

Fair Pay and Safe Workplaces Executive Order 13673

Comments on Proposed Regulations and Guidance
Provided to OMB's Office of Information and Regulatory Affairs

June 3, 2016

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Introduction

- We represent a broad-based coalition of federal government contractors and subcontractors
 - Representing a wide range of industries, with hundreds of millions of dollars in federal contracts, and more than 2 million employees
 - Committed to compliance with federal and state labor laws
- Coalition members object to underlying approach included in the Fair Pay and Safe Workplaces EO
- Coalition members propose alternative approaches to address fundamental deficiencies in the proposed regulations and guidance
 - By providing recommendations, Coalition does not waive or limit legal objections or rights

Legal Issues in Proposed Regulations and Guidance

- Overly broad definition of administrative violation
- Improper retroactive application of the law
 - Three-year lookback when contractors were not required to collect “violation” information
 - Contractors suffer unforeseen sanctions for past settlements
- Back-door amendment of laws and regulations
 - Authorizes the imposition of remedies and obligations that are not duly promulgated
- Circumvents procurement processes

Implementation Issues

- Burden is **overwhelming**
- Gov't cost/benefit analysis and burden hours are wildly inaccurate
 - According to U.S. Chamber of Commerce analysis, the direct compliance costs in first year are **greater than \$1.0 billion** (10 times greater than the Agencies' flawed RIA estimate of \$106.6 million)
- Contractors have not collected or maintained requested information
 - Not required by law
 - No collection systems in place

Impact on Federal Procurement

- Proposals circumvent statutory and regulatory framework underlying federal procurement process
 - Competition
 - Responsibility determinations
 - Debarment/suspension due process
 - Protests and Claims
 - Small business

Impact on Federal Procurement Process (New Steps in Red)

- Solicitation
 - Requirements and evaluation criteria for contract award
- Offeror's proposal includes representations and certifications
 - Representation re specified labor law "violations"
 - Prime determines subcontractor's responsibility
 - Prepares and submits proposal
- Responsibility determination
 - Offeror represents/certifies labor law compliance and discloses "violations"
 - Offeror may provide mitigating information
 - ALCA evaluates under newly created matrix: "serious," "willful," "repeated" and "pervasive" violations
 - ALCA negotiates terms for Labor Compliance Agreement
 - Imposes new/unauthorized remedies for past violations
 - Violations of procurement process
 - Impermissible ex parte discussions
 - SBA responsibility determination requirements

Impact on Federal Procurement Process (cont.)

- **ALCA recommends to Contracting Officer whether Offeror Is Responsible/Nonresponsible**
 - **LCA may be required/imposed**
 - **ALCA recommendation within 3 business days**
- **Nonresponsibility determination**
 - CO determines responsibility and elimination of offeror from competitive range (SB must be referred to SBA for responsibility determination)
 - CO referral to suspension debarment official
 - Offeror can protest the nonresponsibility determination
- **Responsibility determination**
 - Issues award without discussions, or
 - Establishes competitive range so discussions can proceed, opportunity for revised proposals, evaluation and award
 - Competitors can protest determinations
 - Assessment during contract

Alternative Approach

- “Administrative merits determination” interpreted consistent with arbitral award or civil judgment
- Phase-in of three-year reporting beginning on effective date of final regulation
 - Eliminates retroactivity issues
- Use enforcement information held by Federal agencies and do not require contractors to provide information already collected by agencies
 - Significantly reduces burdens on contractors and agencies
 - Consistent with EO 13563, which calls for efficiency and cost-saving measures in regulations
 - More efficient, accurate, and complete approach that avoids redundancy

Example: DOL's Wage and Hour Division Website re Compliance

Wage and Hour Compliance Action Data

Dataset Summary

Agency	Department of Labor
Sub-Agency	Wage and Hour Division
Category	Administrative
Date Released	4/07/2010
Date Updated	2016-02-19
Time Period	1985 - present
Frequency	monthly

Description

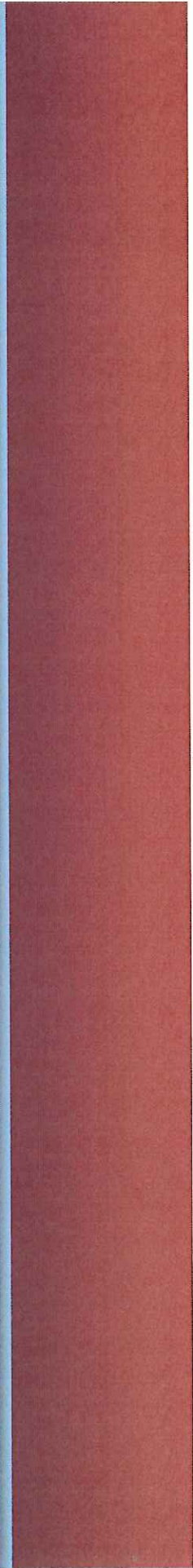
The dataset contains all concluded WHD compliance actions since FY 2007. The dataset includes whether any violations were found and the back wage amount, number of employees due back wages, and civil money penalties assessed.

NOTE: Findings Start Date and Findings End Date are not equal to Case Open Date and Case Close Date, which are not included in the dataset.

Dataset tables listing: WHD Data Dictionary, WHD Metadata and WHD Whisard.

Thank You

We are happy to answer questions
or provide additional information



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