

AFFIRMATIVE ACTION UPDATE

**** NEWS FLASH ****

Volume 14, No. 5

Douglas B. Brown & Associates, LLC

August 2014

AND THE HITS JUST KEEP ON COMING... PRESIDENT OBAMA'S "YEAR OF ACTION" AND ANOTHER EXECUTIVE ORDER:

"FAIR PAY AND SAFE WORKPLACES"

On Thursday, July 31, 2014, President Obama issued his 5th Executive Order (EO) of 2014 affecting federal contractors. The EO, called the "Fair Pay and Safe Workplaces" Order requires federal contractors and subcontractors to do the following:

DISCLOSURE OF FEDERAL AND STATE LABOR AND EMPLOYMENT LAW VIOLATIONS

When submitting bids for federal supply and service or construction contracts, contractors must now provide the contracting officer with a three (3) year history of all labor and employment law violations under the following federal laws, as well as any companion state laws:

- Fair Labor Standards Act
- Occupational Safety and Health Act
- National Labor Relations Act
- Family and Medical Leave Act
- Davis Bacon
- Service Contract Act
- Title VII of the Civil Rights Act
- Americans with Disability Act
- Age Discrimination in Employment Act
- Executive Order 11246
- Vietnam Era Veterans' Readjustment Assistance Act
- Section 503 of the Rehabilitation Act
- Executive Order 13658 (federal contractor minimum wage)

This portion of the EO applies to new contracts in excess of \$500,000 and is not applicable to commercially available "off-the-shelf" items. Government contracting officers are directed to consider the contractor's history in awarding, maintaining and/or withdrawing contracts. Offenders with a history of serious and willful violations may find themselves prohibited from entering into federal contracts, or could find their contracts withdrawn and themselves debarred from further contracts. A violation is defined as "...any administrative merits determination, arbitral award or decision, or civil judgment as defined in guidance issued by the Department of Labor..." After the contract is awarded, the same information is to be updated every six (6) months.

As appropriate, contractors are also directed to obtain and consider the same information from their covered subcontractors.

IN ADDITION TO THE ABOVE, THE EO ALSO ADDRESSES THE FOLLOWING MATTERS

Paycheck Transparency

Contractors must provide employees covered by the Fair Labor Standards Act documentation of their hours worked, overtime hours, pay, and any additions or deductions from pay. For exempt employees, contractors do not have to provide data on hours worked. Contractors are required to incorporate the same requirements into covered subcontracts.

Additionally, contractors must provide written notification to any individual performing work on a covered contract or subcontract as an independent contractor (IC) of their status as an IC.

Complaint and Dispute Transparency

For contracts in excess of \$1,000,000, contractors may no longer require mandatory alternative dispute resolution (ADR) of claims arising under Title VII of the Civil Rights Act of 1964, or any torts related to or arising out of sexual assault or harassment. Any arbitration of such claims can only be with the voluntary consent of the employee or IC after the dispute arises. However, it is important to note that this does not apply to employees already covered under a collective bargaining agreement.

Effective Date

The EO itself states that it is effective immediately. However, the Fact Sheet released with the EO states:

“We expect the Executive Order to be implemented on new contracts in stages, on a prioritized basis, during 2016.”

What exactly this means is not clear at this point. However, it does seem to indicate that contractors will not have to start complying with the EO for at least another year and a half.

This EO raises lots of unanswered questions, including what will be considered an administrative merits determination? Does this include an EEOC Probable Cause determination, or an OFCCP Notice of Violation? What if the contractor is contesting the determination? Does the EO put pressure on contractors to settle unmeritorious claims if a contract is pending?

The Federal Acquisition Guidelines will have to be revised to conform with the directions of the EO. Until that happens, exactly what will be required and how compliance must occur will be up in the air. However, there is no doubt that complying with the EO will be an additional administrative burden on top of the multitude of other requirements that already went into effect this year.

We will continue to keep you apprised of developments as they occur.

If there are any questions or comments concerning anything contained above, they can be directed to this office by calling us at 440-564-7987 or sending an email to dbb@dbbrown.com. The discussion of this matter is for the clients and friends of Douglas B. Brown & Associates, LLC and does not represent nor is intended as a substitute for professional legal advice.