August 26, 2015


Tiffany Jones
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2312
Washington, DC 20210
Attention: RIN 1290-ZA02


Dear Ms. Jones:

The HR Policy Association (“the Association”) welcomes the opportunity to provide comments to the Department of Labor (DOL or “the Department”) regarding its proposed Guidance for Executive Order 13673, “Fair Pay and Safe Workplaces” (“the Order”) as published in the Federal Register on May 28, 2015.1

The HR Policy Association represents the most senior human resource executives in more than 360 of the largest companies in the United States. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. Many of the Association’s member companies are government contractors and as such, they will be directly impacted by the Order. The Association’s member companies have a long standing commitment to complying with all federal and state employment and labor laws as reflected in the very low violation rates that can be obtained from federal enforcement databases. However, the Association respectfully recommends the Department withdraw this rulemaking for reasons stated in these comments.

At the outset, we wish to make clear our strong opposition to the Order beginning with its premise and carrying through to its execution, regardless of whatever form it takes. Thus, while later in these comments we make suggestions regarding certain aspects of the proposed Guidance and corresponding Regulations, even wholesale adoption of these suggestions would not mitigate our strong opposition to the Order. We recognize that, in light of the Order, the Department and the FAR Council have little choice in issuing proposed Guidance and corresponding Regulations. The Association, however, believes this initiative, for reasons outlined below, has not been well thought out and is exceedingly poor public policy. Accordingly, it is very clear to us that, absent congressional action or a subsequent executive order vacating this Order, the only solution is to seek a permanent injunction against its enforcement, which we believe will succeed for the reasons provided in these comments.

1 Proposed 80 FR 30574.
I. Overview and Summary of Comments

- No legal and factual foundation has been established to support the need for the Executive Order

There is already in place a well-established system for preventing the awarding of contracts to those who have engaged in conduct that threatens the integrity of those contracts—violations of federal criminal laws involving fraud, conflict of interest, bribery, or gratuities or civil violations of the False Claims Act. Any attempt to graft onto this process a set of procedures with the entirely different goal of sanctioning violations of federal and state employment laws is misguided and will only serve to undermine the federal contracting process as well as those various laws.

It should not be forgotten that the fundamental objective of the procurement process is to ensure that the government has the ability to purchase quality goods and appropriate services at a competitive price and in a timely fashion. It is critically important that the government have the ability to meet its procurement needs—including among other things infrastructure, medical research, education, emergency and our national defense—in the most efficient manner possible and without undue regulatory interference. Any proposal like the instant Executive Order, which would substantially change the procurement process, should be given the strictest scrutiny.

The Order simply seeks to solve a problem that does not exist. The Guidance even acknowledges that most federal contractors comply with labor and employment laws and that most violations are committed by a “small number.” Therefore, there is no need justifying the establishment of a new federal bureaucracy to carry out the requirements of the Order and Guidance. Hundreds of contracting officers and Agency Labor Compliance Advisors will have to be hired and the “advisory” functions of the DOL and FAR Council will require more people and resources. Any resources spent on labor and employment law compliance should go to the infrastructure already in place to ensure the federal government does not contract with bad actors. For example, the Federal Awardee Performance Information and Integrity System (“FAPIIS”) is a database established to consolidate contractor responsibility data into one location. FAPIIS was specifically designed to aid contracting officers in making responsibility determinations.

Creating new requirements, positions, and infrastructure to enforce this Order is unnecessary and a detriment to taxpayers. Suspension and debarment officials within each federal agency already have broad discretion to exclude companies from contracting with the federal government. The process currently in place is well established and applies to the entire federal government.

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2 See Proposed 80 FR 30574-75.
3 Id.
5 Id.
The Order and proposed Regulations and Guidance will require federal contractors to incur unneeded administrative expenses and adopt procedures that are administratively and operationally infeasible both for contractors and the government.

Consider what the Order is asking contracting officers within the federal government and their counterparts among prime contractors to do. After collecting reports of myriad “determinations” of violations of any nature, they will be required to sift through them to determine which, if any, constitute “serious,” “willful,” “pervasive,” or “repeated,” using criteria spelled out in nine pages of the Guidance provided by the Department of Labor. One need only look at various passages of the Guidance to recognize that the application of such criteria is the kind of exercise that federal judges struggle with and often differ among each other. As such, it will be impossible for federal contractors to be certain about the determinations they make on their covered subcontractors.

First, the Order and proposed regulations establish a complete new federal bureaucracy at the U.S. Department of Labor with at least 15 new Labor Compliance Advisors that is unlikely to be funded by Congress. Further:

- Each contracting agency will most likely need more than one Agency Labor Compliance Advisor;
- Each contracting agency will have to ensure that its contracting officers and new Agency Labor Compliance Advisors are sufficiently educated regarding the various employment laws and executive orders covered by the Order so they can quickly make the responsibility determinations for each covered contract; and
- A system will have to be put into place to receive disclosures.

Contractors will be required to locate, analyze, and report the information to this new federal bureaucracy, not only for their own companies, but also for each of their covered subcontractors. The required information includes:

- The labor law violated, along with the case number, inspection number, charge number, docket number, or other unique identification number;
- The date rendered;
- The name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision;
- The administrative merits determination, arbitral award or decision, or civil judgment document, including non-final determinations;
- Determinations of whether such disclosures are serious, repeated, willful, or pervasive; and
- Analysis of the disclosures.

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After going through these arduous and time-consuming steps—assuming they can even be completed in a timely fashion—companies are required to report every six months for each contract for which they are the prime contractor and for each of their subcontractors. The status of any alleged labor violation including any disposition will also have to be included.

In performing the above steps, contracting officers and federal contractor companies are required to interpret and apply not only complex federal labor employment laws and equivalent state laws—which have extensive administrative and judicial litigation and enforcement history—but also apply new terms such as “repeated,” “serious,” “pervasive,” and “willful” to laws that in some cases do not have those terms defined in them.

- **The Order is a legal “non-starter”**

  The Order violates the fundamental and important balance of powers established in the Constitution between the legislative and executive branches, and unlawfully usurps the legislative authority of the Congress. The Order is also preempted by long-established constitutional principles. The remedial sanctions that are to be imposed by the Order are not contained anywhere in such statutes. If such statutes are to be amended, only the Congress has the authority to act in this area. Stated alternatively, the Order cannot by fiat unilaterally amend the statutes covered by the Order.

  The Order is also legally deficient as it fails to provide due process rights to contractors that would be adversely affected by decisions of contracting officers and Agency Labor Compliance Advisors.

- **The Order is poor public policy and will adversely impact a great number of existing contractors and discourage other responsible business entities from becoming federal contractors.**

  We wholly reject the notion that the procedures established under the Order will only be invoked in a very small minority of instances. While few contractors will have fully adjudicated violations to report, every employer bidding for a federal contract will have to develop systems to ensure they are correctly reporting so as not to create a potential False Claims Act violation. Moreover, some contractors and prospective contractors will have alleged violations that are not yet fully adjudicated, but will still have to be reported even though they may be withdrawn or dismissed later.

  For reasons discussed below, complying with the Order will be a large burden for contractors and prospective contractors. Responsible business entities may decide the requirements are too burdensome to contract with the federal government, especially those employers whose revenue from federal contracts may be a relatively small percentage of their total revenue. Further, contractors do not know, at this point, which state laws they will be subjected to under the Order. Contractors may decide that the costs outweigh the benefits of attempting to do business with the federal government. This would mean less competition for federal contracts, which would result in higher prices for the government and taxpayers.
• The Order is Based on Statements that Have No Factual Support

The Order asserts that compliance with labor laws enhances efficiency and quality of performance of government contracts. There is no data, either in the Order, the Guidance or cost benefit analysis in the Economic Impact Analysis, to support the idea that compliance with labor laws increases efficiency and overall quality of government contracts, and no empirical studies are cited as evidence for this assertion.

The government provides data that some contractors with labor law violations later receive government contracts. However, there is nothing to tie these contractors with decreased productivity or quality in performance of government contracts.

We have broad and profound concerns about the President’s use of executive orders to shape nation-wide employment policy via the federal contracting process. Social policy reforms that lack evidence-based policy rationales and sufficient democratic process risk proceeding with questionable legitimacy, while threatening disastrous and costly results for which the American people will bear the financial and economic burdens. By ignoring the full legislative process, we are concerned about the practical effects of poorly designed, unilaterally driven federal employment policy that can repeatedly change from administration to administration. Accordingly, we strongly believe that changes to the federal employment policy should be based on sound, articulated reasoning and should receive the open debate and scrutiny that the legislative process provides.

We recognize that the federal procurement law affords the President significant discretion to “prescribe policies and directives that the President considers necessary” to carry out the purpose of the Act, namely to “provide the Federal Government with an economical and efficient system” for contracting, among other activities. However, the breadth of this discretion should not encompass using executive action to attempt to shape broader federal employment policy. The legislation the President cites as his authority to issue Executive Order 13658, the Federal Property Administrative Services Act, was passed in 1949, long before federal contract employees constituted such a significant portion of the American workforce. Today, more than one in five workers in the United States is employed by companies that have contracts with the federal government. Employment policy reforms targeting employees of federal contractors now have direct implications for the American economy as a whole. Accordingly, we are concerned that the proposed rule is one in a series of steps toward the Administration’s larger goal of modifying without Congressional approval significant aspects of employment policy for the greater federal contractor workforce. Therefore, caution beyond the extraordinarily broad scope of the federal procurement act is warranted.

Perhaps more importantly, use of executive orders to reform labor and employment law via the federal procurement law contemplates that the President may make significant changes to U.S. social policy without requiring the President to provide an evidence-based rationale to

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7 Exec. Order No. 13,673 at § 1.
8 Proposed 80 FR 30574 at 30575.
9 See id.
support those reforms. As the number of workers impacted by the federal contracting process continues to rise, so should the evidentiary burden for making policy changes.

II. Legal Analysis

- Overview

The penalty and punitive schemes in the Order are preempted by existing remedial measures found in the federal labor laws listed in Section 2(a)(i) of the Order. The federal preemption doctrine clearly applies to this Order as the government action is classified as regulatory rather than proprietary. Stated alternatively, the federal executive in this Order is not acting as a “consumer” or engaging in the procurement process, but as a regulator. Indeed, courts have invalidated similar executive orders when the orders fail a constitutional analysis known as the “Jackson Test” and when there are established preemption doctrines in individual laws. Further, the Order violates contractors’ due process rights because it does not provide for notice and hearing. Contractors have a property interest in continued business with the government and have a right to notice and a hearing before potential suspension or debarment.

- The Order is Regulatory in Nature

The executive branch acts in a regulatory manner when it performs a role that is characteristically governmental in nature rather than as a purchaser of goods and services. In particular, the executive branch plays a governmental role when it “simply is not functioning as a private purchaser of services” but “for all practical purpose . . . [its action] is tantamount to regulation.” Courts have held that the government acted in a regulatory manner when the action is unrelated to procurement policy and is far-reaching.

The Court in Wisconsin Dep’t of Indus. v. Gould rejected the government’s argument that its statutory scheme (to bar contractors with three violations of the National Labor Relations Act (“NLRA”) within the past five years for a period of three years) was related to procurement. The Court found, and the government conceded, that the purpose of the statute was to encourage and reward compliance with labor law. In Chamber of Commerce v. Reich, the court, noting the holding in Gould, said “[the government] conceded that its purpose was to deter labor law

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14 See Chamber of Commerce v. Reich, 74 F.3d 1322, 1335, 1337, 1338 (D.C. Cir. 1996) (holding that President Clinton’s Executive Order No. 12,954 barring the federal government from contracting with employers who hire permanent replacements during a lawful strike was regulatory in nature and preempted by federal law).
15 475 U.S. 282 at 287.
16 Id.
violations, so the court was *easily* able to determine . . . [the conduct] was ‘unrelated to the employer’s performance of contractual obligations to the State . . .’”  

There was no such concession in *Reich*, but the court went on to find that the Executive Order was regulatory in nature because it went to the heart of United States labor relations policy. The court responded to the government’s argument: “[T]he President has, of course, acted to set procurement policy rather than labor policy. But the former is quite explicitly based—and would have to be based—on his views of the latter.” It was noted that the President may draw on secondary policy views when implementing the Procurement Act, however, there is a distinction with the NLRA because of its broad field of preemption. The court recognized that “[n]o state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, *whatever his or her purpose may be.*” When the NLRA is involved, as it is here, the President has less authority to inject labor policy into an executive order related to procurement.

Importantly, the Supreme Court has stated that a particularly determinative factor as to whether an executive order has become regulatory in nature is whether the order addresses federal contractor conduct unrelated to its performance of contractual obligations to the government. In *Bldg & Constr. Trades Dep’t, AFL-CIO v. Allbaugh*, the court clarified that “*Reich* was ‘regulatory’ not because it decreed a policy of general application… but because it disqualified companies from contracting with the Government on the basis of conduct unrelated to any work they were doing for the Government.” The court in *Allbaugh* pointed specifically to its finding six years earlier in *Reich* that Clinton’s Executive Order “[had] the effect of forcing corporations *wishing* to do business with the federal government not to hire permanent replacements.” The court in *Reich* even noted that corporations who one day hope to contract with the federal government would think twice before hiring permanent replacements during a strike.

In *Reich*, the court established that federal contracting executive orders, in particular, are regulatory where “the impact of the executive order is... far-reaching.” In establishing that factor, the D.C. Court of Appeals noted that President Clinton’s Executive Order prohibiting the replacement of striking workers with permanent employees “[sought] to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers.” In particular, the *Reich* court considered that President Clinton’s Executive Order

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17 74 F.3d 1322, at 1335 ((citing 475 U.S. 282, at 287) (quoting 507 U.S. 218, 229) (emphasis added)).
18 Id. at 1337.
19 Id.
20 Id.
21 Id. (emphasis added).
22 507 U.S. 218 at 228-29
23 295 F.3d 28 at 35 (reversing the district court’s order invalidating George W. Bush’s Executive Order No. 13,202 proscribing the prohibiting or requiring of project labor agreements (PLAs) in federally-funded construction projects as valid, in part, because the order exclusively applied to work on projects funded by the government).
24 Id. (emphasis added); 74 F.3d 1322, at 1338.
25 74 F.3d 1322 at 1338.
26 Id. at 1338.
27 Id. at 1337.
applied to all contracts over $100,000; that federal government purchases totaled $437 billion in 1994; and that federal contractors and subcontractors employed 26 million workers, which was 22 percent of the labor force at that time.\textsuperscript{28}

The impact of Executive Order 13673 is also far-reaching on a level that is on par with the impact of the Clinton Executive Order scrutinized and invalidated in\textit{Reich}. The reporting requirements aimed at ensuring compliance with the fourteen labor laws and equivalent state laws articulated in Section 2 of the Order apply directly to all government contracts of any value over $500,000.\textsuperscript{29} Section 2 (a)(iv) of the Order extends those reporting requirements to covered subcontractors seeking to support primary contractors.\textsuperscript{30} A separate provision prohibiting certain pre-dispute arbitration agreements additionally applies directly to any contract valued at more than $1 million. While the exact number of companies directly subject to the Order remains unclear, the Order concerns all of the $408 billion that the federal government continues to spend on federal contracts annually and at a minimum roughly one in five workers employed through government contracts.\textsuperscript{31} An estimated 268,391 firms would have to disclose violations under the Order.\textsuperscript{32} However, all of the firms with contracts of $500,000 or more will have to go through the steps to determine if a disclosure must be made and then make those disclosures.

The Order is unquestionably a regulatory action by the Executive branch. The federal government through both the Order’s pre-award and post-award actions, does not simply establish a private purchaser’s criteria for solicitation of goods and services, but instead, reviews compliance with various federal and state labor and employment laws in an attempt to set general policy for the behavior of those seeking government contracts.

Further, as stated above, the impact of the Order is also unquestionably far-reaching. As in\textit{Gould}, the Order does not simply provide direction related to procurement. The Order provides more than direction to agencies to avoid contracting with companies that “demonstrate a lack of integrity or business ethics.” In fact, just as in\textit{Gould}, the Order expressly states that its true purpose is to “[ensure] that [federal contractors] understand and comply with labor laws.”\textsuperscript{33} The clear purpose of the Order is to require compliance with federal and state laws as a pre-condition to be considered for obtaining and maintaining federal contracts.\textsuperscript{34}

Similar to\textit{Reich}, the Order, here, goes to the heart of labor relations policy. The policy in\textit{Reich} had the effect of depriving contractors of an express right—the right to hire permanent replacement workers during a strike. The Order creates obstacles for contractors, especially small businesses, attempting to contract with the government. It also has a potential punitive effect on companies complying with the order who run the risk of suspension, debarment, and/or

\begin{itemize}
\item \textsuperscript{28} Id. at 1338.
\item \textsuperscript{29} Exec. Order No. 13,673 at § 2.
\item \textsuperscript{30} Exec. Order No. 13,673 at § 2(a)(iv).
\item \textsuperscript{32} Federal Acquisition Regulation Case 2014-025, “Fair Pay and Safe Workplaces Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563” (May 2015).
\item \textsuperscript{33} 475 U.S. 282 at 287 (stating that Wisconsin’s purpose in enacting the regulation was to deter labor law violations); Exec. Order No. 13,673, at § 1.
\item \textsuperscript{34} Exec. Order No. 13,673, at § 1.
\end{itemize}
other remedial measures at the discretion of the contracting officer. This punitive effect would be in addition to whatever remediation the individual labor laws themselves enforce.

- **The Order Applies to Contractor Conduct Unrelated to Performance of Federal Contract Work**

  Furthermore, as in *Allbaugh* and *Reich*, the Order applies to federal contractor conduct unrelated to its performance of contractual obligations to the government.\(^{35}\) The Order requires all companies seeking contracts of the threshold values to report any administrative merits determination, arbitral award or decision, or civil judgment rendered against the company for violating the covered labor laws within the preceding three years – without limiting those judicial findings to disputes that occurred with employees working on a government contract.\(^{36}\) The Order will no doubt immediately cause companies to alter how they handle legal disputes with employees to avoid judicial determinations that could impact their opportunity for retaining existing federal contracts and also for obtaining future government contracts. For example, insofar as the DOL has increasingly refused to settle claims unless there is an employer admission of fault, many companies may choose to litigate labor violation claims they may have otherwise been willing to settle to avoid a finding that could be considered an administrative merits determination for purposes of the remedies, including contractor debarment that is provided for in the Order.

  Another effect of the Order is that contractors can be debarred or suspended based on conduct unrelated to the current contract. In fact, the Order addresses conduct that is unrelated at all to federal contracts. Contractors must disclose any violations that occurred in the previous three years of bidding for a contract.\(^{37}\) Further, they must disclose any decisions rendered in the previous three years “even if the underlying conduct that violated the Labor Laws occurred more than three years prior to the date of the report.”\(^{38}\) The Guidance even specifies that disclosures must be made during the relevant three year period even if contractors “were not performing or bidding on a covered contract at the time.”\(^{39}\) This specification also means that there is the possibility disclosures will have to be made from a time before contractors even planned on contracting with the federal government. The Order unquestionably addresses conduct unrelated to performance of federal contractual obligations.

  Perhaps most importantly, the Order can even apply to companies that have no contracts with the federal government. When analyzing the indirect impacts of President Clinton’s Executive Order in *Reich*, the D.C. Circuit Court observed, “Corporations who *even hope* to obtain a government contract will think twice” about their activities.\(^{40}\) The same is applicable here. Indeed, a company that does not yet have a single contract with the federal government may very well alter its handling of employee disputes to attempt to avoid even allegations of a violation should it choose at some time to offer services as a primary contractor, or even as a

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\(^{35}\) 295 F.3d 28, at 35; 74 F.3d 1322 at 1338.

\(^{36}\) Exec. Order No. 13,673 at § 2(a)(i).

\(^{37}\) Proposed 80 FR 30574 at 30578 (May 2015).

\(^{38}\) *Id.*

\(^{39}\) Proposed 80 FR 30574 at 30578-79.

\(^{40}\) 74 F.3d 1322, 1338 (emphasis added).
subcontractor, on a federal contract. While supporters of the Order may agree this is a desirable outcome, such an argument wholly ignores the fact that many allegations of labor law violations are totally without merit and should be contested if not vacated. Further, the Order will unfairly put companies in a “capitulate or litigate” situation. Indeed, given the highly subjective analytical framework given to Agency Labor Compliance Advisors and DOL Labor Compliance Advisors there is a high probability that adverse parties such as labor unions and government action groups (or even competitor companies) can force a company into an unjust or unwise settlement. Finally, highly qualified contractors may choose not to contract with the federal government at all in order to avoid the complex regulations the Order requires, thereby reducing desirable competition for such contracts and limiting the government for working with such desirable sources of goods and services.

Non-federal contractor employers will also be impacted by the Order. Employers who contract with the federal government often have many employees with limited or no involvement with federal contracting. Most employers do not separate between the two. The Guidance does not address the question of whether a company’s various divisions and subsidiaries that do not perform government contract work will be subject to the Order or just the operations and subsidiaries who contract with the federal government are subject to the Order. The Office of Federal Contract Compliance Programs’ (“OFCCP”) current approach is to broadly apply the single entity test, and therefore many employers may have virtually all of their entities subject to the reporting requirements of the Order even though a small percentage of the employers’ workforce is engaged in federal contract work.\(^{41}\) Therefore, a much larger number of contractors would be affected by the Order.

- **The Jackson Test**

Courts utilize the “Jackson Test” provided in Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* to consider claims of Presidential power and to consider the validity of executive orders.\(^{42}\) In *Youngstown*, the Supreme Court invalidated President Truman’s Executive Order directing the federal government to seize private steel mills in the midst of a labor impasse.\(^{43}\) In its analysis, the Court noted that Congress had expressly rejected seizure as a means to settle labor disputes during consideration of the Taft-Hartley Act.\(^{44}\)

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41 OFCCP v. Manheim Auctions Inc., ALJ Case No. 2011-OFC-00005 (ALJ June 14, 2011) (holding contractor and its subsidiary were both subject to OFCCP jurisdiction because between the two they satisfied the threshold number of employees and dollar amount); OFCCP v. UPMC Braddock, ARB Case No. 08-048 (ARB May 29, 2009) (holding that three hospitals, although they did not have a direct federal contract, were federal contractors subject to the OFCCP’s jurisdiction because they agreed to provide medical services under an HMO health plan with federal employees as beneficiaries).

42 Zivotofsky v. Kerry, 192 L.Ed.2d 83, 93 (2015) (“In considering claims of Presidential power this Court refers to Justice Jackson’s familiar tripartite framework from *Youngstown*”); Medellin v. Texas, 552 U.S. 491 (2008) (“Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in this area”); Hamdan v. Rumsfeld, 548 U.S. 557, 638 (2006) (“[t]he proper framework for assessing whether executive actions are authorized is a three-part scheme used by Justice Jackson in his opinion in *Youngstown*”; Dames & Moore v. Regan, 453 U.S. 654, 666 (1981) (“[t]he parties and lower courts, confronted with the instant questions, have all agreed that much relevant analysis [on the issue of Presidential power] is contained in *Youngstown*”).

43 See 74 3.d 1322

44 Id. at 586-89.
The Court held that the order was an unconstitutional violation of the separation of powers doctrine. Justice Jackson put forth his three prong test on Presidential powers because “[t]hey are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.” Therefore, Justice Jackson’s test lays out three broad groupings to classify presidential action to determine if it would violate the Constitution. The first prong deals with actions “pursuant to an express or implied authorization from Congress.” The second prong deals with actions “in absence of either a congressional grant or denial of authority.” The third prong deals with actions “incompatible with the expressed or implied will of Congress.”

Specifically, the third prong deals with an executive order regarding a matter on which Congress has previously spoken in some form. Courts have consistently used this prong to analyze the substance of executive orders for possible conflicts with provisions of existing laws. Justice Jackson explained the application of this prong of the test in the following way:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is equilibrium established by our constitutional system.

Justice Jackson found that President Truman’s Executive Order fell under this third prong because the government conceded that no congressional authorization existed and because Congress had covered seizure of private property in three statutory policies that were inconsistent with the Executive Order. Therefore, it could only be sustained “by holding that seizure of such strike-bound industries is within [the President’s] domain and beyond control by Congress.”

Based on his explanation of the third prong of his test, Justice Jackson rejected the government’s arguments that President Truman was within his domain when he issued the Executive Order. He further stressed the importance of the separation of powers and

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45 343 U.S. 579 at 635.
46 Id.
47 Id. at 636.
48 Id. at 637.
49 See id.
50 See, Vanessa K. Burrows, at 5. See also, United States v. East Texas Motor Freight System, Inc., 564 F.2d 179, 185 (5th Cir. 1977) (Although the Court was not asked to invalidate the executive order at hand – Exec. Order No. 11,246 – it was asked to analyze whether a seniority system lawful under Title VII could be made unlawful by Executive Order 11246. The Fifth Circuit found that “The argument cannot be accepted because Congress has declared for a policy that a bona fide seniority system shall be lawful.” If further stated, “The Executive may not, in defiance of such policy, make unlawful – or penalize – a bona fide seniority system.”).
51 343 U.S. 579 at 637.
52 Id. at 640.
53 Id. at 640-655 (rejecting the arguments: 1. that “[t]he executive Power shall be vested in a President of the United States of America” is a “grant in bulk of all conceivable executive power”; 2. that the executive order fell within the President’s role as Commander in Chief of the Army and Navy; 3. that the clause “he shall take Care that the Laws be faithfully executed” contains authority to seize private property over the Fifth Amendment; and 4. that President
prerogative of Congress.\textsuperscript{54} Here, he suggested that when Congress is “wise and timely” in meeting its problems, power should stay in the hands of Congress.\textsuperscript{55} He said “I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.”

In \textit{Medellin v. Texas}, the Court applied the third prong of the “Jackson Test” to determine if President Bush overstepped his authority by directing courts to review cases of certain defendants whose rights were violated as determined by the International Court of Justice.\textsuperscript{56} The action fell under the third prong because although Congress had not adopted a self-executing treaty, its inaction implied that President Bush did not have authority to act.\textsuperscript{57} The Court held that the President’s authority to settle international disputes was limited and that he could not order a case to be re-opened.\textsuperscript{58} The Court also rejected the argument that, absent Congressional authorization, enforcing treaties came within the general Presidential power to see that the laws be faithfully executed.\textsuperscript{59}

Executive Order 13673 falls into the third prong of the “Jackson Test” because it patently concerns activities Congress has chosen to regulate. The Order creates penalties expressly tied to violations of existing federal labor laws, all of which already impose a particular set of remedies for covered violations. These remedies address violations from any employer, including federal contractors. Specifically, twelve federal labor laws are incorporated into the Order via Section 2 (a)(i). In constructing these laws, Congress considered a multitude of issues including: various wage and hour issues, safety and health issues, collective bargaining, family and medical leave, and civil rights protections. Further, Congress chose specific remedial schemes to induce compliance. None of these remedies include a prohibition on performing government contract work. Therefore, because there is no Congressional authorization for the Order and because Congress is not silent on labor law compliance, the Order should be considered under the third prong of the “Jackson Test.”

Under the third prong, the Order is “scrutinized with caution” because the President’s power is at its “lowest ebb.” Like the Executive Order in \textit{Youngstown}, the Order, here, is not grounded on any clause of the Constitution concerning executive power and the President’s obligation to faithfully carry out the laws. Further, there is no history or precedent giving the President exclusive control over labor laws. In fact, Congress has “wisely and timely” acted on the exact purpose of the Order, compliance with labor laws, by enacting the fourteen labor laws in the

\textsuperscript{54} See Id. at 654.
\textsuperscript{55} See Id.
\textsuperscript{56} 552 U.S. 491 at 524.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 525.
\textsuperscript{59} Id.; see contra 192 L.Ed.2d 83, at 93 (holding that because the power to recognize foreign states resides in the president alone, Section 214(d) of the Foreign relations Authorization Act of 2003, which directs the Secretary of State, upon request, to designate “Israel” as the place of birth on a passport of a U.S. citizen who is born in Jerusalem, infringes on the executive’s consistent decision to withhold recognition with respect to Jerusalem).
Order along with remedial schemes. As Justice Jackson said, the President cannot be aggrandized at the expense of Congress.  

- **NLRA Preemption**

The NLRA also has a strong judicially created preemption doctrine that tolerates little conflict. When such potential conflicts arise, courts “look to the extensive body of Supreme Court cases that mark out the boundaries of the field occupied by the NLRA”, which was established in *San Diego Building and Trades Council v. Garmon*.  

Such tension may concern “potential conflict of rules of law, of remedy, and of administration.” Importantly, although the NLRA preemption doctrine arose from progenitors in the context of state actions that were thought to conflict with the NLRA, the doctrine also applies equally to federal government behavior.  

*Gould*, a particularly prescient Supreme Court case, considers *Garmon* preemption in the context of executive branch attempts to apply extra remedies, not found in the NLRA, to NLRA violations. Specifically, the Court ruled that “the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.” The Court quoted language from *Garmon*: “the rule is designed to prevent ‘conflict in its broadest sense’. . .” Again, the purpose of Wisconsin’s statute, to enforce compliance with the NLRA, is important to the Court’s analysis. In striking down the debarment statute, the Court found that it “function[ed] unambiguously as a supplemental sanction for violations of the NLRA” and therefore “conflict[ed] with the Board’s comprehensive regulation of industrial relations . . .”  

In *Reich*, the court found that regulations issued pursuant to President Clinton’s Executive Order prohibiting the use of permanent strike replacements included a provision allowing the Secretary of Labor to determine when a “labor dispute” had ended, upon the striking union’s approval (thus allowing strikers to return to work or a collective bargain to be reached), whereas the NLRA potentially can relieve an employer of a duty to bargain with a striking union after a year has passed since the beginning of the strike if the employer permanently replaced a majority of the striking workers and the employer therefore had a good faith doubt as to the union’s majority status. Although the early cases establishing the NLRA preemption doctrine arose in

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60 Id.
62 325 F.3d at 363 (“As we’ve said, *Garmon* preempts state (or here, federal executive regulation) of [NLRA protected activities]”); 74 F.3d at 1334 (“Since the progenitors of these cases originally arose in the context of state actions that were thought to interfere with the federal statute, they are referred to collectively as establishing the NLRA ‘pre-emption doctrine.’ The principles developed, however, have been applied equally to federal governmental behavior that is thought similarly to encroach into the NLRA’s regulatory territory”).
63 See 475 U.S. at 282-83, 286.
64 Id. at 286.
65 Id. (quoting 359 U.S. at 243) (emphasis added).
66 Id. at 288.
67 Id. at 1338.
the context of state action, “[t]he principles developed, however, have been applied equally to 
federal governmental behavior that is thought similarly to encroach into the NLRA’s regulatory 
territory.”  

In effect, the court held, “the Secretary’s regulations promise[d] a direct conflict 
with the NLRA, thus running afoul” of the preemption doctrine. 

Importantly, the court noted that NLRA preemption is relevant even when the government 
acts as a purchaser of goods. Specifically, regarding executive orders, the court found it 
important that another President could not only revoke the executive order in question, but issue 
a new order requiring government contractors to permanently replace strikers. This idea is 
contrary to the whole basis of the NLRA preemption doctrine, which “has from the outset been 
the court’s perception that Congress wished the ‘uniform application’ of its substantive rules and 
to avoid the ‘diversities and conflicts likely to result from a variety of local procedures and 
atitudes toward labor controversies.’” 

To the extent that the remedial scheme of the Order conflicts with the remedies reserved in 
the NLRA, a court would likely find that the NLRA’s strong preemption doctrine invalidates that 
core aspect of the Order. Once claimed that the Order conflicts with the NLRA, the court would 
“look to the body of Supreme Court cases that mark out the boundaries of the field occupied by 
the [NLRA].” The Order clearly establishes remedies for conduct prohibited in the NLRA. 
Contractors bidding on federal contracts over $500,000 in value must represent to the best of 
their knowledge any administrative merits determination, arbitral award or decision, or civil 
judgment rendered against the offeror within the preceding three years for violations of the 
NLRA. These violations would undoubtedly include activities that are protected by Section 7 
of NLRA and unfair labor practices articulated in Section 8 of the NLRA. Accordingly, the 
powerful Garmon preemption test offers the appropriate standard of review. 

Like the analogous remedial scheme provided in Gould, the penalties prescribed in the Order 
are made available to agency contracting officers regardless of any penalties a contractor 
previously paid or any corrective action it previously took as a result of the same NLRA 
violation. Thus, the penalties in the Order also provide supplemental sanctions for violations of 
the NLRA. While the statute in Gould required an automatic ban on contractors with three 
violations of the NLRA, such distinction is without legal consequence. Courts apply the 
Garmon test to eliminate conflict in the “broadest sense.” The remedial scheme need not 
directly conflict with the NLRA’s penalties for preemption to apply. The NLRA will preempt 

69 Id. at 1334. 
70 Id. at 1338. 
71 Id. at 1334(citing 475 U.S. at 289). 
72 Id. at 1337-38. 
73 Id. at 1338 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971) (quoting Garner v. Teamsters Union, 346 
U.S. 485, 490 (1953))). 
74 475 U.S. at 288. 
75 Exec. Order No. 13,673, § 2z(a)(i)(D). 
76 See Exec. Order No. 13,673, § 2(b)(ii). 
77 475 U.S. at 283. 
79 475 U.S. at 286 (emphasis added).
the Order because the Order provides its own regulatory remedies in addition to the remedies provided in the NLRA.\textsuperscript{80}

A court is likely to find the same problems with the Order as it did with the Executive Order in \textit{Reich}. Even if a court were to find that the government is not acting in a regulatory manner preemption would still apply under the \textit{Garmon} test. The NLRA preemption doctrine was enacted to keep penalties for violations uniform. Like the Executive Order in \textit{Reich}, this Order could be repealed or replaced with an executive order that is contradictory to the regulations in this Order. Further, as discussed below, it will be difficult for contracting officers and Agency Labor Compliance Advisors to reach consistent decisions under the Order.

Finally, to the extent any of the unnamed “equivalent state laws” conflict with the NLRA, the Order is also preempted.

- **Fair Labor Standards Act of 1938 (“FLSA”) Preemption**

  The FLSA also creates conflict on the Constitutional level. The FLSA provides specific penalties for violations of the myriad labor protections. Violations include failure to pay the prescribed minimum wage under Section 206(a)(1)(C), engagement in pay discrimination on the basis of sex not otherwise protected under Section 206(d)(1), and failure to pay overtime compensation to covered employees under Section 207. Among the penalties prescribed in Section 216 are the following:

  - Criminal prosecution and fines up to $10,000 for willful violations for the numerous prohibited acts listed in Section 215 of the FLSA; a second conviction may result in imprisonment;
  - Civil awards, including liquidated damages, for violations of the minimum wage and overtime compensation requirements listed in Sections 206 and 207, respectively, in the amounts of such unpaid wages;
  - Civil awards up to $1,100 for willful or repeated violations of the minimum wage or overtime pay requirements listed in Sections 206 and 207, respectively;
  - Civil awards of up to $11,000 for each employee who was the subject of a Section 212 or 213(c) child labor violation;
  - Civil awards of up to $50,000 for each employee who was the subject of a Section 212 or 213(c) child labor violation that caused the death or serious injury of any employee who is a minor; awards may be doubled, up to $100,000, when the violation was determined to be willful or repeated.

  Critically, the penalties available in the FLSA do not include the specific remedies that the Order makes available to contracting agencies in Section 2, namely, decisions not to exercise an option on a contract, contract termination, and referral to appropriate agency officials for suspension or debarment.

\textsuperscript{80} See Exec. Order No. 13,673, § 2(a)(ii).
Furthermore, Congress has amended, in some respect, the penalties provided in Section 216 of the FLSA at least eight times since passage of the law. Such congressional action clearly demonstrates a total commitment to prescribing appropriate penalties for FLSA violations. Congress has “wisely and timely” acted many times in the labor arena.

Federal courts have addressed conflicts with the FLSA and concluded that they are guided by “longstanding principles of preemption in [their] assessment of whether the FLSA invalidates” executive mandated remedies. As the basis for those principles, courts have typically looked to the Supremacy Clause of the Constitution, which renders federal law “the supreme Law of the Land… any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

In particular, the Fourth Circuit Court of Appeals has substantial precedent enforcing what it termed “obstacle preemption” in *Anderson v. Sara Lee Corp*. Though not a preemption doctrine, *per se*, obstacle preemption arises, according to the Fourth Circuit, whenever executive mandated remedies “[stand] as an obstacle to the accomplishment of the full purposes and objectives of federal law.”

In *Anderson*, an employee class alleged that a company violated the FLSA by failing to compensate workers for time spent complying with a mandatory uniform policy. The class did not, however, plead claims directly under the FLSA. Instead, it pled five claims under North Carolina law – breach of contract, negligence, fraud, conversion, and unfair trade practices in violation of the North Carolina Unfair and Deceptive Trade Practices Act – based on an allegation that the company had promised to pay the class members “for all time compensable under the FLSA.” The Fourth Circuit took up only the fraud, contract, and negligence claims and concluded that the district court should have dismissed those claims due to FLSA obstacle preemption.

In its ruling, the court in *Anderson* considered that the existence of a federal regulatory or enforcement scheme alone did not imply preemption of state remedies, particularly in the context of protecting the health, efficiency, and general wellbeing of workers, which Congress has traditionally left in the hands of states. Instead, the court stated that it must look for “special features warranting preemption . . . such as the provision of exclusive remedies for enforcing rights expressly guaranteed by the federal statute.” In reviewing the remedial scheme of the FLSA, the Fourth Circuit concluded that the FLSA’s criminal penalties for willful violations, payment of unpaid wages, liquidated damages, injunctive relief, and the authorization for workers to file private actions, along with particular statutes of limitations, constituted sufficiently exclusive remedies. The court also considered its earlier observation in *Kendall v. City of Chesapeake* that the FLSA’s enforcement scheme provides “unusually elaborate”

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82 *Id.* (citing U.S. Const. art. VI, cl. 2).
83 *Id.* at 191-92.
84 *Id.* at 184.
85 *Id.*
86 *Id.*
87 *Id.* at 185.
88 *Id.* at 192.
89 *Id.* at 193-94.
90 *Id.* at 192 (citing U.S.C. §§ 215-217).
remedies. Accordingly, the court found that preemption principles precluded the class members’ FLSA-based claims, holding that “Congress prescribed exclusive remedies in the FLSA for violations of its mandates.”

As established in Reich, the Garmon test would also require a court to apply FLSA preemption principles to federal governmental behavior. A court would find that, just as employees in North Carolina could not alter the FLSA’s strict, comprehensive remedial scheme, the Order is not permitted to prevent “accomplishment of the full purposes and objectives” of the FLSA by unilaterally aggrandizing the penalties that may result from violations of FLSA Sections 215, 216, and 217.

Further, Congress has had the opportunity to adopt a remedial measure similar to what the Order proposes with an amendment, sponsored by Rep. Keith Ellison (D-MN), to a series of appropriation bills. The amendment sought to prohibit agencies funded by the bills from entering into, or renewing, contracts with any company that has had a “finding of fault in a civil or administrative proceeding related to the FLSA”. In other words, any contractor with FLSA violations would automatically be debarred from contracts involving the agencies in question. Congress failed to approve this approach by rejecting the Ellison Amendment; under the third prong of the Jackson Test congressional intent regarding FLSA preemption is clear. Congress has clearly stated its intent to determine appropriate remedies for FLSA violations and has rejected the remedial approach contained in the Order.

- Family and Medical Leave Act ("FMLA") Preemption

In Ragsdale v. Wolverine World Wide, Inc., the Supreme Court found that the Secretary of Labor did not have the authority to issue a regulation requiring written notice to employees when they took leave that it was regarded as FMLA leave and to impose a penalty for failing to notify employees. The penalty provided that if an employer failed to notify an employee that their leave was designated as FMLA leave then the time off would not count towards leave under the FMLA. This penalty would mean that the employee would be entitled to an additional twelve weeks of FMLA leave.

The Court noted that the regulation’s notice requirement was in addition to a notice requirement set out in the FMLA. The Court found “[t]he challenged regulation is invalid because it alters the FMLA’s cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice.” Further, the regulation “transformed the company’s failure to give notice—along with its refusal to grant [the plaintiff] more than thirty weeks of leave—into an actionable violation of § 2615 [of the

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91 Id. at 192 (citing Kendall v. City of Chesapeake, 174 F.3d 437, 443 (4th Cir. 1999)).
92 Id. at 192.
93 74 F.3d at 1334.
95 See Id.
97 Id.
98 Id.
99 Id. at 90.
FMLA].” The Court found that the penalty in the regulation was “disproportionate and inconsistent with Congress’ intent” because it had the effect of discouraging companies from providing more generous leave packages than what is prescribed in the FMLA.101

Here, as in Ragsdale, the Order impermissibly adds non-congressionally approved remedies for violation of the FMLA.

- **Due Process**

  The Due Process Clause of the Fifth Amendment states that no person shall be “deprived of life, liberty, or property without due process of the law.”102 Consequently, procedural due process prohibits the government from arbitrarily depriving individuals of a legally protected interest without first giving notice and the opportunity to be heard.103 The Supreme Court has stated “[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.”104 Further, “[t]he Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”105 The minimum requirements of due process are notice and an opportunity to be heard, appropriate to the nature of the case.106

  Although contractors have no property right to contract with the federal government, when there is an existing relationship, however, between the government and a contractor, the contractor has a property interest for purposes of due process.107 “Where a federal agency takes action to debar a private firm from further business relations with that agency, the effect is far different from that of simply denying an application for a contract.”108 Further, even though there is no right to contract with the government, “that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and evidence before he is officially declared ineligible for government contracts.”109 Debarment without proper notice and hearing “give[s] rise to serious constitutional issues.”110

  In Transco Security, Inc. of Ohio v. Freeman, the court held that “[o]ne who has been dealing with the government on an ongoing basis may not be blacklisted, whether by suspension or debarment, without being afforded procedural safeguards including notice of the charges, an opportunity to rebut those charges, and, under most circumstances, a hearing.”111

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100 Id. at 91.
101 See id. at 95.
102 U.S. Const. Amend. V.
103 See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 568 (1972).
104 Id.
105 Id. at 571-72.
107 See Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964).
109 334 F.2d at 574.
110 Id. at 579.
111 639 F.3d at 321.
Bros., Inc. v. Laird, the court also found a problem with the suspension provision under the Armed Services Procurement Regulations ("ASPR"). The ASPR allowed the Secretary of Defense to suspend a bidder “upon a finding of adequate evidence of improper or unlawful activities.” However, the procedure for suspension required no opportunity for contractors to be heard or to refute the evidence against them. The court further stated: “Such debarment cannot be left to administrative improvisation on a case-by-case basis.” The court decided against the contractor, but only because the government was not given reasonable time to make arrangements for a proceeding, since the contractor filed suit a mere three weeks after rejection. The court still emphasized, however, the necessity of following due process procedures and required the government to notify the contractor of suspension immediately and afford contractors the opportunity to submit a written response within thirty days.

The court in Horne also found that, in most cases, suspension, like debarment, requires the government to ensure “fundamental fairness” to contractors bidding on government contracts. The court noted two possible exceptions to when the government should not be forced to show its evidence against a contractor it is suspending: national security reasons and the possibility of prejudice to a criminal proceeding. However, the court also noted that evidence can be shown without giving away the entire case and likened the requirement to a finding of probable cause to show the government’s basis for suspension. Even if the government has a legitimate interest in keeping evidence confidential “the Government may not simply ignore the interests of the contractor.” The burden would be on the government to show that significant injury would result should a hearing be held.

As in Horne, the Order empowers certain government officials to decide whether suspension or debarment is appropriate for contractors bidding on contracts with the federal government. The Order goes beyond the regulations in Horne because it allows officials to decide—arguably in a highly subjective manner—if further remedies, such as a labor compliance agreement, beyond those already provided for in the covered labor laws should apply to a federal contractor. Specifically, Section 2(b)(ii) of the Order permits contracting officers, in consultation with Agency Labor Compliance Advisors, to exercise significant subjectivity when deciding whether action is necessary to enforce remedies made available in Section 2(b)(ii) of the Order.

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113 Id.
114 Id.
115 Id. at 1271 (quoting 334 F.2d at 578).
116 Id. at 1272 (holding that three weeks is not a reasonable amount of time to arrange a hearing).
117 Id. (citing FAR 0.407-1(b)(1)).
118 Id. at 1271.
119 Id.
120 Id.
121 Id. at 1272.
122 Id.
123 Exec. Order No. 13,673 § 2(b)(ii).
124 See id.; 80 FR 30574 at 30582.
Finally, although the Order suggests that considerable steps will be undertaken to assist companies to prevent and correct alleged labor violations it does not provide any appeal options once a contracting officer has taken remedial action. As stated in the case law above, when the government suspends or debars a contractor the contractor is entitled to notice and an opportunity to rebut the charges against him. Here, multiple contractors, some with a history of a relationship of contracting with the government, could be suspended or debarred as part of the process of bidding for one contract with no hearing or any way to appeal. The lack of due process in the Order is yet another fatal flaw of this initiative.

- **Other Constitutional Considerations**

  The Order is also fatally flawed because it is void for vagueness under well-established Constitutional principles. Laws are void for vagueness when they do not adequately detail the procedure to be followed by officers or judges of the law. The debarment standard of “serious, repeated, willful, or pervasive” is unconstitutionally vague and will cause arbitrary and capricious punishment, especially given the highly subjective nature of various levels of decision making under the Order.

  The Order also violates the Takings Clause found in the Fifth Amendment to the Constitution. This clause applies when a government actually or constructively takes private property for public use. Importantly, in *Omnia Commercial Co. v. United States*, the Supreme Court held that private contract rights represent “property” within the meaning of the Takings Clause. The Court further stated that a contractual taking may occur where the federal government “frustrates” a contract expectancy.

  Contractors and subcontractors who largely depend on federal funding for the vitality of their business and have also provided goods and services to the government for a significant period of time stand to lose contracts and possible suspension or debarment as a result of the Order. Such a “taking” is not permitted under the Constitution without notice and a hearing being provided to the adversely impacted party. Additionally, just compensation must be provided if the taking is improper.

**III. The Economic Analysis Supporting the Order is Severely Deficient**

Executive Order 12866 directs agencies “to assess all costs and benefits of available regulatory alternatives” and to “select those approaches that maximize net benefits.” It also directs each agency to base “decisions on the best reasonably obtainable scientific, technical, economic and other information,” and to “tailor its regulations to impose the least burden.” Executive Order 13563, further directs agencies “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” In the apparent rush to publish the proposed Regulation and Guidance, the FAR Council and the Department of Labor have not complied with these requirements. Instead of presenting a reasoned analysis based on verifiable empirical evidence of the benefits and costs of the selected regulatory approach and of

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126 *Id.* at 511-12.
the alternatives considered, the FAR Council and the Department of Labor have presented an incomplete analysis based largely on assertions and assumptions not supported by empirical evidence. For example, the cost-benefit analysis:

- Incorrectly assumes that firms already track and maintain consolidated records of alleged labor law violations covered by the Order. In fact, the proposed Regulation will compel current contractors and subcontractors, and prospective contractors, to create information systems that do not currently exist to collect and track the ongoing status of all enforcement and legal actions companies may have related to the covered federal labor and employment laws and executive orders and the as yet undefined equivalent state laws. Importantly, these costs are inherent when a company indicates they have no violations to report. Moreover, splitting the rulemaking for the Order in two (i.e., delaying guidance on the equivalent state laws) grossly underestimates the cost of the Order, and will significantly add to the costs of compliance as companies will have to first create and then modify their tracking systems.

- Fails to estimate the costs associated with the labor compliance agreement process that is discussed in greater detail below. These costs would include the legal costs of entering into such agreements with a wide variety of enforcement agencies. Moreover, it is possible that some contractors and subcontractors will be required to enter into three separate labor compliance agreements with the Department of Labor, the Equal Employment Opportunity Commission, and the National Labor Relations Board that have separate jurisdictions over the federal laws they enforce.

The failure to include such costs in the published economic analysis, especially those costs associated with the labor compliance agreement process, may be viewed as a mere oversight but could also suggest the federal government is trying to hide the true impact of the Order. Regardless of the motivation, it is clearly a violation of the Administrative Procedures Act, and as such, the FAR Council and Department of Labor should re-propose the Regulation and Guidance to include a discussion of this critical component of the Order.

IV. Additional Areas of Concern

- Contracting Officers Acting as Judges and Courts

The Order requires contracting officers to determine, with highly subjective and ill-defined guidance from Agency Labor Compliance Advisors, if and when violations are “serious, repeated, willful, or pervasive” enough to warrant remedial action. These terms are so vague and ill-defined that even Article III courts often disagree about the meaning of such terms. The DOL Guidance does discuss the terms, but such guidance is still seriously flawed. Specifically, the Guidance asks contracting officers and Agency Labor Compliance Advisors to assess each violation on a “case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating

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127 Exec. Order No. 13,673 § 3(d)(i).
128 Proposed 80 FR 30574 at 30582-30591
As noted above, even experienced judges have a difficult time applying and interpreting labor and employment laws, and oftentimes come to differing conclusions.

The Order expects contracting officers and Agency Labor Compliance Advisors in a short amount of time to make these determinations for every single labor violation that is reported. Not only is this outside of their area of expertise, but this suggested process imposes unrealistic expectations on such individuals that already have significant and time-consuming duties to complete in the procurement process. With each agency having its own Agency Labor Compliance Advisors and contracting officers making these subjective determinations, it is highly unlikely that any semblance of consistency will be possible. The way the Order is currently proposed, contractors will also have to make the same determinations about their subcontractors, thereby placing prime contractors in an inappropriate role as a labor and employment law officer, judge, and enforcer of many of the nation’s most important, and highly technical, labor laws. Federal contractors should not be placed in such a position.

- **Labor Compliance Agreements**

  The DOL Guidance proposes, as a way to address labor law violations, a labor compliance agreement between an enforcement agency and a contractor or subcontractor. Labor compliance agreements are not mentioned at all in the Order and only briefly discussed in the Guidance. Specifically a labor compliance agreement is defined as “an agreement entered into between an enforcement agency . . . and a contractor or subcontractor to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or other related matters.” Labor compliance agreements are mentioned again as a remedial measure to be considered as a factor to mitigate the existence of a violation. The Guidance explains that “[e]ntering into a labor compliance agreement indicates that the contractor or subcontractor recognizes the importance that the Federal Government places on compliance with the Labor Laws.” In the Appendix, the Guidance says that a single labor violation, in most cases, will not affect the responsibility determination, but pervasive violations and violations of a particular gravity will, in most cases, result in the need for a labor compliance agreement. No further explanation of the labor compliance agreement is offered.

  Many contractors, especially large ones, may have more than a single violation, or will be in a situation of perhaps reporting violations by their sub-entities. However, they have very limited guidance as to what exactly will trigger the requirement for a labor compliance agreement. As discussed above, contracting officers will be required to make determinations that judges have difficulty making. Contractors will have no way of knowing if a labor compliance agreement will be expected of them until the contracting officer makes a subjective decision as to whether their violations are serious or pervasive. Then the contracting officer will have to make another

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129 Id. at 30582.
130 Id. at 30577.
131 See Exec. Order No. 13,673; see also 80 FR 30574.
132 Proposed 80 FR 30574 at 30577.
133 Id. at 30590.
134 Id.
135 Id. at 30603.
subjective decision as to whether the violations are serious or pervasive enough to require a labor compliance agreement, but not too serious or pervasive to be turned down at the outset for a contract.

The Guidance gives contractors no hint of the process involved in entering into a labor compliance agreement. How many steps will this process involve? Who from the enforcement agency will be negotiating the agreement? How long does the contracting officer have to decide if an agreement is needed? How long will negotiations take? Will charging party plaintiffs and unions be a party to such agreements? If more than one contracting officer determines the need for a labor compliance agreement will the contractor need to negotiate separate agreements? How long will the agreements last? Will the terms of such agreements be subject to public disclosure? Could labor compliance agreements be entered as evidence in related court and arbitration proceedings? What would be the sanctions for violating the terms of a labor compliance agreement? The potential for a labor compliance agreement is yet another example of a problem associated with this poorly thought out initiative.

Even without any guidance of the process involved, labor compliance agreements add another layer to an already overburdened process of reporting in order to bid on federal contracts. This provision could serve as another deterrent for contractors who seek to work with the federal government. Contractors with labor law violations, even if they are not serious or pervasive, may decide that it is not worth the risk of having to go through the whole reporting process only to then have to negotiate further and act under a labor compliance agreement with no real understanding of what will be expected of them. This layer also adds more of a burden to the government. Contracting officers and Agency Labor Compliance Advisors will already have a multitude of information to sort through without adding the need for a determination to enter into a labor compliance agreement.

Further, labor unions could use the knowledge of a possible labor compliance agreement to pressure contractors into signing neutrality agreements or using such agreements as leverage in collective bargaining negotiations. If a contractor does not agree to recognize a union or agree to union bargaining demands in contract negotiations, it could find itself flooded with complaints, which, under the Order, would then also have to be reported; potentially triggering a labor compliance agreement.

Another concern is the effect a labor compliance agreement will have on future bidding. Will it effectively act as an automatic denial? It is also important to note that the labor compliance agreement will be a remedial measure in addition to remedial measures from other agencies. Contractors run the risk of being penalized three separate times for labor law violations under the Order: first, for violating the law itself, second, any remedial measures a contracting officer subjectively decides to take, and third, by being asked to enter into a labor compliance agreement. Since the labor compliance agreement is an important factor in mitigating labor law violations under the Order these concerns need to be addressed.

- **Paycheck Transparency**

  The paycheck transparency provisions with respect to exempt/non-exempt and independent contractor status in the Order have nothing to do with the procurement process and the
performance of federal contract work. Such provisions are overly burdensome, and impose significant administrative challenges for contractors. Further, such provisions will be extremely costly to implement and administer. For example, contractors will be required to provide information by the period for which overtime is calculated and paid, which is almost always weekly.¹³⁶ Many pay systems do not currently break down the wage statement by week, but by pay period, as required under some state laws. This change alone could cost contractors millions. Further, contractors’ payroll systems are not as a general rule set up to track which employees or subcontractors work on federal contracts.

The paycheck provision, if included at all in any final regulation, should, at a minimum, follow state law. For example, California has the most protective paycheck transparency laws in the country for employees, but still does not require the hours to be broken down weekly.

Further, it is premature to require employers to report on the FLSA exempt and non-exempt status of employees when there is disagreement among the courts on who is and who is not exempt under the FLSA. For example, while two Circuit Courts have held service advisers are exempt “salesmen” within the meaning of 29 U.S.C. 213(b)(10), the Ninth Circuit Court of Appeals thinks otherwise, deferring to DOL guidance and finding the exemption inapplicable.¹³⁷

Finally, the United States DOL currently is requesting comments on a proposal to change the salary and duties tests to determine exempt status under the FLSA’s “white-collar” exemptions.¹³⁸ The Order, at a minimum, should be postponed and not implemented until such time as the parameters of the new salary and duties tests under the FLSA are finalized.

- Arbitration

The Order is also invalid because it encroaches on employers’ rights under the Federal Arbitration Act (“FAA”).¹³⁹ Under the FAA, employers have the right to require employees to agree to pre-dispute arbitration clauses.¹⁴⁰ Arbitration agreements receive near universal approval from the courts.¹⁴¹ The purpose of the FAA “was to reverse the long-standing judicial hostility to arbitration agreements . . . and to place agreements to arbitrate on the same footing as other contracts.”¹⁴² In Weeks v. Harden Mfg. Corp., the Court of Appeals for the Second Circuit held that the right to enforce required arbitration agreements extends to Title VII claims.¹⁴³ Almost every circuit has held that “Title VII does not prohibit mandatory arbitration for claims

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¹³⁶ Id. at 30591.
¹³⁹ See Exec. Order No. 13,673 § 6(a).
¹⁴⁰ 9 U.S.C. § 2 (“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).
¹⁴³ See id. at 1313-14.
arising under the statute.” 144 Section 6(a) of the Order, is clearly preempted. Unlike the similar provision in the FY 2010 Department of Defense Appropriations Act (the “Franken Amendment”) where there was clear Congressional action no such Congressional approval has been given to the far-reaching restrictions on arbitration contained in the Order.

The Order’s discussion of the impact of this provision is wholly lacking in substance. The author of the Order would appear to have no experience as to the desirability of the arbitration process the merits of which have been repeatedly endorsed by the courts, including the Supreme Court. The Order concludes without citation to any source that the impact of this provision will merely be a “transfer” of moneys from employers to employees. The choice of the word “transfer” is interesting at best, but provides no analytical assistance in reviewing the arbitration question. Further, the Order wholly disregards the advantages of arbitration to both employees and employers as such process provides on many occasions a much more expeditious process to resolve workplace disputes on a less costly basis than protracted litigation in the courts.

Finally, this provision has no connection whatsoever with the federal procurement process and the way that government contract work is carried out by federal contractors. It simply has no place in the Order and should be deleted in its entirety.

- **Equivalent State Laws**

The Guidance does not list which “equivalent state laws” contractors will be subjected to, other than state Occupational Safety and Health Act statutes. 145 This is yet another substantial flaw in the Order as the number and type of state laws that contractors and subcontractors will be required to monitor and report on could be quite substantial. On this basis alone, the Order should not be implemented and/or, at a minimum, delayed until such time as the definition of “equivalent state laws” is provided.

Contractors will have considerable difficulty in understanding and applying the requirements of potentially hundreds of state statutes. Many contractors operate in more than one state and could possibly be subject to hundreds of state laws for purposes of the Order. Additionally, subcontractors could be subject to labor and employment laws of many states. Prime contractors, contracting officers, and Agency Labor Compliance Advisors will have to become familiar with and understand potentially hundreds of state labor and employment laws. Indeed, the complexity of tracking charges, lawsuits, and arbitral awards on an on-going every six month basis under such state laws will be exceedingly difficult. For prime contractors that have

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145 See Proposed 80 FR 30574 at 30576.
hundreds of subcontractors, which is especially the case with many large defense contractors, such tracking at the state level will be even more difficult.

Further, what does the term “equivalent state laws” mean? Does it include labor and employment regulations of state agencies? Does it include laws and ordinances of local jurisdictions or lower levels of government in the state? Does it include state laws with broader protections than the federal counterparts? For example, many cities and counties have enacted various minimum wage statutes. It is unreasonable to expect that Agency Labor Compliance Advisors will have the necessary knowledge of labor laws in all fifty states. This requirement will also make it even more difficult for consistent decisions across the different agencies.

The Order should not cover “equivalent state laws.”

- **Non-Final Determinations**

Having contractors report non-final determinations, such as complaints issued by the General Counsel of the NLRB and EEOC, is not only fundamentally unfair and violates Due Process Requirements, but it also thwarts the Order’s purpose of efficiency and compliance with labor laws. Contractors and government agents will be overly burdened by the amount of reporting necessary to fulfill this requirement. Contracting officers will have to discuss each alleged violation with the Agency Labor Compliance Advisor and then determine whether the allegations in the complaint cover acts or omissions that are “serious, willful, repeated, and pervasive.” Allegations in complaints are generally not resolved until some type of adjudication occurs. Therefore non-determinative allegations contained in complaints of whether the contractor actually committed a violation will not describe with any clarity or finality the labor compliance status of a contractor. For example, the EEOC receives about 100,000 charges a year, but only .5% mature into lawsuits.146 Contractors, contracting officers, and Agency Labor Compliance Advisors will have to follow the various procedural and substantive stages of all types of complaints on an on-going basis to accurately and fairly assess whether they should be considered in the contracting process. Additionally, the proposed regulations require reporting of arbitral awards and decisions by administrative law judges, federal and state magistrates and state labor and employment agencies. Not only is such reporting going to be exceedingly burdensome (and perhaps not achievable at all) but these types of “preliminary” decisions are almost without exception subject to appeal and modification and therefore should not be considered in any manner until the final appeal period and last procedural steps in a case have occurred. Finally, this process, as written, could easily be exploited by a union corporate campaign and contractors could be forced into capitulating into settlements prematurely before the issues in controversy have been decided by a neutral body.

Contractors should have the opportunity to exhaust their due process rights before possibly losing a government contract or risking suspension or debarment because of an allegation or complaint with no merit. Reporting only finally adjudicated determinations would eliminate the need for additional and unneeded information. The additional information reporting regarding

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complaints and other initial determinations of potential violators will only create more of a burden for contractors and government agents. It will decrease the efficiency that this Order states is one of its principal objectives.

Finally, the Order’s approach in including non-final determinations as “evidence” of contractor labor violations raises due process questions. This area of the Order is legally lacking in all respects and evidences a disregard for both the substance and practicalities of how labor and employment charges are resolved by various federal agencies and in arbitral proceedings.

• Current Facilities and Distinct Entities

The Order should only apply to facilities in use at the time the contractor is making a bid. Contractors should not be punished for violations that occurred at facilities no longer in use or owned by the contractor. The Order would allow contractors to be punished for violations that have no relevance to any current practices by the contractors in their performance of government contracts. Again, as with non-final determinations, this proponent of the Order frustrates the Order’s purpose. It will increase the amount of disclosures that contractors have to make and that government agents have to analyze and will require disclosures that do not reflect the contractors’ current business practices and adherence to labor laws.

The Order should also only apply to employees that are performing work under the federal contract. Contractors should not be punished for violations that occurred at facilities no longer in use or owned by the contractor. The Order would allow contractors to be punished for violations that have no relevance to any current practices by the contractors in their performance of government contracts.

Further, the single-entity test should be applied in an objective fashion, not as the OFCCP is currently applying it, so that companies only have to report on subsidiaries and employees that are involved in federal contract work. Reporting should only be done on activities related to performance of government contracts. It makes no sense to have prime contractors report on labor and employment matters that have no connection with the performance of federal contract work.

• Subcontractor Reporting

Subcontractors should be allowed to report directly to contracting officers, only with the prime contractors’ approval. The prime contractor is responsible for subcontractors’ violations. Also, providing the necessary information under the Order may mean providing sensitive business compliance information. Many companies that subcontract with each other also compete against each other for contracts. Therefore, prime contractors should have the choice as to whether or not subcontractors report directly to them or to the agency’s contracting officer.

• Three-Year Look Back

It is fundamentally unfair to have contractors report violations for the three year period prior to the effective date of the Order. If any reporting is expected of contractors it should be only prospective in nature. Contractors will not yet have the systems in place to track and report with
the specificity required by the Order for the violations and alleged violations for a three year look back period. Further, contractors should not be punished for violations that occurred before the Order was enacted. Indeed, this requirement could be another deterrent for contractors wishing to do business with the federal government.

- **Dollar Threshold**

  The dollar threshold should be raised as $500,000 is too low. This threshold will have the most impact on small businesses. Again, contracting officers and Agency Labor Compliance Advisors will be flooded with information under the Order. Raising the dollar threshold will relieve some of the considerable burden on government agents as well as contractors.

- **Calendar Year Reporting**

  The Order requires contractors and subcontractors to provide updates every six months regarding the status of any labor law violations. It is unclear whether such six month reporting requirement runs on a calendar year basis or during the life of each contract. If the requirement is for the term of each federal contract this requirement will be exceedingly difficult and expensive to meet for prime and subcontractors, especially for prime contractors that have hundreds, if not more, subcontractors. The six month reporting requirement should be on a calendar year basis not every six months during the life of the contract. This would allow contractors with multiple contracts to make only one submission every six months as opposed to dozens of similar submissions, significantly cutting down on administrative costs.

**V. Conclusion**

In summary, the Order, and its proposed Regulations, and Guidance are unnecessary, impose tremendous expense on contractors, establishes an extensive new bureaucratic system that is administratively unworkable, and will be difficult for all involved to ever comply with in any meaningful way. Simply put, the Order is poor public policy. Equally important the Order is a “legal non-starter” as it is preempted under well-established legal principles. It violates the Constitutional separation of powers doctrine by inappropriately usurping the powers of Congress. The Order also violates fundamental due process rights of federal contractors and subcontractors. Finally, the Order, as outlined above, has numerous procedural and substantive deficiencies. The Order should be withdrawn in its entirety.

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HR Policy appreciates the opportunity to comment on the Department of Labor’s proposed Guidance for Executive Order 13673, and we look forward to working with you in the future.

Sincerely,

Daniel V. Yager
President and General Counsel