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More Burden For Federal Contractors Becomes Closer To A Reality -- Courtesy of The President's July 31, 2014 Executive Order and Department of Labor Proposed "Guidance"

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Last summer, President Obama signed an Executive Order entitled "Fair Pay and Safe Workplaces" requiring prospective federal contractors to disclose "any administrative merits decision, arbitral award or decision, or civil judgment" to the contracting agency under fourteen federal statutes, Executive Orders and all equivalent state labor laws addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections. (see our analysis *here*). Among other things, the Executive Order directed the Secretary of Labor to develop guidance to assist agencies in determining whether labor law violations were issued for "serious, repeated, willful, or pervasive" violations.

On May 28, 2015, the Department of Labor's proposed Guidance will be published in the Federal Register. The Executive Order applies to contracts for goods and services over $500,000 and requires potential contractors or subcontractors to disclose any labor law violations described above within the preceding three-year period to the contracting agency.

Succinctly, the proposed Guidance:

- Requires federal contractors and subcontractors to report any administrative merits decision, arbitral award or decision, or civil judgment both ***prior to being awarded, and for the duration of***, a federal contract;

- Allows contracting officers and/or labor compliance officers to disqualify potential contractors where any violations are deemed "serious, repeated, willful or pervasive;"

- Imposes penalties not authorized by the underlying labor laws, including but not limited to the cancellation of a federal contract or requiring a contractor to enter into a labor compliance agreement, even where that contractor settled the underlying allegations; and

- Potentially exposes confidential charges and settlement agreements to public scrutiny under the Freedom of Information Act.

More generally, under the proposed Guidance, virtually any determination from any labor and employment enforcement agency will trigger a federal contractor's reporting requirement, which raises the specter of the Government effectively suspending or debarring a contractor without the due process set forth in the Federal Acquisition Regulations.

Definition of "Administrative Merits Decision"

For purposes of the Executive Order and the proposed Guidance, the term means any notice, whether final or subject to appeal or further review, issued by an enforcement agency following an investigation. The notices include, but are not limited to, a WH-56 "Summary of Unpaid Wages" from DOL's Wage and Hour Division ("WHD"), a citation from OSHA, a show cause notice from the OFCCP, a reasonable cause letter of determination from the EEOC, or any complaint issued by a regional director at the NLRB. Given that none of these notices actually establishes a violation of the law, the Administration is building additional roadblocks in the government procurement process beyond what Congress has provided via the underlying statutes.

What Are Serious, Repeated, Willful or Pervasive Violations?

A serious violation must take into account "the number of employees affected, the degree of risk posed or actual harm done by the violation to the health, safety or well-being of a worker, the amount of damages incurred or fines or penalty assessed with regard to the violation, and other considerations the Secretary finds appropriate." The guidance goes on to say that any fines and penalties over $5,000, back pay in excess of $10,000 or the provision of injunctive relief is considered "serious" for purposes of the Executive Order.

A willful violation depends on "whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by" various labor laws. The proposed Guidance indicates that if an enforcement agency seeks liquidated or punitive damages in its administrative merits decision, then the violation will be considered willful for purposes of the Executive Order.

A repeated violation considers "whether the entity has had one or more additional violations of the same or substantially similar requirement in the past 3 years." Two or more predicate administrative merits decisions need only be adjudicated by the enforcement agency or uncontested when determining whether a violation is repeated for purposes of the Executive Order.

The standard for "pervasive" should consider "the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity." Pervasive violations need not be substantially similar, meaning single violations of multiple statutes can reflect a basic disregard of the labor laws, and be pervasive for purposes of the Executive Order.

Reporting Obligations For Contractors and Subcontractors

Notably, federal contractors will have to report *all* administrative merits determinations within three years of the bid proposal. This reporting obligation continues throughout the bidding process and contract performance, requiring prospective contractors to update their disclosures throughout the term of the contract. Subcontractors must report violations as well.

After contractors comply with the reporting requirements, contracting officers or labor compliance advisors will assess those types of reported violations (from both contractors and subcontractors) to determine if the violations are serious, repeated, willful or pervasive. But, almost any determination or settlement could meet one or more of these definitions.

From a wage and hour perspective, among the events triggering a disclosure requirement is the receipt of a WH-56, which is the document provided by WHD to identify back wages due at the conclusion of an investigation. That is, in every investigation in which WHD has taken credit for the payment of back wages, a contractor will have a subsequent obligation to disclose the ultimate findings of that investigation. Even absent the issuance of a WH-56, however, the proposed Guidance identifies several other similar documents that WHD can use to identify violations, such as letters assessing civil money penalties or identifying violations of the FLSA, Service Contract Act, or Davis-Bacon Act. In short, virtually every finding by WHD that has not been challenged and specifically reversed at a higher level will trigger a contractor's disclosure obligation.

In the case of the NLRB, the decision to issue a complaint, however, is not an agency determination or adjudication. Indeed, at the complaint stage of the litigation, the NLRB is confronted only with alleged violations, and a charging party's right to a remedy can be enforced only after an adjudication. Regional Directors issue complaints not only when a determination of reasonable cause has been made, but also when two competing views of the evidence require a credibility determination and therefore an adjudicatory hearing, thus making a Regional Director's complaint a particularly inappropriate factor to consider in determining suitability for a federal contract. Nevertheless, the proposed Guidance deems a Regional Director's complaint as a reportable event.

At the EEOC, every reasonable cause determination and likely every conciliation agreement will have to be reported. Indeed, a reasonable cause determination that demands $10,000 even if an employer settles the matter for as little as $500 and/or some other injunctive relief would be deemed "serious" under the proposed Guidance.

Any show cause notice issued by OFCCP will have to be reported. As show cause notices are issued for even minor technical violations including delays in submitting requested documents or data to the OFCCP, this could even impact contractors who are otherwise in compliance with the regulations. Moreover, entering into conciliation agreements will need to be evaluated much more carefully. Often federal contractors enter into conciliation agreements even where they have strong defenses because the cost of litigating would outweigh the cost associated with entering into the agreement. Now, conciliation agreements could put federal contracts at risk.

For OSHA, even if a citation is reduced to a non-serious violation to settle an inspection, the initial citation will determine whether a reportable event has occurred.

In addition, to achieve further paycheck transparency for workers, contractors and subcontractors will be required to provide their workers on federal contracts with information each pay period regarding how their pay is calculated (a wage statement) and provide notice to those workers whom they treat as independent contractors. This effectively adopts a right-to-know statute for federal contractors absent Congressional action.

At bottom, any OSHA citation, reasonable cause finding from the EEOC, complaint at the NLRB or notice from WHD could form a basis for a contracting agency to deny awarding a federal contract to any particular contractor (or subcontractor). By setting the floor at $5,000 for a fine or penalty or $10,000 for back pay, the proposed Guidance drastically increases the burdens on federal contractors to report and ultimately be awarded, large federal contracts. Practically, it incentivizes federal contractors to settle claims before any administrative merits decision occurs, even where it is unlikely that any allegations against it are true. With an Administration aggressively pursuing questionable theories on labor law violations that may be rejected inside a courtroom, this proposed Guidance essentially deems any adverse decision by any enforcement agency to be grounds to deny a contract.

The proposed Guidance would significantly impact federal contractors in the areas of compliance and protests. In the area of compliance, the proposed Guidance will require significant data collection and reporting. And any entity, including unions conducting an organizing campaign or plaintiff's attorneys, can use the disclosures for any purpose. It also poses the risk of contractors inaccurately reporting based on the adequacy of their internal collection processes being accused of false reporting. In the area of protests, the proposed Guidance opens the door for bidders to complain of unequal treatment, or unreasonable government review, of their labor compliance.

For federal contractors, it is difficult to view the Guidance as anything more than the Administration's attempt to circumvent Congress and impose extra-statutory penalties against federal contractors. Ultimately, government bureaucrats far removed from any policy-making position will be able to influence the decision of where million-dollar federal contracts are awarded and expose the federal procurement process to potential litigation. As the time for the current Administration winds down, it is clear that this "guidance" reflects its aggressive position that it will pursue in the coming twenty months.

The comment period will be open for 60 days from publication in the Federal Register. Given these potential issues and more that will inevitably arise in the coming weeks, it is important for the regulated community to consider submitting comments for the record regarding pros and cons of the proposed Guidance. As we have throughout this process, we will keep you informed of significant developments.

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