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Try Not To Get Burned By Summer OFCCP Enforcement

Law360, New York (August 11, 2014, 10:04 AM ET) -- While federal contractors may have been looking forward to having a summer break from new affirmative action regulations and related enforcement activities, President Obama and the U.S. Department of Labor's Office of Federal Contractor Compliance Programs have had other ideas.

Kenneth Rosenberg

Indeed, President Obama and the OFCCP have turned up the heat on federal contractors this summer by: (1) issuing a slew of new executive orders and other regulations that exponentially increase their compliance obligations and (2) sending out a second wave of corporate scheduling announcement letters advising of future compliance audits.

Executive Order 11478

Specifically, on July 21, 2014, President Obama issued Executive Order 11478, in relevant part, to prohibit federal contractors and subcontractors (government contractors) from discriminating against their employees based on their sexual orientation and gender identity. Executive Order 11478 specifically amends Executive Order 11246 to add sexual orientation and gender identity to the existing list of protected classifications of race, color, religion, gender and national origin.

Additionally, the new amendment requires federal contractors to: (1) take affirmative action to ensure that applicants are employed and employees are treated during employment without regard to their sexual orientation and gender identity, (2) amend their job advertisements and solicitations for advancement to state that all qualified applicants will receive consideration for employment without regard to sexual orientation or gender identity, and (3) revise the nondiscrimination clause in their vendor and supplier subcontracts to ban sexual orientation and gender identity discrimination.

Although the order is effective immediately, the secretary of lLabor has 90 days from the date the order to issue regulations outlining employers' obligations under the order. As such, contractors should commence reviewing their policies and contracts in the interim to identify which ones will need to be changed once the final regulations are implemented.

The Fair Pay and Safe Workplaces Executive Order

Shortly after issuing Executive Order 11478, President Obama signed the "Fair Pay and Safe Workplaces Executive Order" — 13673, on July 31, 2014, to improve workplace

standards for employees of federal contractors thereby increasing the likelihood of timely, predictable and satisfactory delivery of goods and services to the federal government.

To accomplish these lofty goals, Executive Order 13673 imposes three new obligations on federal contractors.
First, it requires prospective contractors who are seeking procurement contracts valued at more than $500,000 to disclose to the contracting agency's labor compliance adviser any administrative merits determination, arbitral award or decision, or civil judgment that was rendered against it within the preceding three-year period for violations of the: (1) Fair Labor Standards Act, (2) Occupational Safety and Health Act, (3) Migrant and Seasonal Agricultural Worker Protection Act, (4) National Labor Relations Act, (5) Davis-Bacon Act, (6) Service Contract Act, (7) Executive Order 11246 — Equal Employment Opportunity, (8) Section 503 of the Rehabilitation Act, (9) Vietnam Era Veterans' Readjustment Assistance Act of 1974, (10) Family and Medical Leave Act, (11) Title VII of the Civil Rights Act of 1964, (12) Americans with Disabilities Act of 1990, (13) Age Discrimination in Employment Act of 1967, (14) Executive Order 13658 of Feb. 12, 2014 — Establishing a Minimum Wage for Contractors, and/or (15) equivalent state laws, as defined in guidance issued by the Department of Labor ("covered violations").

To ease the burden on contractors that have contracts with multiple agencies, the executive order provides that a central website will be created for covered violations to be reported. This information will then be reviewed by the contracting agency's labor compliance adviser and its contracting officer before awarding a contract.

The executive order further provides that where a prospective contractor discloses that it has had violations, the contracting agency, prior to making an award, must determine the remedial steps taken by the contractor to correct the violations or to improve its compliance efforts. The contracting agency is required to consider this information in determining whether the prospective contractor is a responsible source that has a satisfactory record of integrity and business ethics and thus should be awarded a federal contract.

Once a contract is awarded, the executive order provides that the successful contractor must provide an update to the contracting agency every six months as to whether it has any administrative merits determination, arbitral award or decision, or civil judgment rendered against it within the preceding three-year period for covered violations. It also provides that after a contract is awarded the contractor must require any subcontractor that provides supplies/services on the government contract (where the subcontract exceeds $500,000 and is not for commercially available off-the-shelf-items) to disclose information regarding covered violations every six months, to consider this information before awarding a subcontract and to incorporate this requirement into all of its subcontracts.

Significantly, if a prospective contractor has a history of serious, repeated, willful or pervasive labor law violations it could be disqualified from obtaining a government contract and if it, or its subcontractor, commits repeated labor violations while holding a federal contract the contractor could be subjected to suspension and debarment proceedings.

The executive order directs the Federal Acquisition Regulation Council and the secretary of labor to coordinate and develop consistent guidelines for determining what types of labor law violations are serious, repeated, willful or pervasive and to carry out the foregoing provisions.

Second, the executive order provides that all supply and service contracts valued at more than $500,000 must contain provisions requiring contractors, in each pay period, to provide all individuals performing work under the contract for whom they are required to maintain wage records under the FLSA, the Davis-Bacon Act and Service Contract Act or

equivalent state laws, with a document advising of his/her: (1) hours worked, (2) overtime hours, (3) pay, (4) of any additions made or deductions made from pay and (5) if they are being treated as an independent contractor. This section of the executive order further provides that contractors do not have to advise exempt employees of their hours worked if they give them written notice of their exempt status. However, contractors must ensure that their subcontractors follow these requirements too.

Third, this executive order provides that contractors with contracts valued at more than $1 million dollars are prohibited from requiring their employees to enter into mandatory arbitration agreements to resolve disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment (except when valid contracts already exist) prior to a dispute arising. However, contractors can still enter into voluntary agreements with their employees post-dispute unless they are represented by a union and other limited circumstances apply. As with other sections of the executive orders, this restriction applies to subcontractors as well.

Requirement to Report Summary Data on Employee Compensation

Less than a week after issuing the Fair Pay and Safe Workplaces Executive Order, the OFCCP issued a notice of proposed rulemaking on Aug. 6 that, if passed in its current form, would require federal contractors and subcontractors to annually submit to it equal pay reports regarding employee compensation.

Under the proposed rule, contractors that file EEO-1 reports with the federal government, have more than 100 employees and hold federal contracts or subcontracts worth $50,000 or more would have to submit summary pay data broken down by sex, race, ethnicity and specified job categories to the OFCCP. The OFCCP has revealed that it intends on using the information it obtains from these reports to select companies for audit. This new proposed rule will be open to public comment until Nov. 6.

Corporate Scheduling Announcement Letters

Amidst this fluid and unsettling regulatory environment, the OFCCP recently sent out over 1,500 corporate scheduling announcement letters (CSALs) notifying federal contractors that they have been chosen to undergo a compliance evaluation in the near future. These CSALs were sent to contractors' individual establishments, but not corporate headquarters. As such, it is incumbent for contractors to advise their local facility managers to be on the alert for the CSALs and to forward them to the internal human resource personnel so that appropriate steps are taken to ensure its annual affirmative action plan, compensation data and other relevant records are current and available for submission.

In particular, contractors must ensure that their affirmative action plans are compliant with the recent Vietnam Era Veterans Readjustment Act and Section 503 of the Rehabilitation Act regulatory amendments that became effective March 24, 2014. Time is of the essence in such circumstances, as the OFCCP will likely issue a formal compliance audit notice shortly thereafter.

Conclusion

In order to avoid getting burned by the myriad new affirmative action regulations that President Obama and the OFCCP have implemented and proposed this summer, it is imperative for federal contractors and subcontractors to take action to comply with the foregoing executive orders and to prepare for anticipated aggressive OFCCP enforcement activities. Failing to do so may result in federal contractors being caught unprepared and subjected to lengthy and costly suspension and debarment proceedings if and when the OFCCP comes knocking. Where contractors have questions as to their new affirmative action obligations they should seek experienced counsel to guide them through the ever

increasing regulatory maze as an ounce of prevention can prevent a serious summer burn.

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