What CHROs Need to Know About Contractor "Blacklisting" 

Proposed Rule and Guidance

Making Federal Contracts Contingent on Lack of Labor Violations Threatens the Government’s Ability to Procure Critical Goods and Services From American Companies, Creates New Penalties For Violations of Often Vague and Unevenly Enforced Labor Laws

Pursuant to President Obama’s “Fair Pay and Safe Workplaces” Executive Order (EO 13673), issued July 31, 2014, a new Proposed Rule from the Federal Acquisition Regulation Council (FAR Council) issued May 28, 2015, will require prospective federal contractors to report whether they, or their subcontractors, have violated a wide variety of state and federal labor laws when they bid on contracts. Department of Labor guidance (Guidance) issued along with the Proposed Rule clarifies that contractors must report a wide range of court and agency actions, including a large number of preliminary determinations that often prove baseless when challenged. Federal contracting officers are then required to consider the so-called violations in determining whether a contract should be awarded or discontinued, or whether debarment should be considered by the agency. To assist them in making this determination, the Proposed Rule creates new labor law compliance czars at each federal agency. The Proposed Rule also prohibits employers with federal contracts of $1 million or more from requiring employees working on those contracts to enter into pre-dispute arbitration agreements for Title VII complaints or from torts related to sexual assault or harassment, and establishes new expansive wage and hour reports to employees and independent contractors working on federal contracts.

Reporting of Labor Law “Violations” When bidding on a contract that exceeds $500,000, prospective contractors must report whether they, or any of their potential subcontractors, have incurred any adverse administrative merits determinations, arbitral awards or decisions, or civil judgments within the past three years for any one of 14 federal employment and labor laws and “equivalent state laws,” which DOL intends to define in subsequent guidance.1 The federal labor laws are:

- The Fair Labor Standards Act; National Labor Relations Act; Occupational Safety and Health Act; Family and Medical Leave Act; Title VII of the Civil Rights Act of 1964; Executive Order 11246 (nondiscrimination and affirmative action); Section 503 of the Rehabilitation Act; Vietnam Era Veterans’ Readjustment Assistance Act; American with Disabilities Act; Age Discrimination in Employment Act; Service Contract Act; Davis-Bacon Act; Executive Order 13658 (minimum wage for contractors); and the Migrant and Seasonal Agricultural Worker Protection Act.2

Importantly, the Guidance defines “administrative merits determinations,” “arbitral awards or decisions,” and “civil judgments” broadly to include numerous preliminary court and agency actions “whether final or subject to appeal or further review.” For example, the issuance of a complaint by the NLRB General Counsel would have to be reported, even though employers are often successful in proving the legality of their actions before an administrative law judge, the five-member National

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1 The only “equivalent state laws” identified in the Proposed Rule are Occupational Safety and Health Administration-approved state plans.
2 Interestingly, the Railway Labor Act was not included in this list. No explanation was provided for this exclusion.
Labor Relations Board or, ultimately, a federal court. Moreover, an activist NLRB General Counsel, as we have seen in the current administration, often seeks to stretch the law beyond what employers and their attorneys had contemplated, as in the recent notorious Boeing, McDonald’s and social media cases. Even a preliminary injunction enjoining a violation of a covered labor law would also be considered a reportable “civil judgment.” Under the Proposed Rule, disclosure of basic information about the labor violations will also be made publicly available. Contractors will be given “an opportunity to disclose” any steps taken to correct violations or whether they have entered into “labor compliance agreements” (discussed below). Furthermore, once a contract is awarded, employers must update their reports every six months.3

**Creation of New Compliance Czars** The Proposed Rule will require that each federal agency establish an Agency Labor Compliance Advisor (ALCA) to assist in the award determination process. Specifically, contracting officers will be required to request a review of reported violations by the ALCA, who must respond within three days with a recommendation regarding whether the contractor does or does not have a “satisfactory record of integrity and business ethics” and, if not, whether the agency’s suspending and debarring official should be notified. The contracting officer is to then make a responsibility determination based on DOL guidance and the ALCA recommendation. However, if the ALCA does not respond in time, the contracting officer is to proceed with making a determination “using available information and business judgment.” With such discretion left to ALCA’s and contracting officers the vast number of requests expected, it is unclear how ALCA’s will fairly triage those requests, and, more importantly, how the process will prevent third parties, especially government regulatory agency officials and labor unions, from influencing the requests to which ALCA’s ultimately respond.

**Debarment and Other Remedial Measures** Agency contracting officers, upon reviewing information regarding alleged violations of labor laws will be empowered under the Proposed Rule to take actions against a contractor including requiring the contractor to enter into a “labor compliance agreement,” defined as an agreement entered into with a federal enforcement agency to “address appropriate remedial measures” or “steps to resolve issues to increase compliance.” Based on the contractor’s disclosed violations and its adherence to such agreements, contracting officers will decide whether or not to exercise an option on a contract, to terminate a contract, or to refer the contractor to the agency suspending and debarring official.

**Prime Contractors Have to Police Their Subcontractors** Generally, prior to awarding any subcontract worth more than $500,000, contractors must also obtain from each subcontractor a report listing any adverse administrative merits determination, arbitral award, or civil judgment within the past three years for any one of the 14 federal employment and labor laws, and equivalent state laws, and then determine whether the subcontractor is “a responsible source that has a satisfactory record of integrity and business ethics.” A agency contracting officers, Labor Compliance Advisors, and/or other relevant enforcement agencies will be available to assist federal contractors in making these determinations. The FAR Council is considering alternative language allowing contractors to have their subcontractors report violations to the Department of Labor, which would then advise the contractor regarding the responsibility determination. Nevertheless, once a contract is awarded, contractors must obtain updated reports from their subcontractors every

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3 The Proposed Rule does not clarify whether this six month period is twice during a calendar year or every six months of each contract term.
six months, and then disclose those reports to the federal government. Notably, these reports can form the basis of a suspension or disbarment proceeding against a subcontractor.

**Expansive Definitions of “Serious, Repeated, Willful, or Pervasive”** The DOL Guidance defines key terms for evaluating contractor and subcontractor responsibility to the broadest degree. In fact, the Guidance devotes over 50 pages to clarifying each of the terms and provides appendices with extensive tables of examples, all of which underscore the difficulty federal contracting officers will have in making such determinations. For example, a “serious” violation would include any violation that affected 25 percent of the workforce at the worksite, as well as any violation that resulted in fines or penalties amounting to $5,000, which can easily occur in the aggregate for violations of various labor and employment laws. Importantly, the Guidance creates out of whole cloth a definition for “pervasive” violations, insofar as the term does not exist in any of the federal labor and employment laws. Accordingly, a “pervasive” violation will be one that “[reflects] a basic disregard by the contractor or subcontractor for the Labor Laws as demonstrated by a pattern of serious or willful violations, continuing violations, or numerous violations.” Such violations will not have to arise from substantially similar violations and can result from entirely unrelated violations of any of the covered laws. The Guidance does note that “one violation” will not “give rise to a determination of lack of responsibility” and that the violations are to be evaluated “on a case-by-case basis,” including a review of the extent to which they have been remedied.

**Executive Order Ignores Challenges in Labor Law Compliance** Even well-intentioned employers, such as the federal government, have difficulty avoiding alleged violations of certain employment laws. For example, one grievance brought against the Department of Labor involving the FLSA exempt status of more than 1,900 employees was ultimately settled with back pay awarded to a number of the claimants. The Departments of State, Education, and Veterans Affairs have all settled FLSA violations. Federal agencies also frequently settle Title VII complaints and OSHA violations, as well as unfair labor practices under the Federal Service Labor-Management Relations Statute. There is no reason federal contractors should be singled out for special scrutiny when federal labor law can trip up even the most well-intentioned employer.

**Requires Disclosure of Exempt Overtime Status to Salaried Employees** The Proposed Rule requires employers to either disclose to individuals working on federal contracts their FLSA overtime exempt status, or track and disclose the hours these individuals work. They must also provide notice to those workers whom they treat as independent contractors. It is not yet clear whether the Department of Labor’s long-delayed “Right-to-Know” rulemaking will be tied into this requirement. This new recordkeeping and reporting provision will certainly assist the plaintiffs’ bar in launching FLSA collective action cases against covered contractors and likely increase the already skyrocketing number of FLSA cases clogging the courts.

**Prohibiting Pre-Dispute Arbitration Agreements Will Increase Unnecessary Litigation** The Proposed Rule prospectively prohibits employers with federal contracts of $1 million or more from requiring employees working on federal contracts to enter into pre-dispute arbitration agreements for Title VII complaints or from torts related to sexual assault or harassment, except when valid contracts already exist. While the prohibition does not apply to employees who are covered by a separate collective bargaining agreement or to contracts for commercial items or commercially available “off-the-shelf” items, it will likely direct scores of employees to the plaintiffs’ bar to litigate covered claims in potentially large class action cases.
Opportunity to Comment and Potential Legal Action  Among other issues, the FAR Council is seeking public comments on how to define and identify “equivalent state laws” beyond OSHA-approved state plans, the scope of documents related to reported violations that should be publicly disclosed, how the burden on contractors for tracking violations can be minimized. HR Policy filed comments on August 26, 2015. The comments addressed the issues discussed above with the Proposed Rule as well as the constitutionality of the Executive Order. Separately, HR Policy is in discussions with other key business groups about the possibility of litigation.