PUBLICATION

DOL Presents: The Ghost of Violations Past

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On May 28, 2015, the Department of Labor (DOL) issued proposed guidance for President Obama's infamous Executive Order 13673 – "Fair Pay and Safe Workplaces" (the Order). See http://federalregister.gov/a/2015-12562. Although the stated purpose of the Order is "to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that the parties are responsible and comply with labor laws," the guidance admits that "most federal contractors [already] comply with applicable laws and provide quality goods and services to the government and taxpayers."

The Order applies to new federal contracts with an estimated worth of more than $500,000 and is expected to go into effect at some date in 2016. According to Labor Department statistics, the Order could affect approximately 24,000 businesses employing 28 million workers. Interestingly, of the estimated 24,000 businesses that hold federal contracts worth $500,000 or more, in its guidance, the DOL points to 49 federal contractors that were *cited* with 1,776 federal labor law violations. These 49 contractors represent approximately two tenths of one percent of the federal contractors the Order is estimated to affect. Consequently, it is not surprising that members of the business community have referred to this Order as a solution looking for a problem. Nevertheless, because the proposed guidance is here, outlined below is a summary of what it contains.

Before digging into the rather lengthy requirements set forth in the guidance, the DOL is asking for comments in several specific areas of the guidance (although it will welcome comments on any areas of the guidance):

1. Whether the threshold for fines and penalties and for back wages are set at appropriate levels to be considered "serious violations."
2. For the DOL's definition of a "pervasive violation," and how best to assess the number of a contractor's violations in light of its size.
3. Consideration of ways to determine whether State or local wage payment reporting requirements would be determined substantially similar to the Order's requirements.

Due to the disturbing nature of the Order, contractors and subcontractors should seriously consider commenting on this guidance. Comments may be sent via http://www.regulations.gov. Type "guidance on fair pay and safe workplaces" in the Comment or Submission search box, click Comment, and follow the instructions. Comments must be received on or before July 27, 2015.

Disclosure of Labor Law Violations

When the Order goes into effect, contractors who bid on or respond to a request for proposal for contracts that meet the minimum dollar threshold *must report* any violations of labor laws rendered against them within the previous three years preceding the date of the bid or offer. For purposes of the disclosure, these violations include any adverse administrative merits determinations, civil judgments and arbitral awards or decisions based on the following 14 labor laws:

4. The Fair Labor Standards Act (FLSA)
5. The Occupational Safety and Health Act (OSHA)

6. The Migrant and Seasonal Agricultural Worker Protection Act
7. The National Labor Relations Act (NLRA)
8. The Davis-Bacon Act (DBA)
9. The Service Contract Act (SCA)
10. Executive Order 11246
11. Section 503 of the Rehabilitation Act
12. The Vietnam Era Veterans' Readjustment Assistance Act
13. The Family and Medical Leave Act (FMLA)
14. Title VII
15. The Americans with Disabilities Act (ADA)
16. The Age Discrimination in Employment Act (ADEA)
17. Executive Order 13658 (Establishing a Minimum Wage for Contractors)

The DOL notes that it will publish a second guidance in the future which will address which state laws are equivalent to the 14 federal labor laws and executive orders identified in the Order.

What is an Administrative Merits Determination?

The guidance defines an administrative merits determination as a notice, finding or other document from an enforcement agency that administers federal labor laws, such as the Department of Labor (which includes the Wage and Hour division, the Occupational Health and Safety Administration and the Office of Federal Contract Compliance Programs), the Equal Employment Opportunity Commission and the National Labor Relations Board. The guidance provides an exhaustive list of what constitutes a determination (which can be as innocuous as a show-cause notice issued by the OFCCP). Anything outside the list is considered *not* to be a determination.

What is a Civil Judgment?

The guidance defines a civil judgment as any judgment or order, *whether or not it is final or subject to appeal*, by a state or federal court that the contractor has violated any provision of the labor laws. Thus, a contractor must report, *e.g.*, a judgment rendered against it on a Title VII claim even though it is in the process of appealing that judgment which may later be reversed or vacated.

What is an Arbitral Award or Decision?

Contractors that prefer the use of arbitration as an alternative dispute mechanism may want to re-think their strategy. Not only is an award or order by an arbitrator or arbitral panel in which it is determined that a contractor violated any provision of the labor laws an arbitral award or decision under the guidance, but in addition, the Order prohibits arbitration as an alternative dispute mechanism for all contracts estimated to be in excess of $1 million that involve claims brought under Title VII (including sexual harassment) or torts related to or arising out of sexual assault. An exception to this prohibition is if the employee voluntarily consents to arbitration after a claim arises. Consequently, depending on the dollar amount of the contract, some contractors' arbitration policies may be of little value when the Order becomes effective.

The guidance also details how contractors should address successive determinations, judgments and arbitral awards. Further, the guidance provides that contractors require their subcontractors (provided the estimated value of the subcontract meets the $500,000 threshold) to make the same labor laws violations' report to the contractor so that the contractor can assess whether the subcontractor is "responsible." However, the Federal Acquisition Regulatory Council is considering, for the final regulations, to allow subcontractors to report directly

to the DOL rather than the contractor. Once a contract is awarded, the contractor (or subcontractor) must update its labor laws violations report semi-annually.

How Much Information Must be Reported?

At the initial bid stage, the contractor must only report to the contracting agency whether it has had any administrative merits determinations, civil judgments or arbitral awards rendered against it within the preceding three-year period.

If the contractor makes it to the "responsibility determination" phase of the bid process, the contracting agency will require the following for each administrative merits determination, civil judgment, or arbitral award:

- The labor law violated
- The case number, charge number or other unique identifying number
- The date of the determination/judgment/award
- The name of the court, agency, arbitrator, etc., that rendered the judgment

Who Will Determine Whether I am a Responsible Contractor?

The guidance refers to newly created federal employees known as Labor Compliance Advisors (LCA). Along with the contracting officers, LCAs will assess the reported violations to determine whether the contractor has a satisfactory record of integrity and business ethics.

How Will LCAs Make Their Determination?

The guidance directs the LCAs to consider whether labor law violations are serious, repeated, willful or pervasive. The guidance defines the foregoing terms and directs how the LCAs should weigh the violations. The violations are to be assessed on a case-by-case basis in light of the totality of the circumstances, which includes the severity of the violation(s), the size of the contractor and any mitigating factors (which the DOL states will be given particular weight). In this regard, the DOL states that up to 90% of administrative merits determinations end with the contractor entering into an agreement with the agency obligating it to remediate the alleged violation. Again, this adds further validity to those who say that the Order is a solution looking for a problem.

- *Serious Violation*: Without going into all of the detail found in the guidance, a violation may be found to be "serious" if damages of at least $10,000 were awarded. As a result, nearly any civil judgment will be serious. Also, the guidance states that even an alleged "threat" of an adverse employment action in retaliation against a worker exercising a right protected by the labor laws will be deemed "serious."
- *Willful Violation*: The guidance notes that several statutes already define a "willful" violation. These include the FLSA, Equal Pay Act and the ADEA. For purposes of Title VII or the ADA, a violation will be considered "willful" if punitive damages are awarded.
- *Repeated Violations*: For a violation to be "repeated," the same or substantially similar other violation(s) must be reflected in one or more civil judgments, arbitral awards or decisions, or adjudicated or uncontested administrative merits determinations issued within the last three years.
- *Pervasive Violations*: The guidance states that "pervasive" violations differ from "repeated" violations because the violations need not be substantially similar to be "pervasive." In addition, the guidance notes that the size of the employer in relation to the number of violations will be taken into account to determine whether violations are "pervasive."

Mitigating Factors

The guidance notes that in most cases, the most important mitigating factor will be the extent to which the contractor has remediated the violation and taken steps to prevent its recurrence.

- *Remediation of Violation*: (*see* above)
- *Only One Violation*: Normally a single violation of a labor law will not give rise to a determination of a lack of responsibility (but it could, depending upon the severity).
- *Low Number of Violations Relative to Size*: Because larger employers are more likely to have multiple violations, the size of the employer will be considered in making a determination.
- *Safety and Health Programs or Grievance Procedures*: The guidance suggests that such programs and procedures may prompt workers to report violations that would, otherwise, perhaps go unreported. Consequently, the implementation of these programs or procedures will be considered a mitigating factor.
- *Good Faith and Reasonable Grounds*: If the contractor shows that it made efforts to ascertain its legal obligations and follow the law, its actions, under the circumstances, would most likely be objectively reasonable.
- *Significant Period of Compliance Following Violations*: The guidance notes that a steady period of compliance with the labor laws following a violation(s) may mitigate the existence of prior violations.

Paycheck Transparency Provisions

The guidance provides two reasons for this provision: (1) so that employees have the information they need to calculate their pay and raise concerns about their pay more quickly; and (2) in order for independent contractors to evaluate their status as such and raise any concerns during the course of their work for the contractor instead of after the relationship ends.

Wage Statements

The guidance states that contractors are to provide a wage statement to all individuals performing work for whom the contractor is required to maintain wage records under the FLSA, the DBA, the SCA or equivalent state laws. Regardless of whether the worker is paid on a weekly basis, the hours worked and any overtime hours must be shown on a weekly basis. Contractors must incorporate this provision into any covered subcontracts. The dollar threshold for covered contracts is $500,000 or more. The wage statement must be a written document. However, if the contractor regularly provides documents through electronic means, the wage statement may be provided that way as long as the worker can access it by some type of device or network made available by the contractor.

What is Required on the Statement?

The Wage Statement must include:

18. Hours worked
19. Overtime hours
20. Pay
21. Any additions made to, or deductions made from, pay

If the worker has no entitlement to overtime hours under the FLSA, the contractor need not include hours worked, *provided* that the contractor has given the worker *written notice* that he/she is an exempt employee under the FLSA (oral notice is not sufficient).

I Already Comply with my State's Wage Statement Requirements.

The guidance notes that contractors who are complying with their state or local wage statement requirements will be deemed to be complying with the DOL's requirement if the state or local requirements are *substantially similar* to the DOL's requirements. The DOL has not decided on which states fulfill these requirements. It is currently considering two options. As of now, the maximum number of states that would be included is 13 states plus the District of Columbia. Once the DOL finalizes the guidance, it will maintain on its website a list of "Substantially Similar Wage Payment States."

Independent Contractor Notice

Finally, if the contractor treats any workers on a covered contract as an independent contractor, the contractor must provide *a written notice* to such workers of their status (oral notice is not sufficient) *before such workers perform any work under the contract*. Thus, contractors will want to pay careful attention to the classification of their workers for a couple of reasons: (1) as the DOL states in its guidance, merely because a worker has been given notice that he/she is an independent contractor, does not mean that he/she is classified correctly; and (2) it is anticipated that the DOL will request independent contractor notices during an audit of the contractors' workforce.