

# An Employment Law Guide for Federal Contractors in the Wake of the American Recovery and Reinvestment Act of 2009

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### IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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## An Employment Law Guide for Federal Contractors in the Wake of the American Recovery and Reinvestment Act of 2009

“We would like to live as we once lived, but history will not permit it.”<sup>1</sup> Though those were words spoken by President John F. Kennedy almost five decades ago, they are just as relevant, if not more so, today. From 2002 until the first quarter of 2008, the U.S. economy seemingly hummed with the certitude of an elegant timepiece which created a climate wherein businesses enjoyed record revenues and profits. Like industrial and investor forbearers of the 20th Century, specifically in the 1920s, many local, national and international companies wagered the “bull market” would continue to fuel a robust economy for years to come. However, 2008 changed that forecast with the onset of climbing unemployment, shrinking revenue statements and an economy tinkering on the brink of a depression, which ultimately caused many employers to reevaluate their business operations. As a result, many employers have taken specific steps in attempting to avoid bankruptcy or going out of business, such as reductions-in-force, plant closures, furloughs and strategic planning for survival in the harshest of economic realities: a recession of unusual breadth and duration.

Faced with the realities that have produced the deepest economic downturn since the Great Depression and the highest unemployment rate in 30 years, President Obama, following the example of President Franklin D. Roosevelt, has attempted to jump start the economy through aggressive federal stimulus legislation. When President Roosevelt faced the Great Depression, he obtained the passage of the Emergency Relief Appropriation Act of 1935, which was a part of the “Second New Deal” designed to reverse the effects of the failing economy and ameliorate unparalleled unemployment throughout the country. As part of that effort, President Roosevelt created the Works Progress Administration (WPA) in 1935 as a jobs program to hire the unemployed for the construction of public works, including buildings, roads and parks. Over the eight-year period of the program, governmental statistics suggest that over eight million Americans worked on WPA projects such as:

- 651,022 miles of roads, streets and highways
- 124,031 bridges built, repaired or refurbished
- 125,110 public buildings
- 8,192 parks
- 853 landing fields<sup>2</sup>

The total cost of the WPA’s job program was approximately \$11 billion, which resulted in 1,410,000 public work projects. In an effort to ensure unemployed individuals received prevailing wages

on those public works projects, Congress amended the then recently passed Davis-Bacon Act, which mandated the payment of prevailing wages for employees working on projects funded by federal money. Through the payment of prevailing wages, the WPA hoped to foster enough employment and economic activity, along with other factors, to help guide the country out of its economic distress.

President Obama has been pursuing a similar, and perhaps even more ambitious recovery program. Thus, on February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA), which provides \$787 billion in funding for job creation and preservation. Significant sums of money will be spent on construction and other public works projects. Specifically, and most notably, the ARRA provides the following funding:

- Transportation: \$49.3 billion, including \$29.5 billion for new bridge and highway construction, \$6.9 billion for mass transit programs, \$8.8 billion for high-speed rail investment and development, and \$1.8 billion for airport improvement projects;
- Energy and Technology: \$29.8 billion, including \$11 billion for improvement to the nation’s electrical grid, \$7.2 billion to expand broadband internet availability, and \$5 billion for energy-efficiency grants to private homeowners;
- Federal Facilities: \$29.6 billion, including \$5.6 billion to the General Services Administration to rehabilitate federal government buildings, \$7 billion to the Department of Defense for military housing and facility improvements, and \$8 billion for public housing programs;
- Environmental and Water Infrastructure: \$21.4 billion, including \$5.6 billion for the Army Corps of Engineers and Bureau of Reclamation, \$7.4 billion for clean water programs, and \$7.8 billion for environmental cleanup programs; and
- Public School Facilities: \$8.8 billion in discretionary funds that States can use for the construction and renovation of public schools.

With the allocation of billions designed to create or save jobs, many companies are currently considering, some for the first time, whether to become federal contractors. While the stimulus package is focused to a large extent on construction, there are also funding opportunities available to manufacturing companies and service

providers. For many employers seeking to improve their balance sheets by entering contracts funded through the ARRA, the federal contracting process can be intimidating. What's more, employers are concerned that receipt of any stimulus money through a federal contract, grant or loan can result in a public relations nightmare resulting from nothing more than conducting their businesses as prudent owners. Specifically, employers are increasingly worried about becoming the proverbial example of government waste and mismanagement.

Within the ARRA, and pursuant to subsequent advisory memoranda issued by the White House Office of Management and Budget, agencies responsible for oversight of specific public works projects are required to account for every dollar of public money allocated for a project.<sup>3</sup> With respect to employment laws relevant to the ARRA, Secretary of Labor Hilda Solis has made clear she will aggressively seek compliance with existing federal law: "Under my watch, enforcement of our labor laws will be intensified so we can provide an effective deterrent to employers who may unnecessarily put workers' lives and employment at risk."<sup>4</sup> In fact, Secretary Solis plans to hire approximately 670 investigators, inspectors and other enforcement officers over the next two years to ensure the federal labor and employment laws are not being violated generally, but specifically by those companies receiving federal stimulus funds.

As such, it is imperative for federal contractors to understand the application of the myriad employment laws to which virtually all contracts funded, wholly or in part, by the ARRA will be subject. In particular, federal contractors must comply with statutes related to: (1) wages and benefits; (2) labor unions; (3) affirmative action; and (4) immigration. Complying with these various aspects of employment law will assist employers in not only avoiding violations of existing law, but also with improving revenue and profit statements. This Report is intended to help employers with those efforts. While this Report will not answer every question relating to the employment aspects of federal contracting, it will provide employers with a comprehensive understanding of the various employment laws related to federal contracting.

## I. PREVAILING WAGES

For those considering contracts funded with federal stimulus money, the ARRA provides:

Notwithstanding any other provision of law and in a manner consistent with other provisions in this Act, all laborers and mechanics employed by contractors and subcontractors on projects funded directly or assisted in whole or in part by and through the Federal Government pursuant to this Act shall be paid wages at rates not less than those prevailing on projects of

character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40 United States Code...<sup>5</sup>

In other words, the ARRA generally mandates the payment of prevailing wages on projects funded, wholly or in part, with federal stimulus funds. There are generally three types of contracts that warrant the payment of prevailing wages: (1) construction contracts; (2) manufacturing contracts; and (3) service contracts. Specifically, the Davis-Bacon and Related Acts govern the payment of prevailing wages on construction contracts, the Walsh-Healy Public Contracts Act governs the payment of prevailing wages on manufacturing or supply contracts, and the McNamara-O'Hara Service Contract Act governs the payment of prevailing wages on service contracts. This section discusses each type of contract in detail with respect to the payment of prevailing wages.<sup>6</sup>

### A. Construction Contracts

#### 1. What is the Davis-Bacon and Related Acts?

In 1931, the Hoover Administration, attempting to stabilize local job markets during the Great Depression, enacted the Davis-Bacon Act (DBA).<sup>7</sup> It specifically provides that:

[E]very contract in excess of \$2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics...<sup>8</sup>

Before the Davis-Bacon Act requirements will apply to a federal construction project, the federal contract must meet the following basic requirements: (1) the District of Columbia or the federal government, *e.g.*, the Department of Energy, must be a party to the contract; (2) the contract must be for the construction, repair or alteration of a public building or public work within the District of Columbia or the United States; and (3) the contract value must exceed \$2000. If the contract requires construction on a public building or public work within a territory of the United States, such as Guam, the Davis-Bacon Act generally will not apply.

Congress, by reference, has extended the Davis-Bacon Act prevailing wage requirements to legislative acts providing funding through grants, insurance, loans and loan guarantees.<sup>9</sup> For example, the Davis-Bacon Act prevailing wage obligations will apply even though a highway construction contract is entered into with a state, which receives grant money from the Department of Transportation

through the Federal Highway Administration through the Federal-Aid Highway Act.<sup>10</sup> There are approximately 60 other related federal acts that require the payment of prevailing wages.<sup>11</sup>

Besides complying with the Davis-Bacon Act prevailing wage requirements, federal contractors also have to consider whether “mini” Davis-Bacon Act requirements apply, which are the state counterparts to the Davis-Bacon Act. Currently, 32 states have their own laws related to public works construction contracts.<sup>12</sup> On occasion, a contract with a state may be funded in part by federal and state funds, which will require a federal contractor to determine which laws may apply.

## 2. What Are Prevailing Wages?

All employers, including federal contractors, have an obligation to pay minimum wages under the Fair Labor Standards Act. Federal contractors, however, must pay minimum wages in the form of prevailing wages, which include a basic wage rate and fringe benefits.<sup>13</sup> The United States Department of Labor is responsible for determining the prevailing wage rate and fringe benefits existing in a local area. The Department of Labor considers a wage prevailing in a local market if that wage is paid to more than 50 percent of the laborers or mechanics in a particular classification of work.<sup>14</sup> The prevailing wage also has been defined as a wage determination.

There are two types of wage determinations: (1) general; and (2) project. A general wage determination reflects the wage rates found prevailing in a specific geographic location. These determinations have no expiration date and must be used by a contracting agency for applicable projects.<sup>15</sup> These wage determinations are available online at <http://www.wdol.gov>.

When a wage determination has not been established for classification within a certain geographic location, the Department of Labor will issue a project wage determination. These wage determinations are issued by the Department at the request of the contracting agency entering responsible for the project, who must make the request using Form SF-308.<sup>16</sup> After 180 days, project wage determinations expire. It is advisable that federal contractors confirm the wage determinations contained in a contract because they will be responsible for not paying the correct prevailing wage to the employees on the project.

The obligation to pay the locally prevailing wage also requires provision of the specified benefits or benefits of equal value, or payment of the equivalent cost of the benefits. Benefits that may be included in a prevailing wage determination include medical and life insurance, retirement benefits, disability and sick leave insurance, vacation and holiday pay, and apprentice training.<sup>17</sup>

## 3. Who Must be Paid Prevailing Wages?

All *laborers and mechanics* must be paid prevailing wages in accordance with the Davis-Bacon Act.<sup>18</sup> The term *laborer* or *mechanic* includes “at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial.”<sup>19</sup> The term laborer or mechanic also includes apprentices, trainees, helpers and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act (CWHSSA), watchmen or guards.<sup>20</sup> The term does not apply to workers whose duties are primarily administrative, executive or clerical, rather than manual.<sup>21</sup>

The Davis-Bacon Act limits coverage to mechanics and laborers who are employed directly on the *site of the work*.<sup>22</sup> Once the site of work is determined, “the wage determination is applicable only to those mechanics and laborers employed by a contractor or subcontractor within such limits.”<sup>23</sup> Specifically, the *site of the work* is defined as “the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.”<sup>24</sup> For example, job headquarters, tool yards, batch plants or borrow pits are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work.<sup>25</sup>

However, “permanent home offices, branch plant establishments, fabrication plants, or tool yards of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular federal or federally assisted contract or project” are not considered the site of the work.<sup>26</sup> “This is so even though mechanics and laborers working at such an establishment may repair or maintain machinery used in contract performance, or make doors windows, frames or forms called for by the contract while continuing normal commercial work.”<sup>27</sup> Regardless of the activities performed at such establishments, the wage determination does not apply because they do not constitute the “site of work.”<sup>28</sup>

Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion or repair of a public building or public work, or building or work financed in whole or in part by loans, grants or guarantees from the United States, is *employed* regardless of any contractual relationship alleged to exist between the contractor and such person.<sup>29</sup> In other words, a federal contractor will be unable to avoid paying prevailing wages because of an independent contractor arrangement. In such cases,

the federal contractor will need to pay the independent contractor the prevailing wage for the work being performed.

The wage rates for bona fide supervisory employees are not regulated under the Davis-Bacon and Related Acts because their duties are primarily administrative or executive in nature. Indeed, all persons employed as exempt employees under either the executive, administrative or professional exemption will not be deemed laborers or mechanics.<sup>30</sup> However, if those exempt employees devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and do not meet the criteria for one of the exemptions, they will be considered laborers and mechanics and must be paid the applicable prevailing wage for the time so spent.<sup>31</sup>

#### **4. What Type of Construction “Work” Triggers the Payment of Prevailing Wages?**

The Davis-Bacon Act applies to the *construction, alteration or repair of a public building or public work*.<sup>32</sup> The term *public work* includes “building or work, the construction, prosecution, completion or repair of which ... is carried on directly by authority of or with funds of a federal agency to serve the interest of the general public regardless of whether title thereof is in a federal agency.”<sup>33</sup>

The terms *construction, prosecution, completion or repair* mean all types of work done on a particular building or work by laborers and mechanics including, but not limited to, (1) altering, remodeling and installation (where appropriate) on the site of the work of items fabricated off-site; (2) painting and decorating; (3) manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work; and (4) transportation between the actual construction location and a facility which is dedicated to such construction and deemed a part of the site of the work.<sup>34</sup> Additionally, and under certain circumstances, carpet laying, drapery installation, clean-up work, demolition work, drilling work, soil boring, oil and gas well plugging, landscape contracting, public utility installation, sewer repair, shipbuilding/repair, and steam and sand blast cleaning may be covered under the Act.<sup>35</sup>

#### **5. Who is Responsible for the Payment of Prevailing Wages?**

The principal contractor and all subcontractors on federally funded or federally assisted construction projects must pay prevailing wages. Importantly, the principal contractor is responsible for making sure every subcontractor on a Davis-Bacon Act project pays their employees prevailing wages.<sup>36</sup> In every subcontract, the principal contractor must include a clause obligating the subcontractor to pay prevailing wages.

The principal contractor and subcontractors must pay their employees on a weekly basis.<sup>37</sup> Significantly, the obligation to pay the prevailing hourly wages applies only to hours worked in furtherance of a federal contract; the obligation generally does not apply to hours in a week or in a day that are spent on work unrelated to a federal contract. The hours spent on a federal contract should be identified separately on an employee’s time card, and the amount paid for such work should also be identified separately. The amount paid in satisfaction of the prevailing hourly wage obligation should be separately stated from any amount paid in satisfaction of the prevailing fringe benefit obligation.

A contractor or subcontractor can satisfy the prevailing wage obligations by: (1) paying both the basic wage rate and fringe benefits in cash; (2) making payments or incurring costs for bona fide fringe benefits; or (3) a combination of both. If the fringe benefit is paid in cash, it must be treated as wages for tax purposes. Consequently, this approach will impose additional costs on the employer.

Though not specified in the Davis-Bacon and Related Acts, employees working on federally funded construction projects are entitled to overtime pay. The CWHSSA mandates that employees, on covered contracts in excess of \$100,000, receive time and one-half the basic wage rate for all hours worked in excess of 40 in a workweek. Overtime requirements under the Fair Labor Standards Act may also apply. The fringe benefit, however, can be excluded from the basic rate for overtime purposes. Notably, an employee is only entitled to overtime for the hours spent on a covered contract and not for work unrelated to the federal contract.

#### **6. Recordkeeping Obligations Under the Copeland “Anti-Kickback” Act**

The Copeland “Anti-Kickback” Act<sup>38</sup> applies to all contractors and subcontractors engaged in constructing, carrying out, completing or repairing public buildings, public works or buildings or works that are at least partly financed by a loan or grant from the federal government. In general, only federally funded or federally assisted construction contracts for less than \$2,000, or for which the only federal assistance is a loan guarantee, are excluded from the Act’s coverage. The Anti-Kickback Act prohibits covered contractors and subcontractors from using force, intimidation or threat of dismissal from employment to induce any person employed in covered construction to give up any part of his or her entitled compensation. Any contractor or subcontractor who induces an employee to give up any part of the compensation to which the employee is entitled is subject to fines and/or up to five years imprisonment.

Pursuant to the Anti-Kickback Act, each covered contractor and subcontractor is required to furnish a weekly statement of the

wages paid to each employee performing covered work during the preceding weekly payroll period.<sup>39</sup> The required weekly payroll statement must contain the information set forth on Form WH-347 issued by the Department of Labor, although use of the specific form is optional. The employees covered by these requirements are “laborers” and “mechanics.”

The required information includes: (1) contractor or subcontractor firm name; (2) address; (3) payroll number; (4) workweek ending date; (5) project and location; (6) project or contract number; (6) employee’s name and individual identifying number, *e.g.*, last four digits of social security number;<sup>40</sup> (7) work classifications descriptive of work actually performed by the employee; (8) straight and overtime hours worked; (9) rate of pay (including fringe benefits); (10) gross amount earned on the subject project; (11) each deduction from pay; and (12) net wages paid for the week.<sup>41</sup>

The weekly payroll statement also must include a “statement of compliance,” signed by the contractor or subcontractor or an authorized agent who supervises the payment of wages. The compliance statement certifies that: (1) the payroll information is correct and complete; (2) each laborer and/or mechanic employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and no impermissible deductions have been made, either directly or indirectly, from the full wages earned; and (3) each laborer and/or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed.

The weekly payroll statement must be delivered by the contractor or subcontractor within seven days after the regular payment of the payroll period to a representative of the federal or state agency at the site in charge of the work, or if there is no on-site representative, the statement must be mailed within the seven days to the federal or state agency contracting for or financing the work.<sup>42</sup> The prime contractor is responsible for submission of copies of payrolls by all subcontractors.

In addition, each contractor and subcontractor must retain its weekly payroll records for at least three years from the date of the completion of the contract. The payroll records must accurately and completely include the following information: (1) name and address of each laborer and mechanic; and (2) his or her correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid.<sup>43</sup> The foregoing records must be made available at all times for inspection by authorized representatives of the contracting officer or the Department of Labor.

Any contractor or subcontractor who willfully falsifies the statement of payroll is subject to civil prosecution pursuant to the False Claims Act (31 U.S.C. § 3729) or criminal prosecution under 18 U.S.C. section 1001. Willful falsification of the payroll statement may also be grounds for contract termination or debarment.

## B. Service Contracts-Application of the McNamara-O’Hara Service Contract Act

The McNamara-O’Hara Service Contract Act of 1965 (SCA) applies to every contract an employer enters into with the U.S. Government or the District of Columbia<sup>44</sup> where the principal purpose of the contract is to furnish *services*. Like the Davis-Bacon and Related Acts, the SCA requires contractors and subcontractors in covered contracts greater than \$2,500 to pay the service employees no less than a set monetary wage rate (*i.e.*, a wage determination by the DOL) as well as provide fringe benefits (including any accrued or prospective wage rates and fringe benefits) according to the prevailing rate in the area or the rates (including prospective increases) established by a prior collective bargaining agreement. For contracts equal to or less than \$2,500, contractors are required to pay the federal minimum wage and are not subject to the SCA’s wage and fringe benefit determinations, or to its safety and health requirements.<sup>45</sup> For contracts in excess of \$2,500, the employer must provide the fringe benefit listed in the wage determination in addition to the minimum wage.<sup>46</sup> If no wage determination has been made for the instant contract, employees must be paid no less than the federal minimum wage.<sup>47</sup>

Specifically, the SCA applies to a covered contract when a “service employee” is used. The definition of a *service employee* includes any employee engaged in performing services on a covered contract other than exempt employees (*i.e.*, bona fide executive, administrative or professional employees) as defined by the Fair Labor Standards Act.<sup>48</sup> The SCA also does not apply to certain types of contractual services, such as:

- Contracts related to the construction, alteration or repair of public buildings or public works (covered by the Davis-Bacon Act);
- Work covered under the Walsh-Healy Public Contracts Act (described section I.C. below);
- Contracts for transporting freight or personnel where published tariff rates are in effect;
- Contracts for services by radio, telephone, telegraph or cable companies subject to the Communications Act of 1934;
- Contracts for public utility services;

- Employment contracts providing for direct services to a federal agency by an individual(s);
- Contracts for operating postal contract stations for the U.S. Postal Service;
- Services performed outside the U.S. (except in U.S. territories); and
- Contracts administratively exempted by the Secretary of Labor in special circumstances because of the public interest or to avoid serious impairment of government business.

Federal contractors should pay particular care when classifying their workers with the occupations listed in the wage determinations. If there is a class of service employees who are not listed in the wage determination, the contractor must classify the employees to provide an appropriate level of skill comparable to a classification listed in the wage determination. This is not always a straight-forward task and misclassifications can subject the contractor to a DOL audit with the penalty of back wages. While the SCA's statute of limitations is six years, the Department typically goes back as far as two years in its audits.

When an employer believes that there is not an existing wage determination for a particular classification of its employees, the contractor can utilize the SCA's conformance process to establish an enforceable wage and benefit rate.<sup>49</sup> Under the conformance process, the employer must initiate a request for approval of an additional classification along with the proposed wage and benefit rates for that classification to the contracting officer. Employees, or their union representative, also have an opportunity to concur or disagree with the contractor's proposed wage and benefit rate. The contracting officer, in conjunction with the DOL, will either approve the contractor's proposal, or reject it and provide a recommendation for a different wage and benefit rate.

While the SCA, like the Davis-Bacon and Related Acts, does not have its own overtime provisions, the Contract Work Hours and Safety Standards Act requires that for prime contracts in excess of \$100,000 contractors and subcontractors must pay laborers and mechanics, including guards and watchmen, at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. Additionally, the FLSA's overtime provisions may also apply to SCA-covered contracts.

Each contractor and subcontractor must maintain payroll records for each employee working on the SCA-covered contract for three years. The information required in the payroll records for SCA contracts mirrors the information identified above for Davis-Bacon

Act contracts. A contractor is also obligated to provide a covered employee with notice of the SCA's compensation requirements when the employee begins work on a service contract in excess of \$2,500. That obligation can be fulfilled by the posting of the Service Contract Act/Walsh-Healy Public Contracts Act Poster (including any applicable wage determinations) in the usual employee notice areas.<sup>50</sup>

### C. Manufacturing Contracts: Application of the Walsh-Healy Public Contracts Act.

The Walsh-Healy Public Contracts Act of 1936 (PCA) requires contractors with contracts greater than \$10,000 for the manufacturing or furnishing of materials, supplies, articles or equipment to the U.S. government or the District of Columbia to pay employees who produce, assemble, handle or ship goods the federal minimum wage for all hours worked and time-and-one-half their regular rate of pay for all hours worked over 40 in a workweek. The PCA does not apply to executive, administrative and professional employees, or to outside salespersons exempt from the FLSA's minimum wage and overtime provisions. The PCA also excludes certain office and custodial workers.

The PCA does not apply to the following types of contracts:

- Purchases of materials, supplies, articles or equipment as may usually be bought in the "open market;"
- Purchases of perishables;
- Purchases of agricultural products from the original producers;
- Contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or products;
- Contracts for public utility services and certain transportation and communication services;
- Supplies manufactured or furnished outside the U.S. (including Puerto Rico) or the Virgin Islands; and
- Contracts administratively exempted by the Secretary of Labor in special circumstances because of the public interest or to avoid serious impairment of government business.

The PCA requires covered contractors to pay covered employees the federal minimum wage of \$6.55 per hour effective July 24, 2008, and \$7.25 per hour effective July 24, 2009. Special lower rates may be paid to apprentices, students in vocation educational programs and disabled workers if the employer obtains special certificates from the Department of Labor. Covered employees must also be paid time-and-a-half their regular rate of pay for all hours worked

over 40 in a workweek. The PCA mirrors the SCA's safety and health requirements.<sup>51</sup>

Contractors who violate the PCA may be subject to a withholding of contract payment in amounts sufficient to reimburse the underpayment. Any employer who employs underage minors or convicts is subject to a penalty of \$10 per day per person, as well as the potential withholding of contract payments. The DOL may also bring legal action to collect wage underpayment and fines for illegally employing minors and convicts. A contractor who willfully violates the PCA may be subject to cancellation of the current contract and debarment from future federal contracts for three years.

## D. Prevailing Wage Enforcement

On March 25, 2009, Secretary of Labor, Hilda L. Solis, issued the following statement:

As Secretary of Labor, I am committed to ensuring that every worker is paid at least the minimum wage, that those who work overtime are properly compensated, that child labor laws are strictly enforced and that every worker is provided a safe and healthful environment.

The Department's Wage and Hour Division has already begun the process of adding 150 new investigators to its field offices to refocus the agency on these enforcement responsibilities. In addition, under the American Recovery and Reinvestment Act, the agency will hire 100 investigators to ensure that contractors on stimulus projects are in compliance with the applicable laws. The addition of these 250 new field investigators, a staff increase of more than a third, will reinvigorate the work of this important agency, which has suffered a loss of experienced personnel over the last several years.

The U.S. Department of Labor is the voice for working families, and I am dedicated to ensuring compliance with federal labor laws to both strengthen our economy and protect workers in this country.

Given the Department of Labor's renewed focus on enforcement responsibilities, and the increase in the number of government contractors as a result of the American Recovery and Reinvestment Act of 2009, government contractors — both new and experienced — are on notice that they should get reacquainted with the applicable prevailing wage enforcement process now in order to avoid potential liability for noncompliance in the future.

### 1. Federal and State Departments of Labor both have Enforcement Responsibilities

The U.S. Department of Labor is responsible for enforcing the DBA and Related Acts, SCA, and CWHSSA.<sup>52</sup> Under the DBA

and SCA, the Department of Labor may investigate and prosecute violations for unpaid wages and overtime, adopt rules and regulations necessary for the enforcement those statutes, and issue wage determinations. For violations of the DBA, the Comptroller General of the United States is authorized to withhold payments due under the funding contract for violations of either Act and make direct wage payments to laborers and mechanics from contract payments that have been withheld.<sup>53</sup> Notably, the Department of Labor has discretion to make necessary exceptions to the SCA's requirements on a case-by-case basis.<sup>54</sup>

Decisions of the Department of Labor are appealable to the Administrative Review Board; however, assessments made against a contractor are appealable to the head of the contracting agency or, if applicable, to the mayor of the District of Columbia, and then to the courts.<sup>55</sup>

The contracting agency and the Department of Labor are responsible for carefully examining a contractor's or subcontractor's weekly payroll reports for thoroughness, consistency with previously submitted payrolls, and accuracy of special deductions, work hours and pay rates according to job classifications and the wage determination rate. The contracting agency and Department of Labor are authorized to conduct job-site inspections, during which an inspector considers several factors in determining DBA compliance, including general observations of the job-site and information obtained from employee interviews. The inspector also confirms that the required wage rate notices are posted.

Claims for unpaid minimum wages, overtime pay and liquidated damages must be brought no later than two years from the date that an action occurred, or no later than three years from the date that an action for a willful violation occurred. Under the DBA, covered employees have a right of action or intervention for unpaid wages against the contractor or its surety, to the extent that any withheld payments are insufficient to cover unpaid wages. However, the DBA does not expressly provide an employee with a private right of action to enforce the statute, although in some circumstances courts may find an implied right of action.<sup>56</sup>

As previously discussed, 31 states currently have "Mini Davis-Bacon Acts," prevailing wage laws that were modeled after the federal Davis-Bacon Act.<sup>57</sup> Generally under mini Davis-Bacon Acts, the state's Department of Labor is charged with enforcement of the prevailing wage requirements for programs and projects receiving state and local government funding. Mini Davis-Bacon Acts also typically have administrative enforcement schemes similar to that of the U.S. Department of Labor's enforcement of the federal Davis-Bacon Act.

## 2. Private Rights of Action

Most federal courts have held that an employee does not have a private right of action against his or her employer for failure to pay prevailing wages, on the basis that recognition of a private civil action would be inconsistent with the enforcement procedures explicitly provided by the DBA.<sup>58</sup> Courts also have held that the SCA does not confer a private right of action on employees to enforce alleged violations of the Act.<sup>59</sup>

If an employee's action alleging violations of the DBA is dismissed on the grounds that the DBA does not provide a private right of action, the employee is still permitted to seek an administrative remedy by alerting the Department of Labor of the violation and/or seek contractual relief in state court.<sup>60</sup> In a recent case involving New York law, workers on federally-funded public housing projects that were contracted for by the New York City Housing Authority brought separate actions against the contractors and their sureties, alleging state law causes of action for breach of contract based on the contractors' alleged failure to pay the prevailing-wage rates required by the U.S. Housing Act, which is a Davis-Bacon Related Act.<sup>61</sup> The New York Court of Appeals, which is New York's highest court, made the following holding:

- The workers retained their third-party beneficiary status under state law;
- No implied federal private right of action exists, under either the DBA or the U.S. Housing Act;
- Neither the Davis-Bacon nor the U.S. Housing act preempted the workers' state law contract claims; and
- The workers did not have to exhaust the administrative remedies of the DBA's implementing regulations.<sup>62</sup>

The court reasoned that the only way for workers to get the benefit of the federal regulations implementing the Davis-Bacon Act would be "to call violations of law to an agency's attention and hope for the best — a course plaintiffs [had] already pursued, with very little success."<sup>63</sup>

In finding that state law claims were not preempted by the DBA, the court noted that while the Housing Act requires that workers on federally funded projects be paid prevailing wages, pursuant to the DBA, the Housing Act is completely silent as to what remedy is available if workers are underpaid. As such, the Housing Act differs from the DBA itself, which provides that, where a federal agency employs a contractor, the agency may withhold enough money to make up a deficiency in payments to the workers from any remaining payments owed to the contractor.<sup>64</sup> If the withheld funds are insufficient, the workers have a "right to bring a civil action" to

recover on the bond that federal contractors are required to provide under federal law.<sup>65</sup> However, the court pointed out that the Housing Act does not contain a similar remedial provision. Accordingly, the court held that the defendants' preemption argument was tantamount to an assertion that Congress did not intend for the workers to have a remedy in any court, state or federal. The court found no evidence "to support the unlikely supposition that Congress had any such intention."<sup>66</sup>

Courts also have held that an employee has a right, albeit through his or her union, to alert the Department of Labor to the fact that a contractor's payroll practices are not in compliance with the DBA.<sup>67</sup>

State courts have been somewhat inconsistent in deciding whether or not a private cause of action exists under the state's "Mini Davis-Bacon Act," with courts in some states finding that a private cause of action exists under the state's prevailing wage law,<sup>68</sup> while courts in other states have found that a private rights of action does not exist under state law,<sup>69</sup> or that an employee has a private right of action only after the employee has exhausted the administrative process for enforcement of the state's prevailing wage law.<sup>70</sup>

## 3. Qui Tam Actions

One means of enforcing the requirements of the DBA and the Copeland "Anti-Kickback" Act, however, is an action pursuant to the False Claims Act (31 U.S.C. §§ 3729-3733). The False Claims Act (FCA) lists seven specific acts that may provide a basis for liability. One of the most important and frequently used liability provisions is subsection 31 U.S.C. section 3729(a)(1), under which a person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false fraudulent claim for payment or approval" is liable to the United States Government. Liability includes a civil penalty between \$5,000 and \$10,000, plus three times the amount of damages sustained by the government because of that person's act. A federal contractor or subcontractor who makes a false certification on the weekly payroll statement (*e.g.*, that it has paid applicable prevailing wages as required by the DBA or has not taken a rebate or made an impermissible deduction from wages) comes within the liability purview of that provision.<sup>71</sup>

The FCA also creates incentives for citizen "whistleblowers" to act as private enforcers to combat fraud on the government by allowing a private citizen, with knowledge of fraud on the federal government, to sue on behalf of the government to recover civil penalties and potential treble damages.<sup>72</sup> Such actions are called *qui tam* claims. The individual, referred to as the "relator," files a complaint under seal in the appropriate U.S. District Court together with a written statement disclosing the material evidence and information

the individual has. The written disclosure is intended to provide the government with sufficient information to investigate the claim and determine whether to join in the suit. The appropriate government agency (e.g., Department of Justice, the agency with jurisdiction over the allegations, and the U.S. Attorney's office) will investigate the complaint. In some cases the U.S. Attorney's office will open a criminal investigation based on the allegations, in which case the civil qui tam action is stayed pending completion of that investigation. The Department of Justice can decide to join in the lawsuit, decline to intervene, move to dismiss the action or try to settle the matter. If the federal government decides to intervene in the action, it controls the prosecution of the case; however, the relator may receive between 15 percent and 25 percent of the proceeds of the action. If the federal government declines to join in the action, the relator may investigate and prosecute the case. If successful, the relator generally receives between 25 percent and 30 percent of the proceeds, as well as reimbursement for expenses, including attorney's fees and costs.<sup>73</sup> The relator's share may be reduced at the court's discretion if it is determined the relator was involved in the wrongdoing. Thus, for example, an individual employee or a union could file a qui tam action under the FCA based on the allegation that a contractor on a public works contract submitted a false weekly payroll statement.

## E. Liability for Nonpayment of Prevailing Wages

### 1. Withholding Accrued Payments

When determining appropriate sanctions, the Department of Labor considers several factors, including whether or not the evidence establishes that there is a pattern of repeat violations, the contractor has made full restitution to affected workers and that the contractor/subcontractor(s) have implemented policies to guarantee future compliance. If a violation resulted in the underpayment of wages, the contracting agency or Department of Labor must inform the contractor in writing of the action to be taken in adjusting wages and the amount of payments to be made in back wages to affected employees. To establish that proper restitution was made, the contractor must submit supplemental payroll reports showing the amount of back wages paid, as well as copies of both sides of the canceled checks that it issued to aggrieved employees.

If a contractor fails to make full restitution or to correct violations of the DBA within a reasonable period of time, the contracting agency may withhold as much of any remaining payments owed to the contractor in order to ensure proper payment of prevailing wages to aggrieved workers. Withheld funds are placed in a special account for wage restitution from which the contracting agency can directly pay affected workers until the contractor produces evidence of restitution.

Covered contractors and subcontractors who do not comply with the CWHSSA's overtime requirements may be held liable for liquidated damages. In addition, noncompliance with the FLSA's overtime provisions may result in additional penalties for unpaid overtime because the FLSA's overtime provisions may also apply to DBA covered contracts.

A contractor or subcontractor that fails to comply with the minimum wage and fringe benefit requirements of the SCA may have its contract for services cancelled. In such cases, the U.S. Government may enter into a new contract for the completion of the work, with any additional expenses being charged to the previous contractor.<sup>74</sup> Furthermore, failure to retain and/or provide records to the Department of Labor Administrator upon request are violations of the SCA and may result in the suspension of payments until the violation ceases.<sup>75</sup>

### 2. Debarment

Federal contracting agencies and the Department of Labor may pursue suspension and debarment actions against repeat violators of prevailing-wage requirements. Debarment results in the exclusion of sanctioned federal contractors and subcontractors from further participation in government procurement and non-procurement programs, as well as other federal government programs. Suspensions and debarments are not as much punitive measures as they are part of a government-wide administrative sanctions initiative to ensure the highest standards of professional conduct and ethical business practices by the federal government's business partners. Suspensions are generally enacted after an indictment is issued, while debarments are generally issued after a criminal conviction or when serious program violations are detected.<sup>76</sup>

Violations of the SCA may also result in the culpable contractor being debarred from the federal contractor program. Absent any "unusual circumstances," the contractor/subcontractor will be placed on a list of ineligible contractors for three years. However, if unusual circumstances exist, the Secretary of Labor may recommend a shorter debarment period. The Secretary will make such a determination on a case-by-case basis.

If an individual, corporation, partnership or other entity, with a substantial business interest in a debarred party, enters into a new government service contract, the contract is subject to immediate cancellation and forfeiture of any profits derived from the contract.<sup>77</sup> Moreover, a prime contractor is jointly and severally liable for underpayments by a subcontractor if the underpayment would violate the prime contract. The regulations do not permit a contractor to simply pay workers for the amount of unpaid or underpaid wages in order to avoid sanctions for violating prevailing-

wage requirements;<sup>78</sup> because by doing so, guilty contractors and subcontractors would be allowed to circumvent the law.

If withheld payments fall short of fully reimbursing employees for unpaid overtime, workers covered under the CWHSSA may bring a cause of action against the contractor and its sureties for underpayment of wages, or may intervene in a proceeding brought by the contracting agency or the Department of Labor. Repeated willful or grossly negligent violations of the health and safety standards of the CWHSSA will likely result in debarment from the federal contractor program for up to three years. The CWHSSA also imposes criminal liability for intentional violations by contractors or subcontractors whose duty it is to employ, direct or control any covered worker in the performance of contract-work, as such conduct is a misdemeanor punishable by imprisonment of up to six months and/or a fine up to \$1,000 for each violation.<sup>79</sup>

Under the DBA, contract payments may be suspended if a contractor fails to produce certified payroll reports to the contracting agency or to the Department of Labor upon request. The DBA also contains a debarment provision that is similar to that of the SCA, which sanctions contractors that demonstrate intent to “disregard their obligations” under the DBA.<sup>80</sup> However, unlike debarment under the SCA, under the DBA, debarment must be for at least three years. As a result, if the Administrative Law Judge finds that a contractor has disregarded its DBA obligations, the ALJ does not have discretion to prevent debarment. Violations such as misclassification of employees or failure to pay prevailing wage rates, coupled with falsification of certified payrolls, constitute a disregard of DBA obligations.<sup>81</sup> A contractor or subcontractor that violates the CWHSSA’s overtime requirements is liable to aggrieved workers for unpaid wages. Contractors and subcontractors that violate the CWHSSA also are liable to the U.S. Government for liquidated damages. In addition, the contracting agency is authorized to withhold accrued contract payments to recoup overtime pay and liquidated damages owed by the contractor or subcontractor.

## F. Additional Considerations for Government Contractors

### 1. The Clean Contracting Act

Congress recently enacted the Clean Contracting Act (CCA) as part of the National Defense Authorization Act for Fiscal Year 2009 (NDAA) in an effort to consolidate federal contracting provisions in a comprehensive reform measure aimed at enhancing competition, eliminating fraud and abuse, improving the workforce and increasing transparency. With regard to suspension and debarment, the CCA’s last goal — increasing transparency — did so by mandating the

creation of a new federal database that not only includes suspension and debarment actions, similar to the current, publicly available Excluded Parties List System. The database also includes other information that may reflect on a contractor’s integrity, including:

- Information relating to civil, criminal and administrative proceedings against contractors;
- Information relating to a contractor being terminated for default;
- Administrative agreements to resolve suspension and debarment actions; and
- Contracting officer non-responsibility findings.

Unlike the Excluded Parties Lists System, this database will be available to acquisition officials and members of Congress only. Also, individual contractors will have access to any adverse information concerning their companies.

Although Congress and government officials laud the benefits of contracting officers having as much information at their fingertips as possible, the database required by the CCA presents significant concerns. First, it remains to be seen precisely what type of information and what level of detail will be available in this database. Second, the content of the information contained in the database also begs such questions as whether contracting officers have the background or training to fully understand the ramifications and relevance of certain criminal violations or complex administrative agreements. For instance, the CCA fails to outline how such information should be interpreted or used by a contracting officer; *e.g.*, whether administrative agreements to resolve a suspension or debarment action be viewed positively or negatively. Moreover, the CCA is silent as to whether a contractor will be permitted to object to, or to rebut such information.

### 2. The Mandatory Disclosure Rule

On November 12, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (“Councils”) issued a final rule requiring government contractors to disclose violations of federal criminal law involving fraud, conflict of interest, bribery or gratuities or a violation of the civil False Claims Act. This rule, which became effective on December 12, 2008, created a new cause for suspension and debarment based on a contractor’s intentional failure to make a required disclosure under the new rule.

The Mandatory Disclosure Rule presents a number of possible issues for government contractors, because of the breadth of its requirements. Mandatory disclosure is required when “principals” of contractors have “credible evidence” of a violation of law

(including criminal fraud, conflicts of interest, bribery or gratuities) or civil false claim. Principals include officers, directors, owners and persons with primary management and supervisory responsibilities. Furthermore, the rule goes beyond statutory requirements to include the mandatory disclosure of civil fraud. The Councils explained that expanding the rule beyond the requirements of the statute to include violations of the civil False Claims Act is a “natural extension of the rule” that it is a “matter of policy” and is consistent with the intent of the statute. Regardless, the new rule imposes significant compliance requirements, with serious implications, such as suspension and debarment and past performance evaluation for failing to meet those requirements.

## G. Prevailing Wage Practical Compliance Tips

- Determine whether the Davis-Bacon or Related Acts apply to your project.
- Determine whether the your state has a “Mini Davis-Bacon Act,” such as California, which can, at times, be more stringent than the federal version.
- Ensure you have the correct prevailing wage determination for the classifications of employees on a specific project before you submit a bid and execute the contract.
- Properly define the classifications of employees necessary for the public works project.
- Determine what work areas necessary for the project will be considered a “site of work” mandating the payment of prevailing wages for work performed within that work area.
- Train your managers and payroll staff to properly determine what work will be subject to the payment of prevailing wages, and ensure that appropriate employees on the appropriate projects are properly reporting and being paid for overtime hours.
- Train all subcontractors on the payment of prevailing wages and include contract language that permits the termination of a subcontract and indemnification should a subcontractor incorrectly pay employees.
- Ensure the appropriate federal posters (and if applicable, state posters) related to prevailing wage requirements are posted within appropriate areas of the worksite or relevant work location.
- Conduct periodic audits of your subcontractors’ certified payroll statements to ensure thorough compliance with reporting obligations.

- Identify potential violations; determine whether “credible evidence” shows that a violation occurred; and make a timely disclosure to the government agency’s inspector general.

## II. LABOR RELATIONS ISSUES FOR FEDERAL CONTRACTORS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

During the first days of his administration, President Obama signed four Executive Orders that signal a dramatic shift in labor policies affecting federal contractors. President Obama also issued a Presidential Memorandum to executive agency leaders announcing his intent to reform the entire federal contracting process. These policy announcements, combined with the significant enforcement and compliance authority the Executive Orders grant to the Department of Labor, require employers that are already federal contractors, as well as those that anticipate becoming federal contractors, to consider carefully the labor relations implications presented by pursuing new contracting opportunities under the ARRA.

It is abundantly clear from these policy announcements, as well as from the President’s stated support of pro-labor legislation such as the Employee Free Choice Act (H.R. 1409, S. 560) introduced in the 111th Congress, that the Obama Administration believes increased unionization in all industries is an essential component of job growth and economic recovery — as well as integral to the success of the ARRA. As discussed below, President Obama also has made clear that he believes a growing and thriving middle class is possible only through increased unionization. Regardless of the merits of this belief, the President’s recent actions lay the groundwork for organized labor to take major strides in its efforts to further unionize federal contractors.

### A. Executive Orders Impacting Federal Contractors

The first three Executive Orders were issued on January 30, 2009. In his announcement of the new Executive Orders, President Obama stated:

I... believe that we have to reverse many of the policies towards organized labor that we’ve seen these last eight years, policies with which I’ve sharply disagreed. I do not view the labor movement as part of the problem, to me it’s part of the solution. We need to level the playing field for workers and the unions that represent their interests, because we know that you cannot have a strong middle class without a strong labor movement.

The trio of Executive Orders issued by President Obama on January 30 reverses certain obligations of federal contractors put in place by President George W. Bush and imposes new obligations and restrictions on these employers.

The fourth Executive Order was issued by President Obama on February 6, 2009, and authorizes executive agencies to require employers on “large-scale” construction projects to negotiate or become a party to a project labor agreement with one or more labor unions. Although President Obama did not make a formal statement when he issued this Executive Order, he and Vice President Joe Biden discussed the use of project labor agreements at the annual AFL-CIO Executive Council Meeting on March 3-5, 2009. According to President Obama, “We’ve reversed the ban on project labor agreements, and we’ve overturned the previous administration’s Executive Orders which were designed to not only undermine critical government work — but to undermine organized labor.” Mr. Biden agreed: this Executive Order “mak[es] it clear that we want to see a project labor agreement on federal construction projects.”

As discussed below, these Executive Orders represent a marked departure from the labor policies of the previous administration. When considered together, they also signal a clear desire of the Obama Administration for increased unionization of federal contractors and provide the means for labor organizations to fulfill that policy objective. Coupled with the stated justifications for the ARRA (*i.e.*, to revitalize the economy through strengthening the middle class), President Obama has given labor unions additional tools to organize federal contractors’ employees.

### **1. Executive Order 13494 — Economy in Government Contracting**

Executive Order 13494 is by far the most controversial of the group. In the President’s own words, this Executive Order “is going to prevent taxpayer dollars from going to reimburse federal contractors who spend money trying to influence the formation of unions.” It directs the Federal Acquisition Regulatory Council (FAR Council) to adopt rules and regulations necessary to carry out the purpose of the Executive Order. Although this Executive Order takes effect immediately, it applies only to those federal contracts, regardless of whether they satisfy the simplified acquisition threshold of \$100,000 in value, resulting from solicitations issued on or after the date the FAR Council issues its rules and regulations, which have so far only been issued on an interim basis for public comment. Those regulations will likely include a protocol for monitoring compliance with the Executive Order.

#### ***Restrictions on Use of Federal Funds for “Persuader” Activities***

Specifically, Executive Order 13494 prohibits federal contractors from expending federal funds to persuade their employees to exercise or to not exercise the right to organize and bargain through a representative of their own choosing. Several examples of “persuader” expenditures prohibited by the Executive

Order include preparing or distributing persuader materials, hiring or consulting legal counsel or consultants, holding meetings, or planning or conducting activities by managers or supervisors during work hours. Such expenditures are declared “unallowable” under any federal government contract by the Executive Order. Carrying out union avoidance activities is not completely forbidden, but contractors must ensure that they account for the funds used for such purposes separately from “allowable” expenditures submitted to the contracting agency for reimbursement.

#### ***Separate Accounting Needed for “Persuader” Expenses***

While Executive Order 13494 does not set out a specific enforcement and compliance scheme, unwary contractors risk being denied reimbursement for substantial costs related to everyday activities — preparing and distributing materials, holding meetings, hiring consultants or outside legal counsel — which are now deemed “unallowable” expenses. In many federal contracts, seeking reimbursement of unallowable costs can result in substantial liquidated penalties. Contractors may need to implement more robust accounting procedures to segregate the costs not only for hiring outside counsel and consultants for advice on unionization issues, but also payroll costs for the time supervisors spend in union avoidance training and the expenses associated with preparing materials for such training sessions.

#### ***Probable Legal Challenge***

The President’s authority to constrain federal contractors’ free speech rights likely will face legal and constitutional challenge upon implementation of the FAR Council’s rules and regulations. Such a challenge could have merit. In June 2008, the United States Supreme Court addressed a similar state law prohibition in *Chamber of Commerce v. Brown*. Ultimately, the Supreme Court held that the National Labor Relations Act (NLRA) preempted California’s law because Congress had manifested a clear intent to encourage free debate on labor relations issues and intended, in section 8(c) of the NLRA, that noncoercive employer speech was to remain unregulated.<sup>82</sup>

Thus, Executive Order 13494 may violate a federal contractor’s First Amendment right to engage in noncoercive speech regarding unionization, and it appears inconsistent with the NLRA. In short, a legal fight undoubtedly will arise as soon as the FAR Council issues implementing rules and regulations regarding Executive Order 13494.

### **2. Executive Order 13495 — Non-displacement of Qualified Workers Under Service Contracts**

Executive Order 13495 creates additional rights for employees of a federal contractor that has lost a federal service contract. As President

Obama explained in his January 30 statement, “I’m issuing an Order so that qualified employees will be able to keep their jobs even when a contract changes hands. We shouldn’t deprive the government of these workers who have so much experience in making government work.” Covered contracts under the SCA must now contain a specific provision granting employees of a federal contractor that lost a service contract the right of first refusal for employment with the successor contractor. The successor contractor may not hire new employees, other than management or supervisors, until all employees of the predecessor contractor have been offered employment.

There are some exceptions to this requirement. First, a successor contractor is not required to offer a right of first refusal to an employee of the predecessor that the successor “reasonably believes, based on the particular employee’s past performance, has failed to perform suitably on the job.” This means that the successor must have some proof that the employee has performed poorly for the predecessor in order to justify not making an offer of employment to that employee. Second, the Executive Order permits the successor contractor to employ an individual who has worked for the successor for at least three months immediately prior to the beginning of the new service contract and who would otherwise face lay-off or discharge if the successor was required to offer employment to one of the predecessor’s employees. Finally, the Executive Order permits the successor contractor to hire fewer employees than were employed by the predecessor in the performance of the service contract.

Executive Order 13495 applies to all SCA contracts that exceed the simplified acquisition threshold of \$100,000. There are some exceptions, however. Contracts issued under the Javits-Wagner-O’Day Act, contracts serviced by severely handicapped workers in sheltered workshops,<sup>83</sup> and vending services contracts are not covered by the Executive Order. Additionally, the federal agency entering the service contract can exempt contractors from the requirements of this Executive Order on a case-by-case basis.

#### ***Successorship Liability Under the Service Contract Act***

As previously discussed, the SCA requires employers to pay their employees at the “prevailing wage rate” for any work performed for the federal government. When the predecessor’s workforce is unionized, however, the successor contractor’s obligations go beyond simply paying employees the prevailing wage. Under the SCA, the successor employer must pay its employees at least the same wages and fringe benefits (including prospective increases) provided by the predecessor’s collective bargaining agreement. Reductions in wages and benefits from the levels required by the predecessor’s collective bargaining agreement are not permitted, even if none of the predecessor’s employees are hired by the successor.<sup>84</sup>

The Department of Labor has promulgated regulations specifically excluding certain terms and conditions of employment from the meaning of fringe benefits, including: (1) seniority; (2) grievance procedures; (3) work rules, and (4) overtime.<sup>85</sup> Because these terms and conditions of employment are not considered fringe benefits, the SCA does not require the successor employer to provide the same seniority, overtime, grievance procedures or work rules as its predecessor.

Additionally, a successor employer is not required to offer the exact same benefits as its predecessor. The SCA only entitles the successor’s employees to the value of the fringe benefits provided by the predecessor’s collective bargaining agreement, not to those exact benefits. A successor employer may offer cash in exchange for the value of benefits it does not wish to, but is required to, provide. For example, if a predecessor employer offered more medical coverage than the new employer, the new employer may make up the difference in benefits with cash (or other benefits<sup>86</sup>) rather than by providing additional coverage to employees.<sup>87</sup>

#### ***Successorship Liability Under the National Labor Relations Act***

Executive Order 13495 expands the successor liabilities under the SCA beyond simply wages and benefits. This Executive Order essentially ensures “representational security” for unions in collective bargaining relationships with federal contractors.

In *NLRB v. Burns International Security Services*, the Supreme Court upheld the NLRB’s rationale that a mere change in ownership in the employing entity is not such an “unusual circumstance” as to relieve the new employer of an obligation to bargain with the union that represented its predecessor’s employees.<sup>88</sup> The Supreme Court noted that a new employer is ordinarily free to set initial terms and conditions of employment unless it is “perfectly clear” that the employer planned to retain all of the former bargaining unit employees; then a successor would have an obligation to negotiate with the union on the initial terms and conditions of employment, as well as, at least initially, honor the terms of the predecessor contractor’s collective bargaining agreement.

The requirement in Executive Order 13495 that a successor contractor provide all of the predecessor contractor’s employees the right of first refusal for employment with the successor employer, combined with the SCA’s requirement that the successor contractor pay the same, or better, wages and provide an equivalent level of benefits to employees as did the predecessor, makes finding that the successor contractor is a “perfectly clear” successor under the NLRA much more likely.

### *Penalties for Noncompliance*

The Department of Labor is responsible for enforcement of these hiring standards, and is required to issue implementing regulations by July 29, 2009. Violations of these requirements will be subject to remedy by the Department of Labor. Willful violations of the Executive Order 13495 could result in complete disbarment from federal contracts for a period of up to three years for the contractor, its responsible officers, and any firm in which the contractor has a substantial interest. Other potential remedies include an order requiring that the federal contractor employ its predecessor's employees and potential back pay for lost wages and benefits.

Not only could a federal contractor violate Executive Order 13495 by its conduct when taking over an existing service contract, but it also could violate the successorship doctrines of the NLRA discussed above. Thus, any remedy imposed by the Department of Labor would be in addition to any unfair labor practice remedies imposed for violations of the NLRA's successorship rules.

### **3. Executive Order 13496 — Notification of Employee Rights Under Federal Labor Laws**

As expected, President Obama also revoked Executive Order 13201, signed by President Bush on February 21, 2001, which required federal contractors to post a notice in the workplace informing employees of their rights under *Communication Workers of America v. Beck*.<sup>89</sup> In *Beck*, the United States Supreme Court held that unions could not use member dues for purposes unrelated to collective bargaining or contract administration without the members' consent. Accordingly, these "*Beck*" rights guarantee all employees that they will not have to pay fees to unions other than for the purposes of collective bargaining, contract administration and grievance adjustment.

While the Executive Order does not and cannot reverse the decision in *Beck*, it goes further than reversing the notice requirement of Executive Order 13201. President Obama declared: "We will also require that federal contractors inform their employees of their rights [to unionize or refrain from unionizing] under the National Labor Relations Act. Federal labor laws encourage collective bargaining, and employees should know their rights to avoid disruption of federal contracts."

### **4. Executive Order 13502 — Use of Project Labor Agreements for Federal Construction Projects**

The ARRA does not contain a requirement that construction projects funded by the stimulus package utilize project labor agreements. On February 6, 2009, however, President Obama issued

Executive Order 13502 "encouraging" the use of such agreements on certain federal or federally funded construction projects, including those funded by the stimulus package. This Executive Order grants executive agencies the authority, on a project-by-project basis, to require that contractors on "large-scale," federal or federally funded construction projects (*i.e.*, a construction project valued at \$25 million or more) sign a project labor agreement.

The Executive Order also contemplates the "broader use" of project labor agreements on federally funded construction projects in the future, which includes many of the shovel-ready projects contemplated by the ARRA. Many of these projects likely qualify as "large scale" projects under Executive Order 13502, which could result in the requirement that construction contractors bidding on these projects agree to sign or negotiate a project labor agreement before being awarded the contract.<sup>90</sup>

According to the most recent data from the Department of Labor's Bureau of Labor Statistics, only 15.6 percent of construction contractors are unionized. This means either that construction trades unions will attempt to unionize any construction contractor bidding on work paid for by stimulus package funds or that a large percentage of construction contractors in this country will be ineligible to bid on such projects.

The "Government Neutrality in Contracting Act" (S. 90, H.R. 983) was introduced in the Senate on January 6, 2009 and in the House on February 11, 2009. These companion bills would codify the provisions of Executive Order 13202, which requires government neutrality in federal contracting and prohibits the government from discriminating against construction contractors who agree or refuse to a project labor agreement on a federal or federally funded construction project contract. Both bills have been referred to committee, but no further action has been taken on either bill.

## **B. Increased Focus on Suspension and Debarment of Noncompliant Contractors**

Compliance with the new Executive Orders, the rules and regulations implementing these Executive Orders, and the broader Federal Acquisition Regulations (FAR), will become increasingly important. Congress has focused an inordinate amount of attention on suspension and debarment for noncompliant contractors due to the significant level of federal funds paid to federal contractors and with increased reports of contractor fiscal misconduct. The suspension and debarment penalties are designed to ensure that the federal government contracts only with "responsible" contractors.

## C. Labor-Management Relations Practical Compliance Tips

- Understand which Presidential Executive Order applies to your contract.<sup>91</sup>
- Develop a system to account for “unallowable” persuader expenditures.<sup>92</sup>
- Review your bidding process and determine whether you have any obligations as a successor employer.<sup>93</sup>
- Revise your contracts and subcontracts to ensure compliance with the Presidential Executive Orders, which require inclusion of specific contract provisions in existing and anticipated federal contracts.

## III. AFFIRMATIVE ACTION/OFCCP

The Office of Federal Contract Compliance Programs (OFCCP) is the agency within the U.S. Department of Labor charged with enforcing equal employment opportunity at government contractor establishments. The OFCCP’s power to impose penalties for a contractor’s failure to comply with its rules is limited to the ultimate sanction of debarring the contractor from continued federal contracting. Otherwise, the agency cannot impose any penalties or fines, although it can obtain monetary remedies for employees damaged by unlawful discrimination. OFCCP’s primary activity is to audit covered contractors to confirm compliance with its regulations and reveal and remedy discriminatory treatment of females, minorities, veterans, and the disabled.

In FY 2007 and 2008, the OFCCP identified approximately 7500 supply and service contractor establishments each year for random compliance audits (nonconstruction companies). These audits expose substantial amounts of data to government scrutiny, and where the data reveals hiring, promotion or termination patterns that disfavor females and minorities at statistically significant levels, or reveals disparities in compensation that cannot be explained by nondiscriminatory reasons, the OFCCP aggressively pursues the employer to obtain remedies for the aggrieved workers. In FY08, the OFCCP recovered more than \$67.5 million for the alleged victims of discrimination at government contractor establishments.

### A. What Types of Arrangements Will Implicate Affirmative Action Obligations?

#### 1. Contracts Versus Grants or Federal Financial Assistance (Nonconstruction)

The obligation to engage in equal employment opportunity, prepare affirmative action plans, and be subject to the audit and enforcement jurisdiction of the OFCCP is contractual; in other

words, receiving grant monies does not subject the awardee to the OFCCP’s jurisdiction. A company contracting to perform construction work which is paid for in whole or in part with funds obtained from the government or borrowed on the credit of the government pursuant to any federal program involving a grant, loan, insurance, or guarantee is subject to OFCCP’s jurisdiction; all other recipients of federal financial assistance are not subject to the OFCCP’s jurisdiction.

It is usually fairly obvious when a company has a prime or direct contract with the federal government. Simple searches on [www.usaspending.gov](http://www.usaspending.gov) or [www.fedspending.org](http://www.fedspending.org) are a reliable method for confirming prime contractor status. It is less obvious to subcontractors and other downstream vendors and suppliers whether the goods and services they are providing will subject them to the obligations imposed by the laws that the OFCCP enforces: (1) Executive Order 11246; (2) the Vietnam Era Veterans Readjustment Assistance Act of 1974, as most recently amended by the Jobs for Veterans Act of 2002; (3) Section 503 of the Rehabilitation Act of 1973; and (4) the OFCCP’s own regulations, codified at 41 Code of Federal Regulations (CFR) Part 60. Subcontractor status is discussed below.

Companies need to look for cross-references in the contract to the laws referenced in the previous paragraph as well as potential cross references to the Federal Acquisition Regulations. Citations to FAR 52.222-26, -35 and -36 impose on the contractor (and its covered subcontractors, suppliers, and vendors) the affirmative action obligations described below. Significantly, however, even when a covered contract fails to reference these obligations and the contractor lacks actual notice that these provisions apply, the contractor is still subject to OFCCP’s jurisdiction by operation of law.

#### 2. Who is a Subcontractor?

The OFCCP defines *subcontract* to mean “any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee): (1) for the purchase, sale, or use of personal property or non-personal services which, in whole or in part, is necessary for the performance of any one or more contracts; or (2) under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed.”<sup>94</sup>

Many companies receive boilerplate certification notices from upstream contractors, attempting to place them on notice that they may be subject to the OFCCP’s jurisdiction. Any time a company receives such a notice, it should determine whether it is covered, or not. First-tier subcontractors with 50 or more employees and a subcontract that meets the monetary thresholds described below are

required to self-identify as government contractors on their annual EEO-1 form in response to question C(3).

### 3. What Are the Thresholds that Trigger Coverage?

Once the amount of all contracts aggregated together equal \$10,000 or more, the nondiscrimination, equal employment opportunity and recordkeeping obligations arise.<sup>95</sup> Each nonconstruction<sup>96</sup> contractor must develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees and:

1. Has a contract of \$50,000 or more; or
2. Has government bills of lading which in any 12-month period, total or can reasonable be expected to total \$50,000 or more; or
3. Serves as a depository of government funds in any amount; or
4. Is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

Once the amount of a single fixed-price government contract or subcontract exceeds \$50,000 (or \$100,000 in the case of the applicable veterans and individuals with disabilities regulations), and the contractor has 50 or more employees, the company has 120 days to prepare **annual written affirmative action plans (AAPs) for each establishment with 50 or more employees.** The OFCCP takes the position that once one establishment (*i.e.*, a site or facility) within a single entity has a government contract that exceeds the dollar threshold, all establishments within that entity are obligated to comply with the affirmative action obligations of the Executive Order, even if no work on the government contracts is being performed at these other establishments. For sites with fewer than 50 employees, the employer retains discretion to decide how and where to 'roll up' these smaller sites into larger AAPs. Furthermore, when an entity within a family of companies enters into a government contract that exceeds the dollar threshold, the obligation to comply with the obligations of the Executive Order may extend to its parent, sibling or other related entities depending on the degree of their interrelationships.

Nonconstruction supply and service contractors and subcontractors are required to prepare three AAPs for each establishment: (1) one for women and minorities, (2) one for individuals with disabilities, and (3) one for veterans. These AAPs do not get filed with the OFCCP. Only when the OFCCP selects the establishment for an audit must the employer submit its data to the enforcement agency for review.

The AAP for women and minorities contains extensive data analysis and much confidential and proprietary company information. The AAPs for veterans and individuals with disabilities do not contain any data analyses, and the regulations require that those AAPs be made available even to applicants upon request. For that reason, most companies do not combine the AAP for veterans or individuals with disabilities with the AAP for women and minorities. The data portions of the women and minorities AAP, and the narrative sections that reference or discuss the data, are company confidential documents.

## B. The Executive Order AAP

The Women and Minorities' AAP includes both narrative and statistical information. The narrative includes identification of any problem areas discovered in the data analyses and an explanation of how the contractor intends to remedy any problems in the section called "development and execution of action oriented programs." These documents are discoverable in litigation. Because the narrative commitments are derived from the data analyses, the data analyzed in the AAP is discussed first, before providing an example of the types of statements and commitments that need to be included in the narrative.

The data portions of the affirmative action plan are comprised of three sets of analyses: (1) comparison of demographic information about the company's workforce with demographic information about the relevant labor force; (2) analyses of 12 months of transaction data, including applicants, hires, promotions and terminations to identify policies that may be having a disparate effect on females or minorities; and (3) compensation.

### 1. Comparison of Employment Versus Availability

Every job title in the contractor's workforce is mapped to a three-digit census code, and the contractor is required to identify the reasonable recruiting areas in which it sources qualified candidates when it conducts external searches to fill vacant positions. The AAP does not impose any restrictions or limitations on where the contractor searches for candidates, but in order to achieve a good faith estimate of whether the contractor's employment of females and minorities appropriately reflects estimates of availability, the match between titles and census codes needs to be appropriate, and the contractor needs to identify the cities, regions, and states where it recruits for its positions. In the AAP, the workforce is subdivided into groups of jobs with similar content, wage rates, and opportunities. Employers often look to the EEO-1 job categories (executive/senior-level officials and managers, first/mid-level officials and managers, professionals, technicians, sales workers,

administrative support workers, craft workers, operatives, laborers and helpers, and service workers) as a convenient place from which to begin this analysis. When the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group, the contractor must establish a placement goal.

A goal is not a quota. There is no obligation to hire a female or a minority if that person is not the most qualified person for the job. There is an obligation, however, placed squarely on recruiters and hiring managers (and everyone else involved in the hiring process) to document the additional outreach that they engage in when attempting to source candidates for applicant pools. If the job group has a goal, then the contractor cannot just engage in business as usual in filling the vacancy. It must reach out to new and more diverse sources in an effort to find qualified candidates, and it must document where else it searched for qualified candidates. This could include trying a new website to list its vacancies; it could be sourcing a new diversity job website. If there are technical journals or professional affiliations that prospective candidates might read or belong to, does the contractor advertise there? At all times, the contractor must be able to demonstrate that it selected the most qualified person for the vacancy, without regard to race, gender, or any other protected category. The OFCCP is highly skeptical in an audit when the employer prepared its AAP, knew it had a goal, had vacancies to fill, but then has no documentation to support a good faith effort at outreach.

Another example of an action-oriented program might be the following: the goals analysis reveals that women and minorities are well-represented among professionals, but do not seem to be advancing at proportional rates into managerial and executive roles. An action-oriented program might be to encourage high-performing female and minority professionals to sign up for well-respected professional development seminars or managerial training programs that HR or operations executives pre-approve. When manager vacancies become available, the pool of qualified female and minority talent hopefully will be more robust. More qualified internal candidates would be available for promotion.

There are no fines or penalties for not making a goal. In an audit, if the contractor has done nothing, or has no evidence of what it has done, it probably would get cited for a violation for failing to engage in good faith outreach and for failing to maintain documentation. Such a violation is typically resolved by the contractor committing via a conciliation agreement to prepare one or more follow-up progress reports to the Agency demonstrating that it is doing what it was supposed to be doing all along. When an audit concludes with

a violation and a conciliation agreement, it substantially increases the possibility of a follow-up compliance review two years later, though. By contrast, when an audit is closed without findings of noncompliance, there is a 24-month moratorium on being selected for an audit again. (Other aspects of a typical compliance review are discussed below in more detail.

## 2. The Transaction Data

The AAP also examines the contractor's transaction activities, such as hires, promotions or terminations to determine whether women or minorities are being selected disproportionately. The theory is that if 40 percent of the *qualified* applicants are women, roughly 40 percent of the hires should be women, too. When there is a statistically significant difference between hiring, promotion, and termination rates, "adverse impact" exists, and the contractor must be prepared to explain the nondiscriminatory reasons for that difference.

Of the approximately \$67.5 million that the OFCCP recovered in FY08, 95 percent of that figure (if not 99 percent of that figure) is derived from cases in which the OFCCP observed disparate hiring rates between females and males, or minorities and non-minorities. Poor employer record keeping is the major factor in the size of these settlements. In particular, many employers fail to maintain documentation of intermediate decisions that would explain why qualified candidates did *not* advance to the next step of the employer's process. Although most employers know to maintain employment applications and can generate a roster of who was hired, many employers are unable to explain why particular applicants failed to move forward through the process. For example a candidate may have been called for an interview but never returned messages, another candidate may have given a phone number that was not in service when the employer tried to call, another may have failed to show for an interview, still another may have conducted his or herself at the interview in a manner that clearly justified the hiring manager's decision to reject the candidate. Another example of a circumstance that causes problems is when hiring managers hire candidates whose paper credentials appear to be less than the required qualifications stated in the vacancy announcement. As a final example, distribution and warehouse operations may get hundreds of applications for entry-level positions, and hiring managers may be making very subjective decisions about whether the applicant's prior work history, reasons for leaving prior employment, and ability to perform the job, warrant calling the candidate in for an interview. At the same time, because men sometimes have more prior experience doing certain types of work than women, a hiring manager considering relevant

prior experience may legitimately end up selecting for interviews a higher percentage of the male applicants. Unfortunately, however, without records showing that experience is a relevant qualification and that a higher percentage of the male candidates had the relevant experience, the employer will be unable to provide a defense to the observed disparities in selection. Such types of data and record keeping lapses or inconsistencies afford the OFCCP substantial leverage in settling allegations of discrimination in hiring.

Finally, accurately defining who is an applicant is critical in ensuring that the contractor's documentation and records accurately reflect its employment practices. Nongovernment contractors are not required to solicit race and gender of applicants nor are they required to engage in applicant tracking, but a government contractor must devise a method of gathering this information early in the hiring process so that the OFCCP can evaluate hiring patterns. The logistics of how to do that are left up to the contractor. We turn briefly to a discussion of the third aspect of the AAP preparation — compensation — and then return to more detail on the burdens associated with applicant tracking.

### 3. Compensation Analysis

The third and final set of annual analyses that are required by the OFCCP's regulations include an analysis of compensation. For several years now, employers have been able to evaluate compensation very crudely and submit strategically positioned data in an audit so as to "fly under the OFCCP's radar screen." The OFCCP did not have the resources to engage in a serious evaluation of compensation, and ever since the Supreme Court decided the Ledbetter case in May of 2007, the OFCCP's legal foundation to pursue current compensation disparities (based on untimely decisions) had been eviscerated.

The Lilly Ledbetter Fair Pay Restoration Act of 2009 is now law, and the OFCCP once again has a legal foundation to pursue compensation in its audits. Simply by aggregating data into artificial groupings, and "observing an unexplained disparity," the OFCCP can easily shift the burden to the employer to have to explain the compensation differences between individuals. The OFCCP can assert that individuals are similarly situated without putting much thought into the process, and then shift the burden to the employer to: (a) disprove the OFCCP's arbitrary groupings; and/or (b) offer legitimate, nondiscriminatory bases for its compensation.

This shift in the legal landscape is going to force more government contractors to engage outside experts to evaluate current compensation and fix disparities that cannot be justified by nondiscriminatory reasons. It also will bolster the OFCCP's negotiating tactics in audits. All the OFCCP needs to do is settle

unfounded allegations at or below the employer's litigation price point, and the employer will settle just to make the audit go away.

### 4. Compliance with the OFCCP's Internet Applicant Rule

Statistically speaking, the larger the applicant pool, the greater the possibility of adverse impact and the greater the contractor's potential liability in an audit. In 2006, OFCCP announced its Internet Applicant Rule, which defines who is an "applicant" when the employer is using electronic means to source and review candidates, and it **requires covered federal contractors to obtain gender, race, and ethnicity data, where possible, on applicants by requesting that they voluntarily self-identify.**<sup>97</sup> The OFCCP defines an Internet Applicant as any individual who meets each of the following four criteria:

1. The individual has submitted an expression of interest in employment;
2. The contractor considers the individual for employment in a particular position;
3. The individual's expression of interest indicates the individual possesses the basic qualifications for the position; and
4. At no point prior to an offer of employment has the individual removed himself or herself from consideration or otherwise indicated that he or she is no longer interested in the position.

Basic qualifications must be documented at the beginning of the recruiting process for the particular position either via an updated job description, a requisition form, or an advertisement. Basic qualifications are not the same as minimum qualifications. Basic qualifications are required to be non-comparative, objective, and relevant to the performance of the particular position and enable the contractor to accomplish business related-goals.

Prior to the Internet Applicant Rule, many employers counted as applicants only those individuals it interviewed. It was relatively simple for such employers to calculate adverse impact by looking at the hires compared to candidates who were interviewed. The relatively few candidates who made it to the interview stage made it less likely that an analysis of the hiring rates for women and minorities would be statistically significant.

By pushing the definition of an applicant to an earlier point in the hiring process, it exposes each stage of the contractor's selection process to a much greater degree of scrutiny. Now, because the contractor would be counting as an applicant every individual

who was considered for a particular position and met the basic qualifications, and is collecting race and gender on this larger population earlier in the process, there is increased scrutiny being placed on its ability to explain why qualified candidates were not sent to the hiring manager for review, why qualified candidates who were sent to the hiring manager for review were not interviewed, and so forth. The contractor will have to invest in the technology that will support the tracking of each individual who expresses an interest in employment and the disposition of applicants through each stage. A reasonably effective applicant tracking system can run upwards of \$250,000, not including the cost involved in training everyone who will need to use it.

If the contractor uses temporary labor in any of its operations, it is obligated to notify the temporary agencies of their obligations, too, in tracking applicant information for the contractor. The OFCCP's position is that the government contractor cannot just outsource its recruiting function and absolve itself of these obligations. The obligation to maintain records lies at all times with the contractor. If the contractor hires temporary workers, who are not on its payroll, but after 90 days decides to convert the best performers to regular, full-time employees, the temporary labor pool that it leases from the third-party staffing company will need to be captured as its own applicant flow. The same principles apply with executive recruiting firms or placement agencies. These agencies stand in the contractor's shoes when recruiting for the contractor positions and need to be placed on notice of their obligations as well as the summary data that the contractor will need to obtain from them, each time a candidate is hired from their agency.

It would be a fair statement to say that recruiters, hiring managers, temporary agencies and search firms dislike the record keeping and disposition obligations imposed by this regulation. They are burdensome and slow down the organization's ability to fill jobs quickly.

### **5. Soliciting Race and Gender Identification**

Once the contractor determines that an individual meets all four prongs of the Internet Applicant definition, it is obligated to count that person as an applicant and solicit race and gender from that individual. The contractor may use a variety of methods for collecting this information, including e-mail, postcards, or electronic "tear-off sheets." If an Internet Applicant declines to self-identify, but appears in person during the hiring process, the contractor may gather the data through visual observation. Finally, where an Internet Applicant declines to self-identify and visual observation is not feasible, there is nothing more for the contractor to do, and the OFCCP would not hold a contractor responsible for applicant data in this situation.

Most employers choose to ask individuals to self-identify early in the process — at the point of completing an electronic application over the Internet or via a tear-off sheet attached to a paper application. The advantage to soliciting race and gender early is that it is administratively easier to do so, and the response rate generally is higher. The disadvantage to soliciting race and gender early is that the employer now has race and gender data on individuals whom it has probably eliminated from its applicant population as not being Internet Applicants, and who, therefore, the company had no obligation to solicit their race and gender information.

The contractor also will end up having two different self-identification forms: one for applicants that solicits information regarding race and gender, and one for employees that solicits information on veteran and disability status as well. Under the Americans with Disabilities Act, an employer may not ask about disability prior to an offer. The same logic applies to government contractors, who must wait until post-offer to ask about disabled veteran status, as well as qualified individual with a disability status.

### **6. Recordkeeping Requirements**

Generally speaking, the contractor must retain all employment records for at least two years from the date of the making of the record or the personnel action involved (small contractors with fewer than 150 employees or a contract under \$150,000 must retain records for at least one year). This includes records pertaining to hiring, promotion, demotion, transfer, lay-offs or termination, rates of pay or other terms of compensation, selection for training, requests for reasonable accommodation, job advertisements and postings, applications and resumes, tests, test results and interview notes.

The Internet Applicant regulations also add specific recordkeeping requirements related to searches of both internal and external resume databases. For internal database searches, the contractor must maintain a record of each resume added to the database, the date that each resume was added — and for each search — the position for which the search was made, the substantive search criteria used, and the date of the search. With respect to external resume databases, the contractor must maintain a record of what position it was filling, which database was being searched — and for each search — the substantive search criteria used, the date of the search, and the resumes of those individuals considered by the contractor who met the basic qualifications for the position.

### **C. Obligations Arising Out of the Regulations Covering Individuals with Disabilities and Veterans**

Although less onerous than the Women and Minorities' AAP because of the analyses required under 41 C.F.R. Part 60-2, there are

additional obligations placed on government contractors subject to the Veterans and Disabilities regulations (found at 41 C.F.R. Parts 60-300 and 60-741, respectively).

### 1. The Preparation of Annual Affirmative Action Plans

There are 10 required obligations arising out of a contractor's affirmative action program for Veterans and Individuals with Disabilities:

1. Develop and post the equal employment policy statement;
2. Review personnel processes to ensure that they do not discriminate on the basis of veteran status or disability status;
3. Review physical and mental qualifications for the job;
4. Make reasonable accommodations to individuals with physical and mental limitations;
5. Develop and implement procedures to ensure employees are not harassed because of veteran and disability status;
6. Externally disseminate the policy, and engage in outreach and positive recruitment;
7. Develop procedures to ensure adequate internal support from supervisory and management personnel and employees about the contractor's nondiscrimination and equal employment objectives;
8. Design and implement an internal audit and reporting system that will measure the effectiveness of the contractor's affirmative action programs;
9. Ensure that an official is assigned responsibility for implementation of the contractor's affirmative action activities; and
10. Train all personnel involved in the recruitment, screening, selection, promotion, and discipline of employees about the contractor's commitment to equal employment opportunity and nondiscrimination.

Although the details and specifics within each of these broad categories is permissive or recommended by the OFCCP, each of these is a required AAP section. What is critical is documentation of the contractor's specific outreach efforts to organizations that focus on placing qualified veterans and individuals with disabilities in employment. Indeed, to encourage employers to engage in added outreach for returning veterans, the OFCCP developed its Good Faith Initiative for Veterans' Employment or G-FIVE initiative. Companies that can demonstrate their commitment to the initiative may be eligible for a three-year

moratorium on compliance reviews for the specific location receiving the recognition.<sup>98</sup>

### 2. Additional Obligations Imposed by the Veterans and Disabilities Regulations

In addition to the preparation of annual AAPs, government contractors currently are required to do the following:

1. List, with the local office of the state unemployment service or online at an approved website that will disseminate these vacancy announcements broadly, all non-executive vacancies to be filled externally. 41 C.F.R. Section 60-300.5(a)(2).
2. Solicit the disability and veteran status of employees using a voluntary self-identification form and use the veteran data to file annually a VETS-100 form by September 30 (separate report required for each hiring location).
3. Ensure that online application systems comply with OFCCP's directive on accessibility to individuals with disabilities.<sup>99</sup>

## D. Other Practical Considerations

Each of these obligations imposes costs — both in terms of time and money — on the organization. The cost of preparing plans for each establishment could be significant for many companies. In addition to these more “visible” costs, there are other costs that needs to be factored into the decision whether to become a government contractor or subcontractor.

### 1. Manager and Recruiter Training

Recruiters and hiring managers must be trained regarding the contractor's affirmative action obligations, the roles that they play in the sourcing of qualified candidates, and the recordkeeping obligations that are imposed on government contractors in order to be able to defend the contractor's decisions in an audit.

The contractor's recruiting team is on the front lines in ensuring compliance. When the contractor declares a goal to improve the representation of women and minorities in a job group, the burdens of finding new outreach sources of qualified candidates, recruiting and disposition of these qualified candidates pursuant to the Internet Applicant definition, collecting and amassing all the hiring documentation, and ensuring that every requisition is handled pursuant to the contractor's policy on equal employment opportunity falls on its recruiting team.

In fact, there is no more important action-oriented program that a contractor could engage in than to require that its recruiters be trained on the Internet Applicant Rule, the importance of disposition

of qualified candidates, and the role they play as recordkeepers of the outreach documentation.

## **2. The HRIS System**

The contractor will probably need to audit its Human Resource Information System (HRIS) system and ensure that it is able to support the data needs for its AAP preparation. For example, the system needs to distinguish hires from rehires, ladder or career promotions from promotions that are competitive, voluntary terminations from involuntary terminations, and so forth.

One of the more complicated provisions in the regulations deals with who gets counted in which AAP. As a general rule, employees are counted in the AAP of the physical establishment where they are located. The HRIS system must be able to “map” each employee to the correct AAP location. As employees move across a contractor’s establishments, it will be critical to ensure that the employees’ “AAP Location” moves with them. These fields are different from the fields currently used to capture data for the EEO-1 forms.

## **3. The Costs Associated with OFCCP Compliance Reviews**

### *Supply and Service Contractors*

A compliance review is an *in-depth* review of a contractor’s employment practices at a specific facility. A review often takes place over the course of many months or even years and typically focuses on four broad issues: (1) whether the contractor has discriminated against minorities or women in hiring, promotions, terminations, or compensation; (2) whether the contractor has engaged in appropriate outreach efforts; (3) whether the contractor has engaged in affirmative action to recruit, train, and advance women and minorities within the organization; and (4) whether the contractor has complied with the OFCCP’s recordkeeping regulations.

All compliance reviews begin with an audit of the contractor’s most recent AAP and the specific data items requested in the OFCCP’s Scheduling Letter. After reviewing the AAP and other data submitted, the OFCCP may ask for additional information. These requests typically involve additional information on the selection process or the compensation system.

After reviewing all the data, the OFCCP will then determine if an onsite visit is necessary. In general, on-site reviews include an investigation of findings made during the desk audit, a review of its “technical” compliance with the regulations, and an inspection of I-9 forms. The OFCCP also will conduct interviews and examine documents such as personnel records, policy statements, job advertisements, job descriptions, performance appraisals,

termination files, applicant flow logs, interview notes, and test results. On-site audits impose heavy burdens on the employer’s ability to get work done. They disable the HR department for weeks ahead of time, and during the week of the on-site, and they place a drain on employee productivity because the OFCCP conducts interviews of a fair number of employees.

The final stage of the on-site is the exit conference where the OFCCP will identify problems that have been uncovered during the review. If the OFCCP has identified any individual victims of discrimination, it will insist that the contractor make such victim whole by paying them back pay with interest and benefits, and placing them in the jobs from which each was excluded. Any issues identified by the OFCCP that are not fully resolved will be the subject of a formal notice of violation, which also will include any individual findings and any other deficiencies identified during the evaluation.

### *Construction Contractors*

For at least the past ten years, the OFCCP has been focusing its auditing and enforcement efforts on supply and service contractors so that audits of construction contractors have been relatively rare and primarily limited to a review of the construction contractors use of women and minority workers on specific projects. As discussed, below, however, construction contractors receiving ARRA funds are likely going to be subject to far greater scrutiny.

### *Recipients of ARRA Funds*

On July 7, 2009, the OFCCP released a new directive announcing different procedures that will apply in scheduling and conducting compliance evaluations for ARRA-funded contractors versus other federal contractors.

Although the new procedures do not really change the substantive requirements applicable to supply and services contractors, they do substantially increase the likelihood of an audit and the degree of scrutiny to be applied during an audit. Among other things, supply and service contractors receiving ARRA funds, when audited, will automatically be subjected to full desk audits and on-site reviews. In addition, existing 24-month moratoriums on audits for companies on the pre-award registry will not apply, and the current audit ceiling of no more than 25 audits per company will not apply to companies receiving ARRA funds.

The changes for construction contractors under the new procedures will be even more dramatic.

Construction projects will be selected for review from lists developed by the OFCCP’s national office and provided in “batches”

to the regional or district OFCCP office where the projects are located. The lists of projects will apparently be compiled from information provided by federal contracting officers, applicants for and recipients of federal financial assistance, and current contractors (all of whom are required to provide such notice under existing federal regulations).

Once a local office has selected a project for evaluation, it will identify and then contact the prime contractor for the project. If the prime contractor confirms that construction on the project has begun, the OFCCP will then: (1) seek additional information from the prime contractor about the project and all of its construction subcontractors; (2) schedule an on-site date; and (3) identify those subcontractors working on the current phase of the project as of the date of the on-site.

For each selected construction project, OFCCP will identify three contractors for review. Every prime or subcontractor working on the current phase of the project on the date of OFCCP's scheduled on-site will be subject to review if:

- It has a minimum of 10 trade employees and laborers assigned to the project;
- It has a contract of \$10,000 or more;
- It has not previously undergone an ARRA construction evaluation within the same geographical area; and
- The OFCCP has not reviewed the contractor, within the same geographic area, within the past 6 months.

Construction compliance reviews will focus on the contractor's trade workforce in the geographic area(s) where the contract work is performed. The OFCCP will consider the contractor's total on-site workforce, including those employees working on other construction projects in the relevant geographic area, *regardless of whether or not those projects are federally funded or federally assisted, ARRA funded or non-ARRA funded.*

Furthermore, the OFCCP has also defined certain covered construction projects as "Mega Projects." These are projects that have a contract value of \$50 million or more, have a significant economic and/or employment impact on a community, and are expected to last more than one year.

In order to promote equal employment opportunity in the skilled trades and to enhance relations among governmental entities, community groups, labor organizations, sponsors, and contractors, the OFCCP intends to act proactively in connection with Mega Projects to coordinate preliminary meetings with the contracting agency, provide pre-construction technical assistance to the prime and major subcontractors, coordinate establishment of an

oversight committee to monitor the project, facilitate introductions between contractors and community and labor groups, and conduct compliance evaluations of the prime contractor and its subcontractors as the project progresses.

#### 4. Uniform Guidelines on Employee Selection Procedures

Finally, the OFCCP has injected renewed vigor to the *Uniform Guidelines on Employee Selection Procedures* and the requirement that employers maintain records as to **each** specific step in their overall selection process. As such, during a compliance review, one of the OFCCP's follow-up questions will be whether the contractor uses tests in its selection process. The OFCCP has been targeting the use of tests because: (a) the tests often have an adverse impact on a protected group; and (b) rarely, if ever, have contractors validated their tests as prescribed by the Uniform Guidelines on Employee Selection Procedures (UGESP). Accordingly, if the contractor uses tests in its selection process it must ensure that these tests have been validated for the specific job in question at the specific location.

The OFCCP's position is that these guidelines apply to more than just paper and pencil tests. If the contractor uses scored interview questionnaires, or uses an online application process that contains screening questions, and those steps in the selection process have an adverse impact on females or minorities, those steps need to be validated, or the OFCCP applies a presumption of discrimination.

#### E. Obligations of Construction Contractors

During the Bush Administration, the number of construction companies that were audited plummeted to the point where it was somewhat rare to find a compliance officer that knew how to conduct one of these audits. Given the amount of stimulus monies heading in the direction of construction contracts under the Obama Administration, it seems prudent to touch upon the obligations imposed on construction companies, even if the likelihood of an audit remains remote.

Prime construction contractors are required to provide written notification to the Director of the OFCCP within 10 working days of award of any construction subcontract in excess of \$10,000 at any tier. (41 C.F.R. Section 60-4.2(c)(3).) All awards of \$10,000 or more must contain the equal opportunity clause set forth in 41 C.F.R. Section 60-4.3.

Section 60-4.3 requires construction contractors and subcontractors to undertake the following obligations as part of their commitment to equal employment opportunity:

1. Ensure and maintain a working environment free of harassment and intimidation.
2. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources, and maintain a record of the organizations' responses.
3. Maintain a current file of the names, addresses and phone numbers of each minority and female off-the-street applicant or union referral, and the outcome of the action taken.
4. Provide immediate written notification to the OFCCP if any union referral process is impeding the contractor's equal employment opportunity efforts.
5. Develop on-the-job training opportunities which expressly include minorities and women.
6. Disseminate the contractor's EEO policy to unions and training programs, and internally by including it in policy manuals and collective bargaining agreements, by reviewing the policy with all levels of management and with all minority and female employees at least once a year.
7. Review the EEO policy and affirmative action obligations with all employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions.
8. Disseminate the contractor's EEO policy externally by including it in advertisements.
9. Direct recruitment efforts to minority, female and community organizations, schools, and training organizations.
10. Encourage present minority and female employees to recruit others.
11. Validate all tests and other selection requirements where there is an obligation to do so under the Uniform Guidelines on Employee Selection Procedures (including, for example, post-offer physical ability tests).
12. Conduct, at least annually, an inventory of minority and female personnel for promotional opportunities and encourage them to seek training to prepare for such promotional opportunities in the future.
13. Ensure that seniority practices, job classifications, work assignments and other personnel practices do not have a discriminatory effect by monitoring activity.
14. Ensure that all facilities and company activities are non-segregated (except that it is acceptable to have single-user toilet and changing facilities).

15. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction suppliers and contractors.

16. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies.<sup>100</sup>

## F. Government Contractor Obligations Under the Obama Administration

Finally, there are several legal developments on the horizon that need to be mentioned. The Paycheck Fairness Act, if enacted, would resurrect the old OFCCP Equal Opportunity Survey. Half of all government contractors were required to submit this Survey each year on one or more of their facilities. In other words, it was a biennial survey. Unlike the current environment, in which an employer is not obligated to submit its data to the OFCCP until it is selected for an audit, and the OFCCP only targets approximately 7500 facilities each year, if the Survey is reinstated, more than 55,000 contractor establishments' data will be visible each year to the OFCCP for analysis and audit targeting. The survey requires the employer to report on the expiration date of the current AAPs (placing a premium on ensuring that the plans were done on or before the survey due date), the number of vacancies listed with the local unemployment office or the online equivalent, and summary data on applicants, hires, promotions, terminations, the workforce, and compensation. In short, the Survey is oppressively detailed and burdensome, and it affords the OFCCP the ability to hone in on companies with adverse impact in hiring.

Last, the Bush Administration OFCCP placed some self-imposed boundaries on the number and scope of audits that the OFCCP would undertake. Currently, a contractor may not be scheduled for more than 25 audits in a year. One in 25 audits goes through a full desk audit review. One in 50 audits has a full on-site visit. As discussed above, these limits have already been dispensed with for recipients of ARRA funds. There is nothing to stop the Obama Administration from later extending its new policies to the rest of the contracting community, perhaps, for example, raising the per-company audit ceiling to 50 or increasing the frequency of full desk audits or on-sites.

## G. Additional Reporting Requirements

Recipients of stimulus funds are also subject to some additional reporting requirements independent of those associated with the statutes and regulations discussed above.

Under ARRA, the Federal Acquisition Regulations have been amended to require that any contract funded in whole or in part by

ARRA include provisions mandating the filing of quarterly reports by the contractor.<sup>101</sup>

It should be noted that the government appears to be imposing these reporting requirements not only on new contracts but also in connection with pre-existing contracts in situations where the government has now decided to pay for the supplies or services provided under those contracts with ARRA funds.

The quarterly reports, which will be available to the public, must include, among other things, the following information:

1. The amount of Recovery Act funds invoiced by the contractor.
2. A list of all significant services performed or supplies delivered, including construction.
3. A description of the overall purpose and expected outcomes or results of the contract, including significant deliverables.
4. An assessment of the contractor's progress towards the completion of the overall purpose and expected outcomes or results of the contract.
5. A narrative description of the employment impact of work funded by the Recovery Act, including a brief description of the types of jobs created and jobs retained in the United States and outlying areas.
6. Information on subcontractors.<sup>102</sup>

Of great significance for some contractors is the requirement to also include in these reports the names and total compensation of each of the five most highly compensated officers of the contractor for the calendar year in which the contract is awarded. This requirement applies where:

- (i) In the contractor's preceding fiscal year, the contractor received—
  - (A) 80% or more of its annual gross revenues from federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
  - (B) \$25,000,000 or more in annual gross revenues from federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
- (ii) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.<sup>103</sup>

## H. Affirmative Action Practical Compliance Tips

- Determine whether you are a subcontractor as defined by the OFCCP.
- Determine whether you are required contractually to prepare Affirmative Action Plans and for which facilities you must do so.
- Prepare a protocol for documenting employment decisions that your hiring managers and recruiters can use to ensure relevant information is complied and retained as it relates to your equal employment opportunity obligations.
- Train your hiring managers and recruiters about the Internet Applicant Rule and compliance with the recordkeeping obligations of the OFCCP.
- Invest in an applicant tracking system that will help facilitate your compliance with the Internet Applicant Rule.
- Conduct routine audits of your HRIS system, and consider conducting of full-scale audit of your employment practices because of the heightened enforcement environment under the Obama Administration.
- Ensure that all employment tests and structured selection procedures are validated according to the requirements of the UGESP.
- Companies that are not willing to accept the greater scrutiny that will come with work on ARRA-Funded projects or contracts should not undertake such projects.

## IV. IMMIGRATION RELATED ISSUES IMPACTING FEDERAL CONTRACTORS

### A. Government Audits and Investigations

As previously stated, under the Obama Administration, federal contractors are at a heightened risk of being selected for government audits or investigations related to the legal status of their employees. The government's rationale for imposing additional scrutiny upon federal contractors stems from the belief that contractors employing illegal workers provide a less stable and secure workforce for government projects, which are often connected to critical infrastructure efforts and designed to rebuild the economy and create jobs.<sup>104</sup> As a result, since most enforcement efforts begin with an I-9 audit, employers with federal contracts should carefully review their I-9 compliance and do everything possible to improve it.

Like all employers, federal contractors are subject to the Immigration Reform and Control Act of 1986 (IRCA) and must

properly complete Form I-9 for all new hires to verify identity and employment eligibility.<sup>105</sup> U.S. Immigration and Customs Enforcement (ICE) conducts audits of employers' I-9 records and may impose penalties ranging from \$110 to \$1,100 for each paperwork violation, \$375 to \$16,000 for knowing<sup>106</sup> employment of an unauthorized worker, and \$3,000 per unauthorized employee and six months imprisonment for a pattern and practice of knowing employment violations. In addition, federal contractors are subject to potential debarment from future contracts for up to one year if they are found to have knowingly employed unauthorized workers.<sup>107</sup> Since April 2006, ICE has been using criminal enforcement efforts against employers believed to knowingly employ illegal workers.<sup>108</sup>

During the past four years, ICE has increased its worksite enforcement efforts, resulting in many high-profile raids, arrests of illegal aliens, and prosecution of employers.<sup>109</sup> The Obama Administration has stated that it will continue efforts to enforce sanctions against employers. Homeland Security Secretary Janet Napolitano has specifically directed ICE agents to focus more on arresting and prosecuting employers rather than on targeting unauthorized workers.<sup>110</sup> Although the policy on how raids are conducted is shifting, ICE has and will continue to target employers working on federal projects.

## B. Potential E-Verify Requirement

As a continuation of the federal government's heightened scrutiny of federal contractors, President George W. Bush amended Executive Order 12989 in June 2008, and an implementing regulation was published to require federal departments and agencies that enter into certain contracts to include, as a condition of those contracts, a provision that the contractor agrees to use E-Verify to verify the employment eligibility of all new hires as well as all existing employees who are assigned to perform work under the contract.<sup>111</sup> E-Verify is an Internet-based system operated by the Department of Homeland Security's U.S. Citizenship and Immigration Services in partnership with the Social Security Administration. E-Verify allows participating employers to verify electronically the identity and employment eligibility of their newly hired employees. E-Verify was established as a voluntary system. Nonetheless, several states have passed laws mandating its use for all private employers, other states require E-Verify of state contractors and subcontractors, and the federal government has joined in this effort with the E-Verify Federal Contractor rule.

The rule, however, has been subject to many delays, and its implementation is now in question. When President Barack Obama took office in January 2009, the effective date of the E-Verify Federal

Contractor rule was delayed to allow the new administration to review the rule and potentially make changes or withdraw the regulation. In addition, the U.S. Chamber of Commerce and other parties filed a lawsuit challenging the E-Verify Federal Contractor regulation.<sup>112</sup> As a result of both the lawsuit and change in administration, the effective date of the rule was postponed to May 21, 2009. In April, the government announced that the parties to the litigation had agreed to postpone the rule's effective date again, this time to June 30, 2009. However, in June 2009, the government announced that the rule's effective date would yet again be postponed, this time until September 8, 2009.

If implemented, the regulation requiring federal contractors to enroll in E-Verify will apply only to contracts under the Federal Acquisition Regulation that include some work in the United States, have performance terms of 120 days or more, and meet the value threshold. The value threshold for prime federal contracts applies to those with a value in excess of \$100,000 (the simplified acquisition threshold). In addition to complying with the E-Verify requirement itself, contractors subject to the rule must include a provision requiring certain subcontractors to enroll in E-Verify. The requirement applies only to subcontracts for services or construction with a value above \$3,000 that involve work in the United States. The E-Verify federal contractor requirement will be triggered only upon the inclusion of specific Federal Acquisition Regulation language in a new federal contract or a modification or amendment of an existing federal contract. Unlike affirmative action obligations for federal contractors, the E-Verify requirement only exists if the company enters into a contract with language specifically imposing its use of E-Verify under Executive Order 12989.

Specifically exempted from the E-Verify requirement are contracts and subcontracts for: (1) commercially available, off-the-shelf (COTS) products; (2) items that would be COTS products but for minor modifications; (3) items that would be COTS products were they not bulk cargo; and (4) commercial services that are part of the purchase of a COTS product, are performed by the COTS provider and are normally provided for that product. COTS products are defined as commercial items that are sold in substantial quantities in the marketplace. These products either must be offered to the government without modification (that is, in the same form in which they are sold in the marketplace), or with only minor modifications.

## C. Requirement or Preference for U.S. Workers

In addition to the employer sanctions and employment eligibility verification provisions of IRCA, the Act also prohibits

discrimination based on national origin or citizenship status.<sup>113</sup> These protections extend to “U.S. Workers” which is defined to mean citizens, nationals, permanent residents, temporary residents, asylees, and refugees — all of whom have indefinite employment authorization in the United States. However, many federal contracts will require that individuals performing certain jobs be U.S. citizens. In that regard, an employer may require U.S. citizenship for a particular job if required to do so by federal, state, or local law or regulation, or by government contract.<sup>114</sup> Further, an employer may prefer an American citizen over a foreign national if both are equally qualified.<sup>115</sup> Contractors should note that these exceptions are construed very narrowly.

#### D. Financial Transactions with Nationals of Certain Countries

All employers must ensure that they are not doing business with a person, entity or country sanctioned by the U.S. government. This prohibition extends to business transactions with an entity owned, operated or affiliated with a country subject to a sanctions program, and can include employment of a person who has been placed on a sanctions list. Due to the heightened scrutiny that federal contractors receive, such employers should take extra steps to ensure they are in compliance with any federal sanctions programs.

The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals.<sup>116</sup> As part of its enforcement efforts, OFAC publishes a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries.<sup>117</sup> It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Collectively, such individuals and companies are called Specially Designated Nationals (SDNs).<sup>118</sup> The assets of SDNs are blocked, and U.S. persons are generally prohibited from dealing with them. Federal contractors should check the list on the OFAC web site on a regular basis to ensure compliance with respect to new hires and business transactions.

#### E. Controls on the Distribution of Technological Information

Another area of particular concern for federal contractors is the export and deemed export of sensitive technology. The International Traffic in Arms Regulations (ITAR) require that information and material pertaining to defense and military-related technologies may be shared only with U.S. Persons unless authorization from the Department of State is received or a special exemption is used.<sup>119</sup>

The Export Administration Regulations (EAR) regulate the export of “dual-use” items — items that have both commercial and military or proliferation applications — and similarly restrict the sharing of this information with those who are not U.S. Persons unless a license is obtained from the Department of Commerce.<sup>120</sup>

The definition of *U.S. Person* is linked to the definition of a U.S. worker in the IRCA anti-discrimination context, which includes U.S. citizens or nationals, lawful permanent residents, temporary residents, refugees, or asylees. Contractors must ensure that all other workers who are non-U.S. persons are not exposed to protected information or must obtain an export license for that person, if available. Contractors must be careful of “deemed exports,” that is, being deemed to have exported protected information possessed by the company to a foreign national simply by hiring the foreign national to work in the United States. Although the foreign national is working in the U.S., the risk of the person taking that information back to their country of nationality creates a risk of the data, product, or technology being exported.

Whether a foreign national employee is subject to export controls is based on the person’s nationality. The most restricted individuals are those who are citizens from countries that are state supporters of terrorism (currently Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria). Individuals who are citizens of other countries deemed to pose a threat to the national security, often referred to as the “List of 26,” also are subject to export control requirements.<sup>121</sup> Further, Indian and Chinese citizens frequently are subject to export license requirements. To determine whether the product, technology, or other information a contractor possesses is subject to export controls and whether the specific person it wishes to hire is subject, the contractor must analyze both ITAR and EAR to ensure any required licenses are obtained or the information is strictly restricted so the employee does not have access.

#### F. Immigration Practical Compliance Tips:

- Train Human Resources professionals about properly completing the I-9 Form and verifying citizenship or residency status of applicants and employees.
- Conduct periodic audits of I-9 Forms.
- Determine whether the company is subject to the e-verify requirements, if the federal contractor rule becomes effective.
- Confirm that vendors are not on the SDN list, and insert language in contracts that provide for immediate termination rights should it be discovered that the vendor has later been added to the list.

## **V. CONCLUSION**

This Littler Report: Employment Law Guide for Federal Contractors in the Wake of the American Recovery and Reinvestment Act has been designed to help current and would-be federal contractors benefit from the unprecedented sums of money made available through the ARRA. This Report can help companies successfully bid on federal contracts and maintain them without the fear of unintentional employment law violations. Although this Report does not cover every contingency, it does offer a one-of-a-kind comprehensive view of the various employment law areas encountered by every federal contractor. This Report will assist employers with ongoing compliance, which besides performing the actual contract, is the most important aspect of federal contracting.

## ENDNOTES

- 1 Kennedy, President John F., Remarks. Breakfast of the Fort Worth Chamber of Commerce. Texas Hotel, Fort Worth, Texas, Nov. 22, 1963.
- 2 Auerback, Marshall, *Time for a New 'New Deal,'* Feb. 1, 2009. <http://cobar.org>.
- 3 On February 18, 2009, April 3, 2009, and June 22, 2009 the Office of Management and Budget issued initial guidance for federal agencies and others to effectively manage the funds of the ARRA.
- 4 Solis, Labor Secretary Hilda, Remarks, 2009 National Policy Forum. George Washington University, Washington, D.C., June 11, 2009.
- 5 ARRA § 1606.
- 6 The Office of Management and Budget has issued two memoranda, February 19 and May 15, respectively, unequivocally mandating that each federal agency enforce Davis-Bacon and Related Acts for all projects funded with stimulus funds. A copy of each memorandum can be found at [http://www.whitehouse.gov/omb/recovery\\_default](http://www.whitehouse.gov/omb/recovery_default). On May 29, 2009, the Wage and Hour Division of the U.S. Department of Labor issued a memorandum to all contract agencies of the federal government further stating that the Davis-Bacon Act applies to projects funded by the ARRA. A copy of this memorandum can be found at <http://www.dol.gov/esa/whd/recovery/AAM207.pdf>.
- 7 Pub. L. No. 74-403, 40 U.S.C. §§ 3141-3148.
- 8 40 U.S.C. § 3142(a).
- 9 29 C.F.R. § 5.2(c).
- 10 23 U.S.C. § 113.
- 11 A list of those related acts is attached as Appendix B.
- 12 A list of those states is attached as Appendix C.
- 13 29 C.F.R. § 5.2(p).
- 14 29 C.F.R. § 1.2(a)(1).
- 15 29 C.F.R. § 1.5.
- 16 29 C.F.R. § 1.5(b).
- 17 Meals and lodging provided to construction workers while working out of town could not be credited against obligation to provide fringe benefits under Davis-Bacon Act. (U.S. Department of Labor Administrative Review Board 2004). See also *In re William J. Lang Land Clearing, Inc.*, 2004 DOL Ad. Rev. Bd LEXIS 281 (Sept. 28, 2004) (subcontractor's payments for employees' meals and lodging outside of their home community were not creditable against the Davis-Bacon Act's prevailing wage requirements as either fringe benefits or cash payments).
- 18 40 U.S.C. §§ 3141 *et seq.*
- 19 29 C.F.R. § 5.2(m).
- 20 *Id.*
- 21 *Id.*
- 22 40 U.S.C. § 3142(c)(1).
- 23 FOH 15b04 (c).
- 24 29 C.F.R. § 5.2(l).
- 25 *Id.* However, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work are not included in the definition of *site of the work*.
- 26 *Id.*
- 27 FOH 15b04 (b)(3).
- 28 *Id.*
- 29 29 C.F.R. § 5.2(o).
- 30 29 C.F.R. § 5.2(m).
- 31 *Id.*
- 32 40 U.S.C. §§ 3141 *et seq.*
- 33 29 C.F.R. § 5.2(k).
- 34 29 C.F.R. § 5.2(j).
- 35 "Interpretations – Application of DBRA to Types of Work and Contracts," FOH 15d00-15d10.
- 36 29 C.F.R. § 5.5(a)(6).
- 37 29 C.F.R. § 5.5(a)(1)(i).
- 38 18 U.S.C. § 874.
- 39 40 U.S.C. § 3145.
- 40 Effective January 18, 2009, contractors and subcontractors are no longer required to include workers' home addresses or full Social Security numbers on the weekly certified payroll statements. They are required to include individual employee identification numbers, which generally will be the final four digits of the Social Security number.
- 41 29 C.F.R. §§ 3.3 and 5.5 and Form WH-347, which can be found at <http://www.acquisition.gov/far/current/html/FormsDDWH4.html>.
- 42 29 C.F.R. § 3.4(a).
- 43 29 C.F.R. § 3.4(b).
- 44 For purposes of the SCA, the United States includes any state, the District of Columbia, Puerto Rico, the Virgin Islands, as well as other territories such as Guam. If a portion of the work is performed both within the United States and outside the U.S., the SCA applies to the portion performed in the U.S.
- 45 The SCA's safety and health requirements prohibit that any work be done in unsanitary, hazardous, or dangerous working conditions as defined and administered by the Occupational Safety and Health Administration (OSHA).
- 46 Wage determinations can be found online at <http://www.wdol.gov>. The SCA's Directory of Occupations can be found at <http://www.dol.gov/esa/whd/regs/compliance/wage/index.htm>.
- 47 Currently, the federal minimum wage is \$7.25 per hour.
- 48 29 C.F.R. Part 541.
- 49 The conformance process should not be used to propose a new classification that combines job duties from two or more existing classifications, nor should it be used to propose a new classification that performs only part of the duties of an existing classification.
- 50 A copy of the poster can be found at <http://www.dol.gov/esa/whd/regs/compliance/posters/sca.htm>.
- 51 See *supra*, n. 40.
- 52 The health and safety provisions of the SCA and CWHSSA are enforced by the Occupational Safety and Health Administration.
- 53 See 40 U.S.C. §§ 3142, 3144, 3145; 29 C.F.R. § 5.6; See 41 U.S.C. §§ 352–354; 29 U.S.C. § 4.102 (SCA).
- 54 See 41 U.S.C. §§ 352–354; 29 U.S.C. § 4.102.
- 55 See 40 U.S.C. §§ 3702, 3703, 3706.
- 56 See 29 U.S.C. § 255; 40 U.S.C. § 3144(a).
- 57 See Table of Dollar Threshold Amounts for Contract Coverage Under State Prevailing Wage Laws, located at [www.dol.gov/esa/whd/state/dollar.htm](http://www.dol.gov/esa/whd/state/dollar.htm) (last visited on Apr. 9, 2009).
- 58 See, e.g., *Grochowski v. Phoenix Const.*, 318 F.3d 80 (2d Cir. 2003) (holding that the Davis-Bacon Act does not provide employees with a private right of action for unpaid wages); *Weber v. Heat Control Co.*, 728 F.2d 599 (3d Cir. 1984) (same); *U.S. for Benefit and on Behalf of Glynn v. Capeletti Bros., Inc.*, 621 F.2d 1309 (5th Cir. 1980) (same); *Mosley v. Starr Elec. Co.*, 542 F. Supp. 1032 (E.D. Tenn. 1981) (same); *Operating Engineers Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671 (9th Cir. 1998) (same).
- 59 See, e.g., *District Lodge No. 166, Int'l Ass'n of Machinists & Aerospace Workers v. TWA Servs., Inc.*, 731 F.2d 711 (11th Cir. 1984) (holding that if the Secretary of Labor issues a wage determination after the contract has begun, employees cannot bring suit against the contractor to recover the difference between wages actually paid and those that would have been due in the interim had the agency issued the wage determination earlier), *cert. denied*, 469 U.S. 1209 (1985).
- 60 *Weber v. Heat Control Co.*, 579 F. Supp. 346 (D.N.J. 1982), *judgment aff'd*, 728 F.2d 599 (3d Cir. 1984) (holding no private right of action exists for the enforcement of the Davis-Bacon Act's prevailing wage requirements, but plaintiff was free to seek either administrative relief against the defendant from the Department of Labor or contractual relief in the New Jersey state courts).
- 61 *Cox v. NAP Constr. Co., Inc.; Araujo v. Tiano's Constr. Corp.*, 10 N.Y.3d 592 (N.Y. June 5, 2008).
- 62 *Id.*
- 63 *Id.* at 606.
- 64 *Id.* at 604 (citing 40 U.S.C. § 3142(c)(3)).
- 65 *Id.* at 604-605 (citing 40 U.S.C. § 3144(a)(2) and *Universities Research Ass'n, Inc. v. Coutu*, 101 S.Ct. 1451 (1981)).
- 66 *Id.* at 605.
- 67 *E.M. Gilbert Eng'g Corp. v. U.S.*, 82 Ct. Cl. 616 (1936).

- 68 See, e.g., *Dayhoff v Temsco Helicopters, Inc.* 848 P.2d 1367 (Alaska 1993) (holding that the state legislature intended for employees to have a private cause of action to enforce the Alaska Little Davis-Bacon Act, noting that the state department of labor investigated the contractor's alleged noncompliance and suggested that the employee file a civil suit).
- 69 See, e.g., *International Bhd. of Elec. Workers, Local Union No. 58 v McNulty* (1995) 214 Mich. App. 437, 543 N.W.2d 25 (1995) (holding there is no private cause of action to enforce Michigan's Prevailing Wage Act).
- 70 See, e.g., *Winsch v. Esposito Bldg. Specialty, Inc.*, 852 N.Y.S.2d 199 (App. Div. 2d Dep't 2008) (holding that under New York's prevailing wage law, no private right of action for the underpayment of prevailing wages exists until an administrative determination in the employee's favor has been made and has not been reviewed or has been affirmed); *P.T. Iron Works v. Talisman Contracting Co., Inc.* (holding that an underpaid employee has a private right of action under prevailing wage provision, but that the employee's prevailing wage claim must be initially subjected to an administrative proceeding).
- 71 See, e.g., *United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co.*, 183 F.3d 1088 (9th Cir. 1999).
- 72 See 31 U.S.C. §§3729-33.
- 73 31 U.S.C. §3730(d).
- 74 41 U.S.C. § 352; 29 C.F.R. §§ 4.187, 4.190.
- 75 29 C.F.R. § 4.6(g)(3).
- 76 See *The Excluded Parties List System (EPLS)*, located at [www.epls.gov](http://www.epls.gov) (last visited on April 12, 2009) ("The EPLS "includes information regarding entities debarred, suspended, proposed for debarment, excluded or disqualified under the non-procurement common rule, or otherwise declared ineligible from receiving Federal contracts, certain subcontracts, and certain Federal assistance and benefits. This information may include names, addresses, DUNS numbers, Social Security Numbers, Employer Identification Numbers or other Taxpayer Identification Numbers, if available and deemed appropriate and permissible to publish by the agency taking the action.").
- 77 41 U.S.C. § 354; 29 C.F.R. § 4.188.
- 78 29 C.F.R. § 4.188(b)(2).
- 79 40 U.S.C. §§ 3704(c), 3708.
- 80 40 U.S.C. §3144(b); 29 C.F.R. §5.5(a)(3)(iii).
- 81 See *P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996) (holding that an earlier meeting with a Wage and Hour investigator had put the contractor on notice regarding the misclassification of laborers who were, during some periods, performing the work of sheet metal mechanics. Allowing the violations to persist demonstrated "reckless disregard" for the contractor's obligations to pay its employees in accordance with the wage determination); See also *KP&L Electrical Contractors, Inc.*, 1996-DBA-34 (ALJ, Dec. 31, 1998), *aff'd. in part*, ARB Case No. 99-039 (ARB, May 31, 2000) (affirming the ALJ's holding debarment appropriate where the contractor misclassified employees as laborers when they actually performed the work of electricians or carpenters).
- 82 For more detail on the Supreme Court's decision in *Chamber of Commerce v. Brown*, See Littler's June 2008 ASAP, *U.S. Supreme Court Overturns California's Limitation on Employer Free Speech Rights to Resist Union Organizing*. This can be found at [http://www.littler.com/PressPublications/Documents/2008\\_06\\_ASAP\\_USSupremeCourt\\_FreeSpeechRightsResistUnionOrganizing.pdf](http://www.littler.com/PressPublications/Documents/2008_06_ASAP_USSupremeCourt_FreeSpeechRightsResistUnionOrganizing.pdf).
- 83 The National Labor Relations Board (NLRB) has held that in certain circumstances workers in such settings do not have organizational rights under the NLRA. *Brevard Achievement Center*, 342 NLRB 982 (2004).
- 84 There is an exception to this general rule. The successor employer may appeal to the Secretary of Labor for a hearing. If the Secretary finds that the wages and fringe benefits provided in the predecessor's collective bargaining agreement are "substantially at variance with those that prevail for services of a character similar in the locality," the successor will not be required to provide the wages and fringe benefits as provided in the collective bargaining agreement. 41 U.S.C. § 353 (c).
- 85 29 C.F.R. § 4.163.
- 86 For example, the Department of Labor's regulations provide that an employer may substitute \$0.20 per hour that was to be paid into a pension fund with \$0.20 per hour worth of hospitalization benefits. 29 C.F.R. § 4.177 (b)(1).
- 87 29 C.F.R. § 4.177.
- 88 406 U.S. 272 (1972).
- 89 487 U.S. 735 (1988).
- 90 On July 14, 2009, the Federal Acquisition Regulatory Council issued a proposed rule governing the use of project labor agreements pursuant to Executive Order 13502. Interested parties and the public have until August 13, 2009, to comment on the proposed rule. Thereafter, the Council will issue a final rule.
- 91 The President's Executive Orders do not necessarily apply to every federal contract. The threshold compliance issue for federal contracts, therefore, is to determine your status as a covered federal contractor. An employer can be a "government contractor" for some rules and regulations but not others based on the value of its contract with the government. The most commonly utilized threshold is the "simplified acquisition threshold" of \$100,000 in value. Oftentimes, federal contracts over this threshold must comply with federal regulations while contracts less than this threshold may not have to comply with those same rules. An employer's status as a "subcontractor" on a federal contract makes this determination even more complex. Several of the President's Executive Orders also apply to "subcontractors" who may have no direct dealings with the federal government but who provide goods or services necessary for the performance of the prime contract. The federal government, especially in light of these new Executive Orders, will likely focus more on subcontractor compliance than in the past. Additionally, forthcoming regulations may require the prime contractor to ensure its subcontractors' compliance with these Executive Orders.
- 92 Although Executive Order 13494 does not prohibit federal contractors from engaging in "persuader" activities, just from *Seeking* reimbursement from federal funds for such purposes, the penalties for *Seeking* reimbursement for "unallowable" expenses are significant. Federal contractors, therefore, should segregate expenditures for "persuader" activities from expenditures for reimbursable purposes. This becomes significantly more complex when, for example, the employer is conducting a training course on workplace harassment issues (which would be an allowable expenditure) and the discussion unexpectedly turns to union-related issues (which would not be an unallowable expenditure). Forthcoming regulations may address this and other scenarios, but employers should be cautious when conducting "persuader" activity, or any activity that could be construed as persuader activity, and should account for such expenditures separately.
- 93 Federal contractors should carefully consider the impact of successorship liability on the ultimate cost of performing the contract. Bidders should request copies of predecessor contractors' collective bargaining agreements prior to responding to a solicitation for bids. Under Executive Order 13495, the successor contractor will likely be required to recognize and bargain with the existing union as soon as it takes over the federal contract and, at least initially, to honor the terms of the predecessor contractor's collective bargaining agreement. Employers therefore must decide, prior to submitting a bid, whether that eventuality will make winning the contract a profitable endeavor. Federal service contractors also should assess the potential that future service contracts will be awarded on a "fixed-cost" basis rather than on a "cost-reimbursement" basis. Under a "fixed-cost" model, contracts may be awarded on the basis of competitive cost structures rather than on cost-neutral factors such as efficient performance or quality customer service. Bidders should consider whether their existing bidding process can accommodate a "fixed-cost" payment model. In light of these issues, some federal contractors may elect to forego new contracting opportunities. At a minimum, however, federal contractors may need to revise their bidding processes to account for these issues.
- 94 41 C.F.R. § 60-1.3.
- 95 41 C.F.R. §§ 60-1.4, 60-300.5, and 741.5 (equal opportunity obligations) and 41 C.F.R. § 60-1.12 (record keeping).
- 96 The obligations of construction contractors can be found in subsection V of this part.
- 97 See 41 C.F.R. § 60-1.12(c).
- 98 <http://www.dol.gov/esa/ofccp/regs/compliance/directives/dir282.pdf>.
- 99 <http://www.dol.gov/esa/ofccp/regs/compliance/directives/dir281.htm>.
- 100 See 41 C.F.R. § 60-4.3(a)(7).
- 101 48 CFR §§ 4.1501, 52.204-11(c).
- 102 48 CFR §§ 52.204-11(d).
- 103 48 CFR §§ 52.204-11(d)(8).
- 104 The first formal expression of this policy is found in Executive Order 12989, signed by President William Clinton in February 1996. Exec. Order No. 12,989, 61 Fed. Reg. 6,091 (1996).
- 105 The regulations implementing the Immigration Reform and Control Act of 1986 (IRCA) require employers to verify the employment of employees hired after November 6, 1986. An employee is defined as an individual who provides services or labor for an employer for wages or other remuneration. 8 C.F.R. § 274a.1(f). This definition does not include independent contractors. 8 C.F.R. § 274a.1(j).
- 106 *Knowing* employment of an unauthorized worker includes actual knowledge and constructive knowledge that may fairly be inferred through notice of

- certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know that an employee was not authorized to work in the U.S. Constructive knowledge includes: (1) failure to complete I-9 forms properly; (2) possession of information suggesting that an alien is not authorized to work; and (3) reckless or wanton disregard by reliance upon representations of another. 8 C.F.R. § 274a.1(l)(1).
- 107 Exec. Order No. 12,989, 61 Fed. Reg. 6,091 (1996). Debarment may be extended in one-year increments if the employer continues to violate IRCA provisions.
- 108 Press Conference with Secretary of Homeland Security Michael Chertoff, *et al.*, Apr. 20, 2006, [http://www.dhs.gov/xnews/releases/press\\_release\\_0892.shtm](http://www.dhs.gov/xnews/releases/press_release_0892.shtm).
- 109 A summary of recent enforcement actions is available on the ICE web site at [http://www.ice.gov/pi/news/factsheets/worksite\\_cases.htm](http://www.ice.gov/pi/news/factsheets/worksite_cases.htm).
- 110 An article in The Seattle Times after the first ICE raid of the Obama Administration quotes Secretary Napolitano: "in my view, we have to do workplace enforcement, and it needs to be focused on employers who intentionally and knowingly exploit the illegal labor market." Napolitano Demands Review of ICE Raid at Bellingham Plant, THE SEATTLE TIMES, Feb. 26, 2009.
- 111 Exec. Order No. 13,465, Amending Exec. Order No. 12,989, 73 Fed. Reg. 33,285 (2008); Employment Eligibility Verification, 73 Fed. Reg. 67,651 (2008).
- 112 *Chamber of Commerce of the United States of Am. v. Chertoff*, (D. Md. Dec. 23, 2008). The crux of the Chamber's lawsuit is that the federal contractor regulation violates an express statutory prohibition against mandating "any person or other entity to participate in a pilot program" such as E-Verify, as set forth in Section 402(a) of the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The U.S. Chamber of Commerce and its co-plaintiffs have asked the court to declare President Bush's Executive Order illegal and void and to enjoin permanently the defendants from enforcing the federal contractor regulation. However, the government maintains that the rule does not violate Section 402 and that, in any event, they have not mandated E-Verify participation because employers are not required to be government contractors or subcontractors.
- 113 It is an unfair immigration-related employment practice for an employer to discriminate against individuals with respect to hiring, recruitment or referral for a fee, or discharging from employment because of that person's national origin or, in the case of a "protected individual," because of citizenship status. INA § 274B(a). The term "protected individual" is defined as an individual who is a U.S. citizen or national, lawful permanent resident, temporary resident, refugee, or asylee. INA § 274B(a)(3).
- 114 INA § 274B(a)(2).
- 115 INA § 274B(a)(4).
- 116 Sanctions are imposed against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy, or economy of the United States.
- 117 OFAC administers a number of U.S. economic sanctions and embargoes that target geographic regions and governments. Comprehensive sanctions programs include Burma (Myanmar), Cuba, Iran and Sudan. Other non-comprehensive programs include the Western Balkans, Belarus, Cote d'Ivoire, Democratic Republic of the Congo, Iraq, Liberia (Former Regime of Charles Taylor), Persons Undermining the Sovereignty of Lebanon or its Democratic Processes and Institutions, North Korea, Sierra Leone, Syria and Zimbabwe, as well as other programs targeting individuals or entities that could be anywhere. Those programs currently relate to foreign narcotics traffickers, foreign terrorists, and WMD proliferators.
- 118 The list of SDNs is available on the OFAC web site: <http://www.ustreas.gov/offices/enforcement/ofac/sdn/>.
- 119 Department of State responsibility for the control of the permanent and temporary export and temporary import of defense articles and services is governed primarily by 22 U.S.C. § 2778, Arms Export Control Act, and Executive Order 11958, as amended. The ITAR, with amendments, is available at: [http://www.pmdtc.state.gov/regulations\\_laws/itar\\_consolidated.html](http://www.pmdtc.state.gov/regulations_laws/itar_consolidated.html).
- 120 The Bureau of Industry and Security (BIS) of the U.S. Department of Commerce is responsible for implementing and enforcing the EAR.
- 121 Although it is classified, the list of countries reportedly has included at various times, but is not limited to, Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates, and Yemen.

## APPENDIX A: ARRA Reporting Requirements Regulations

### Subpart 4.15—American Recovery and Reinvestment Act—Reporting Requirements

#### 4.1500 Scope of subpart.

This subpart implements section 1512(c) of Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act), which requires, as a condition of receipt of funds, quarterly reporting on the use of funds. The subpart also implements the data elements of the Federal Funding Accountability and Transparency Act of 2006, as amended (Pub. L. 109-282). Contractors that receive awards (or modifications to existing awards) funded, in whole or in part by the Recovery Act, must report information including, but not limited to—

- (a) The dollar amount of contractor invoices;
- (b) The supplies delivered and services performed;
- (c) An assessment of the completion status of the work;
- (d) An estimate of the number of jobs created and the number of jobs retained as a result of the Recovery Act funds;
- (e) Names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded; and
- (f) Specific information on first-tier subcontractors.

#### 4.1501 Procedures.

- (a) In any contract action funded in whole or in part by the Recovery Act, the contracting officer shall indicate that the contract action is being made under the Recovery Act, and indicate which products or services are funded under the Recovery Act. This requirement applies whenever Recovery Act funds are used, regardless of the contract instrument.
- (b) To maximize transparency of Recovery Act funds that must be reported by the contractor, the contracting officer shall structure contract awards to allow for separately tracking Recovery Act funds. For example, the contracting officer may consider awarding dedicated separate contracts when using Recovery Act funds or establishing contract line item number (CLIN) structures to mitigate commingling of Recovery funds with other funds.
- (c) Contracting officers shall ensure that the contractor complies with the reporting requirements of 52.204-11, American Recovery and Reinvestment Act—Reporting Requirements. If the contractor fails to comply with the reporting requirements, the contracting officer shall exercise appropriate contractual remedies.
- (d) The contracting officer shall make the contractor's failure to comply with the reporting requirements a part of the contractor's performance information under Subpart 42.15.

#### 4.1502 Contract clause.

Insert the clause at 52.204-11, American Recovery and Reinvestment Act—Reporting Requirements in all solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. This includes, but is not limited to, Governmentwide Acquisition Contracts (GWACs), multi-agency contracts (MACs), Federal Supply Schedule (FSS) contracts, or agency indefinite-delivery/indefinite-quantity (ID/IQ) contracts that will be funded with Recovery Act funds. Contracting officers shall ensure that this clause is included in any existing contract or order that will be funded with Recovery Act funds. Contracting officers may not use Recovery Act funds on existing contracts and orders if the clause at 52.204-11 is not incorporated.

### 52.204-11 American Recovery and Reinvestment Act—Reporting Requirements.

As prescribed in 4.1502, insert the following clause:

#### American Recovery and Reinvestment Act—Reporting Requirements (Mar 2009)

- (a) *Definitions.* As used in this clause—

“Contract”, as defined in FAR 2.101, means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see FAR Part 16.

“First-tier subcontract” means a subcontract awarded directly by a Federal Government prime contractor whose contract is funded by the Recovery Act.

“Jobs created” means an estimate of those new positions created and filled, or previously existing unfilled positions that are filled, as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas (see definition in FAR 2.101). The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

“Jobs retained” means an estimate of those previously existing filled positions that are retained as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas (see definition in FAR 2.101). The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

“Total compensation” means the cash and noncash dollar value earned by the executive during the contractor's past fiscal year of the following (for more information see 17 CFR 229.402(c)(2)):

- (1) *Salary and bonus.*
  - (2) *Awards of stock, stock options, and stock appreciation rights.* Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.
  - (3) *Earnings for services under non-equity incentive plans.* Does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.
  - (4) *Change in pension value.* This is the change in present value of defined benefit and actuarial pension plans.
  - (5) *Above-market earnings on deferred compensation which is not tax-qualified.*
  - (6) *Other compensation.* For example, severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property if the value for the executive exceeds \$10,000.
- (b) This contract requires the contractor to provide products and/or services that are funded under the American Recovery and Reinvestment Act of 2009 (Recovery Act). Section 1512(c) of the Recovery Act requires each contractor to report on its use of Recovery Act funds under this contract. These reports will be made available to the public.
  - (c) Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter.
  - (d) The Contractor shall report the following information, using the online reporting tool available at [www.FederalReporting.gov](http://www.FederalReporting.gov).
    - (1) The Government contract and order number, as applicable.
    - (2) The amount of Recovery Act funds invoiced by the contractor for the reporting period. A cumulative amount from all the reports submitted for this action will be maintained by the government's on-line reporting tool.

- (3) A list of all significant services performed or supplies delivered, including construction, for which the contractor invoiced in this calendar quarter.
- (4) Program or project title, if any.
- (5) A description of the overall purpose and expected outcomes or results of the contract, including significant deliverables and, if appropriate, associated units of measure.
- (6) An assessment of the contractor's progress towards the completion of the overall purpose and expected outcomes or results of the contract (*i.e.*, not started, less than 50 percent completed, completed 50 percent or more, or fully completed). This covers the contract (or portion thereof) funded by the Recovery Act.
- (7) A narrative description of the employment impact of work funded by the Recovery Act. This narrative should be cumulative for each calendar quarter and only address the impact on the contractor's workforce. At a minimum, the contractor shall provide—
  - (i) A brief description of the types of jobs created and jobs retained in the United States and outlying areas (see definition in FAR 2.101). This description may rely on job titles, broader labor categories, or the contractor's existing practice for describing jobs as long as the terms used are widely understood and describe the general nature of the work; and
  - (ii) An estimate of the number of jobs created and jobs retained by the prime contractor, in the United States and outlying areas. A job cannot be reported as both created and retained.
- (8) Names and total compensation of each of the five most highly compensated officers of the Contractor for the calendar year in which the contract is awarded if—
  - (i) In the Contractor's preceding fiscal year, the Contractor received—
    - (A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
    - (B) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
  - (ii) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.
- (9) For subcontracts valued at less than \$25,000 or any subcontracts awarded to an individual, or subcontracts awarded to a subcontractor that in the previous tax year had gross income under \$300,000, the Contractor shall only report the aggregate number of such first tier subcontracts awarded in the quarter and their aggregate total dollar amount.
- (10) For any first-tier subcontract funded in whole or in part under the Recovery Act, that is over \$25,000 and not subject to reporting under paragraph 9, the contractor shall require the subcontractor to provide the information described in (i), (ix), (x), and (xi) below to the contractor for the purposes of the quarterly report. The contractor shall advise the subcontractor that the information will be made available to the public as required by section 1512 of the Recovery Act. The contractor shall provide detailed information on these first-tier subcontracts as follows:
  - (i) Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company.
  - (ii) Name of the subcontractor.
  - (iii) Amount of the subcontract award.
  - (iv) Date of the subcontract award.
  - (v) The applicable North American Industry Classification System (NAICS) code.
  - (vi) Funding agency.
  - (vii) A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.
  - (viii) Subcontract number (the contract number assigned by the prime contractor).
  - (ix) Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.
  - (x) Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.
  - (xi) Names and total compensation of each of the subcontractor's five most highly compensated officers, for the calendar year in which the subcontract is awarded if—
    - (A) In the subcontractor's preceding fiscal year, the subcontractor received—
      - (1) 80 percent or more of its annual gross revenues in Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
      - (2) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
    - (B) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

## APPENDIX B: Related Acts

1. National Housing Act (sec. 212 added to c. 47, 48 Stat. 1246, by sec. 14, 53 Stat. 807; 12 U.S.C. 1715c and repeatedly amended).
2. Housing Act of 1950 (College Housing) (amended by Housing Act of 1959 to add labor provisions, 73 Stat. 681; 12 U.S.C. 1749a(f)).
3. Housing Act of 1959 (sec. 401(f) of the Housing Act of 1950 as amended by Pub. L. 86-372, 73 Stat. 681; 12 U.S.C. 1701q(c)(3)).
4. Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199; 16 U.S.C. 779e(b)).
5. Library Services and Construction Act (sec. 7(a), 78 Stat. 13; 20 U.S.C. 355c(a)(4), as amended).
6. National Technical Institute for the Deaf Act (sec. 5(b)(5), 79 Stat. 126; 20 U.S.C. 684(b)(5)).
7. National Foundation on the Arts and Humanities Act of 1965 (sec. 5(k), 79 Stat. 846 as amended; 20 U.S.C. 954(j)).
8. Elementary and Secondary Education Act of 1965 as amended by Elementary and Secondary and other Education Amendments of 1969 (sec. 423 as added by Pub. L. 91-230, title IV, sec. 401(a)(10), 84 Stat. 169, and renumbered sec. 433, by Pub. L. 92-318; title III, sec. 301(a)(1), 86 Stat. 326; 20 U.S.C. 1232(b)). Under the amendment coverage is extended to all programs administered by the Commissioner of Education.
9. The Federal-Aid Highway Acts (72 Stat. 895, as amended by 82 Stat. 821; 23 U.S.C. 113, as amended by the Surface Transportation Assistance Act of 1982, Pub. L. 97-424).
10. Indian Self-Determination and Education Assistance Act (sec. 7, 88 Stat. 2205; 25 U.S.C. 450e).
11. Indian Health Care Improvement Act (sec. 303(b), 90 Stat. 1407; 25 U.S.C. 1633(b)).
12. Rehabilitation Act of 1973 (sec. 306(b)(5) 87 Stat. 384, 29 U.S.C. 776(b)(5)).
13. Comprehensive Employment and Training Act of 1973 (sec. 606, 87 Stat. 880, renumbered sec. 706 by 88 Stat. 1845; 29 U.S.C. 986; also sec. 604, 88 Stat. 1846; 29 U.S.C. 964(b)(3)).
14. State and Local Fiscal Assistance Act of 1972 (sec. 123(a)(6), 86 Stat. 933; 31 U.S.C. 1246(a)(6)).
15. Federal Water Pollution Control Act (sec. 513 of sec. 2, 86 Stat. 894; 33 U.S.C. 1372).
16. Veterans Nursing Home Care Act of 1964 (78 Stat. 502, as amended; 38 U.S.C. 5035(a)(8)).
17. Postal Reorganization Act (sec. 410(b)(4)(C); 84 Stat. 726 as amended; 39 U.S.C. 410(b)(4)(C)).
18. National Visitors Center Facilities Act of 1966 (sec. 110, 32 Stat. 45; 40 U.S.C. 808).
19. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. App. 402).
20. Health Services Research, Health Statistics, and Medical Libraries Act of 1974 (sec. 107, *see sec.* 308(h)(2) thereof, 88 Stat. 370, as amended by 90 Stat. 378; 42 U.S.C. 242m(h)(2)).
21. Hospital Survey and Construction Act, as amended by the Hospital and Medical Facilities Amendments of 1964 (sec. 605(a)(5), 78 Stat. 453; 42 U.S.C. 291e(a)(5)).
22. Health Professions Educational Assistance Act (sec. 303(b), 90 Stat. 2254; 42 U.S.C. 293a(g)(1)(C); also sec. 308a, 90 Stat. 2258, 42 U.S.C. 293a(c)(7)).
23. Nurse Training Act of 1964 (sec. 941(a)(1)(C), 89 Stat. 384; 42 U.S.C. 296a(b)(5)).
24. Heart Disease, Cancer, and Stroke Amendments of 1965 (sec. 904, as added by sec. 2, 79 Stat. 928; 42 U.S.C. 299d(b)(4)).
25. Safe Drinking Water Act (sec. 2(a) *see sec.* 1450e thereof, 88 Stat. 1691; 42 U.S.C. 300j-9(e)).
26. National Health Planning and Resources Act (sec. 4, *see sec.* 1604(b)(1)(H), 88 Stat. 2261, 42 U.S.C. 300o-3(b)(1)(H)).
27. U.S. Housing Act of 1937, as amended and recodified (88 Stat. 667; 42 U.S.C. 1437j).
28. Demonstration Cities and Metropolitan Development Act of 1966 (secs. 110, 311, 503, 1003, 80 Stat. 1259, 1270, 1277, 1284; 42 U.S.C. 3310; 12 U.S.C. 1715c; 42 U.S.C. 1437j).
29. Slum Clearance Program: Housing Act of 1949 (sec. 109, 63 Stat. 419, as amended; 42 U.S.C. 1459).
30. Farm Housing: Housing Act of 1964 (adds sec. 516(f) to Housing Act of 1949 by sec. 503, 78 Stat. 797; 42 U.S.C. 1486(f)).
31. Housing Act of 1961 (sec. 707, added by sec. 907, 79 Stat. 496, as amended; 42 U.S.C. 1500c-3).
32. Defense Housing and Community Facilities and Services Act of 1951 (sec. 310, 65 Stat. 307; 42 U.S.C. 1592i).
33. Special Health Revenue Sharing Act of 1975 (sec. 303, *see sec.* 222(a)(5) thereof, 89 Stat. 324; 42 U.S.C. 2689j(a)(5)).
34. Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532; 42 U.S.C. 2947).
35. Headstart, Economic Opportunity, and Community Partnership Act of 1974 (sec. 11, *see sec.* 811 thereof, 88 Stat. 2327; 42 U.S.C. 2992a).
36. Housing and Urban Development Act of 1965 (sec. 707, 79 Stat. 492 as amended; 42 U.S.C. 3107).
37. Older Americans Act of 1965 (sec. 502, Pub. L. 89-73, as amended by sec. 501, Pub. L. 93-29; 87 Stat. 50; 42 U.S.C. 3041a(a)(4)).
38. Public Works and Economic Development Act of 1965 (sec. 712; 79 Stat. 575 as amended; 42 U.S.C. 3222).
39. Juvenile Delinquency Prevention Act (sec. 1, 86 Stat. 536; 42 U.S.C. 3884).
40. New Communities Act of 1968 (sec. 410, 82 Stat. 516; 42 U.S.C. 3909).
41. Urban Growth and New Community Development Act of 1970 (sec. 727(f), 84 Stat. 1803; 42 U.S.C. 4529).
42. Domestic Volunteer Service Act of 1973 (sec. 406, 87 Stat. 410; 42 U.S.C. 5046).
43. Housing and Community Development Act of 1974 (secs. 110, 802(g), 88 Stat. 649, 724; 42 U.S.C. 5310, 1440(g)).
44. Developmentally Disabled Assistance and Bill of Rights Act (sec. 126(4), 89 Stat. 488; 42 U.S.C. 6042(4); title I, sec. 111, 89 Stat. 491; 42 U.S.C. 6063(b)(19)).
45. National Energy Conservation Policy Act (sec. 312, 92 Stat. 3254; 42 U.S.C. 6371j).
46. Public Works Employment Act of 1976 (sec. 109, 90 Stat. 1001; 42 U.S.C. 6708; also sec. 208, 90 Stat. 1008; 42 U.S.C. 6728).
47. Energy Conservation and Production Act (sec. 451(h), 90 Stat. 1168; 42 U.S.C. 6881(h)).
48. Solid Waste Disposal Act (sec. 2, 90 Stat. 2823; 42 U.S.C. 6979).
49. Rail Passenger Service Act of 1970 (sec. 405d, 84 Stat. 1337; 45 U.S.C. 565(d)).
50. Urban Mass Transportation Act of 1964 (sec. 10, 78 Stat. 307; renumbered sec. 13 by 88 Stat. 715; 49 U.S.C. 1609).
51. Highway Speed Ground Transportation Study (sec. 6(b), 79 Stat. 893; 49 U.S.C. 1636(b)).
52. Airport and Airway Development Act of 1970 (sec. 22(b), 84 Stat. 231; 49 U.S.C. 1722(b)).
53. Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281i).
54. National Capital Transportation Act of 1965 (sec. 3(b)(4), 79 Stat. 644; 40 U.S.C. 682(b)(4). Note.-- Repealed December 9, 1969, and labor standards incorporated in sec. 1-1431 of the District of Columbia Code).
55. Model Secondary School for the Deaf Act (sec. 4, 80 Stat. 1027, Pub. L. 89-694, but not in the United States Code).
56. Delaware River Basin Compact (sec. 15.1, 75 Stat. 714, Pub. L. 87-328) (considered a statute for purposes of the plan but not in the United States Code).
57. Energy Security Act (sec. 175(c), Pub. L. 96-294, 94 Stat. 611; 42 U.S.C. 8701 note).
58. Energy Independence and Security Act of 2007 (Pub.L. 110-140, originally named the CLEAN Energy Act of 2007).

Sourced from 29 CFR 5.1 (a).

## APPENDIX C: States with Mini-Davis Bacon Laws

1. Alaska, ALASKA STAT. §§ 36.05.010 to 36.05.110 (Michie 2004)
2. Arkansas, ARK. CODE ANN. §§ 22-9-301 to 22-9-315 (Michie 2004)
3. California, CAL. LAB. CODE §§ 1771 to 1781 (West 2004)
4. Connecticut, CONN. GEN. STAT. §§ 31-53 to 31-55a (2003)
5. Delaware, DEL. CODE ANN. tit. 29, § 6960 (2004)
6. Hawaii, HAW. REV. STAT. §§ 104-1 to 104-34 (2003)
7. Illinois, 820 ILL. COMP. STAT. 130/1 to 130/12 (West 2004)
8. Indiana, IND. CODE §§ 5-16-7-1 to 5-16-7-5 (2004)
9. Kentucky, KY. REV. STAT. ANN. §§ 337.010, 337.505 to 337.550, 337.990 (Michie 2004)
10. Maine, ME. REV. STAT. ANN. tit. 26, §§ 1303 to 1315 (West 2003)
11. Maryland, MD. CODE ANN. STATE FIN. & PROC. §§ 17-201 to 17-226 (2004)
12. Massachusetts, MASS. GEN. LAWS CH. 149, §§ 26 to 27H (2004)
13. Michigan, MICH. COMP. LAWS §§ 408.551 to 408.558 (2004)
14. Minnesota, MINN. STAT. §§ 177.42 to 177.44 (Supp. 2003)
15. Missouri, MO. REV. STAT. §§ 290.210 to 290.340 (2003)
16. Montana, MONT. CODE ANN. §§ 18-2-401 to 18-2-432 (2004)
17. Nebraska, NEB. REV. STAT. §§ 73-101 to 73-106 (2004)
18. Nevada, NEV. REV. STAT. §§ 338.010 to 338.645 (2004)
19. New Jersey, N.J. STAT. ANN. §§ 34:11-56.25 to 34:11-56.47 (West 2004)
20. New Mexico, N.M. STAT. ANN. §§ 13-4-11 to 13-4-17 (Michie 2004)
21. New York, N.Y. LAB. §§ 220 to 220-g (McKinney 2004)
22. Ohio, OHIO REV. CODE ANN. §§ 4115.03 to 4115.16; 4115.99
23. Oregon, OR. REV. STAT. §§ 279.348 to 279.380 (2003)
24. Pennsylvania, 43 PA. CONS. STAT. §§ 165-1 to 165-17 (2004)
25. Rhode Island, R.I. GEN. LAWS §§ 37-13-1 to 37-13-17 (2004)
26. Tennessee, TENN. CODE ANN. §§ 12-4-401 to 12-4-415 (2004)
27. Texas, TEX. GOV'T CODE §§ 2258.001 to 2258.058 (West 2003)
28. Vermont, VT. STAT. ANN. tit. 29, § 161 (2004)
29. Washington, WASH. REV. CODE §§ 39.12.010 to 39.12.900 (2004)
30. West Virginia, W. VA. CODE §§ 21-SA-1 to 21-SA-11 (2004)
31. Wisconsin, WIS. STAT. § 103.49 (2004)
32. Wyoming, WYO. STAT. ANN. §§ 27-4-401 to 27-4-413 (2004)

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