Final Rules and Guidance Issued on "Blacklisting" Executive Order

Controversial Mandate Requires Disclosure of Labor and Employment Violations as Part of the Federal Contracting Process

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On August 25, 2016, the Federal Acquisition Regulatory Council issued final rules and the Department of Labor (DOL) published final guidance implementing President Obama's 2014 "Fair Pay and Safe Workplaces" Executive Order (E.O.) 13673. The Executive Order requires covered federal contractors and subcontractors to report adverse determinations under federal and state labor laws to federal agencies as part of the procurement process, and these violations can be used to find a contractor or subcontractor "nonresponsible," preventing the contractor or subcontractor from receiving the contract. As a result, the Executive Order has been highly controversial and has become known in the contractor community as the "blacklisting" rule.

As addressed in our previous client alert on June 23, 2015, the far-reaching changes to the Federal Acquisition Regulation (FAR) and DOL guidance may have a profound impact on federal contractors and subcontractors. Secretary of Labor Thomas Perez touted the final rule and guidance as benefiting "the responsible contractors—the vast majority of them—who are doing the right thing, so that they no longer have to compete for contracts with companies that do not." Writing in support of the new requirements, Secretary Perez stated that "[c]ontracting with the government is a privilege, not an entitlement" and argued that "low-road contractors who break [labor and employment] laws" should not benefit from taxpayer money.[1] While few may take issue with that sentiment, criticism of the final rule and guidance has focused on how the expansive definition of adverse labor determinations may label many responsible businesses as bad actors. In addition, in order to avoid even a small risk of an adverse determination that

[1] "Delivering Value Consistent with Our Values," U.S. Department of Labor Blog Post (Aug. 24, 2016), available at https://blog.dol.gov/2016/08/24/delivering-value-consistent-with-our-values/.

could cost them critical federal business, many contractors may feel compelled to settle unmeritorious claims.

The core of the final rule and guidance, when fully implemented, is the requirement that federal contractors seeking or holding federal procurement contracts for goods and services, including construction contracts, valued at $500,000 or more will have to report to contracting officers whether there has been any administrative merits determination, civil judgment, or arbitral award or decision rendered against them during the preceding three-year period for violations of any of 14 identified federal employment laws and executive orders or equivalent State laws ("Labor Law decisions")—regardless of whether the adverse determination is still under appeal or otherwise subject to further review and challenge. Contractors may also report mitigating factors, remedial measures, and other steps taken to correct the violations. Based on this information, contracting officers, in consultation with their Agency Labor Compliance Advisor (ALCA), will evaluate the information to determine "if a contractor is a responsible source with a satisfactory record of integrity and business ethics" eligible for a contract award. These disclosures must be made when the contractor first submits a bid, at the pre-award stage, and semi-annually during the performance of the covered procurement contract. The 14 identified federal laws for which reports must be made are:

- The Fair Labor Standards Act (FLSA),
- The Family and Medical Leave Act (FMLA),
- Title VII of the Civil Rights Act of 1964,
- The Americans with Disabilities Act (ADA),
- The Age Discrimination in Employment Act (ADEA),
- The National Labor Relations Act (NLRA),
- The Occupational Safety and Health Act (OSHA),
- The Davis-Bacon Act (DBA),
- The Service Contract Act (SCA),
- Executive Order 11246,
- Section 503 of the Rehabilitation Act,
- The Vietnam Era Readjustment Assistance Act (VEVRAA),
- The Migrant and Seasonal Agricultural Worker Protection Act (MSPA), and
- Executive Order 13658 (Establishing a Minimum Wage for Contractors).

Covered subcontractors will also be subject to this requirement, and contractors will need to consider the DOL's analysis and advice as they make their own responsibility determinations on their prospective subcontractors. The DOL estimates that "10 percent of covered contractors and subcontractors will have labor violations involving enforcement-agency action that require disclosure" with "an additional small number" required to disclose "violations involving private litigation or arbitration proceedings."[2] Contractors and subcontractors without adverse Labor Law decisions in the applicable period will have to certify that they have no covered Labor Law decisions to disclose.

Contractors will use the "System for Award Management" (SAM), already used for other disclosures in the federal contracting process, to certify whether there have been any adverse Labor Law decisions against

[2] See "Fact Sheet: Final Guidance and Regulations Implementing the Fair Pay and Safe Workplaces Executive Order" (Aug. 24, 2016), at https://www.dol.gov/asp/fairpayandsafeworkplaces/factsheet.htm

the contractor in the relevant period. An example of the new disclosure questions that a prospective contractor will have to answer starting October 25, 2016, can be found here. If a contracting officer initiates a responsibility determination, a contractor that has reported the existence of adverse Labor Law decisions during the reporting period will have to provide additional information: the labor law violated, identification of the case or decision and the decisional body (e.g., case or docket number, as well as the name of the court, arbitrator, or agency), and the date of the decision. The contractor may also provide additional information about mitigating factors, remedial measures, and other steps taken to achieve compliance with labor laws.

In addition, the final rule and guidance require contractors to provide written notice to employees and independent contractors of the components of the individuals' compensation and their classification as a non-exempt employee, an exempt employee, or an independent contractor.

In our previous alert, we detailed the key proposed requirements under consideration at the time. Despite well-reasoned opposition to the expansive and burdensome nature of the proposed requirements, the vast majority of the requirements remain fundamentally unchanged in the final rule and guidance, with only three significant changes. First, the final rule and guidance will phase in the requirements over a three-year period. Second, unlike in the proposed rule and guidance, covered subcontractors will now report adverse Labor Law decisions directly to federal agencies, rather than to the prime contractors. Third, there are now greater protections against public disclosure of some of the information submitted by contractors.

Critical Amendment to E.O. 13673

The day before the final FAR rule and DOL guidance were released, President Obama issued an amendment modifying E.O. 13673, to provide authority for some of the changes in the final rule and guidance. The amendment made two substantive changes to E.O. 13673. First, it changed the reporting standard for covered subcontractors, no longer requiring them to report covered violations to their prime contractor but instead, directly to the applicable federal agency. Second, although the amendment still mandates public disclosure of certain information in the federal awardee database related to a covered contractor's labor compliance history, it now makes public disclosure of any supporting mitigation documentation provided by the contractor voluntary.

Timeline for Implementation

Perhaps the most welcomed revision is that the requirements will be phased-in over time. The final timeline for implementation is as follows:

October 25, 2016 Final rule and guidance takes effect. Mandatory reporting begins for all prospective *prime contractors for solicitations valued at $50 million or more issued on or after October 25, 2016*. Covered prime contractors will be required to disclose all adverse Labor Law decisions issued in the prior one-year period (i.e., since October 25, 2015). This disclosure period will gradually increase each year up to the maximum three-year period, effective October 25, 2018. Additionally, as of this date, contractors and subcontractors on federal contracts exceeding $1 million will be prohibited from requiring employees or independent contractors to enter into pre-dispute arbitration agreements with respect to claims arising under Title VII or torts related to sexual assault and/or harassment (except where a valid agreement already exists).

January 1, 2017	The "Paycheck Transparency" provisions take effect requiring contractors to provide specified information on wage statements and notice to applicable workers of their independent contractor status.
April 25, 2017	Mandatory reporting requirements will apply to prospective *prime contractors for solicitations valued at $500,000 or more issued on or after April 25, 2017.*
October 25, 2017	Mandatory reporting begins for all subcontractors under consideration for contracts with an estimated value of $500,000 or more (except for commercially available off-the-shelf (COTS) items) under prime contracts awarded pursuant to solicitations issued on or after October 25, 2017.
October 25, 2018	Full three-year disclosure or "look back" period begins for all covered contractors and subcontractors.

Voluntary Early Assessment Period Begins September 12, 2016

Beginning September 12, 2016, the DOL is introducing a "preassessment" period where current and prospective contractors may voluntarily seek DOL guidance and assessment of their labor compliance history as a proactive measure in anticipation of future proposals. The DOL represents that it will be available to "discuss existing labor law violations and whether additional compliance measures are necessary" outside of the regular procurement process.[3] The details of how this process would work or the impact of any such voluntary "preassessment" have not been fully explained by the DOL. The guidance does state, however, that if a contractor that has been "preassessed" by the DOL subsequently submits a proposal, "the contracting officer and the ALCA may rely on the [DOL's] assessment that the contractor has a satisfactory record of Labor Law compliance unless additional Labor Law decisions have been disclosed."

Other Key Changes to the FAR Final Rule and DOL Guidance

I. No Disclosure Beyond Contracting Party (e.g. parents, subsidiaries, affiliates)

In its preamble provisions, the final rule and guidance make clear that representation and reporting obligations pertain only to the "legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract." Under most circumstances, disclosure obligations would not generally flow to a non-signatory contractor's parent corporation, subsidiary or other affiliate entity. A contracting entity that is a division of a corporation, however, is required to report the corporation's violations. Additionally, each concern participating in a joint venture that is not itself a separate legal entity must separately comply with the certification and reporting obligations. Contractors will want to carefully review and disclose only those Labor Law decisions that they are required to report.

[3] See *id.*

II. Subcontractor's Disclosures Directly to DOL

The final rule and guidance, as well as E.O. 13673, now provide for direct reporting of violations by subcontractors to, and assessment of such violations by, the DOL (rather than the prime contractor). The rule further allows the prime contractor to rely on the DOL's findings regarding the subcontractor's violations in determining whether the subcontractor would be deemed a "responsible" source for contracting. Contractors, however, are still expected to notify subcontractors of their obligation to provide the requested information to the DOL, and subcontractors must provide the DOL's assessment to the prime contractor for an ultimate responsibility determination

III. Broadened Scope of Administrative Merits Decisions and Limitations to Civil Judgments

Despite significant comments from contractors, the final rule and guidance declined to amend the broad definitions of "administrative merits determinations", "civil judgments", and "arbitral awards or decisions," which include findings and decisions that are subject to challenge by contractors or to further review and judgments that are not final or are subject to appeal. In fact, the final rule and guidance actually broadened the scope of the reportable violations by incorporating additional violations.

The final rule and guidance define, for each of the 14 federal employment and labor statutes, what constitutes a "Labor Law decision" that must be reported. In the case of administrative merits determinations, reportable Labor Law decisions include non-final findings by administrative agencies that the agencies do not have the power to enforce absent court order and that are subject to further review by an Administrative Law Judge, the Administrative Review Board, and/or federal courts. For example, a reportable Labor Law decision includes an Equal Employment Opportunity Commission (EEOC) "letter of determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring." Likewise, the DOL's issuance of a WH–56 "Summary of Unpaid Wages" form indicating Wage and Hour Division's determination that back wages are due because of an FLSA violation, even if issued in connection with a settlement, must be reported, as must any letter from the DOL "indicating that an investigation disclosed a violation of the FLSA or a violation of the FMLA, SCA, DBA, or Executive Order 13658." An Office of Federal Compliance Programs (OFCCP) show cause notice for failure to comply with the requirements of affirmative action laws (Executive Order 11246, section 503 of the Rehabilitation Act, and VEVRAA) must be reported. In addition, a reportable administrative merits determination includes, from the NLRB, a "complaint issued by any Regional Director." Similarly, contractors must report any "complaint filed by or on behalf of an enforcement agency with a Federal or State court, an administrative law judge or other administrative judge alleging that the contractor or subcontractor violated any provision of the Labor Laws." Although such complaints have yet to be adjudicated, the guidance rejects arguments from the contractor community that "requiring contractors to report nonfinal and appealable allegations denies them due process" and "force[s] contractors to litigate a Labor Law violation in two separate fora—first, in front of the enforcement agency that has made the determination; and, second, by submitting mitigating circumstances to a contracting officer when submitting a bid." While acknowledging that this process subjects contractors to "additional costs," the final rule and guidance dismiss these concerns, asserting that a "very low percentage of administrative merits determinations are later overturned or vacated," and that "[e]xcluding these determinations would in many cases result in a particularly long delay between the prohibited conduct and the obligation to disclose.

In an apparent oversight, the language of the proposed rule and guidance was silent as to coverage for retaliation claims under OSHA and the FLSA. Specifically, the proposed guidance limited DOL wage and hour "determination letters" to enumerated sections of the FLSA related to minimum wage and overtime violations. The final rule and guidance explained that it never intended to narrow applicable violations under the FLSA. The final rule and guidance removed all limiting language and now indicates that an

administrative merits determination may include "determination letters" for *any* statutory provision of the FLSA. Additionally, the final rule clarified that the definition of administrative merits determination includes violations of the anti-retaliation provisions of OSHA and the FLSA.

The final rule did, however, narrow the definition of civil judgments by clarifying that temporary restraining orders and offers of judgment pursuant to Federal Rule of Civil Procedure 68 are not civil judgements that need to be reported.

IV. Moratorium on State Law Reporting Requirements Outside of OSHA-Approved State Plans Until Further Guidance is Provided

The final rule and guidance have delayed implementation of the controversial and far-reaching "state law equivalent" provision under covered laws. The final rule and guidance advise that the DOL will issue a comprehensive list of state laws that it proposes to include in the definition of reportable Labor Law decisions. Once issued, the DOL will institute an additional notice and comment period prior to implementation.

For now, contractors have at least some reprieve to be able to digest the federal reporting requirements prior to expanding into reporting of state law violations. The only exception to the state-law suspension is where there are violations committed under an OSHA-approved State Plan (which currently applies to approximately 28 states). Any such violations of state OSHA plans would need to be reported under the regular reporting scheme as of October 25, 2016. For more information on OSHA-approved State Plans, see the OSHA website.

V. Additional Illustrations of "Serious, Repeated, Willful and/or Pervasive" Conduct

Disclosed adverse determinations will only affect procurement decisions if the violation is deemed to be "serious, repeated, willful and/or pervasive" conduct by the contractor. The proposed definitions of what constitutes "serious, repeated, willful and/or pervasive" conduct remain generally unchanged, despite significant concerns from contractors. The final rule and guidance does provide additional guidance for the decision makers as well as more detailed illustrative examples in the Appendices of what could constitute a reportable violations and trigger a contractor's reporting obligations. The final rule and guidance also provide additional information related to what mitigating factors are to be considered in weighing the violations and making responsibility determinations. Some examples of mitigating factors include size of the employer, the severity of the violation, and other factors like internal reporting and resolution procedures, resolution of past violations and proactive remedial measures. The guidance also states that "the information that the contractor is challenging or appealing an adverse administrative merits determination will be carefully considered" by the ALCA.

The final rule and guidance further provide much-needed clarification regarding the role of the newly created ALCA position. The rule outlines the general process the ALCA will use in providing general guidance, evaluating reported labor law violations and advising the contracting officers on responsibility determinations. Generally, upon receipt of information regarding the reported violation, the ALCA will review the violation to determine whether it meets the "serious, repeated, willful and/or pervasive" standard. The final rule and guidance expressly provides that ALCA's are not to second guess or re-litigate labor law determinations or decisions of another adjudicating body and will generally rely on the information contained in the decisions themselves to determine severity. Next, the ALCA should weigh any violations meeting the standard against any of the mitigating factors described above or other information provided by the contractor. The ALCA is to consider all of the evidence presented with a holistic view in light of the totality of circumstances.

The final rule was also notably revised so that the ALCA has an ongoing role, outside of responsibility determinations, to provide input regarding a contractor's labor violations for the Contractor Performance Assessment Report (the CPAR). Specifically, FAR 42.1502(j) requires the CPAR to incorporate "an assessment of contractor's labor violation information" when a contract includes FAR 52.222–59. The CPARs are used in evaluations of a contractor during source selections for future awards.

It appears that federal agencies may assign the ALCA role as an additional responsibility to current senior staff. For example, the Department of Energy has announced that the position of Assistant General Counsel for Labor and Pension Law, described as "a career civil servant with sufficient authority to bring issues to the Deputy Secretary or other appropriate agency leadership as needed," will serve as its Labor Compliance Advisor with primary responsibility "for implementation of [E.O. 13673] within the agency and for promoting awareness of and respect for the importance of labor law compliance through their interactions with senior agency officials, contracting officers, and contractors."[4]

VI. Public Disclosure: Clarification on How Disclosures Will be Publicly Disseminated

While the proposed rule and guidance indicated that violation disclosures submitted to the contracting agency would be publicly available, it did not provide any additional guidance as to how this disclosure would operate and what specific information provided by the contractors would be publicly disclosed. The final rule and guidance provide that the following information will be publicly disclosed through the Federal Awardee Performance and Integrity Information System (FAPIIS): 1) the law violated; 2) the case or docket number; 3) the date of the adverse decision or determination; and 4) the name of the adjudicating body or arbitrator rendering the decision. The final rule clarifies that other documentation provided by a contractor would not be made public unless the contractor chooses to make it public.

Nonetheless, contractors are concerned about the loss of confidentiality. Much of the limited information disclosed through FAPIIS would not otherwise be publicly available. EEOC determinations, for example, are not subject to disclosure, even in response to a Freedom of Information Act request, except to the respondent or charging party,[5] and arbitration awards are generally confidential. This information will now become publicly available for covered contractors or subcontractors who make these disclosures. In other employment lawsuits brought under the same statutes as the reported violations, savvy plaintiffs' lawyers will be able to use such information as a road map to seek discovery of the details of those adverse determinations.

VII. Semi-Annual Reporting: Clarification on Obligations

The final rule provides a clarification that streamlines the reporting obligations by contractors and subcontractors. Specifically, the final rule permits contractors to integrate their semi-annual reports across all covered contracts. The unified semi-annual report will alleviate the reporting burden, instead of requiring contractors to file reports at exactly six-month intervals for each covered prime contract and subcontract.

Pressure to Settle: the National Labor Relations Board (NLRB) Memorandum re Collection of Data for E.O. 13673

The possible loss of federal contracts and public disclosure of otherwise confidential legal proceedings is sure to be used by enforcement agencies and plaintiffs alike as leverage to pressure contractors into

[4] See http://energy.gov/gc/labor-compliance-advisor.

[5] See https://www.eeoc.gov/eeoc/foia/qanda_foiarequest.cfm ("The confidentiality provisions of Title VII and the ADA prohibit EEOC employees from disclosing the charge file to 'members of the public,' individuals who are not parties to the charge").

settling claims. Indeed, the National Labor Relations Board has already taken steps to take advantage of its new settlement leverage.

In anticipation of the implementation of the Executive Order, the NLRB Office of General Counsel issued a memorandum (OM 16-23) on July 1, 2016 to all Regional Directors, Officers-in-Charge, and Resident Officers with instructions on collecting four data points from employers necessary to begin linking information within their internal database with that of other enforcement agencies. The additional data points include a charged employers CAGE number, DUNS number, DUNS number suffix and/or its EIN/TIN. Presumably this will provide faster access for contracting officers or ALCAs to be able to quickly ascertain a contractor's labor compliance history with the NLRB.

The memorandum includes as an attachment a proposed email to be sent by the NLRB to charged parties that notifies the charged party that a complaint will issue absent "prompt settlement." OM 16-23 (Attachment 2). The email informs the charged party that such information will be submitted to a "central database" accessible by ALCAs and used to determine whether employers should be disqualified from contracting with the federal government, but that "if you reach a settlement on this matter before the Region issues a complaint, such as by entering a pre-complaint informal settlement agreement with the Regional Director, no information on this case will be forwarded to this database." The NLRB's email simply makes explicit the risk calculations that contractors will now have to perform whenever faced with a charge or claim under any of the labor laws covered by the Executive Order: to settle, or to risk the consequences of an adverse determination—consequences that may overshadow the costs of legal defense or damages award from the claim itself.

Next Steps for Federal Contractors

Challenges to the final rule and guidance are all but guaranteed. Business groups have declared their intention to challenge the rule as a violation of their constitutional due process rights, because contractors could face of one or more contracts that they would have otherwise received as a result of a non-final adverse determination. In addition, Congress is considering the 2017 National Defense Authorization Act (NDAA) which would exempt Department of Defense contractors (the largest single group of contractors) from the enforcement provisions of E.O. 13673. There are also likely to be other legislative measures aimed at lessening the reporting burdens of this rule.

Until then, however, federal contractors have no choice but to gear up for the current regulations and guidance as published. We recommend that federal contractors consider the following strategies for handling these new requirements:

1. Take proactive measures to assess the scope and nature of what "administrative merits determinations," "civil judgments," and "arbitral awards or decisions" must be disclosed and whether they need to be disclosed based on the organizational structure.

2. If the contractor has an adverse Labor Law decision in the relevant period, begin gathering and documenting any mitigation or remediation efforts, in an effort to minimize the likelihood of a negative responsibility determination.

3. Review current legal compliance programs to ensure they are in full compliance and performing successfully.

4. Educate managers and workforce on the great importance of compliance with labor and employment laws to business success.

5. If arbitration is preferred for Title VII and similar claims, ensure that employees execute such agreements no later than October 25, 2016. In addition, arbitration agreements after October 25, 2016, should exclude contracting subsidiaries.

6. Consider whether it be possible or helpful to reorganize so that only some (or one) subsidiaries are the contractors.

7. Voluntary early assessment by the DOL may be an attractive option for contractors that have one or more adverse Labor Law decisions to report since October 25, 2015, and that have a strong case to make that such decisions do not reflect serious, repeated, willful, or pervasive noncompliance, especially if the contractors can point to remedial efforts taken since those adverse decisions. Contractors that enter the bidding process with a determination by the DOL that the contractor has a satisfactory record will have assurance that their bid will not be derailed by a negative responsibility determination, provided that the contractor avoids new adverse Labor Law decisions.

As always, contractors with questions about the applicability or interpretation of the final rule and guidance or how it will impact their business should contact a legal professional for further guidance.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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