

Labor and Employment Obligations & Considerations

NCMA Boston Chapter Workshop

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Overview

- Significant executive and regulatory activity in the last quarter of the Obama Administration

- Trends:
 - Reporting, compliance, and disclosure burdens
 - Increased DOL/OFCCP activity and oversight
 - **Broad scope**: commercial and non-commercial
 - **Low applicability thresholds**: many businesses will be affected

Noteworthy Executive and Regulatory Action

- Minimum wage and paid sick leave for federal contractor employees
- Additional protections for veterans, individuals with disabilities, and LGBT employees
- Protection for workplace discussions about compensation
- Affordable Care Act implementation
- “Independent contractor” definitions
- Human trafficking prohibitions
- **Fair Pay and Safe Workplaces (“The Blacklisting Order”)**

Minimum Wage for Federal Contractors

- As of January 1, 2016, the required minimum wage for covered contracts will be increased annually in tandem with the Consumer Price Index (**\$10.15** for calendar year 2016)
- Applicability: contracts and subcontracts entered since January 1, 2015 within four major categories:
 - Procurement contracts for construction covered by the **DBA**
 - Service contracts covered by the **SCA**
 - **Concessions** contracts
 - Contracts to provide **services in federal buildings** for federal employees or the general public

Paid Sick Leave for Federal Contractors

- Proposed regulations published February 25, 2016.
 - **Comments due March 28, 2016**
 - Final rule expected September 2016

- Coverage is essentially identical to minimum wage rules, but paid sick leave **also applies to employees who qualify for an exemption** under FLSA

- **“Double-counting”** prohibited; complications for employers who offer paid sick leave fringe benefits for SCA employees

- Sanctions for **“interference”** or **“discrimination”**:
 - miscalculating accrual
 - “discouraging” use of paid sick leave
 - diverting employee to a non-covered contract with malign intent
 - disclosing confidential information in a certification
 - requiring employee to find a replacement worker

White Collar Exemption Updates

■ **Key Provisions**

- Increases standard salary level from \$455 per week (\$23,660 per year) to **\$921 per week** (\$47,892 per year)
 - Increases **HCE exemption level to \$122,148** (90th percentile of full-time salaried workers)
 - **Automatic increases** for salary and compensation levels “to provide a useful and effective test for exemption”
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- Proposed rule published July 2015; comment period ended September 4, 2015
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- Final rule predicted summer 2016

Pay Transparency

- Outgrowth of Lilly Ledbetter Act and (failed) Paycheck Fairness Act
- Non-retaliation for pay disclosure: protects discussions about employee's or colleagues' compensation **“if they obtained that information through ordinary means”**
- Does **NOT** protect information that an employee obtained as part of his or her **“essential job functions”** (complete defense)
- **“General defense”** if contractor disciplined employee for violating a legitimate, “consistently and uniformly applied” rule (Example: standing on desk and shouting about pay violates rule against disruptive behavior)
- Covers new or modified contracts **greater than \$10,000**
- Applies to job **applicants** and current employees

Sexual Orientation and Gender Identity Protections

- Federal Civil Service: Adds “**gender identity**” (“T”) to provisions prohibiting sexual orientation discrimination (“LGB”)
- Federal Contractors: Adds “**sexual orientation and gender identity**” (“LGBT”) to provisions prohibiting employment discrimination by federal contractors and subcontractors, and federally assisted construction contracts and subcontracts
- Some items to bear in mind:
 - Confidentiality, especially with respect to medical status of transgender employees
 - Dress and grooming codes cannot reflect “gender stereotypes”

Human Trafficking Prohibitions

- Final Rule prohibits **all** federal contractors, employees, subcontractors, and other agents from engaging in human trafficking:
 - procuring forced labor or commercial sex acts
 - charging recruitment fees
 - failing to provide return transportation when required
 - destroying/withholding identity or immigration documents
- “**Immediate**” notification to CO and IG of “**credible information**” alleging a violation
- Contractors providing goods and services outside the United States under high-value contracts (>\$500K, non-COTS) must implement **compliance plans** and make new **certifications**
- Trafficking Prevention in Foreign Affairs Contracting Act (H.R. 400) would require USAID to propose a definition of “recruitment fees”

DOL Guidance Regarding “Independent Contractor”

“[M]ost workers are employees under the FLSA.”

Administrator’s Interpretation No. 2015-1, The Application of the Fair Labor Standards Act’s “Suffer or Permit Standard” (July 15, 2015)

- Myopic focus on worker’s “economic dependence” on one company
- Issued without notice-and-comment procedures
- **Wide-ranging consequences** to a determination of misclassification
 - Tax liability and penalties for failing to withhold income tax and pay employment tax
 - Affordable Care Act headcounts for “shared responsibility” excise tax are based on “employees”

Classification Notices to Workers

- Notice requirements under the Fair Pay and Safe Workplaces Executive Order (and proposed regulations and guidance): covered employers must provide **written documents to justify classification** decision
- Advantages to providing detailed classification notices:
 - Forestall investigations or inquiries by WHD
 - Bolster “good faith” mitigation factor in integrity & business ethics determination
 - Develop a record for litigation or enforcement action

Fair Pay and Safe Workplaces - Overview

- Executive Order 13673 (signed July 31, 2014)

- Key Provisions:
 - Contractors must **monitor and disclose violations** of labor and employment laws
 - Enhanced **responsibility determination** process
 - “**Labor Compliance Advisors**” in contracting agencies
 - Limitations on **mandatory arbitration** provisions

- Significant resistance from industry and Congress

Monitoring & Disclosure Obligations

- Pre-Award Requirements: “[E]ach agency shall ensure that provisions in solicitations require that the offeror represent, to the best of the offeror's knowledge and belief, whether there has been any **administrative merits determination, arbitral award or decision, or civil judgment**, as defined in guidance issued by the Department of Labor, rendered against the offeror within the **preceding 3-year period** for violations of **any of the following labor laws**”
- Post-Award Requirements: Ongoing duty to update disclosures every **six months**
- Contractors must incorporate monitoring and disclosure requirements into covered **subcontracts**

What Are the “Labor Laws”?

- FLSA
- OSHA
- Migrant and Seasonal Agricultural Worker Protection Act
- NLRA
- Davis-Bacon Act
- Service Contract Act
- Equal Opportunity Executive Order
- Rehabilitation Act (Section 503)
- Vietnam Era Veterans’ Readjustment Assistance Act
- FMLA
- Title VII of the Civil Rights Act of 1964
- ADA
- ADEA
- Minimum Wage Executive Order

... and “**equivalent State laws**”

Proposed FAR Council Rule & DOL Guidance

- **Broad definition of “administrative merits determination, arbitral award or decision, or civil judgment”**
 - Includes notices and findings that are not yet final
 - Not limited to results of adjudicative procedures
 - Includes complaints filed by enforcement agencies

- **Expansive concepts of “serious, repeated, willful, or pervasive”**
 - Disjunctive test = four paths to problems
 - “Willful” does not just mean “purposeful”; also includes the concepts of knowledge, “reckless disregard,” and “plain indifference”

- **Mitigation factors may require “double-litigation”**

Disclosure Mechanics

- Applicability:
 - Contracts for goods and services (including construction) with estimated value higher than \$500,000
 - Subcontracts where the estimated value of the supplies acquired and services required exceeds \$500,000 (and **not** for COTS items)

- Online Disclosure: GSA “shall develop a **single Web site** for Federal contractors to use for all Federal contract reporting requirements related to this order, as well as any other Federal contract reporting requirements to the extent practicable.”

- Disclosures will also be reported in **FAPIIS**

Responsibility Determination

- **“In consultation with the agency's Labor Compliance Advisor, contracting officers shall consider the information provided ... in determining whether an offeror is a **responsible source** that has a **satisfactory record of integrity and business ethics**”**
- Potential SDO Involvement: “As appropriate, contracting officers in consultation with the Labor Compliance Advisor shall send information provided [in disclosures] to the agency **suspending and debarring official** in accordance with agency procedures.”

Mitigation

- “A contracting officer, prior to making an award, shall, as part of the responsibility determination, provide an offeror ... **an opportunity to disclose any steps taken to correct the violations of or improve compliance** with the labor laws listed in paragraph (i) of this subsection, including any agreements entered into with an enforcement agency.”
- “The agency's **Labor Compliance Advisor** ... in consultation with relevant enforcement agencies, **shall advise the contracting officer** whether agreements are in place or are otherwise needed to address **appropriate remedial measures**, compliance assistance, steps to resolve issues to avoid further violations, or other related matters.”

Arbitration Restrictions

- Contractors and employers seeking contracts may not mandate arbitration for these claims:
 - **Title VII**
 - **sexual assault**
 - **harassment**

- Applicability: Contracts and subcontracts for goods or services where the estimated value **exceeds \$1 million**
 - Does **not** apply to COTS contracts or subcontracts
 - Does **not** apply to collectively bargained employees
 - Does **not** override otherwise valid mandatory arbitration clauses in pre-existing contracts (i.e., those in place before bidding on a contract covered by this Executive Order)
 - **DOES** apply if the contractor can change the terms of the pre-existing contract, or when the contract is renegotiated or replaced

Initial Court Challenges Have Been Unsuccessful

- Regulations expanded data-collection obligations for contractors hiring individuals with disabilities (under Section 503 of the Rehabilitation Act of 1973)
- Trade association challenged regulations as an excess of Labor Department's authority, and as "arbitrary and capricious"
- **December 2014:** Challenges were **rejected** by the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit. *Associated Builders & Contractors, Inc. v. Shiu*, No. 14-5076 (D.C. Cir. Dec. 12, 2014)

Navigating the Maze

- Review and update **compliance, disclosure policies**
- Designate an “**internal LCA**” to coordinate data collection and reporting
- Prime contractors: review and revise **supply agreements**
- Consider offensive and defensive use in **bid protests**
- Consider **impact on settlement negotiations** (settled matters may not be reportable, and may therefore be more attractive)

Questions and Discussion

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