Insight

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Blacklisting Proposed Rule and DOL Guidance Could Have Serious Repercussions for Those Doing Business with the Federal Government

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On May 28, 2015, the Federal Acquisition Regulatory (FAR) Council published in the Federal Register its highly anticipated Notice of Proposed Rulemaking (NPRM) regarding the so-called "blacklisting" procedures ordered by President Obama in his Fair Pay and Safe Workplaces Executive Order (EO). Accompanying the proposed rule was separate guidance issued by the Department of Labor (DOL). The new proposed rule and DOL guidance, if finalized in their present form, will impose multiple new obligations on government contractors and greatly increase the risks that such contractors will confront in performing services for the government. Many of the new rules are unprecedented in their scope and appear to exceed the President's authority under the laws enacted by Congress. For employers seeking to do business with the federal government, the untold cost and risk of the proposed rule and guidance represent a far greater burden than the title of the EO suggests.

The proposed rule provides specific guidance for the EO's broad requirements that:

- Companies bidding on federal contracts for goods and services (including construction) worth more than $500,000 must for the first time disclose violations of 14 federal labor laws and their state law equivalents that occurred in the past three years;
- Senior agency officials will be selected by contracting agencies to act as labor compliance advisors, who are supposed to assist compliance officers in determining whether contractors' actions "rise to the level of a lack of integrity or business ethics";
- Contractors and subcontractors must provide updated disclosures of their violations every six months;
- Each pay period, employers with federal contracts for goods and services (including construction) worth more than $500,000 must for the first time report to their employees detailed information (including hours worked, overtime hours, pay, and any additions to/subtractions from pay), and incorporate this requirement into qualifying subcontracts worth more than $500,000; and

- For goods and services contracts worth more than $1 million, contractors will be prohibited from arbitrating Title VII claims, as well as sexual assault and sexual harassment claims, unless the complaining employee agrees to arbitration after the claim arises. Contracts will be obligated to incorporate this requirement into qualifying subcontracts worth more than $1 million.

The stated purpose of the EO is to "help contractors come into compliance with federal labor laws." According to the DOL's guidance document, "violations of the labor laws create risks that government contracts will not be fulfilled satisfactorily or timely," because labor law violations arise in work environments that are not conducive to productivity and creativity, and where there is high workforce turnover. But the proposed rule and guidance give little attention to the careful balance of remedies and penalties already established by Congress in existing labor and employment laws. Instead, the proposed rule and guidance will now form the basis for new and subjective responsibility determinations.

The Proposed Rule Requirements

Under the proposed rule, bidding employers who meet the disclosure threshold – and successful bidders who meet the disclosure threshold – must disclose to the contracting agency any violations of 14 federal labor laws and as yet unspecified state laws that occurred during the previous three years. The relevant three-year period is the three-year period preceding the date of the offer, contract bid or proposal. Violations covered by the regulations must be reported, even if the underlying conduct occurred more than three years prior to the date of the offer.

The list of covered federal laws is extensive and includes:

- The Fair Labor Standards Act (FLSA);
- The Occupational Safety and Health Act of 1970 (OSH Act);
- The Migrant and Seasonal Agricultural Worker Protection Act (MSPA);
- The National Labor Relations Act (NLRA);
- The Davis-Bacon Act (DBA);
- The Service Contract Act (SCA);
- Executive Order 11246 (Equal Employment Opportunity);
- Section 503 of the Rehabilitation Act of 1973;
- The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA);
- The Family and Medical Leave Act (FMLA);
- Title VII of the Civil Rights Act of 1964 (Title VII);
- The Americans with Disabilities Act of 1990 (ADA);
- The Age Discrimination in Employment Act of 1967 (ADEA);
- Executive Order 13658 (Establishing a Minimum Wage for Contractors); and
- Equivalent state laws.

The DOL guidance notes it will publish additional proposed guidance addressing which state laws are equivalent to the 14 federal laws and executive orders listed above; OSHA-approved state plans are specifically listed as covered laws.

Covered Violations

The proposed rule defines "violation" as (i) administrative merits determinations; (ii) awards or decisions from an arbitration; or (iii) civil judgments.

Administrative *merits determinations* are issued by enforcement agencies. An enforcement agency is defined as any agency that administers the federal labor laws, such as the DOL, the Occupational Safety and Health Review Commission, and the National Labor Relations Board, as well as any state agency designated to administer an OSHA-approved state plan, and any state agencies that enforce the (to be identified) state laws. An administrative merits determination is defined as any notice or finding (final, or subject to appeal or further review) issued after a full investigation by the relevant enforcement agency that indicates the contractor violated any provision of the enumerated labor laws. The proposed rule provides the following exhaustive list of what constitutes an administrative merits determination:

- DOL'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 OSHA's field sanitation or temporary labor camp standards; an order of reference filed with an administrative law judge;
- 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;
- Office of Federal Contract Compliance Programs (OFCCP):
  - 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;
- Equal Employment Opportunity Commission (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 by the EEOC;
- National Labor Relations Board (NLRB):
  - a complaint issued by any Regional Director;
- 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
- 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.

As can be seen from the above list, the proposed rule would require contractors to report many types of administrative determinations that are not final, even where no hearing has been held and no ultimate agency determination has been issued or reviewed by the courts. Contractors will therefore be deprived of their rights to due process if such reports form the basis for agency responsibility determinations, as the proposed rule contemplates.

The proposed rule states that when contractors and subcontractors report administrative merits determinations, they may also submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the determination has been challenged). Additionally, contractors and subcontractors will have "opportunities" to provide information regarding any mitigating factors. The net result of these provisions will be to require contractors to litigate their defense of any claimed violations in two separate forums: at the original agency level and at the procurement level.

Civil determination means any judgment or order – including appealable judgments – 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. The definition covers private suits resolved by jury trial, bench trial, or the granting of summary judgment, as well as preliminary injunctions for labor law violations, consent judgments, and default judgments. A private settlement where the lawsuit is dismissed by the court without any judgment being entered is not a civil judgment.

Finally, *an arbitral award or decision* is defined as any award or order by an arbitrator or arbitral panel where the contractor or subcontractor was found to have violated labor laws. This includes an award or order that is not final or is subject to being confirmed, modified, or vacated by a court, and also covers arbitral proceedings that were private or confidential.

Contractors and subcontractors are relieved from the reporting requirements only if the determination that there was a violation of labor law has been reversed or vacated.

Reporting Requirements

Under the proposed rules, when a contractor or subcontractor submits a bid on a contract, it will first report whether any violations have been rendered against it, without more detail. If the bidder reaches the stage of the procurement process at which a responsibility determination is made, then the bidder will be required to provide additional information as to each of the violations it disclosed. This additional information is as follows: "the labor law that was violated; the case number, inspection number, charge number, docket number, or other unique identification number; the date that the determination, judgment, award, or decision was rendered; and the name of the court, arbitrator(s), agency, board, or commission that rendered it."

At this point, the contractor can provide mitigating circumstances and remedial efforts. The agency will then determine whether the bidder "is a responsible source that has a satisfactory record of integrity and business ethics." This determination will be made by the agency's Contracting Officer (CO) in concert with the agency's Labor Compliance Advisor (LCA), and will be driven by whether the violations reported were "serious, repeated, willful," or "pervasive." The proposed rule further requires COs to report information received through this process to their agency's suspending and debarring official, as required by their agency's procedures.

For many contractors and contracting officers, this new process will be extremely burdensome. It will require a time-consuming and highly subjective analysis of complex and specialized legal concepts that appear in each of the 14 federal laws subject to the proposed rules.

The Parameters of Violations

The proposed rule and the DOL guidance attempt to define whether violations are "serious," "willful," "repeated," or "pervasive," as required by the EO. Some of these terms have already been defined by Congress in the labor laws covered by the new rules, but some terms such as "pervasive" do not appear in any of the statutes and others are defined by the proposed rules in ways that are inconsistent with legislative intent.

In any event, the proposed rule and DOL guidance provide their own new and arguably inconsistent definitions of the reportable types of violations. Under the proposed rule and DOL guidance, a violation will be deemed to be "serious" if it involves at least one of the following scenarios:

- 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 affected workers composed 25% or more of the workforce at the worksite;
- Fines and penalties of at least $5,000 were assessed, back wages of at least $10,000 were due, or injunctive relief was imposed by an enforcement agency or a court. Note that the threshold amounts are measured by the amount "assessed" – so even if an administrative merits determination of $7,000 is lowered to a $4,000 settlement, for example, the fine will be considered a "serious" violation;
- The contractor's or subcontractor's conduct violated MSPA or the child labor provisions of the FLSA and 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 on a Hazardous Occupations Order;
- The contractor or subcontractor engaged in an adverse employment action (including discharge, refusal to hire, suspension, demotion, or threat) or is responsible for unlawful harassment against one or more workers for exercising any right protected by any of the labor laws;
- The findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor engaged in a pattern or practice of discrimination or systemic discrimination;
- The findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor interfered with the enforcement agency's investigation; or
- The contractor or subcontractor breached the material terms of any agreement or settlement entered into with an enforcement agency, or violated any court order, any administrative order by an enforcement agency, or any arbitral award.

A violation is "willful" if:

- Under the OSH Act, an employer has demonstrated either an intentional disregard for the requirements of the OSH Act or a plain indifference to its requirements;
- For purposes of a citation issued pursuant to the OSH Act or an OSHA-approved state plan, the citation at issue was designated as willful or any equivalent state designation (i.e., "knowing"), and the designation was not subsequently vacated;
- For purposes of the FLSA (including the Equal Pay Act), the administrative merits determination sought or assessed back wages for greater than two years or sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding the contractor or subcontractor liable for back wages for greater than two years or affirming the assessment of civil monetary penalties for a willful violation;
- For purposes of the ADEA, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages;
- For purposes of Title VII or the ADA, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor or subcontractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual; or
- For purposes of any of the other labor laws, the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor knew that its conduct was prohibited by any of the labor laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the labor laws.

A violation is "repeated" if it is the same as, or substantially similar to, one or more other violations of the labor laws by the contractor or subcontractor. Two violations may be substantially similar where they share "essential elements in common." The inquiry does not require that the violations be under the same labor law; rather it focuses on the obligations under the labor laws. For example, violations under Title VII, the ADA, Executive Order 11246, and the VEVRAA are substantially similar if they involve the same or overlapping protected status.

Finally, violations are "pervasive" if they show a pattern of serious or willful violations. In other words, there must be multiple violations, although "the number of violations necessarily depends on the size of the contractor or subcontractor, because larger employers, by virtue of their size, are more likely to have multiple violations." For smaller companies, a smaller number of violations may be enough, while larger companies will "typically require either a greater number of violations or violations affecting a significant number or percentage of a company's workforce." Violations need not have had similar requirements under labor laws, unlike repeated violations. Additionally, pervasive violations can have arisen in the same proceeding or investigation – such as multiple but different OSH Act violations discovered in the same investigation. Violations under many different labor laws are also indicative of pervasiveness.

Each contractor's disclosed violations will be "assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractors, and any mitigating factors. The extent to which a contractor has remediated violations . . . including agreements entered into by contractors with enforcement agencies, will be given particular weight in this regard." Left unclear is how the new assessments will be made in a manner that is consistent with congressional intent underlying each of the 14 federal laws whose violations must be assessed, how contractor due process rights will be protected, and how agencies will accomplish all of this in a timely manner without unduly delaying the procurement process. Many contractors are justifiably concerned that the new, yet-to-be-defined guidelines for determining whether past labor law violations impact the contractor's responsibility will result in favoritism and deny due process to contractors who are denied contract eligibility.

Assessing Violations and Mitigation

Of particular concern to contracting officers are pervasive violations, violations that meet two or more of the categories above, violations reflected in final orders, and violations of "particular gravity." In determining whether a bidder has a satisfactory record of integrity and business ethics, the CO must also consider any corrective steps that the bidder has already taken to correct the violations, including steps to prevent their recurrence (including those taken pursuant to any agreements entered into with the relevant enforcement agency), as well as information communicated by the respective enforcement agency itself regarding necessary remedies, compliance assistance, or future corrective actions. Other mitigating factors include recent legal or regulatory changes, good faith, and a significant period of compliance following violations. Excluded from consideration are violations that are "inadvertent or minimally impactful." Additionally, a single violation of one of the labor laws will not give rise to a determination of lack of responsibility.

Successful bidders must update their disclosures every six months during the pendency of the contract. Using the updated disclosures, as well as "similar information obtained through other sources," COs would be empowered to take remedial measures up to and including contract termination and referral to the agency's suspending and debarring official.

The proposed rule imposes further obligations on contractors with regard to their subcontractors. In the event a successful bidder subcontracts work under a qualifying contract, and that subcontract is worth more than $500,000, the proposed rule requires that the contractor first perform the same analysis that the contracting agency performed of the contractor. In other words, before awarding the subcontract, the contractor must determine whether the subcontractor is "a responsible source that has a satisfactory record of integrity and business ethics," by reviewing the subcontractor's disclosures of its violations of the 14 or more labor laws. If the prime contractor awards the subcontract (or the subcontract becomes effective) within five days of the prime contract execution, then it must conduct this analysis within 30 days of awarding the subcontract. For all other subcontracts, review of possible reportable subcontractor violations must occur prior to the subcontract award. The proposed rule defers providing any guidance or details on how the cumbersome subcontracting will work, amid concerns that attempting to implement the subcontracting provisions of the EO will cause the entire procurement process to grind to a halt. Contractors are exempted from determining whether a subcontractor has a satisfactory record of integrity and business ethics if the subcontract is for commercially available, off-the-shelf items. Note, however, that according to the DOL guidance, the FAR Council is considering allowing contractors to direct their subcontractors to report the violations themselves to the DOL, which would then assess the violations directly.

Additional Discussion of Paycheck Transparency Provisions

In addition to requiring contractors to disclose violations of labor laws, the proposed rule also requires contractors holding federal contracts for goods and services (including construction) worth more than $500,000 to provide certain information to employees with each paycheck.

This provision has long been sought by labor unions and employee advocacy groups but had been rejected by previous administrations as unduly burdensome and likely to increase litigation challenges. Although the DOL's so-called "Right-to-Know" rulemaking remains a separate item on the Department's long-term regulatory agenda, the blacklisting proposed rule effectively applies it to government contractors. The new proposed rule would require all government contractors to include with each of their employees' paychecks the number of hours worked; the number of overtime hours worked; pay; and any additions to or subtractions from pay (like bonuses, awards and shift differentials). Hours worked would not be required to be provided to employees who are exempt from the overtime compensation requirements of the FLSA, provided the contractor has informed the employees of their exemption status. For independent contractors for whom contractors must maintain wage records under the FLSA, the DBA, the SCA, or equivalent state laws, a document informing the individual of his or her independent contractor status must be provided. This document must be given before the worker performs any work under the contract, and must be separate from any contract entered into between the contractor or subcontractor and the independent contractor. The first notice must be provided as of the effective date of the notice requirement, and thereafter each time the independent contractor is engaged to perform work under each covered contract. It is important to note that the determination of independent contractor status under a particular law is governed by that law's definition of employee.

Contractors would further be required to incorporate this requirement into qualifying subcontracts worth more than $500,000, and to inform independent contractors of their status, in writing.

Additional Discussion of Arbitration Provisions

Finally, the proposed rule prohibits contractors from agreeing with employees in advance to arbitrate certain civil rights claims, provided the contractor has a contract for goods and services worth more than $1 million. This provision of the proposed rule covers all claims arising under Title VII, as well as all tort claims related to sexual assault or harassment. Contractors would be able to arbitrate such claims only if the employee filing the claim voluntarily agreed to arbitration after the dispute arose. Contractors would be required to include this provision in subcontracts worth $1 million or more.

This prohibition of pre-claim arbitration agreements would not apply in three circumstances. First, if a contractor's employees are covered by a collective bargaining agreement that the contractor negotiated with a labor organization, the contractor would not be bound by this provision. Second, agreements to arbitrate such claims, if signed before the contractor or subcontractor became covered by this provision of the proposed rule, would still be valid – unless the contractor or subcontractor has the ability to change the terms of the contract. This latter exception would expire "when the contract is renegotiated or replaced." Finally, the prohibition of pre-claim arbitration agreements would not apply to contractors who are providing commercial items or commercially available off-the-shelf items.

Until now, only defense contractors had been prevented from requiring such arbitration agreements. The new proposed rule's broader restriction on government contractors' use of the arbitration process appears to conflict with the U.S. Supreme Court's decision in *CompuCredit v. Greenwood*, and other similar rulings upholding the enforceability of arbitration agreements under the Federal Arbitration Act.

Conclusion

In addition to the violations of existing laws and contractor due process rights discussed above, the proposed rule represents a radical change in federal contracting practices that will increase costs to taxpayers and delay necessary procurement decisions. The "blacklisting" provision would enable federal agencies to reject a bid or cancel an existing contract – as well as initiate suspension and debarment proceedings – based on violations that a contractor may have already resolved or that have not been fully adjudicated. This pre-award review as proposed will likely result in uncertainty for both contractors and the government, and delay in the procurement process. The impact would be compounded by the proposed reporting requirement imposed on prime contractors regarding their subcontractors if this requirement stands. For large contractors in particular, the burden to review a multitude of possible violations from hundreds of subcontractors will be tremendous; prime subcontractors may not have the staffing or legal expertise necessary to identify and confirm the subcontractor violations that fall under the reporting requirement from those that do not.

The threat of cancellation, suspension, and debarment of contracts may also significantly impact contractors' approaches to charges, demands, and matters pending before enforcement agencies, perhaps forcing contractors to settle matters rather than seeking vindication of their position and thereby risking a reportable "violation" that could affect their contract rights. The cost of compliance will be high, and may skew particularly against small contractors, who have more limited resources, and may deter new contractors from choosing to compete for and perform government contracts.

Next Steps

Comments to the proposed rule and DOL guidance are due July 27, 2015. Littler's Workplace Policy Institute, in conjunction with its Government Contractors Industry Group, will be submitting comments. In addition, Littler will be holding a complimentary webinar on Tuesday, June 16, 2015 at 1:00 pm Eastern (10:00 am Pacific) to discuss the proposed rule and the DOL guidance.