

Fair Pay and Safe Workplace Requirements for Federal Contractors Begin to Go Live on October 25, 2016

Federal law requires that federal agencies contract only with “responsible” sources. Executive Order 13673, “[Fair Pay and Safe Workplaces](#)” (FPSW), is intended to help define “responsible sources” and establishes new requirements for disclosing labor law violations. In August 2016, the FAR Council released its final [Rule](#) to implement the FPSW and the Department of Labor released its final [guidance](#) on provisions of the Rule – amounting to more than 200 pages of information.

The FPSW applies to all federal procurement contracts for goods and services, including construction contracts. Substantial aspects of the FPSW beginning to go into effect next week. Federal contractors and subcontractors need to be ready for these upcoming “go live” dates:

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| October 25, 2016 | Labor law violation disclosures required of all prime contractors responding to federal solicitations of \$50 million or more |
| January 1, 2017 | Paycheck transparency requirements become effective for prime contractors and subcontractors |
| April 25, 2017 | Labor law violation disclosures required of all prime contractors responding to federal solicitations of \$500,000 or more |
| October 25, 2017 | Labor law violation disclosures required of subcontractors with subcontracts of \$500,000 or more |

The FPSW contains three discrete parts: (1) disclosure and evaluation of labor law violations; (2) paycheck and independent contractor notification requirements; and (3) limits on the use of arbitration clauses in employment contracts.

FPSW Part One: Labor Law Violation Disclosure Requirements

The FPSW requires federal contracting officers to affirmatively determine that a contractor is responsible before making a contract award. Now, the contracting officer’s determination must include consideration a proposed contractor’s labor law violations as part of its review of the contractor’s record of integrity and business ethics.

Contractors must disclose whether it has had and decisions rendered against it in the preceding three-year period under any of the following federal labor laws or their state law equivalents:

- Fair Labor Standards Act;
- Occupational Safety and Health Act of 1970;
- Migrant and Seasonal Agricultural Worker Protection Act;
- National Labor Relations Act;

- Davis-Bacon Act;
- Service Contract Act;
- Equal Employment Opportunity;
- Rehabilitation Act of 1973, Section 503;
- Vietnam Era Veterans' Readjustment Assistance Act of 1974;
- Family and Medical Leave Act;
- Title VII of the Civil Rights Act of 1964;
- Americans with Disabilities Act of 1990;
- Age Discrimination in Employment Act of 1967; and
- Executive Order 13658 (Minimum Wage for Federal Contractors).

Violations that must be disclosed include findings through administrative review procedures, arbitration, and civil judgments. A contractor must disclose specific information about each violation. Based on a disclosed violation, and any steps a contractor may take or took to improve compliance, a contracting officer will determine if a contractor is sufficiently responsible to be awarded a contract.

Disclosure is ongoing for contractors who are awarded a contract. Semiannually during the performance of a contract, a contractor must provide updated disclosures regarding labor law compliance.

Subcontractors with subcontracts valued at \$500,000 or more that is not for a commercially available "off-the-shelf" item must also disclose labor law violations. The FPSW requires contractors to obtain disclosures from subcontractors that meet the same requirements as those applicable to contractors. The contractor is then required to consider those disclosures, in consultation with the agency if desired, to evaluate each subcontractor's responsibility.

The required disclosures are to be reported through the Federal Awardee Performance and Integrity Information System – where they will be publicly accessible.

FPSW Part Two: Paycheck Transparency Requirements

The FPSW requires contractors to provide all individuals working on a federal contract with a detailed wage statement for each pay period. The wage statement must contain the individual's hours worked, overtime hours, gross pay, and details for any additions or deductions made to pay. Exempt employees do not need to be notified of their hours worked if the contractor notifies them of their exempt status. To the extent a significant portion of a contractor's workforce is not fluent in English, the wage statement must be provided in the language in which that significant portion of the workforce is fluent.

The FPSW also requires contractors to advise any individuals being treated as independent contractors of their independent contractor status at the time the relationship is established or before any work is performed under the federal contract. Oral notice is not sufficient; only written notice. A new notice must be provided for each federal contract. The notice also must be separate from any independent contractor agreements with the individual.

These paycheck and status disclosure requirements also must be incorporated into subcontracts at all tiers.

FPSW Part Three: Limiting Mandatory Arbitration Clauses With Employees

Finally, the FPSW requires construction contractors with contracts over \$1 million to agree that they will not utilize mandatory arbitration agreements with employees or independent contractors for any dispute arising under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment. The FPSW requires that arbitration of these claims may only be done with the voluntary consent of the employee or independent contractor after a dispute arises. The provision also applies to subcontractors with non-commercial item subcontracts exceeding \$1 million. The requirement, however, does not apply to employees covered by collective bargaining agreements or employees and independent contractors who have a valid contract to arbitrate that existed prior to the contractor bidding on a covered contract. There are limits to this last exception, however.

The above information contains just some highlights of the FPSW – the implementing Rule and accompanying guidance are extensive and nuanced. The new requirements no doubt will add layer of uncertainty and risk for federal contractors over the next few years as the contracting industry begins to unravel and understand the requirements and how the government will implement and interpret the FPSW. If you have specific concerns about how the FPSW might impact your federal contracting business, feel free to contact Chandra Lantz at clantz@hf-law.com or 804.771.9586.



Chandra Lantz is a trial lawyer and member of Hirschler Fleischer's Construction & Suretyship Practice Group and Insurance Recovery Group. She handles a variety of commercial business disputes, including insurance recovery and policyholder claims litigation. Chandra dedicates a substantial portion of her practice to construction industry and real estate development advisory services and dispute resolution. Additional information may be obtained by contacting Chandra Lantz at clantz@hf-law.com or 804.771.9586.