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Fair Pay and Safe Workplaces Order: Answers to Questions

On July 31, 2014, President Obama issued Executive Order 13673, Fair Pay and Safe Workplaces, with the stated intent of increasing "efficiency and cost savings" by ensuring that executive branch procurement contractors understand and comply with labor laws.

What does the order require?

The order requires that contractors and subcontractors disclose information about their compliance with 14 specified federal labor laws and their state equivalents as part of the award process. The order also requires that agency contracting officers take these disclosures into consideration when assessing whether prospective vendors have a "satisfactory record of integrity and business ethics" as part of the responsibility determination process. Agencies generally cannot award a procurement contract without determining that the prospective vendor is "affirmatively responsible" for purposes of that specific contract.

In addition, the order imposes requirements intended to promote "paycheck transparency" for contractor employees and limit mandatory arbitration of employee claims.

Has the order been implemented?

The order itself was effective immediately on its July 31, 2014, issuance, at which time the White House indicated that it anticipates that the order's requirements will be applied to new contracts "in stages," beginning in 2016. There does not appear to be any provision for application of the order's requirements to existing contracts, or new orders under existing contracts. In early 2015, agencies issued guidance and proposed rules to implement the order.

What federal labor laws are covered?

Executive Order 13673 requires covered contractors and subcontractors to disclose violations of the following fourteen federal labor laws.

Law	Basic Requirements
Fair Labor Standards Act (FLSA)	Minimum wage, overtime pay, and child labor standards
Occupational Safety and Health Act (OSH Act)	Workplace safety standards
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Protections for migrant and seasonal workers in dealings with agricultural employers, agricultural associations, and farm labor contractors
National Labor Relations Act (NLRA)	Employee right to unionize and engage in collective bargaining
Davis-Bacon Act	Minimum wage and fringe benefits for construction contractor workers
Service Contract Act	Minimum wage and fringe benefits for service contractor employees
Executive Order 11246 on Equal Employment Opportunity	Prohibits contractors from certain types of employment discrimination
Section 503 of the Rehabilitation Act (Rehab Act)	Contractor affirmative action requirements as to individuals with disabilities
Vietnam Era Veterans Readjustment Assistance Act (VEVRA)	Contractor affirmative action requirements as to veterans
Family Medical Leave Act (FMLA)	Job-protected, unpaid leave for specified family and medical reasons
Title VII of the Civil Rights Act of 1964	Prohibits certain types of employment discrimination
Americans with Disabilities Act (ADA)	Prohibits discrimination against disabled individuals
Age Discrimination in Employment Act (ADEA)	Prohibits employment discrimination against those aged 40 or older
Executive Order 13658 Establishing a Minimum Wage for Contractors	Requires that contractors pay a minimum wage of $10.10 for certain employees

What state laws are to be seen as the "equivalent" of covered federal laws?

Executive Order 13673 itself does not identify state laws that are equivalent to the specified federal laws, and the recently issued guidance and regulations partially implementing the order provide no additional clarity other than observing that OSHA-approved state health and safety regulatory plans are equivalent state laws.

What is the President's authority to impose these requirements?

When issuing Executive Order 13673, President Obama expressly referenced 40 U.S.C. §121 and the promotion of "economy and efficiency" in contracting. In so doing, he invoked provisions of the Federal Property and Administrative Services Act of 1949, as amended, which authorize the President to "prescribe policies and directives that [he] considers necessary" to provide the "Federal Government with an economical and efficient system for ... [p]rocuring and supplying property and ... services."

This is the same authority that President Obama and other Presidents have relied upon when imposing requirements upon the procurement process. Such requirements have generally been found to be within the President's authority so long as they are seen to have a "sufficiently close nexus" to economy and efficiency in procurement, and they do not conflict with congressional enactments.

Did agencies have authority to consider labor law violations in the procurement process prior to Executive Order 13673?

Neither the disclosure of labor law violations, *per se*, nor the consideration of such violations in the responsibility determination process was required prior to the issuance of the executive order. However, the absence of such requirements does not mean that agencies lacked the authority to consider contractors' compliance with labor laws before the order was issued. Rather, agencies could have considered at least certain labor law violations pursuant to their authority to (1) make responsibility determinations; (2) establish qualification requirements and evaluation factors; and (3) debar and suspend contractors.

Any consideration given to labor law violations was, however, generally within agency officials' discretion prior to the issuance of Executive Order 13673, rather than required, as it is with the order. Also, the types of violations considered prior to the order tended to be more limited than those to be considered under the order.

What is *de facto* debarment, and will the order result in *de facto* debarment?

The term *de facto* debarment refers to exclusion outside of the formal suspension and debarment process. It can be seen as improper on this basis alone, because it involves action that is not in compliance with the law. In addition, conduct that constitutes *de facto* debarment can violate contractors' rights to due process by depriving them of liberty interests in being able to challenge allegations about their integrity that could deprive them of their livelihood without notice or an opportunity for a hearing.

Whether Executive Order 13673 results in *de facto* debarment seems likely to depend upon its implementation by the procuring agencies. If contracting officers were to make repeated determinations of nonresponsibility based on the same labor law violations (or prior determinations of nonresponsibility), contractors could potentially successfully raise claims of *de facto* debarment. On the other hand, such claims may be less likely if the procuring agencies developed practices or procedures whereby they routinely pursue exclusion or labor compliance agreements in situations where *de facto* debarment is possible.

What would happen if a contractor falsely certifies as to its labor law violations?

The government has several means of recourse if a contractor were to falsely represent that it is not the subject of a covered labor violation, as would be required under the proposed Federal Acquisition Regulation (FAR) clause implementing the order. The proposed clause expressly notes the possibility of the contract being terminated for false certifications. However, the government could also take other action, including seeking monetary damages for fraud under the civil False Claims Act.

How does Executive Order 13673 compare to the Clinton Administration's contractor responsibility regulation?

The Clinton Administration's amendments to the FAR (which were subsequently revoked by the Bush Administration) could be said to resemble Executive Order 13673 in that they called for contracting officers to consider vendors' "compliance" with legal requirements in determining whether vendors are "affirmatively responsible" for the award of a federal contract.

There are, however, some notable differences between the Clinton Administration's amendments to the FAR and the FAR amendments proposed by the Obama Administration. For example, the Clinton Administration considered compliance with the broad categories of tax, labor and employment, environmental, antitrust, and consumer protection laws, while the Obama Administration focuses upon compliance with 14 specific federal labor and employment laws and their state equivalents.

The Clinton Administration also amended the "general standards" of responsibility in Section 9.104-1 of the FAR to address contractors' violations of law. The Obama Administration, in contrast, does not propose to amend these standards, but instead would address compliance with labor laws primarily in a new Subpart 22.20 of the FAR, one provision of which would specify that contracting officers' duty to consider labor law violations is "in addition" to their duties as to responsibility determinations under Part 9 of the FAR.

What are Congress's options?

Congress could potentially take various actions—or no action—in response to Executive Order 13673, depending upon its policy preferences. If opposition to the order and its requirements is sufficiently widespread, Congress could enact legislation that would bar implementation of the order. Alternatively, if Congress were to favor the disclosure requirements, it could enact legislation to codify (or even augment) these requirements, thereby ensuring that they are not repealed by a subsequent administration.

For a more extended discussion of these and other questions regarding Executive Order 13673, see CRS Report R44106, *Fair Pay and Safe Workplaces Executive Order: Questions and Answers*, by Kate M. Manuel and Rodney M. Perry.

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