

New "Blacklisting" Executive Order Will Increase Workplace Litigation, Add Unnecessary Subjectivity to Federal Contracting Process

Making Federal Contracts Contingent on the Lack of Labor Violations Significantly Increases the Leverage of Labor Unions, Plaintiffs' Lawyers and Other Pressure Groups to, in the Words of the White House, "Encourage Companies to Settle Existing Disputes"

On July 31, 2014, President Obama signed the "Fair Pay and Safe Workplaces" Executive Order (EO 13673, or EO), requiring 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. Federal contracting officers are then required to consider the 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. EO 13673 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. The EO also establishes new wage and hour reports to employees and independent contractors working on federal contracts.

Increased Leverage for Enforcement Agencies and Pressure Groups Although many of the details on how the new federal contracting processes will work have to be determined through regulations, they are likely to introduce additional subjectivity, distortion, and political influences into the process that has little to do with procuring high quality goods and services. By making contract awards, terminations and debarment contingent on the existence or lack thereof of labor violations, the EO has significantly increased the stakes of resisting union action and litigating employment disputes. Unions and plaintiffs' attorneys will have greater leverage to intimidate companies into quickly settling meritless complaints by holding the potential threat of the loss of government contracts over their heads. Indeed, a White House Fact Sheet issued at the time the EO was signed stated the new process is "structured to encourage companies to settle existing disputes." However, settlements that include a finding of guilt could, depending on Department guidance, constitute an administrative merits determination and subject the admitting contractor to potentially serious remedial action under the order. As the Department of Labor has increasingly refused to settle claims unless there is an employer admission of fault, many companies may choose to litigate labor violation claims that they may have otherwise been willing to settle to avoid such a costly admission.

Reporting of Labor Law Violations When bidding on a contract that exceeds \$500,000, prospective contractors must report whether they, or any of their potential subcontractors, have incurred any adverse administrative merits determinations, arbitral awards, or civil judgments within the past three years for any one of 14 federal employment and labor laws, and equivalent state laws. Contractors will also be given "an opportunity to disclose" any steps taken to correct violations and any agreements entered into with an enforcement agency.

The federal laws are:

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.

Once a contract is awarded, employers must update their reports every six months. The Department of Labor also will regularly inform agency contracting officers of its investigations of contractors and subcontractors on current federal contracts. Although the EO states that employers with labor law violations will be offered the opportunity to receive early guidance on whether those violations are potentially problematic and remedy any problems, it remains unclear how that process will work in practice, particularly for violations that have already been settled or for investigations and audits that may be ongoing.

Creation of New Compliance Czars Each federal agency will create a new “Labor Compliance Advisor,” who will provide “guidance” to agency contracting officers on whether an employer’s reported violations are serious, willful, repeat, or pervasive, and rise to the level of “a lack of integrity or business ethics” that could trigger an adverse contract award decision. The new Advisors must also advise the agency contracting officers whether appropriate agreements are in place or whether any remedial measures are needed to avoid further labor law violations.

Debarment and Other Remedial Measures Agency contracting officers, upon reviewing information regarding violations of labor laws will be empowered under the EO to take actions against a contractor including, “agreements [with contractors] requiring appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations.” Importantly, contracting officers will also have authority not to exercise an option on a contract, to terminate a contract, and to refer the contractor to the agency suspending and debarring official.

Prime Contractors Have to Police Their Subcontractors Generally, prior to awarding any subcontract worth more than \$500,000, contractors must obtain from each subcontractor a report listing any adverse administrative merits determination, arbitral award, or civil judgment within the past three years for any one of 14 federal employment and labor laws, and equivalent state laws, and then determine whether the subcontractor is “a responsible source that has a satisfactory record of integrity and business ethics.” Agency contracting officers, Labor Compliance Advisors, and/or other relevant enforcement agencies will be available to assist federal contractors in making these determinations. Once a contract is awarded, contractors must obtain updated reports from their subcontractors every six months, and then disclose those reports to the federal government. Notably, these reports can form the basis of a suspension or disbarment proceeding against a subcontractor.

III-Defined, Broadly Applicable Key Terms Under the EO, federal contractors and subcontractors must report any adverse administrative merits determination and the new Labor Compliance Advisors and agency contracting officers must review and “assess the serious,

repeated, willful, or pervasive nature of any violation.” However, “administrative merits determination” does not appear to be defined in employment or labor laws, but public sector disability nondiscrimination rules describe it as reflecting the “the results of [an] investigation,” “findings of fact and conclusions of law,” and “a remedy and/or corrective action.” 29 C.F.R. § 33.12. In the case of the “pervasive nature of any violation,” while the EO describes the term as depending on “the number of violations” or “the aggregate number of violations ... in relation to the size of the entity,” the Secretary of Labor may through further “guidance” expand on the meaning of this new standard.

Executive Order Ignores Challenges in Labor Law Compliance Even well intentioned employers, like the federal government have difficulty avoiding pervasive violations of certain employment laws. For example, one grievance brought against the Department of Labor involving the FLSA exempt status of more than 1,900 employees was ultimately settled with back pay awarded to a number of them. 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 EO 13673 requires employers to either disclose to individuals working on federal contracts what their FLSA overtime exempt status is, or track and disclose the hours these individuals work. It is not yet clear whether the Department of Labor’s long-delayed “Right-to-Know” rulemaking will be tied into this requirement. 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 EO 13673 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.

Effective Immediately Officially, the order is effective immediately; however, it will not apply to contract solicitations until the Department of Labor develops guidance on how to implement the order, and the Federal Acquisition Regulatory Council publishes a final implementation rule. In the meantime, interested parties can participate in listening sessions with the Labor Department, the Office of Management and Budget, and the White House to help shape outstanding interpretation and procurement process issues, including what will be the definitions of “administrative merits determination” and the “pervasive nature of any violation” in the final regulations.