



President Obama Signs Two Executive Orders Impacting Federal Contractors

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FAIR PAY AND SAFE WORKPLACES FOR FEDERAL CONTRACTORS

Aiming to “crack down on federal contractors who put workers’ safety and hard-earned pay at risk,” on July 31, 2014, President Barack Obama signed the Fair Pay and Safe Workplaces Executive Order (“Executive Order”), which obligates most federal contractors and subcontractors to disclose labor law violations, to provide employees with detailed information about their paychecks, and limits the circumstances under which certain claims may be arbitrated.

Obligation to Disclose Labor Law Violations

One stated goal of the Executive Order is to ensure contractors’ compliance with labor and employment laws. In this regard, the Executive Order requires those seeking to enter into goods or services contracts with the federal government estimated to exceed \$500,000 in value, to disclose violations of specified federal laws, and any equivalent state laws, within the preceding three (3) years. This disclosure obligation also will apply to subcontracts with an estimated value in excess of \$500,000 (excluding those for commercially available off-the-shelf products).

The federal laws identified in the Executive Order are the Fair Labor Standards Act (“FLSA”), the Occupational Safety and Health Act, the Migrant and Seasonal Agricultural Worker Protection Act, the National Labor Relations Act, the Davis-Bacon Act, the Service Contract Act, Executive Order 11246 (Equal Employment Opportunity), Section 503 of the Rehabilitation Act, the Vietnam Era Veterans’ Readjustment Assistance Act, the Family and Medical Leave Act, Title VII of the Civil Rights Act (“Title VII”), the Americans with Disabilities Act, The Age Discrimination in Employment Act, and Executive Order 13658 (establishing a minimum wage for contractors). Specifically, the Executive Order requires the disclosure of any merits determinations made by a government agency, arbitral awards or decisions, or civil judgments rendered against the employer under these laws. While violations will be considered in determining whether a prospective contractor “is a responsible source” with “a satisfactory record of integrity and business ethics,” contractors will be offered the opportunity to receive guidance on whether any reported violation may be fatal to its bid.

After a federal contract is awarded, the contractor shall remain obligated to report its own labor law violations and, if applicable, those of its covered subcontractors to the federal contracting agency every six (6) months. Based upon this information, the federal agency may take action to address the violations, including for example, requiring remedial measures, refusing to extend the contract, terminating the contract or seeking suspension or debarment from serving as a federal contractor or subcontractor.



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Obligation to Provide Detailed Wage Notices

In an effort to ensure that federal contractors are properly paying wages, the Executive Order further mandates that covered contractors and subcontractors (i.e., those described above) also must provide each of their employees, each pay period, with a written document identifying the employee's hours worked, overtime hours, pay and any additions to or deductions from their wages. This provision of the Executive Order does not apply to any employee who is exempt from overtime under the FLSA, provided that the employer informs the employee of his or her exempt status. An employer is deemed to have satisfied this requirement if it is in compliance with State or local wage notice requirements that are determined by the Secretary of Labor to be substantially similar to the foregoing requirements of the Executive Order.

Significant Limitations on Pre-Dispute Arbitration Agreements

The Executive Order also seeks to limit the circumstances under which certain claims may be arbitrated. Specifically, employers with federal contracts or subcontracts for supplies or services valued in excess of \$1 million (but excluding contracts or subcontracts solely for the purchase of commercial items or commercially available off-the-shelf items) are now prohibited from entering into agreements with employees or independent contractors to arbitrate claims arising under Title VII, or any tort relating to sexual assault or harassment, unless the agreement is made with the employee's or independent contractor's voluntary consent after the dispute arises. The Executive Order additionally requires that employers incorporate this requirement into any subcontracts similarly exceeding \$1 million.

The Executive Order expressly carves out exceptions to this requirement where:

- The employee is covered by any type of collective bargaining agreement negotiated between the contractor and the labor organization representing the employee; or
- The employee or independent contractor entered into a valid arbitration agreement before the contractor or subcontractor bid on a contract that is covered by the Executive Order. (However, if the contractor or subcontractor is permitted to change the terms of the contract, or if the contract is renegotiated or replaced, then voluntary post-dispute consent is required).

Although the Order is effective immediately, it shall only apply to solicitations for contracts as set forth in final rule to be issued by the Federal Acquisition Regulatory Council. According to the White House, this is anticipated that the Order will be "be implemented on new contracts in stages, on a prioritized basis, during 2016."

PROTECTIONS EXTENDED TO LGBT EMPLOYEES OF FEDERAL CONTRACTORS

Executive Order 11246, which prohibits discriminatory hiring and employment practices by employers with federal contracts, previously prohibited discrimination on the basis of race, color, religion, sex or national origin. In addition, the Executive Order required federal contractors and subcontractors to take affirmative action to hire applicants and treat workers without regard to



their race, color, religion, sex or national origin. On July 21, 2014, however, President Obama signed an Executive Order to amend Executive Order 11246 extending these protections to lesbian, gay, bisexual and transgendered workers by expressly adding sexual orientation and gender identity as protected categories.

The Executive Order became effective immediately and directs the Secretary of Labor to prepare regulations which would implement the above requirements within 30 days of the Executive Order.

Ask MSK

Q: Does the Fair Pay and Safe Workplaces Executive Order apply to my company?

A: It depends. The labor law violation disclosure requirement and the paycheck requirement apply to employers with federal contracts or subcontracts that exceed \$500,000. The requirement limiting arbitration agreements applies to employers with federal contracts or subcontracts that exceed \$1 million.

Q: What should federal contractors do in response to the requirement to disclose labor law violations?

A: If the Fair Pay and Safe Workplaces Executive Order applies to your company, then, prior to being awarded a contract, the company must disclose violations of the specified federal and state-equivalent labor laws, but only for the preceding three (3) years. If the company is awarded a federal contract, the company must update the federal contracting agency with any post-award labor law violations and obtain the same information by covered subcontracts on a continuing basis every six months.

Q: What steps must a federal contractor take in response to the amendment to Executive Order 11246 (RE: LGBT Employees)?

A: The Executive Order will require that federal contractors and subcontractors review and revise their discrimination policies and practices to ensure compliance with the Executive Order. Employers must train supervisors to avoid discriminatory conduct on the basis of a worker's sexual orientation and gender identity. In addition, employers must revise their equal opportunity policies, solicitations or job advertisements, and required postings to state that applicants and employees will not be discriminated against on the basis of their sexual orientation or gender identity. The employer also must revise its compliance reports to similarly state that its practices and policies do not discriminate on the grounds of sexual orientation or gender identity.