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New "Fair Pay and Safe Workplaces" Executive Order Dramatically Increases Risks for Government Contractors

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The White House has issued another Executive Order (EO) aimed at federal contractors, and it is the most sweeping order to date. The EO, titled "Fair Pay and Safe Workplaces," was issued July 31, 2014 and is intended – according to the accompanying White House Fact Sheet – to "crack[] down on federal contractors who put workers' safety and hard-earned pay at risk." The EO imposes multiple new obligations on government contractors and greatly increases the risks that such contractors will confront in performing services for the government. In a number of its provisions, the EO is unprecedented in its scope and may very well exceed the President's authority under the laws enacted by Congress.

New Labor Law Responsibility Requirements

At the outset, the new EO changes the procurement process for contracts worth more than $500,000, and requires federal contractors to disclose during the bid process any labor law violations committed within the past three years. Under the EO, the contracting officer will then determine whether, based on the information disclosed, the would-be contractor is a responsible source with a satisfactory record of integrity and business ethics. Depending on the number and nature of the violations, employers could be restricted from receiving the contract. The EO states that "labor law violations" will for the first time include any violation of the "14 covered federal statutes and equivalent state laws includ[ing] those addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections."

Similar new provisions are included in the EO that will impose unprecedented burdens on contractors to certify that each of their subcontractors whose compensation exceeds $500,000 meets the newly imposed responsibility standards. The contractors' determinations regarding their subcontractors' responsibility will be subject to further evaluation and potential challenge by newly appointed agency officials.

Although agency officials are permitted to prevent the award of contracts to employers that have committed serious law violations relating primarily to contract performance without regard to the EO, the new EO greatly expands the list of laws that will become part of this responsibility determination and includes a new focus on labor and employment issues.

The EO will also require agencies to designate a senior official as a Labor Compliance Advisor "to provide consistent guidance on whether contractors' actions rise to the level of a lack of integrity or business ethics" and take this information into consideration in awarding new contracts. The new Advisors will have sweeping authority within their respective agencies to monitor and enforce labor law responsibility requirements as well as other workplace requirements to which government contractors are subject.

The EO further directs the Federal Acquisition Regulation (FAR) Council and the Secretary of Labor to undertake the massive new task of coordinating and developing consistent guidelines for determining what types of labor law violations will be deemed to adversely impact contractors' responsibility determinations. The agencies will, for the first time, have to evaluate and compare "administrative merits determinations, arbitral awards or decisions, and civil judgments" to determine whether they reflect "serious, repeated, willful, or pervasive violations" of labor and employment laws. The EO claims authority to make such determinations within the executive branch regardless of whether Congress has established statutory standards for such determinations. Many contractors are justifiably concerned that the new, yet-to-be-defined guidelines for determining whether past labor law violations impact the contractor's responsibility will result in favoritism and deny due process to contractors who are denied contract eligibility.

The EO also directs the General Services Administration to create a new website where contractors will be required to post all of the new reports required by the EO. Nothing is stated regarding the public or private nature of such reports.

New Restrictions on Government Contractors Use of Employment Arbitration

In addition, the EO bars employers seeking contracts of $1 million or more from requiring their employees to enter into mandatory arbitration agreements to resolve disputes regarding sexual discrimination, harassment or assault. Until now, only defense contractors had been prevented from requiring such arbitration agreements. The new EO's broader restriction on government contractors' use of the arbitration process appears to conflict with the U.S. Supreme Court's decision in *CompuCredit v. Greenwood*, and other similar rulings upholding the enforceability of arbitration agreements under the Federal Arbitration Act.

New Paycheck Information Requirements

The EO includes a new wage and hour transparency component. This requires contractors to give their employees information concerning their hours worked, overtime hours, pay, and any additions to, or deductions made, from their pay. The EO also includes a "right to know" provision requiring employers to notify any employee in writing whether they are being treated as an independent contractor rather than an employee. This provision is likely to increase litigation challenges questioning such determinations.

Plans for Implementation

The new EO is not self-enforcing. The EO directs the FAR Council to propose and implement rules and regulations to execute the EO's provisions, after notice and comment proceedings. No timelines are set forth in the EO, and the process is expected to be lengthy and complicated.

According to the White House, interested parties will be invited to "listening sessions" with the Office of Management and Budget (OMB), Department of Labor, and senior White House officials to provide input on shaping the policies and practices set forth in the EO. In theory, agencies will take these comments into consideration when drafting the EO's implementing regulations. The White House Fact Sheet states contractors with past violations "will be offered the opportunity to receive early guidance on whether those violations are potentially problematic and remedy any problems."

Other Recent Measures Aimed at Federal Contractors

Efforts to penalize contractors for past violations are increasing. Amendments were recently added to four different appropriations bills in the House of Representatives that would effectively bar from federal contracts any employers that have committed Fair Labor Standards Act (FLSA) violations within the past five years.[1] Such violations could include a finding of fault and liability in any civil, criminal, or administrative

1 *See* Michael J. Lotito, *Amendments to Appropriations Bills Increase Chances of Federal Contractor Debarment*, Littler's Workplace Policy Update (July 15, 2014).

proceeding, including entering into wage and hour conciliation agreements or consent decrees that include a "finding of fault." It is unclear whether these amendments will survive Senate consideration.

Earlier this month, the President also signed an EO preventing federal contractors from discriminating against their employees on the basis of sexual orientation or gender identity.[2] This followed an EO issued in February 2014 setting the minimum wage of certain federal contractors at $10.10 per hour starting January 1, 2015.[3] And in March, the White House issued a memorandum directing the Department of Labor to revise its "white collar" overtime exemption regulations.[4]

One month later, the President signed an EO – *Non-Retaliation for Disclosure of Compensation Information*[5] – making it unlawful for contractors to retaliate against employees who disclose their pay information. The same day the President issued a memorandum – *Advancing Pay Equality Through Compensation Data Collection*[6] – directing the Department of Labor to issue regulations within 120 days that will require federal contractors and subcontractors to submit to the DOL summary data on the compensation paid their employees, including data by sex and race.

Next Steps

Federal contractors have clearly borne the brunt of recent Administration actions. The latest Executive Order could fundamentally change the stakes of doing business with the federal government and appears subject to legal challenge. Contractors would be advised to prepare now for the changes to come, including becoming actively involved in the future agency listening sessions and submitting comments to the proposed implementing regulations when released.

Ilyse Schuman, Co-Chair of Littler's Workplace Policy Institute® (WPI), Linda Jackson, Co-Chair of the Government Contractors Industry Group, and Maury Baskin, Chair of the Construction Practice Group, are all Shareholders in Littler's Washington, DC office.

Littler's Government Contractors Industry Group is staffed by attorneys with many years of experience advising and assisting government contractors in their workplace compliance policies. In addition, Littler's WPI™ is actively involved in responding to each of the new Executive Orders discussed above. Any government contractors who are interested in receiving more information or assistance in responding to the significant changes in the government's rules should contact their Littler attorney at 1.888.Littler or info@littler.com, Ms. Schuman at ischuman@littler.com, Ms. Jackson at ljackson@littler.com, or Mr. Baskin at mbaskin@littler.com.

2 Exec. Order No. 13672, 79 Fed. Reg. 42,971 -42,972 (July 21, 2014).

3 Exec. Order No. 13658, 79 Fed. Reg. 9,849 -9,854 (Feb. 12, 2014).

4 Presidential Memorandum, 79 Fed. Reg. 15,209 -15,212 (Mar. 18, 2014); *see also* Tammy D. McCutchen and S. Libby Henninger, *President Obama Directs the Department of Labor to Revise Federal Overtime Regulations*, Littler ASAP (Mar. 18, 2014).

5 Exec. Order No. 13665, 79 Fed. Reg. 20,749 -20,750 (Apr. 8, 2014).

6 Presidential Memorandum, 79 Fed. Reg. 20,751 -20,752 (Apr. 11, 2014).