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Order Requires Contractors to Report Labor Violations

By

The recent Executive Order on Fair Pay and Safe Workplaces, signed by President Obama on July 31, 2014, has major implications for the way that federal government contractors treat their employees. Failure to comply with the new rules could exclude a contractor from consideration by a soliciting agency.

While the implementation of these new requirements is not expected to be begin until 2016, federal contractors should note the significance of the mandates. Perhaps the most significant section of the new Executive Order requires that, for any government contract worth more than $1 million in services and/or supplies, “the decision to arbitrate claims arising under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise.” Until now, employers could rely on the enforceability of binding arbitration clauses to keep employment discrimination claims out of court. In fact, the U.S. Supreme Court has issued some key decisions in recent years bolstering the strength of these arbitration clauses against claims by employees and consumers.

Currently, an employee signs a contract to work for the employer, and within the document is a clause stating that all disputes between the employer and the employee are subject to mandatory arbitration. The employee thus waives his or her right to file a claim in court. These clauses are broad, often covering all manner of claims from basic nonpayment of wages all the way to discrimination based on race or sex. If a claim later arises, the employee has already preemptively abandoned the option to seek redress in a court of law. Arbitration is the only option.

Now, if they want to continue being eligible for government contracts, contractors are required to give employees veto power over the arbitration option for claims of workplace discrimination based on race, sex, ethnicity, religion, or any other protected category under Title VII, as well as sexual assault or harassment. Employers may only arbitrate such claims if the employee voluntarily consents to arbitration after the dispute arises – meaning that employers can no longer rely on the argument that an employee preemptively waived the right to go to court before the alleged discriminatory conduct even occurred. There are exceptions, however, for employees covered by collective bargaining agreements.

This change should trigger a careful review of employment agreements and workplace policies and, where required, amendments to any mandatory arbitration provisions to ensure compliance with the new Executive Order. For provisions that were in place prior to an employer’s bid on an applicable contract under the Executive Order, they may continue to be enforced; however, if an existing agreement allows the employer to make changes, then essentially it must do so to ensure that it complies with the Order. Similarly, if any terms of an employment agreement are ever renegotiated or amended from this point forward, then the employer must ensure that any arbitration clause comports with the Order.

It is important to note that this new rule also applies to subcontractors. Furthermore, the protection applies not only to employees but also to workers who are independent contractors.

Another section of the Executive Order requires contractors and subcontractors bidding on federal agency opportunities to disclose as part of their proposal “any administrative merits determination, arbitral award or decision, or civil judgment” against the employer in the last three years for any violations of a laundry list of labor laws and regulations. Unlike the arbitration veto provision, this section of the Order applies to any contracts worth more than $500,000 in services and/or supplies. Also unlike the arbitration veto, this disclosure section is not limited to claims related to Title VII, sexual assault, or harassment. Rather, it applies to adverse determinations under an array of federal labor laws including the FLSA, the NLRA, the FMLA, the ADA, and others. It also applies to adverse determinations under equivalent State laws.

In consultation with designated “Labor Compliance Advisors” for each agency, contracting officers will consider these disclosures, along with remedial measures taken by the offeror, in weighing “whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics.” Moreover, this obligation is not limited to the pre-award process. These disclosures must be updated every six months during performance of an awarded contract.

It is important to note that the employee’s arbitration veto does not apply to contracts worth less than $1 million, and neither the veto nor the disclosure requirements apply to contracts worth less than $500,000 or contracts for commercial off-the-shelf products. It remains to be seen whether the Executive Order’s enforceability will be challenged in court. Given the record of the current Supreme Court and the paralysis in Congress, it is unlikely that the Order is a harbinger of similar changes for those employers who do not engage in government contracting. But for those who do, they are now subject to one of the most significant shifts in labor regulation in decades.

