, further, that higher procurement costs and a more burdensome procurement system will result;
- impinge on separation-of-powers principles in two-ways: (a) the FPSW EO is preempted by federal labor laws, most notably the National Labor Relations Act ("NLRA"), and (b) the FPSW EO and implementing proposals improperly amend federal laws by creating new categories of violations and imposing new penalties;
- do not provide contractors with constitutionally sufficient due process protections, for example by requiring that contractors report non-final and appealable allegations denies them due process;
- conflict with the Federal Arbitration Act ("FAA" (i.e., that the Rule's pre-dispute prohibition on arbitration agreements is contrary to the FAA policy favoring arbitration); and finally that
- the costs associated with the FPSW EO so greatly outweigh the benefits that there is a great decrease in economy and efficiency, thus the rulemaking is not a rational exercise of Government power, and the proposed rules violate the APA.

The FAR Council and the DOL vehemently disagreed with contractor commenters and rejected all challenges concerning the constitutionality and legality of the Order and the implementing rule and guidance. Final Rule, at 58,631; Guidance, at 58,659-61. It remains to be seen whether a lawsuit will be filed in time or whether one will succeed in preventing the Rule and/or Guidance from becoming effective on October 25, 2016. Only time will tell whether the Order, the Rule and/or the Guidance will survive a court challenge—or, for that matter, a challenge by Congress or the newly-elected President, should the Republicans prevail in November. The next President could repeal the Order, which is just what President George W. Bush did to a regulation issued in the final days of President Clinton's administration that is similar in some respects to the FPSW EO.

VIII. Challenges for Contractors

A. Immediate and Practical Takeaways

- The Final Rule is effective October 25, 2016, but will only apply to solicitations valued at or above $50 million until April 25, 2017.
- Contractors should start preparing now to comply with disclosure obligations and take steps to ensure they are prepared to issue the required wage statements and worker notices in compliance with the Final Rule.



- Contractors should brace for ongoing discussions with contracting officers regarding Labor Law Decisions throughout the performance of their contracts.
- Subcontractors will disclose their Labor Law violations directly to DOL rather than to the prime contractor. Subcontractor disclosure obligations do not begin until October 25, 2017.
- Contractors should take preventative and corrective actions to avoid violations that must be disclosed and consider how to argue that conduct was not serious, repeated, willful, or pervasive.

B. Longer Term Strategic Issues

- For a more complex corporate structure, what impact will the Labor Law violations of closely related affiliates have on the final responsibility determination concerning the reporting contractor?
- Which departments and stakeholders should be involved in a contractor's internal audit process and in mitigating risk?
- What is the best way to audit compliance?
- Should contractors consider engaging in pre-assessment with DOL?
- What are the keys to reducing/mitigating risk?
- Can contractors protect their compliance program, in part or in whole, with the attorney-client privilege or work product doctrine?

These and other strategic issues will be the subject of our October 13, 2016 teleconference which you can register for here.

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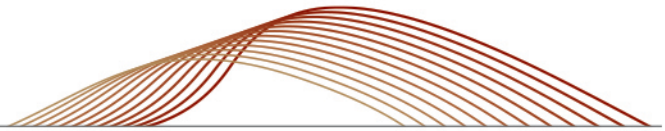

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[1] Like the proposed guidance, the Final Guidance does not provide any insight into this section of the FPSW.

[2] In contrast, with respect to the requirement to disclose Labor Law violations, the FPSW EO only excludes contracts for COTS items from covered subcontracts.

[3] These terms are defined as follows:

> "Administrative Merits Determination" – Any notice or finding, "whether final or subject to appeal or further review[,] issued by an enforcement agency following an investigation that indicates that the [prospective] contractor or subcontractor violated any provision of the Labor Laws."
>
> "Arbitral Award or Decision" – "Any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the [prospective] contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws."
>
> "Civil Judgment" – "Any judgment or order entered by any federal or state court in which the court determined that the [prospective] contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws."

[4] The Final Guidance contains appendices, which include examples of serious, repeated, willful, and pervasive Labor Law violations as well as mitigating factors that weigh in favor of and against a satisfactory record. Guidance, at 58742-58768.

[5] The Final Guidance included some minor changes, such as adding "other compliance programs" to the category of mitigating factors previously limited to "safety-and-health programs and grievance procedures."