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FEDERAL CONTRACT COMPLIANCE & EMPLOYMENT DATA ANALYTICS

Client Update

June 2015

FAR Council Proposed Rule and DOL Guidance for Implementation of the Fair Pay and Safe Workplaces "Blacklisting" Executive Order Would Impose Onerous Reporting Requirements and Questionable Review Standards on Federal Contractors and Subcontractors

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On May 28, 2015, the Federal Acquisition Regulatory (FAR) Council published its Notice of Proposed Rulemaking (NPRM) to implement the so-called blacklisting Executive Order (Executive Order 13673, "Fair Pay and Safe Workplaces") in the Federal Register. In addition, the United States Department of Labor (DOL) issued guidance related to some of the details under the rule.

The Executive Order calls for a paradigm shift in the compliance obligations of federal contractors and subcontractors in a way that the many other new regulatory requirements, as expansive as they were in their own right, did not. Specifically, employers with a federal contract or subcontract over **$500,000** will need to:

(a) report on their compliance status related to 14 federal employment laws and their state law equivalents,

(b) account for, report on, and on some level be accountable for the compliance posture of their subcontractors, and

(c) provide expanded disclosures with their employees' paychecks.

In addition, employers with a contract or subcontract over **$1 million** will be prohibited from entering into pre-claim arbitration agreements with regard to claims arising under Title VII, or any tort related to or arising out of sexual assault and sexual harassment claims.

Subcontracts for items that are commercially available off-the-shelf are not subject to the proposed rule's requirements.

The most obvious effects of the proposed rule are the imposition of onerous disclosure requirements on employers bidding on federal contracts and the creation for the first time of contractor responsibility for the compliance posture of their current and proposed subcontractors. But a more troubling aspect of the proposed rule is that it potentially will cause employers to be denied federal contracts and subcontracts based on legal proceedings that are far from final—some of which could be based on mere allegations or represent legal posturing. The power this would give to anyone merely accusing would-be federal contractors of wrongdoing seems wildly inappropriate in our legal system, which places a premium on fairness and due process. If nothing else, the proposed rule and DOL guidance should ensure that the reportable labor law violations are limited to those that result from a thorough and complete process and not those that are very much interim steps in the larger legal process.

Compliance with Labor Laws

The main element of the EO and proposed rule relates to contractor and subcontractor reporting on, and federal agency scrutiny of, "labor violations." Labor violations include administrative merits determinations, civil judgments, and arbitral awards or decisions under the following laws:

(1) The Fair Labor Standards Act (FLSA);
(2) The Occupational Safety and Health Act of 1970 (OSHA);
(3) The Migrant and Seasonal Agricultural Worker Protection Act (MSPA);
(4) The National Labor Relations Act (NLRA);
(5) The Davis-Bacon Act (DBA);
(6) The Service Contract Act (SCA);
(7) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);
(8) Section 503 of the Rehabilitation Act of 1973;
(9) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA);
(10) The Family and Medical Leave Act (FMLA);
(11) Title VII of the Civil Rights Act of 1964;
(12) The Americans with Disabilities Act of 1990 (ADA);
(13) The Age Discrimination in Employment Act of 1967 (ADEA);
(14) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors); and
(15) Equivalent State laws as defined in guidance issued by the Department of Labor. (The only equivalent State laws currently identified are OSHA-approved State Plans; DOL will issue a second guidance that will identify the complete list of equivalent state laws).

Reportable Administrative Merits Determinations, Civil Judgements, and Arbitral Awards or Decisions

As previously stated, contractors and subcontractors must report administrative merits determinations, civil judgments, and arbitral awards or decisions that have been rendered against them within the previous three years.

The DOL guidance defines administrative merits determinations, civil judgments, and arbitral awards or decisions. Of the three, the definition of an **administrative merits determination** is by far the most controversial. It includes seven categories of documents, notices, and findings from enforcement agencies:

(a) from the Department's Wage and Hour Division:

- a WH-56 "Summary of Unpaid Wages" form;
- a letter indicating that an investigation disclosed a violation of sections six or seven of the FLSA or a violation of the FMLA, SCA, DBA, or Executive Order 13658;
- a WH-103 "Employment of Minors Contrary to The Fair Labor Standards Act" notice;
- a letter, notice, or other document assessing civil monetary penalties;
- a letter that recites violations concerning the payment of special minimum wages to workers with disabilities under section 14(c) of the FLSA or revokes a certificate that authorized the payment of special minimum wages;
- a WH-561 "Citation and Notification of Penalty" for violations under the OSH Act's field sanitation or temporary labor camp standards;
- an order of reference filed with an administrative law judge;

(b) from the Department's Occupational Safety and Health Administration (OSHA) or any State agency designated to administer an OSHA-approved State Plan:

- a citation;
- an imminent danger notice;
- a notice of failure to abate; or
- any State equivalent;

(c) from the Department's Office of Federal Contract Compliance Programs:

- a show cause notice for failure to comply with the requirements of Executive Order 11246, Section 503 of the Rehabilitation Act, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, or the Vietnam Era

Veterans' Readjustment Assistance Act of 1974;

(d) from the Equal Employment Opportunity Commission (the EEOC):

- a letter of determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring; or
- a civil action filed on behalf of the EEOC;

(e) from the National Labor Relations Board:

- a complaint issued by any Regional Director;

(f) a complaint filed by or on behalf of an enforcement agency with a federal or State court, an administrative judge, or an administrative law judge alleging that the contractor or subcontractor violated any provision of the Labor Laws; or

(g) any order or finding from any administrative judge, administrative law judge, the Department's Administrative Review Board, the Occupational Safety and Health Review Commission or State equivalent, or the National Labor Relations Board that the contractor or subcontractor violated any provision of the Labor Laws.

DOL's guidance establishes the above as the exclusive list of administrative merit determinations.

A **civil judgment** includes "any judgment or order entered by any federal or State court in which the court determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws." Disclosure is required "even if the order or decision is subject to further review in the same proceeding, is not final, can be appealed, or has been appealed."

An **arbitral award or decision** includes "any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws." Arbitral awards or decisions that are not final or are subject to being confirmed, modified, or vacated by a court must be reported by the contractor or subcontractor.

If an administrative merits determination, civil judgment, or arbitral award or decision arises out of the same underlying Labor Law violation as a prior administrative merits determination, civil judgment, or arbitral award or decision, then only the most recent instance must be disclosed for each underlying violation.

Federal Contractor Self-Certification Requirements

Prime contractors with contracts with an estimated value over $500,000 must report administrative merits determinations, civil judgments, and arbitral awards or decisions that have been rendered against them within the previous three years for a violation of the Labor Laws. The prime contractor must update this information every 6 months throughout the life of the contract.

Different stages of the contracting process require different disclosures. An "initial representation" will occur when a contractor bids on a solicitation for a covered procurement contract and must include a bare indication as to whether, to the best of the contractor's knowledge, it has been the subject of administrative merits determinations, civil judgments, or arbitral awards or decisions, without further information. If the contractor responded affirmatively in the "initial representation," then the contracting officer initiates a responsibility determination, which will require the contractor to submit a "pre-award reporting" disclosure. This disclosure indicates the Labor Law violated, the identification number of the violation, the date that the determination, judgment, or award was rendered, the name of the entity that rendered it, and any mitigating circumstances. "Post-award reporting" requires that

every 6 months, contractors include any new determinations, judgements, or decisions that have been rendered since the last report. Further, contractors must require subcontractors performing subcontracts with a value of over $500,000 to make identical disclosures and to update these disclosures semi-annually during the performance of the covered subcontract. Subcontracts for commercially available off-the-shelf items are not subject to the disclosure/reporting requirements.

Review by Contracting Officers and Agency Labor Compliance Advisors

If a prospective contractor makes a disclosure pursuant to the certification requirements described above, the contracting officer will need to determine whether the prospective contractor has a satisfactory record of integrity and business ethics, referred to in the proposed rule as a "responsibility determination." In making this determination, the contracting officer must get the written advice and recommendation from the agency's designated labor compliance advisor. The Agency Labor Compliance Advisor ("ALCA") will make one of three recommendations:

(a) the prospective contractor has a satisfactory record of integrity and business ethics;

(b) the prospective contractor could be found to have a satisfactory record of integrity and business ethics if the process to enter into or enhance a labor compliance agreement is initiated; or

(c) the prospective contractor does not have a satisfactory record of integrity and business ethics, and the agency Suspending and Debarring Official should be notified in accordance with agency procedures.

The ALCA and contracting officer will collectively consider the following when assessing whether a contractor has a satisfactory record of integrity and business ethics:

- whether the labor violations are serious, willful, repeated, or pervasive;
- the number of labor violations;
- mitigating circumstances;
- remedial measures taken by the contractor;
- the need for, existence of, and or adherence to a labor compliance agreement; and
- whether the contractor is still negotiating a labor compliance agreement in good faith.

These same standards will be applied to any information disclosed by the contractor in its post-award semi-annual updates. The ALCA can recommend and the contracting officer can take action based on any new information disclosed in the contractor's semi-annual update, including:

- electing to continue the contract,
- referring the matter to DOL for a new or enhanced labor compliance agreement,
- electing not to exercise a contract option, or
- terminating the contract.

Criteria for Serious, Willful, Repeated, and Pervasive Labor Law Violations

DOL's guidance establishes the standards for whether labor violations are serious, willful, repeated, or pervasive.

A determination as to whether the violation is **"serious"** must take into account "the number of employees affected, the degree of risk posed or actual harm done by the violation to the health, safety, or well-being of a worker, the amount of damages incurred or fines or penalties assessed with regard to the violation." A violation is serious if it involves at least one of the following:

- An OSH Act or OSHA-approved State Plan citation was designated as serious, there was a notice of failure to abate an OSH Act violation, or an imminent danger notice was issued under the OSH Act or an OSHA-approved State Plan;
- The violation affected 25% or more of the workforce at the worksite;

- The violation resulted in fines and penalties of at least $5,000 or back wages of at least $10,000, or in injunctive relief being imposed by an enforcement agency or a court;
- MSPA or the child labor violations that caused or contributed to the death or serious injury of one or more workers;
- Employment of a minor who was too young to be legally employed or in violation of a Hazardous Occupations Order;
- The violation involved an adverse employment action against or unlawful harassment against one or more workers for exercising any right protected by any of the Labor Laws;
- Violations involving a pattern or practice of discrimination or systemic discrimination;
- Violations involving interference with the enforcement agency's investigation; or
- Breaches of the material terms of any agreement or settlement entered into with an enforcement agency, or violation of any court order, administrative order, or arbitral award.

Violations are **"willful"** when the contractor knew of, acted with reckless disregard for, or acted with plain indifference to the requirements of the law.

Violations are **"repeated"** when the entity has had more than one violation, stemming from separate investigations or proceedings, involving the same or a substantially similar violation within the three year reporting window. The "substantially similar" inquiry is not limited to violations falling under the same law but instead turns on the similarity of the nature of the violations and the underlying obligations themselves.

Combining the serious, willful, and repeated standards, the standard for **"pervasive"** considers whether the violation demonstrates a basic disregard for Labor Laws as demonstrated by a pattern of serious or willful violations, continuing violations, or numerous violations.

The size of the contractor will be taken into account when considering the number of violations. Although a determination of "pervasive" takes into account the totality of the circumstances, three particular situations are most likely to result in a finding of "pervasive." These situations include (1) violations that meet two or more of the serious, repeated, and willful categories, (2) violations that are reflected in final judgments, determinations, or orders, and (3) violations of particular gravity such as the death of an employee, the termination of an employee for the employee's exercise of a right protected under the Labor Laws, violations impacting the working conditions of nearly all of the workforce at a worksite, and violations where the amount of back wages, penalties , and other damages awarded is greater than $100,000.

A finding of pervasive violations is highly probative of whether the contractor or subcontractor lacks integrity and business ethics—the central consideration of the agency's responsibility determination. This determination will be made on a case-by-case basis by considering the severity of the violation, the size of the contractor, and any mitigating factors. "The most important mitigating factors will be the extent to which the contractor or subcontractor has remediated the violation and taken steps to prevent its recurrence." Other mitigating circumstances include:

- where the contractor or subcontractor has only had a single violation;
- where the number of violations is low relative to the size of the contractor or subcontractor;
- where the contractor or subcontractor has implemented a safety and health management program, a collectively bargained grievance procedure, or other compliance program;
- where there was a recent legal or regulatory change; where the findings of the enforcement agency, court, arbitrator, or arbitral panel support a conclusion that contractor or subcontractor acted in good faith and had reasonable grounds for believing that it was not violating the law; and
- where the contractor or subcontractor has maintained a long period of compliance following any violations.

Contractor Certification Requirements on Behalf of Subcontractors

Not only is the Prime Contractor required to make disclosures with regard to its own compliance, each Contractor must also elicit and evaluate labor violation information from its subcontractors for subcontracts estimated to exceed $500,000.

First, the Prime Contractor must require a prospective subcontractor with a subcontract that exceeds an estimated value of $500,000 to disclose whether there have been any of the above actions (administrative merits determinations, civil judgments, or arbitral awards or decisions) taken against the subcontractor in the past three years. Contractors must require subcontractors to update their disclosures to the prime contractor every 6 months.

If the subcontractor indicates that there have been any of the above actions, the Contractor must determine whether the subcontractor is a responsible source that has a satisfactory record of integrity and business ethics ("responsibility determination"). The Contractor will make this responsibility determination based on consideration of (1) the nature of the violations (whether serious, repeated, willful, or pervasive), (2) the number of violations, (3) any mitigating circumstances, (4) remedial measures taken by the subcontractor to address violations (including existence of and compliance with any labor compliance agreements or current good faith negotiation of such agreement), and (5) any advice and assistance provided by DOL. If the contractor determines that the subcontractor has a satisfactory record of integrity and business ethics, the contractor must notify the contracting officer of the name of the subcontractor and the basis of its responsibility determination.

The contractor also shall require the subcontractor to provide updated Labor Law violation information and to disclose whether the subcontractor is meeting the terms of any existing labor compliance agreement. Based on the information it receives from the subcontractor, the prime contractor must determine whether action is necessary. The proposed rule provides the following examples of actions that can be pursued by the prime contractor: "requesting that the subcontractor pursue a new or enhanced labor compliance agreement, requiring other appropriate remedial measures, compliance assistance, resolving issues to avoid further violations, or not continuing with the subcontract." The prime contractor must disclose the course of action to the contracting officer.

Paycheck Transparency

Contractors and subcontractors with a contract of over $500,000 must provide a "wage statement" to all individuals performing work under the government contract subject to the wage records requirements under the FLSA, DBA, SCA, and equivalent state laws. The specific state laws will be identified in yet-to-be-issued DOL guidance. The wage statement must list hours worked, overtime hours, pay, and any additions made to or deductions from pay. The information required in this document is typically contained in a conventional pay stub.

For FLSA exempt employees, contractors may leave out hours worked so long as the statement informs the individuals of their overtime exempt status. For FLSA non-exempt employees, contractors must indicate how many total hours worked in the pay period and how many of those hours are overtime hours. In addition, employers will be required either to provide the wage statement every week or alternatively break down the hours worked and overtime hours corresponding to the period for which overtime is calculated and paid. Under federal law, those will be weekly tallies. In jurisdictions with daily overtime requirements, the breakout presumably will need to be by the workday.

The wage statement requirement does not apply to subcontracts for items commercially available off-the-shelf.

Post-Dispute Voluntary Consent for Arbitration

Finally, employers with a federal contract or subcontract over $1 million have restrictions on pre-dispute employee arbitration agreements. Specifically, regardless of any arbitration agreement in place prior to the dispute, claims arising under Title VII or any tort related to or arising out of sexual assault or harassment can only be arbitrated with the voluntary consent of the employee or independent contractor after such dispute arises. There are two exceptions to the post-dispute voluntary consent requirement:

(a) employees covered by a collective bargaining agreement, or

(b) employees or independent contractors who entered into valid arbitration contracts prior to the contractor bidding on a contract under the Executive Order. The post-dispute voluntary consent requirement will apply, however, if the arbitration agreement permits the contractor to change its terms or if the agreement is renegotiated or replaced.

The arbitration restrictions do not apply to subcontracts for items commercially available off-the-shelf.

Public Comments Due On July 27, 2015

The FAR Council and DOL are accepting public comments on the proposed rule and DOL guidance. Roffman Law Office will be drafting comments on behalf of its clients and the federal contractor employer community generally. Please contact Joshua Roffman (jroffman@roffman-law.com; 703-752-3775) with any thoughts or concerns you may have about the proposed rule and DOL guidance and we will do our best to capture them as part of our overall comments on behalf of employers who will be affected by these expansive new obligations.