



GC-63: Labor Update





Monitoring a Changing Landscape

- A major policy-making tool is that of the Executive Order (“EO”) and the Presidential Memo.
- Both the Obama and Trump Administrations have issued EO’s that fall under the auspices of GC-63.



Today's Discussion

- [Executive Order 13495](#), *Nondisplacement of Qualified Workers Under Service Contracts*
- [Executive Order 13658](#), *Establishing a Minimum Wage for Contractors*
- [Executive Order 13706](#), *Establishing Paid Sick Leave for Federal Contractors*
- [Executive Order 13665](#), *Non-Retaliation for Disclosure of Compensation Information*
- [Executive Order 13627](#), *Strengthening Protections Against Trafficking in Persons*
- [Executive Order 13672](#), *Regulations Prohibiting Discrimination Based on Sexual Orientation and Gender Identity*
- [Executive Order 13673](#), *Fair Pay & Safe Workplaces*
- [Executive Order 13502](#), *Use of Project Labor Agreements for Federal Construction Projects*
- [Presidential Memorandum](#), *Strengthening Overtime Protections*
- [Employee Benefits Security Administration Rule](#), *Fiduciary Rule*
- [S.3471](#), *Retirement Enhancement and Savings Act of 2016 (RESA)*



Executive Order 13495, *Nondisplacement of Qualified Workers Under Service Contracts*

[48 CFR 1, 2, 22, 52](#) requires that qualified workers on a Federal service contract who would otherwise lose their jobs as a result of the completion or expiration of a contract be given the right of first refusal for employment with the successor contractor.

- ***Flows down to subcontractors even if Primary contractor is exempt.***
- ***Requirements set out in [FAR 52.222-17](#)***
- DOE Request for Proposals (RFPs), generally require that:
 - “The Contractor shall comply with the right of first refusal for employment for service employees and all of the requirements set forth in FAR 52.222-17 for the applicable work and positions. If a qualified service employee declines a bona fide express offer of employment, the Contractor need not provide the preference in hiring in paragraphs (B)(1)(a) and (b) below to such employee, but should provide the other preferences in Paragraph (B) below, as applicable.”



Executive Order 13658, *Establishing a Minimum Wage for Contractors*

[29 CFR part 10](#) became effective on January 1, 2016, with a minimum wage of \$10.10/hr for all workers on Federal construction and service contracts solicited after the effective date. The minimum wage increased to \$10.20/hr on January 1, 2017.

- ***Flows down to subcontractors even if Primary contractor is exempt.***



EO 13658, cont.

- Applies to workers subject to prevailing wage requirements, under
 - Contracts covered by the Davis-Bacon Act (DBA) or the Service Contract Act (SCA);
 - Concessions contracts;
 - Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.
 - Also applies to FLSA-covered employees who provide support on SCA- and DBA-covered contracts who are necessary for the performance of the contract.
- [DOE Flash Policy 2015-04](#)
- [FAR § 52.222-99](#)
- *Still in Effect*



Executive Order 13706, *Establishing Paid Sick Leave for Federal Contractors*

[48 CFR Parts 1, 11, 22, and 52](#) Requires accrual of at least 1 hour of sick leave to accumulate per every 30 hours worked, to a leave bank of at least 56 hours. Became effective January 1, 2017, for solicitations and contracts made thereafter.

- For existing contracts, [an interim rule](#) directs contracting officers to include the new FAR clause 52.222-62, Paid Sick Leave Under Executive Order 13706:
 - In bilateral modifications extending the contract when such modifications are individually or cumulatively longer than six months
 - It also “strongly encourage[s]” contracting officers to include the clause in existing indefinite-delivery indefinite-quantity contracts, *if the remaining ordering period extends at least six months, and the amount of remaining work or number of orders expected is substantial.*



EO 13706, cont.

Applies to:

- Contracts covered by the Davis-Bacon Act (DBA) or the Service Contract Act (SCA);
 - Concessions contracts,
 - Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.
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- Final Rule incorporated at [FAR Subpart 22.21](#), in accordance with [29 CFR 13.5](#) and by operation of the clause at [FAR Subpart 52.222-62](#)
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- *Still in Effect*



Executive Order 13665, *Non-Retaliation for Disclosure of Compensation Information*

41 CFR 60-1 Prohibits discriminating against employees and applicants “who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants.”

- Requires update of nondiscrimination policies to specifically address pay transparency; and dissemination to employees and applicants.
- Covers contracts entered into or modified as of January 11, 2016 and amends Section 202 of EO 11246 (1965) which already prohibits employment discrimination by federal contractors.
- No affirmative obligation to *actually remedy* pay discrimination.
- *Still in Effect*



Executive Order 13627, *Strengthening Protections Against Trafficking in Persons*

48 CFR 52.222-50 Requires annual certification from contractors and subcontractors that neither they nor their employees have engaged in trafficking-related activities.

- This applies to contracts above \$500,000.00;
- Flows down to sub-contractors.

Final Rule incorporated as FAR 22.1705, and DOE Flash Policy 2013-06.

- *Still in Effect*



Executive Order 13672, *Prohibiting Discrimination Based on Sexual Orientation and Gender Identity*

41 CFR §60-20.7 Prohibits federal contractors and subcontractors from discriminating on the basis of sexual orientation and gender identity. Issued on December 3, 2014, as an amendment to EO 11246 (1965)

- Applies to all contracts and subcontracts in excess of \$10,000.00.
- On January 31, 2017, the Trump Administration affirmatively announced that it will continue to enforce the workplace protections for sexual orientation and gender identity put in place under Executive Order 13672.
- Final Rule incorporated as [FAR 52.222-26](#).
- *Still in Effect*



Executive Order 13673, *Fair Pay and Safe Workplaces*

[48 CFR 22.20](#) Required that Federal Contractors (or even potential Federal Contractors) report all labor violations, engage in “Paycheck Transparency” activities, and place a prohibition on pre-dispute arbitration. The Contracting Officer would make a responsibility determination based on these reports and corrective actions made by the contractor, before awarding the contract or communicating the need for further action on part of the Contractor.

- On October 24, 2016, the United States District Court for the Eastern District of Texas granted a [preliminary injunction](#) suspending implementation.
- *A DAY before the Reg. was scheduled to go into effect.*



EO 13673: Actions since 1/17/2017

- On March 27, 2017, President Trump signed [H.J. Res. 37](#), nullifying *EO 13673: Fair Pay & Safe Workplaces*.
- H.J. Res. 37 not only negates the “paycheck transparency” provision that went into effect earlier this year, but also officially removes the Rule from the FAR and prevents its future enforcement.
 - As a [Congressional Review Act](#) Resolution, there is a prohibition on the promulgation of any similar Agency regulation being issued without express authorization from Congress.
- *The Rule is treated as if it was never enacted and any provisions in effect were retroactively negated.*



Executive Order 13502, *Use of Project Labor*

Agreements for Federal Construction Projects

[48 CFR 17](#) Encourages executive agencies to consider requiring the use of Project Labor Agreements (PLAs) on large-scale direct Federal construction projects (defined as a project with a total cost of \$25 million or more).

- A PLA is a pre-hire, collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project; described in [29 U.S.C. 158\(f\)](#).
- **Applies specifically to Federal procurement contracts**, but does not preclude contracts awarded under Federal financial assistance programs.
- It allows agencies to require use of a PLA in Federal contracts where such use will
 - (i) advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and
 - (ii) be consistent with law."



EO 13502, *Recent Developments*

On March 14, 2017, the U.S. Congress introduced [HR.1552](#) and [S.622](#) ,the “**Fair Open Competition Act**” (FOCA) bill “to preserve open competition and Federal Government neutrality towards the labor relations of Federal Government contractors on Federal and federally funded construction projects, and for other purposes.”

- These bills closely resemble President George W. Bush’s [EO 13202](#) on PLA use.
- An agency head may exempt a particular project which the agency head determines had been - as of the date of enactment of this law - *the subject of bid specifications, project agreements, or other documents which did contain provisions otherwise inconsistent with the law, or as to which one or more construction contracts subject to such requirements had previously been issued.*
- **This bill has not been passed; Obama’s Reg. is STILL IN EFFECT.**



Obama Presidential Memorandum, 3/13/14

Strengthening Overtime Protections

29 CFR 541 Raised the salary ceiling under which employees are eligible for overtime pay from \$23,660 to \$47,476 a year, or from \$455 to \$913 a week.

- Updated the salary threshold every three years.
- Also raised the FLSA “highly compensated employee” threshold from \$100,000 to \$134,004 (ERISA definition of a “highly compensated employee” is separate, distinct and unaffected).



Overtime, Delayed

Nine days before implementation, the Eastern District of Texas issued a nationwide injunction, ruling that the Obama administration may have exceeded its authority when it raised the overtime salary limit so significantly.

- It is important to note that the injunction did not kill the rule; rather, it temporarily blocked the changes from taking place.

On December 1, **2016**, the Department of Labor filed a notice of appeal in the United States Court of Appeals for the Fifth Circuit, indicating that the federal government intended to defend the new rule.



Overtime, since January 17, 2017

- Since then, the government has received filing extensions of time to file a brief stating its position on the appeal.
- New Labor Secretary Alexander Acosta suggested setting the new threshold at \$33,000; not the \$47,476 noted in the Presidential Memo. This may require starting from ‘scratch’ procedurally.
- On May 2, 2017, the House passed the working Families Flexibility Act ([HR.1180](#), S.801), which would amend the FLSA to allow Employers and workers to voluntarily agree to 1.5 hours of compensatory time for every hour of overtime worked, up to 160 hours of leave per year.
 - Senate has yet to vote.

As of now, the Reg. is frozen, and nothing has gone into effect.



Employee Benefits Security Administration

(EBSA) Rule, Fiduciary Duty Rule

[29 CFR 2509](#) would require that retirement plan financial advisors abide by a fiduciary standard, which requires them to provide guidance only with their clients' interests in mind.

- The rule has survived three court-based challenges.
- February 3, 2017 President Trump *announced the delay of implementation for 180 days* while the Department of Labor reviewed the rule's potential impact.



S.3471, *Retirement Enhancement and Savings Act of 2016 (RESA)*

- Nondiscrimination relief for closed defined benefit plans
- Unrelated employers may participate in a “Pooled Employer Plan,” treated as a single plan
- Defined contribution plans must provide monthly annuity income estimates

RESA was unanimously approved by the Senate Finance Committee, but died in the previous Congress. Will it be renewed?



Wrapping up

- Questions?
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