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The Year of Living Dangerously - Government Contractors in the Year of (Executive) Action

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In his State of the Union address on January 28, 2014, President Obama called for 2014 to be a "year of action." At the time, federal contractors could be excused for not anticipating that five Executive Orders ("Orders") and the roll-out of proposed implementing regulations beginning this month would be among the actions. When the first of the series of Orders was issued on February 12, 2014, government contractors were still trying to ensure they understood and were going to be able to comply with the heightened demands of new veterans- and disability-regulatory requirements. That first Order - EO 13658 - [raised the minimum wage to \\$10.10](#) for workers on government contracts entered into beginning January 1, 2015.

Now, however, it is clear that the minimum wage executive action was just the proverbial tip of the iceberg, a forerunner of additional actions honing in on federal contractor compensation and labor law compliance and expanding protections for gender identity and sexual orientation. As a result of these executive actions and the implementing regulations now starting to be issued, federal contractors face increased liability exposure. This memo provides a basic review of the executive actions and those proposed implementing regulations currently open for public comment.

Worker Pay: Compensation Data Collection and Non-Retaliation for Disclosure of Compensation Information

On April 8, 2014, the President issued [EO 13665](#), which prohibits contractors from retaliating against applicants or employees who inquire about, discuss, or disclose pay information. The same day, [a companion memorandum](#) was issued directing the Department of Labor ("DOL") to issue regulations requiring federal contractors and subcontractors to submit to the DOL summary data on the compensation paid to their employees, including data by gender, race, and national origin. In response, the Office of Federal Contract Compliance Programs ("OFCCP") issued [proposed regulations](#) on August 8, 2014, creating a compensation data collection tool - identified as the "Equal Pay Report" - to be used by federal contractors when annually submitting compensation information to OFCCP. The regulations propose to amend the EEO-1 reporting regulation to require covered contractors and subcontractors (those with more than 100 employees who have federal contracts or subcontracts of \$50,000 or more) to annually provide summary wage information from prior year Form W-2s by sex, race, ethnicity, and hours worked within specified EEO-1 job categories.

OFCCP has stated it intends to use the Equal Pay Report as a mechanism to help identify contractors for compliance reviews based upon the amount of difference or variance between a contractor's reported pay and an "objective industry standard" that OFCCP will develop from the aggregated W-2 data submitted. Employers with ratios falling below the industry standards would be targeted for compliance reviews. OFCCP describes the industry standards as reflecting male/female, minority/nonminority and ethnicity pay ratios, but it is not clear how or if those ratios will be developed by race group and ethnicity. Given that the submissions will be from a limited group of contractors, the "standard" would itself be a limited construct of only those regulated contractors in the industry rather than a true nationwide industry standard. Moreover, because EEO-1 categories include multiple job titles, W-2 data does not consider the critical factors upon which pay rate is dependent (such as location, training, experience, education, specialty), and W-2 information is affected by tax deductions. All of this makes questionable the reliability of the developed industry standard and its use in identifying potential discrimination. Indeed it suggests that the net effect may be to influence contractors to just pay more to be competitive.

Public comment so far relates to concerns over administrative burden, the lack of relevance and reliability of the proposed methodology to show putative pay discrimination, and confidentiality of the data to be submitted to OFCCP. Because of these real concerns, contractors are advised to consider the impact of these proposed regulations and to submit comments on the proposed regulations.

Non-Discrimination: EO 13672 - Prohibiting Discrimination Based on Gender Identity and Sexual Orientation

On July 21, 2014, President Obama signed [Executive Order 13672](#), which extends protections against workplace discrimination to members of the lesbian, gay, bisexual, and transgender ("LGBT") community by amending Executive Order 11246 to add sexual orientation and gender identity as protected characteristics. Religiously affiliated federal contractors are not exempted from the requirement. The Executive Order was effective immediately, and implementing regulations are due by October 21, 2014. As a companion step, on August 19, 2014, OFCCP issued a directive indicating that it will enforce gender identity protections protected under Title VII prohibitions against discrimination based on sex.

Employers who fall under the purview of this Executive Order should review their equal employment opportunity and harassment policies and procedures to extend protections on the basis of sexual orientation and gender identity. They should make certain that policies and mechanisms are put in place to ensure discrimination is not tolerated against LGBT employees.

Labor Law Enforcement: EO 13673 - "Fair Pay and Safe Workplaces"

On July 31, 2014, perhaps the most aggressive of the recent Orders, EO 13673, was issued. Meant to "[crack\[\] down on federal contractors who put workers' safety and hard-earned pay at risk,](#)" the Order requires prospective federal contractors for goods and services contracts exceeding \$500,000 to disclose "any administrative merits decision, arbitral award or decision, or civil judgment" under specified federal statutes (including Title VII, the Fair Labor Standards Act, the National Labor Relations Act, the FMLA, the ADA, the ADEA, the Davis-Bacon Act, and many others), Executive Orders and equivalent state labor laws within the preceding three-year period. Proposed implementing regulations have not yet been issued.

This Order is particularly troubling for contractors. As written, it could mean a prospective contractor will have to disclose violations as diverse as an administrative tribunal determination from the DOL Wage and Hour Division, a determination from a state equal rights administrative law judge, or a citation from the Occupational Safety and Health Administration. In addition, federal contractors will be required to update the violation information every six months and to collect and disclose the same type of information from their subcontractors - also updating that every six months. Contractors disclosing past violations must also identify "the steps they have taken to correct the violations and improve compliance with labor laws."

Based upon this information, the contracting agency will determine whether a contractor is a "responsible source that has a satisfactory record of integrity and business ethics." The Order further requires contractors to make this determination of prospective subcontractors. After the information is disclosed, it is placed into the hands of the contracting agency's "Labor Compliance Advisor" (created in Section 3 of the Order) who is to consult with and "provide assistance to contracting officers regarding appropriate actions to be taken in response to violations identified prior to or after contracts are awarded." This includes "helping agency officials determine appropriate responses to address violations...including agreements requiring appropriate remedial measures, decisions not to award a contract or exercise an option on a contract, contract termination, or referral to the agency suspending and debaring official." It also includes providing assistance to the contracting agencies "so as to assess the serious, repeated, willful, or pervasive nature of any violation and evaluate steps contractors have taken to correct violations or improve compliance with relevant requirements."

While compliance with the previously discussed executive actions are relatively straightforward, this Order seems to sow confusion, as past decisions are now reviewed after the fact by unrelated agencies, with unknown consequences that could include increased penalties and additional compliance obligations post-resolution. For example, after fully satisfying a two-year term Compliance Agreement with OFCCP, a contractor could be subject to additional compliance obligations imposed by a contracting agency officer who determines that OFCCP's remedy was inadequate. Confusion could occur over which agency has the authority to finally resolve a matter. Duplication will likely result, in part because certain agencies, such as OFCCP, are already empowered to implement disbarment and like procurement penalties. In short, the reporting requirements create additional, serious exposure from accidental underreporting or challenges from competitive contractors. Contractors having hundreds of subcontractors will be hard-pressed to compile and report all required information.

Another notable aspect of the Order is that it bars prospective contractors on 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. [The U.S. Supreme Court has recently reiterated](#) its long-held opinion on the supremacy of the Federal Arbitration Act over other Congressional statutes, including Title VII claims, in that arbitration agreements are to be enforced on their terms. The new Order is clearly a step taken based on disagreement with such decisions.

Finally, the Order requires contractors to give nonexempt

employees a listing every pay period identifying hours worked, overtime hours, pay, and any additions to or deductions from their pay. Contractors are also required to inform any worker in writing if they are being treated as an independent contractor rather than as an employee. The Order is projected for implementation in 2016.

Until the proposed regulations are published, the actions contractors can take are speculative. There are significant unresolved issues involving considerations such as "lack of responsibility" determinations, confidentiality, and access. Employers are advised to review and comment on proposed regulations when the opportunity arises. However, the pay transparency requirements and the arbitration portion of the Order will likely not be materially affected by the proposed regulations. Employers are advised to immediately begin assessing and, if necessary, revising their practices regarding notification to employees on wages and be prepared to provide independent contractor notification beginning in 2016.

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