

115TH CONGRESS
2D SESSION

S. 3077

To provide for certain contracting requirements to promote fair and safe workplaces, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 14, 2018

Ms. SMITH (for herself, Mrs. MURRAY, Mrs. GILLIBRAND, Mr. MERKLEY, Mr. BLUMENTHAL, Mrs. FEINSTEIN, Ms. BALDWIN, and Mrs. SHAHEEN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To provide for certain contracting requirements to promote fair and safe workplaces, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fair Pay and Safe
5 Workplaces Act of 2018”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

8 (1) COVERED CONTRACT.—The term “covered
9 contract” means a Federal contract for the procure-

1 ment of property or services, including construction,
2 valued in excess of \$500,000.

3 (2) COVERED SUBCONTRACT.—The term “cov-
4 ered subcontract”—

5 (A) means a subcontract for property or
6 services under a Federal contract that is valued
7 in excess of \$500,000; and

8 (B) does not include a subcontract for the
9 procurement of commercially available off-the-
10 shelf items.

11 (3) EXECUTIVE AGENCY.—The term “executive
12 agency” has the meaning given the term in section
13 133 of title 41, United States Code.

14 **SEC. 3. PURPOSE.**

15 The purpose of this Act is to—

16 (1) ensure that the purchasing power of the
17 Federal Government is employed to raise labor
18 standards, improve working conditions, and
19 strengthen workers’ bargaining power; and

20 (2) increase efficiency and cost savings in the
21 work performed by parties who contract with the
22 Federal Government by ensuring that they under-
23 stand and comply with labor laws, which are de-
24 signed to promote safe, healthy, fair, and effective
25 workplaces and increase the likelihood of enhanced

1 productivity in the workplace and the timely, pre-
2 dictable, and satisfactory delivery of goods and serv-
3 ices to the Federal Government.

4 **SEC. 4. REQUIRED PRE-CONTRACT AWARD ACTIONS.**

5 (a) DISCLOSURES.—The head of an executive agency
6 shall ensure that the solicitation for a covered contract re-
7 quires the offeror—

8 (1) to represent, to the best of the offeror's
9 knowledge and belief, whether there has been any
10 administrative merits determination, arbitral award
11 or decision, or civil judgment, as defined in guidance
12 issued by the Secretary of Labor, rendered against
13 the offeror in the preceding 3 years for violations
14 of—

15 (A) the Fair Labor Standards Act of 1938
16 (29 U.S.C. 201 et seq.);

17 (B) the Occupational Safety and Health
18 Act of 1970 (29 U.S.C. 651 et seq.);

19 (C) the Migrant and Seasonal Agricultural
20 Worker Protection Act (29 U.S.C. 1801 et
21 seq.);

22 (D) the National Labor Relations Act (29
23 U.S.C. 151 et seq.);

1 (E) subchapter IV of chapter 31 of title
2 40, United States Code (commonly known as
3 the “Davis-Bacon Act”);

4 (F) chapter 67 of title 41, United States
5 Code (commonly known as the “Service Con-
6 tract Act”);

7 (G) Executive Order 11246 (42 U.S.C.
8 2000e note; relating to equal employment op-
9 portunity);

10 (H) section 503 of the Rehabilitation Act
11 of 1973 (29 U.S.C. 793);

12 (I) section 4212 of title 38, United States
13 Code;

14 (J) the Family and Medical Leave Act of
15 1993 (29 U.S.C. 2601 et seq.);

16 (K) title VII of the Civil Rights Act of
17 1964 (42 U.S.C. 2000e et seq.);

18 (L) the Americans with Disabilities Act of
19 1990 (42 U.S.C. 12101 et seq.);

20 (M) the Age Discrimination in Employ-
21 ment Act of 1967 (29 U.S.C. 621 et seq.);

22 (N) Executive Order 13658 (79 Fed. Reg.
23 9851; relating to establishing a minimum wage
24 for contractors); or

1 (O) equivalent State laws, as defined in
2 guidance issued by the Secretary of Labor;

3 (2) to require each subcontractor for a covered
4 subcontract—

5 (A) to represent to the offeror and the en-
6 tity designated by the final rule reissued under
7 subsection (a) of section 7, to the best of the
8 subcontractor's knowledge and belief, whether
9 there has been any administrative merits deter-
10 mination, arbitral award or decision, or civil
11 judgment, as defined in guidance issued by the
12 Department of Labor, rendered against the
13 subcontractor in the preceding 3 years for viola-
14 tions of any of the labor laws and executive or-
15 ders listed under paragraph (1); and

16 (B) to update such information every 6
17 months for the duration of the subcontract; and

18 (3) to consider the advice rendered by the enti-
19 ty designated by the final rule reissued under sub-
20 section (a) of section 7 or information submitted by
21 a subcontractor pursuant to paragraph (2) in deter-
22 mining whether the subcontractor is a responsible
23 source with a satisfactory record of integrity and
24 business ethics—

25 (A) prior to awarding the subcontract; or

1 (B) in the case of a subcontract that is
2 awarded or will become effective within 5 days
3 of the prime contract being awarded, not later
4 than 30 days after awarding the subcontract.

5 (b) PRE-AWARD CORRECTIVE MEASURES.—

6 (1) IN GENERAL.—A contracting officer, prior
7 to awarding a covered contract, shall, as part of the
8 responsibility determination, provide an offeror who
9 makes a disclosure pursuant to subsection (a) an op-
10 portunity to report any steps taken to correct the
11 violations of or improve compliance with the labor
12 laws listed in paragraph (1) of such subsection, in-
13 cluding any agreements entered into with an en-
14 forcement agency.

15 (2) CONSULTATION.—The executive agency's
16 Labor Compliance Advisor designated pursuant to
17 section 6, in consultation with relevant enforcement
18 agencies, shall advise the contracting officer whether
19 agreements are in place or are otherwise needed to
20 address appropriate remedial measures, compliance
21 assistance, steps to resolve issues to avoid further
22 violations, or other related matters concerning the
23 offeror.

24 (3) RESPONSIBILITY DETERMINATION.—The
25 contracting officer, in consultation with the executive

1 agency's Labor Compliance Advisor, shall consider
 2 information provided by the offeror under this sub-
 3 section in determining whether the offeror is a re-
 4 sponsible source with a satisfactory record of integ-
 5 rity and business ethics. The determination shall be
 6 based on the guidelines reissued under subsection
 7 (b)(1) of section 7 and the final rule reissued under
 8 subsection (a) of such section.

9 (c) REFERRAL OF INFORMATION TO SUSPENSION
 10 AND DEBARMENT OFFICIALS.—As appropriate, con-
 11 tracting officers, in consultation with their executive agen-
 12 cy's Labor Compliance Advisor, shall refer matters related
 13 to information provided pursuant to paragraphs (1) and
 14 (2) of subsection (a) to the executive agency's suspension
 15 and debarment official in accordance with agency proce-
 16 dures.

17 **SEC. 5. POST-AWARD CONTRACT ACTIONS.**

18 (a) INFORMATION UPDATES.—The contracting offi-
 19 cer for a covered contract shall require that the contractor
 20 update the information provided under paragraphs (1)
 21 and (2) of section 4(a) every 6 months.

22 (b) CORRECTIVE ACTIONS.—

23 (1) PRIME CONTRACT.—The contracting officer,
 24 in consultation with the Labor Compliance Advisor
 25 designated pursuant to section 6, shall determine

1 whether any information provided under subsection
2 (a) warrants corrective action. Such action may in-
3 clude—

4 (A) an agreement requiring appropriate re-
5 medial measures;

6 (B) compliance assistance;

7 (C) resolving issues to avoid further viola-
8 tions;

9 (D) the decision not to exercise an option
10 on a contract or to terminate the contract; or

11 (E) referral to the agency suspending and
12 debarring official.

13 (2) SUBCONTRACTS.—The prime contractor for
14 a covered contract, in consultation with the Labor
15 Compliance Advisor, shall determine whether any in-
16 formation provided under section 4(a)(2) warrants
17 corrective action, including remedial measures, com-
18 pliance assistance, and resolving issues to avoid fur-
19 ther violations.

20 (3) DEPARTMENT OF LABOR.—The Department
21 of Labor shall, as appropriate, inform executive
22 agencies of its investigations of contractors and sub-
23 contractors on current Federal contracts for pur-
24 poses of determining the appropriateness of actions
25 described under paragraphs (1) and (2).

1 **SEC. 6. LABOR COMPLIANCE ADVISORS.**

2 (a) IN GENERAL.—Each executive agency shall des-
3 ignate a senior official to act as the agency’s Labor Com-
4 pliance Advisor.

5 (b) DUTIES.—The Labor Compliance Advisor shall—

6 (1) meet quarterly with the Deputy Secretary,
7 Deputy Administrator, or equivalent executive agen-
8 cy official with regard to matters covered under this
9 Act;

10 (2) work with the acquisition workforce, agency
11 officials, and agency contractors to promote greater
12 awareness and understanding of labor law require-
13 ments, including record keeping, reporting, and no-
14 tice requirements, as well as best practices for ob-
15 taining compliance with these requirements;

16 (3) coordinate assistance for executive agency
17 contractors seeking help in addressing and pre-
18 venting labor violations;

19 (4) in consultation with the Department of
20 Labor or other relevant enforcement agencies, and
21 pursuant to section 4(b) as necessary, provide assist-
22 ance to contracting officers regarding appropriate
23 actions to be taken in response to violations identi-
24 fied prior to or after contracts are awarded, and ad-
25 dress complaints in a timely manner, by—

1 (A) providing assistance to contracting of-
2 ficers and other executive agency officials in re-
3 viewing the information provided pursuant to
4 subsections (a) and (b) of section 4 and section
5 5(a), or other information indicating a violation
6 of a labor law in order to assess the serious, re-
7 peated, willful, or pervasive nature of any viola-
8 tion and evaluate steps contractors have taken
9 to correct violations or improve compliance with
10 relevant requirements;

11 (B) helping agency officials determine the
12 appropriate response to address violations of
13 the requirements of the labor laws listed in sec-
14 tion 4(a)(1) or other information indicating
15 such a labor violation (particularly serious, re-
16 peated, willful, or pervasive violations), includ-
17 ing agreements requiring appropriate remedial
18 measures, decisions not to award a contract or
19 exercise an option on a contract, contract termi-
20 nation, or referral to the executive agency sus-
21 pension and debarment official;

22 (C) providing assistance to appropriate ex-
23 ecutive agency officials in receiving and re-
24 sponding to, or making referrals of, complaints
25 alleging violations by agency contractors and

1 subcontractors of the requirements of the labor
2 laws listed in section 4(a)(1); and

3 (D) supporting contracting officers, sus-
4 pension and debarment officials, and other
5 agency officials in the coordination of actions
6 taken pursuant to this subsection to ensure
7 agency-wide consistency, to the extent prac-
8 ticable;

9 (5) as appropriate, send information to agency
10 suspension and debarment officials in accordance
11 with agency procedures;

12 (6) consult with the agency's Chief Acquisition
13 Officer and Senior Procurement Executive, and the
14 Department of Labor as necessary, in the develop-
15 ment of regulations, policies, and guidance address-
16 ing labor law compliance by contractors and sub-
17 contractors;

18 (7) make recommendations to the agency to
19 strengthen agency management of contractor compli-
20 ance with labor laws;

21 (8) publicly report, on an annual basis, a sum-
22 mary of agency actions taken to promote greater
23 labor compliance, including the agency's response
24 pursuant to this order to serious, repeated, willful,

1 or pervasive violations of the requirements of the
 2 labor laws listed in section 4(a)(1); and

3 (9) participate in the interagency meetings reg-
 4 ularly convened by the Secretary of Labor pursuant
 5 to section 7(b)(2)(C).

6 **SEC. 7. MEASURES TO ENSURE GOVERNMENT-WIDE CON-**
 7 **SISTENCY.**

8 (a) FEDERAL ACQUISITION REGULATION.—

9 (1) IN GENERAL.—Notwithstanding Public Law
 10 115–11 (131 Stat. 75) and section 553 of title 5,
 11 United States Code, not later than 1 year after the
 12 date of enactment of this Act, the Secretary of De-
 13 fense, the Administrator of the General Services Ad-
 14 ministration, and the Administrator of the National
 15 Aeronautics and Space Administration shall reissue
 16 the final rule entitled “Federal Acquisition Regula-
 17 tion; Fair Pay and Safe Workplaces” (81 Fed. Reg.
 18 58,562 (Aug. 25, 2016)), subject to paragraph (2).

19 (2) UPDATED DATES.—The agencies described
 20 in paragraph (1) may, in reissuing the final rule
 21 under such paragraph, update any date provided in
 22 such final rule as reasonable and necessary.

23 (b) DEPARTMENT OF LABOR.—

24 (1) GUIDANCE.—Not later than 1 year after
 25 the date of enactment of this Act, the Secretary of

1 Labor shall reissue the guidance entitled “Guidance
2 for Executive Order 13673, ‘Fair Pay and Safe
3 Workplaces’” (81 Fed. Reg. 58,564 (Aug. 25,
4 2016)). In reissuing such guidance, the Secretary of
5 Labor may update any date provided in such guid-
6 ance as reasonable.

7 (2) ADDITIONAL ACTIVITIES.—The Secretary of
8 Labor shall—

9 (A) develop a process—

10 (i) for the Labor Compliance Advisors
11 designated pursuant to section 6 to consult
12 with the Secretary of Labor in carrying
13 out their responsibilities under section
14 6(b)(4);

15 (ii) by which contracting officers and
16 Labor Compliance Advisors may give ap-
17 propriate consideration to determinations
18 and agreements made by the Secretary of
19 Labor and the heads of other executive
20 agencies; and

21 (iii) by which contractors may enter
22 into agreements with the Secretary of
23 Labor, or the head of another executive
24 agency, prior to being considered for a con-
25 tract;

1 (B) review data collection requirements
2 and processes, and work with the Director of
3 the Office of Management and Budget, the Ad-
4 ministrator of General Services, and other
5 agency heads to improve such requirements and
6 processes, as necessary, to reduce the burden on
7 contractors and increase the amount of infor-
8 mation available to executive agencies;

9 (C) regularly convene interagency meetings
10 of Labor Compliance Advisors to share and pro-
11 mote best practices for improving labor law
12 compliance; and

13 (D) designate an appropriate contact for
14 executive agencies seeking to consult with the
15 Secretary of Labor with respect to the require-
16 ments and activities under this Act.

17 (c) OFFICE OF MANAGEMENT AND BUDGET.—The
18 Director of the Office of Management and Budget shall—

19 (1) work with the Administrator of General
20 Services to include in the Federal Awardee Perform-
21 ance and Integrity Information System the informa-
22 tion provided by contractors pursuant to sections
23 4(a)(1) and 5(a) and data on the resolution of any
24 issues related to such information; and

1 (2) designate an appropriate contact for agen-
2 cies seeking to consult with the Office of Manage-
3 ment and Budget on matters arising under this Act.

4 (d) GENERAL SERVICES ADMINISTRATION.—

5 (1) IN GENERAL.—The Administrator of Gen-
6 eral Services, in consultation with other relevant ex-
7 ecutive agencies, shall establish a single Internet
8 website for Federal contractors to use for all Federal
9 contract reporting requirements under this Act, as
10 well as any other Federal contract reporting require-
11 ments to the extent practicable.

12 (2) AGENCY COOPERATION.—The heads of ex-
13 ecutive agencies with covered contracts shall provide
14 the Administrator of General Services with the data
15 necessary to maintain the Internet website estab-
16 lished under paragraph (1).

17 (e) MINIMIZING COMPLIANCE BURDEN.—After re-
18 issuing the guidance under subsection (b)(1) or the final
19 rule under subsection (a), the Secretary of Labor or the
20 Secretary of Defense, the Administrator of the General
21 Services Administration, and the Administrator of the Na-
22 tional Aeronautics and Space Administration may, respec-
23 tively, amend such guidance or final rule consistent with
24 the requirements under chapter 5 of title 5, United States
25 Code.

1 **SEC. 8. PAYCHECK TRANSPARENCY.**

2 (a) IN GENERAL.—Each executive agency entering
3 into a covered contract, or covered subcontract, shall en-
4 sure that provisions in solicitations for such contracts, or
5 subcontracts, and clauses in such contracts, or sub-
6 contracts, shall provide that, for each pay period, contrac-
7 tors or subcontractors provide each individual described
8 in subsection (b) with a document containing information
9 with respect to such individual for the pay period con-
10 cerning hours worked, overtime hours worked, pay, and
11 any additions made to or deductions made from pay.

12 (b) INDIVIDUALS DESCRIBED.—An individual de-
13 scribed in this subsection is any individual performing
14 work under a contract or subcontract for which the con-
15 tractor or subcontractor is required to maintain wage
16 records under—

17 (1) the Fair Labor Standards Act of 1938 (29
18 U.S.C. 201 et seq.);

19 (2) subchapter IV of chapter 31 of title 40,
20 United States Code (commonly referred to as the
21 “Davis-Bacon Act”);

22 (3) chapter 67 of title 41, United States Code
23 (commonly known as the “Service Contract Act”); or

24 (4) an applicable State law.

25 (c) EXCEPTIONS.—

1 (1) EMPLOYEES EXEMPT FROM OVERTIME RE-
2 QUIREMENTS.—The document provided under sub-
3 section (a) to individuals who are exempt under sec-
4 tion 13 of the Fair Labor Standards Act of 1938
5 (29 U.S.C. 213) from the overtime compensation re-
6 quirements under section 7 of such Act (29 U.S.C.
7 207) shall not be required to include a record of the
8 hours worked if the contractor or subcontractor in-
9 forms the individual of the status of such individual
10 as exempt from such requirements.

11 (2) SUBSTANTIALLY SIMILAR STATE LAWS.—
12 The requirements under this section shall be deemed
13 to be satisfied if the contractor or subcontractor
14 complies with State or local requirements that the
15 Secretary of Labor has determined are substantially
16 similar to the requirements under this section.

17 (d) INDEPENDENT CONTRACTORS.—If the contractor
18 or subcontractor is treating an individual performing work
19 under a covered contract or subcontract as an independent
20 contractor, and not as an employee, the contractor or sub-
21 contractor shall provide the individual a document inform-
22 ing the individual of their status as an independent con-
23 tractor.

24 **SEC. 9. COMPLAINT AND DISPUTE TRANSPARENCY.**

25 (a) IN GENERAL.—

1 (1) CONTRACTS.—The head of an executive
 2 agency may not enter into a contract for the pro-
 3 curement of property or services valued in excess of
 4 \$500,000 unless the contractor agrees that any deci-
 5 sion to arbitrate the claim of an employee or inde-
 6 pendent contractor performing work under the con-
 7 tract that arises under title VII of the Civil Rights
 8 Act of 1964 (42 U.S.C. 2000e et seq.) or any tort
 9 related to or arising out of sexual assault or sexual
 10 harassment may only be made with the voluntary
 11 consent of the employee or independent contractor
 12 after the dispute arises.

13 (2) SUBCONTRACTS.—The head of an executive
 14 agency shall require that a contractor covered under
 15 paragraph (1) incorporate the requirement under
 16 such subsection into each subcontract for the pro-
 17 curement of property or services valued in excess of
 18 \$500,000 at any tier under the contract.

19 (b) EXCEPTIONS.—

20 (1) CONTRACTS FOR COMMERCIAL ITEMS AND
 21 COMMERCIALLY AVAILABLE OFF-THE-SHELF
 22 ITEMS.—The requirements under subsection (a) do
 23 not apply to contracts or subcontracts for the acqui-
 24 sition of commercial items or commercially available
 25 off-the-shelf items (as those terms are defined in

1 sections 103(1) and 104, respectively, of title 41,
2 United States Code).

3 (2) EMPLOYEES AND INDEPENDENT CONTRAC-
4 TORS NOT COVERED.—The requirements under sub-
5 section (a) do not apply with respect to an employee
6 or independent contractor who—

7 (A) is covered by a collective bargaining
8 agreement negotiated between the contractor or
9 subcontractor and a labor organization rep-
10 resenting the employee or independent con-
11 tractor; or

12 (B) entered into a valid agreement to arbi-
13 trate claims covered under such subsection be-
14 fore the contractor or subcontractor bid on the
15 contract covered under such subsection, except
16 that such requirements do apply—

17 (i) if the contractor or subcontractor
18 is permitted to change the terms of the ar-
19 bitration agreement with the employee or
20 independent contractor; or

21 (ii) in the event the arbitration agree-
22 ment is renegotiated or replaced after the
23 contractor or subcontractor bids on the
24 contract.

1 **SEC. 10. NEUTRALITY.**

2 (a) ALLOWABLE COSTS.—Costs incurred in main-
3 taining satisfactory relations between a contractor, and its
4 employees, on a covered contract or a subcontractor, and
5 its employees, on a covered subcontract (other than those
6 made unallowable in subsection (b) of this section), includ-
7 ing costs of shop stewards, labor management committees,
8 employee publications, and other related activities, are al-
9 lowable.

10 (b) LIMITATION ON FEDERAL FUNDS.—No Federal
11 funds made available through a covered contract or cov-
12 ered subcontract may be used to engage in activities un-
13 dertaken to persuade employees, of any entity, to exercise
14 or not to exercise, or concerning the manner of exercising,
15 the right to organize and bargain collectively through rep-
16 resentatives of the employees' own choosing or any other
17 activities that are subject to the requirements under sec-
18 tion 203(b) of the Labor-Management Reporting and Dis-
19 closure Act of 1959 (29 U.S.C. 433(b)). Examples of unal-
20 lowable costs under this subsection include the costs of—

- 21 (1) preparing and distributing materials;
22 (2) hiring or consulting legal counsel or consult-
23 ants;
24 (3) meetings (including paying the salaries of
25 the attendees at meetings held for this purpose); and

1 (4) planning or conducting activities by man-
2 agers, supervisors, or union representatives during
3 work hours.

4 **SEC. 11. IMPLEMENTING REGULATIONS.**

5 Not later than 9 months after the date of enactment
6 of this Act, the Federal Acquisition Regulatory Council
7 shall amend the Federal Acquisition Regulation to carry
8 out the provisions of this Act, including sections 8 and
9 9.

10 **SEC. 12. SEVERABILITY.**

11 If any provision of this Act or the application of any
12 such provision to any person or circumstance is held to
13 be unconstitutional, the remaining provisions of this Act
14 and the application of such provisions to any person or
15 circumstance shall not be affected by such holding.

16 **SEC. 13. RULES OF CONSTRUCTION.**

17 Nothing in this Act shall be construed as—

18 (1) impairing or otherwise affecting the author-
19 ity granted by law to an executive agency or the
20 head thereof; or

21 (2) impairing or otherwise affecting the func-
22 tions of the Director of the Office of Management
23 and Budget relating to budgetary, administrative, or
24 legislative proposals.

○