What CHROs Need to Know About the Federal Contractor "Blacklisting" Executive Order and Final Rule

Executive Order Threatens the Government’s Ability to Procure Critical Goods and Services, Creates New Penalties For Violations of Often Vague and Unevenly Enforced Labor Laws

President Obama’s “Fair Pay and Safe Workplaces” Executive Order (EO 13673 or EO), issued July 31, 2014, 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. On August 25, 2016, the Federal Acquisition Regulation Council (FAR Council) published the final rule and the Department of Labor (DOL) published proposed implementation guidance. The final rule goes into effect on October 25, 2016 for contracts of $50 million or more. After April 24, 2017 the final rule will apply to federal contracts worth more than $500,000.

According to the Teamsters for a Democratic Union the final rule “gives unions unprecedented new leverage against companies and institutions that contract with the federal government. Unless the Order or its implementing regulations are overturned by the courts (employers have promised lawsuits) or revoked by a future president (wonder who), unions should be able to significantly increase their bargaining power by the simple expedient of filing meritorious charges with the NLRB, OSHA, the EEOC, or the DOL.”

The Labor Department’s final guidance clarifies that federal contractors must report an extensive list of court and agency actions, including a large number of preliminary determinations that often prove baseless when fully adjudicated. 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 EO creates new labor law compliance czars at each federal agency. The final 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 Labor Law “Violations” When bidding on a contract that exceeds $500,000, prospective contractors must report whether they have incurred any adverse administrative merits determinations, arbitral awards or decisions, or civil judgments for serious, repeated, willful, or pervasive violations of any one of 14 federal employment and labor laws and “equivalent state laws,” which DOL intends to define in subsequent guidance. The final rule phases in the “look back” requirements, beginning with a one-year look back for the first year of implementation, gradually increasing to three years by October 25, 2018. The federal labor laws encompassed in the final rule are:

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1 The only “equivalent state laws” identified in the final rule are Occupational Safety and Health Administration-approved state plans. A proposed rule implementing the state law reporting requirements will be published in the future.
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; Americans 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.

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 Labor Relations Board or, ultimately, a federal court. Even a preliminary injunction enjoining a violation of a covered labor law would also be considered a reportable “civil judgment.”

Under the EO, agency contracting officers will use the reports to determine if a prospective contractor is a responsible source that has a satisfactory record of integrity and business ethics. 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). Moreover, under the final rule, the disclosure of labor violations will be made publically available.

Once a contract is awarded, employers must update their reports every six months.\(^2\) Notably, these reports can form the basis of a suspension or disbarment proceeding against a contractor.

**Problematic Subcontractor Reporting Remains** Under the final rule and guidance, subcontractors will now report their violations to DOL who will make the determination of responsibility and integrity and report back to the subcontractor who will then inform the relevant higher tier contractor of DOL’s decision. While this is a significant change from the proposed rule, it essentially replaces one unworkable approach with another. Congress did not fund the DOL budget request to implement the EO last year and they are unlikely to fund in next year, so it will be virtually impossible for DOL to process the tens of thousands of subcontractor reports it will receive. While removing the responsibility determination from prime/upper tier contractors may be a positive, the bottleneck and uncertainty expected to ensue from DOL handling this process could result in substantial delays, as well as more contests and challenges to unfavorable determinations.

**Expansive Definitions of “Serious, Repeated, Willful, or Pervasive”** Importantly, the final rule notes that while the EO provides that in most cases a single violation may not necessarily give rise to a determination of lack of responsibility, federal contracting officers are “not precluded from making a determination of nonresponsibility based on a single violation in the circumstances where merited.” Further, the final DOL guidance devotes over 30 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

\(^2\) The final rule clarifies that the contractor may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date to achieve compliance with this requirement. In either case, the contractor must continue to update its disclosure semiannually.
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. Moreover, 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.” Further, such violations will not have to arise from substantially similar violations and can result from entirely unrelated violations of any of the covered laws.

Creation of New Compliance Czars  The EO requires each federal agency establish an Agency Labor Compliance Advisor (ALCA) to assist in the award determination process. Specifically, ALCAs review reported violations and make a recommendation to the contracting officer whether a contractor has 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 then makes a responsibility determination on DOL guidance and the ALCA recommendation. With such discretion left to ALCAs and contracting officers, it is unclear how the process will prevent third parties, including labor unions and business competitors, from inappropriately influencing the ALCA’s recommendations.

Violations Will Be Publicly Reported  The final requires also requires prospective contractors to publicly disclose whether they have violations of covered laws within the reporting period and, for contractors being evaluated for responsibility, certain basic information about those violations. In addition, third-parties and the public will be able to contact the ALCAs with information regarding violations they feel should be disclosed, and ALCA contact information will be made available on DOL’s website.

Debarment and Other Remedial Measures  Agency contracting officers, upon reviewing information regarding alleged violations of labor laws will be empowered 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.

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, the Department of Labor recently settled an FLSA exempt status case involving more than 1,900 employees for $7 million. 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 EO and final rule also 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. 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 EO and 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.