Insight

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Taking a Closer Look at the New Federal Contractor "Blacklisting" Obligations

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On August 25, 2016, the Federal Acquisition Regulatory (FAR) Council published in the Federal Register its highly anticipated Final Rule[1] regarding the so-called "blacklisting" procedures for federal contractors President Obama ordered in his Fair Pay and Safe Workplaces Executive Order (EO) Number 13673. Accompanying the Final Rule was separate Final Guidance[2] the Department of Labor (DOL) issued to help employers interpret the new Rule. The Rule becomes partially effective on **October 25, 2016**, with phased-in disclosure requirements, while the paycheck transparency obligations take effect on January 1, 2017. This timeline leaves government contractors just two months to sift through the new Rule, perform internal compliance audits, and prepare for the implementation deadline. While the Final Rule largely adopts the language contained in the May 23, 2015 proposed rule,[3] it includes some key differences, which are discussed in more depth below.

As predicted, the Final Rule and DOL Guidance impose multiple new recordkeeping and disclosure obligations on government contractors that may greatly increase the risks that such contractors will confront in performing services for the federal government. In response to criticism that the EO, and the Rule and Guidance implementing it, exceed the President's constitutional authority, and possibly to try to insulate the EO against litigation, the White House released an amendment[4] to the

1 Defense Department, General Services Administration, and the National Aeronautics and Space Administration, *Federal Acquisition Regulation: Fair Pay and Safe Workplaces*, 81 Fed. Reg. 58562 -58651 (Aug. 25, 2016).

2 Department of Labor, *Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces"*, 81 Fed. Reg. 58653 -58768 (Aug. 25, 2016).

3 *See* Linda Jackson, *Agencies Issue Proposed Rule, Guidance on Blacklisting Executive Order*, Littler Insight (May 27, 2015).

4 The White House, Office of the Press Secretary, *Executive Order – Amendment to Executive Order 13673*, (Aug. 23, 2016).

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EO immediately prior to the release of the Final Rule. While the Final Rule clarifies many of the new obligations for government contractors under the EO, it also leaves many questions unanswered—questions that will, undoubtedly, be slow to work themselves out, either through litigation and/or additional rulemaking.

Recap of the EO's Requirements

The Final Rule provides guidance for the EO's broad requirements that:

- Companies bidding on federal contracts for goods and services (including construction) worth more than $500,000 must, for the first time, disclose violations of 14 federal labor laws and their state law equivalents that occurred in the past three years;
- Senior agency officials will be selected by contracting agencies to act as agency labor compliance advisors (ALCAs), who are supposed to assist compliance officers in determining whether contractors' actions "rise to the level of a lack of integrity or business ethics";
- Contractors and subcontractors must provide updated disclosures of their violations every six months;
- Each pay period, employers with federal contracts for goods and services (including construction) worth more than $500,000 must, for the first time, report to their employees detailed information (including hours worked, overtime hours, pay, and any additions to/subtractions from pay), and incorporate this requirement into qualifying subcontracts worth more than $500,000; and
- For goods and services contracts worth more than $1 million, contractors will be prohibited from arbitrating Title VII claims, as well as sexual assault and sexual harassment claims, unless the complaining employee agrees to arbitration after the claim arises. Contracts will be obligated to incorporate this requirement into qualifying subcontracts worth more than $1 million.

Primary Changes in the Final Rule

The Final Rule contains several significant changes from the FAR Council's proposed rule. Among the key differences between the proposed rule and the Final Rule are the applicable time periods for disclosures. Under the Final Rule, the disclosure requirements will be gradually phased in as follows:

- For the first year—October 25, 2016 through October 24, 2017—only prime contractors must make the required disclosures;
- For the first six months—October 25, 2016 to April 24, 2017— prime contractors need only make disclosures in response to solicitations (and resulting contracts) with an estimated value of $50 million or more. Starting on April 25, 2017, the prime contractor disclosure requirements will apply to all solicitations (and resulting contracts) with an estimated value greater than $500,000;
- The Final Rule phases in the three-year look-back period for reporting. Disclosure must be made for decisions rendered during "the period beginning on October 25, 2015 to the date of the offer, or for 3 years preceding the date of the offer, whichever period is shorter." FAR 55.222-57(c). In effect, this results in contractors having to disclose labor law violations received within the first year preceding the submission of a contract bid. The reporting obligation will be phased in, so the full three-year look-back period will not take effect until October 25, 2018;
- Subcontractors do not need to make any disclosures until **October 25, 2017**, at which point disclosures are required for any solicitation (or resulting contract) valued at greater than $500,000, other than subcontracts for COTS ("commercially available off the shelf") items;

- Under the Final Rule, contractors and subcontractors on contracts awarded prior to the October 25, 2016 effective date of the Final Rule will not be required to disclose labor law violations at all, not even after the effective date of the Final Rule.

The Final Rule also altered subcontractor disclosures. Instead of reporting labor law violations to the prime contractor, subcontractors must disclose any reportable labor law violations directly to the DOL. The DOL will then issue an assessment regarding the reported violations and provide the assessment to the subcontractor at issue. If the subcontractor disagrees with the DOL's assessment, the subcontractor is required to inform the prime contractor and provide its rationale regarding the disagreement. If the subcontractor is found responsible for a labor law violation, the prime contractor must provide an explanation to the contracting officer ("CO") -- who is responsible for, among other things rendering a responsibility determination regarding bidders on a contract. Prime contractors will, however, still have to make subcontractor responsibility determinations pursuant to FAR 9.104-4(a), which will necessarily include an evaluation of past labor law violations. The Final Rule expressly requires that prime contractors exercise "due diligence when evaluating and selecting among prospective subcontractors." If prime contractors decide to enter into or continue subcontracts with a subcontractor the DOL has advised needs a "labor compliance agreement," and the subcontractor disagrees with the DOL's assessment, the prime contractor is required to inform the CO. A similar process will be followed for subcontractor updates during the performance of the applicable contract. The Final Rule further clarifies that a contractor, acting in good faith, is not liable for misrepresentations made by its subcontractors regarding labor law decisions or labor compliance agreements.

Disclosure Requirements

Under the EO, federal contractors—both prime contractors and subcontractors—submitting bids on solicitations meeting the disclosure threshold (described below) must disclose to the contracting agency any violations of the following 14 federal labor laws (collectively, "labor laws"):

- The Fair Labor Standards Act (FLSA);
- The Occupational Safety and Health Act of 1970 (OSH Act);
- The Migrant and Seasonal Agricultural Worker Protection Act (MSPA);
- The National Labor Relations Act (NLRA);
- The Davis-Bacon Act (DBA);
- The Service Contract Act (SCA);
- Executive Order 11246 (Equal Employment Opportunity);
- Section 503 of the Rehabilitation Act of 1973;
- The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA);
- The Family and Medical Leave Act (FMLA);
- Title VII of the Civil Rights Act of 1964 (Title VII);
- The Americans with Disabilities Act of 1990 (ADA);
- The Age Discrimination in Employment Act of 1967 (ADEA); and
- Executive Order 13658 (Establishing a Minimum Wage for Contractors).

In addition to the labor laws, the EO also mandates that contractors must disclose violations of "equivalent State laws, as defined in guidance issued by the [DOL]." With the exception of OSHA-approved state plans

included in the Final Rule and the DOL Guidance, DOL has yet to identify or define "equivalent State laws." These disclosure requirements will be phased in following an additional notice and comment period.

There is some potential ambiguity regarding the extent to which a contractor is required to report violations committed by other entities related to the contractor. According to the Final Rule, the disclosure requirements are dependent upon the legal entity bidding for the particular solicitation. Consequently, it appears from the rule that if the contractor bidding on the solicitation has a parent corporation, a subsidiary corporation, or a sister corporation, the contractor need only disclose labor law violations for itself, and not for any other legal entity (whether parent, subsidiary, or sister). However, the Final Rule also states that COs are "require[d]" to continue "consider[ing] all relevant information when reviewing a contractor's responsibility—including the past performance and integrity of a contractor's affiliates when they affect the prospective contractor's responsibility." While these two aspects of the DOL Final Guidance appear somewhat contradictory, it seems that they can be reconciled by virtue of the fact that the contractor is not required to report violations of its affiliated entities, but the CO is still required to consider the contractor's affiliates' integrity issues, to the extent those integrity issues are known by the CO.

What Constitutes A Reportable Violation?

The Final Rule defines "violation" as (i) administrative merits determinations; (ii) awards or decisions from an arbitration; or (iii) civil judgments. The Final Rule and DOL Final Guidance broadly interpret the definition of "violation." As a result, regardless of which type of violation is at issue, the only instance in which contractors and subcontractors are relieved from the reporting requirements is if the determination that there was a violation of labor law has been reversed or vacated.

Administrative Merits Determination

Administrative merits determinations are issued by enforcement agencies. An enforcement agency is defined as any agency that administers the federal labor laws, such as the DOL, the Occupational Safety and Health Review Commission, the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission, as well as any state agency designated to administer an OSHA-approved state plan. Once the DOL determines and identifies the equivalent state laws that will also require disclosure, then the state agencies tasked with enforcing those laws will also be included as "enforcement agenc[ies]." As mentioned above, the DOL will be issuing separate guidance, followed by a notice and comment period and FAR amendment, regarding the state equivalent laws. An administrative merits determination is defined as any notice or finding (final, or subject to appeal or further review) issued after a full investigation by the relevant enforcement agency that indicates the contractor violated any provision of the enumerated labor laws.

The DOL Final Guidance adopted nearly the same list of what constitutes an "administrative merits determination" as presented in the Proposed Guidance. Despite numerous comments raising due process concerns and the non-final nature of these decisions, the DOL stood by its previous position and made limited changes. For example, the DOL in its Final Guidance cited Littler's Workplace Policy Institute's comment, which characterized an NLRB Regional Director's complaint as "being based on investigatory findings without judicial or quasi-judicial safeguards." Nonetheless, the DOL retained the definition of administrative merits determinations for NLRA violations as proposed.

Under the Final Rule, the following will be considered reportable administrative merits determinations:

DOL's Wage and Hour Division:

- a WH-56 "Summary of Unpaid Wages" form;
- a letter indicating that an investigation disclosed a violation of ANY provision of the FLSA,[5] or a violation of the FMLA, SCA, DBA, or Executive Order 13658;
- a WH-103 "Employment of Minors Contrary to The Fair Labor Standards Act" notice;
- a letter, notice, or other document assessing civil monetary penalties;
- a letter that recites violations concerning the payment of special minimum wages to workers with disabilities under section 14(c) of the FLSA or revokes a certificate that authorized the payment of special minimum wages;
- a WH-561 "Citation and Notification of Penalty" for violations under the OSHA's field sanitation or temporary labor camp standards; or
- an order of reference filed with an administrative law judge.

Occupational Safety and Health Administration (OSHA) or any state agency designated to administer an OSHA-approved state plan:

- a citation;
- an imminent danger notice;
- a notice of failure to abate; or
- any state equivalent.

Office of Federal Contract Compliance Programs (OFCCP):

- a show cause notice for failure to comply with the requirements of Executive Order 11246,
- Section 503 of the Rehabilitation Act, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, or the
- Vietnam Era Veterans' Readjustment Assistance Act of 1974.

Equal Employment Opportunity Commission (EEOC):

- a letter of determination that reasonable cause exists to believe that an unlawful employment practice (including retaliation) has occurred or is occurring.[6]

National Labor Relations Board (NLRB):

- a complaint issued by any Regional Director.

Other:

- a complaint filed by or on behalf of an enforcement agency with a federal or state court, an administrative judge, or an administrative law judge alleging that the contractor or subcontractor violated any provision of the labor laws; or
- any order or finding from any administrative judge, administrative law judge, the DOL's Administrative Review Board, the Occupational Safety and Health Review Commission or state equivalent, or the

5 In the Proposed Guidance, this provision was limited solely to letters indicating that an investigation disclosed a violation of sections six and seven of the FLSA. Upon commentary indicating the omission of findings of retaliation by the DOL, this provision was expanded to include a letter indicating the violation of *any* provision of the FLSA.

6 The Proposed Guidance included "a civil action filed by the EEOC" as well. Recognizing that this was redundant in light of its definition of "a complaint filed by or on behalf of an enforcement agency with a federal or state court . . .", the Final Guidance omits this language.

National Labor Relations Board, that the contractor or subcontractor violated any provision of the labor laws.

As seen from the above list, the Final Rule requires contractors to report many types of administrative determinations that are not final, even where no hearing has been held and no ultimate agency determination has been issued or reviewed by the courts. While many commentators expressed concern that the disclosure of non-final determinations violated due process rights, the DOL dismissed those concerns. The DOL reasoned that because the disclosure of labor law violations was merely the first step in the process, not all labor law violations disclosed will factor into the ALCA's written reports; only those violations that are categorized as serious, repeated, willful, and/or pervasive will carry the most weight.

The Final Rule states that when contractors and subcontractors report administrative merits determinations, they may also submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the determination has been challenged). Additionally, contractors and subcontractors will have "opportunities" to provide information regarding any mitigating factors.

Civil Judgments

Civil determination means any judgment or order – including appealable judgments – entered by any federal or state court, in which the court determined that the contractor or subcontractor violated any provision of the labor laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the labor laws. The definition covers private suits resolved by jury trial, bench trial, or the granting of summary judgment, as well as preliminary injunctions for labor law violations, consent judgments, and default judgments. A private settlement where the lawsuit is dismissed by the court without any judgment being entered is not a civil judgment. The Final Rule and DOL Guidance also clarify that civil judgments do not include temporary restraining orders and offers of judgment pursuant to Federal Rule of Civil Procedure 68.

Arbitral Awards or Decisions

An arbitral award or decision is defined as any award or order by an arbitrator or arbitral panel where the contractor or subcontractor was found to have violated labor laws. This includes an award or order that is not final or is subject to being confirmed, modified, or vacated by a court, and also covers arbitral proceedings that were private or confidential.

Reporting Requirements

Under the Final Rule and Final Guidance, when a contractor or subcontractor submits a bid on a contract, it will first report whether any violations have been rendered against it, without more detail. Only if the bidder reaches the stage of the procurement process where the CO renders a responsibility determination regarding that bidder, will the bidder be required to provide additional information as to each of the violations it disclosed. This additional information is as follows: "the labor law that was violated; the case number, inspection number, charge number, docket number, or other unique identification number; the date that the determination, judgment, award, or decision was rendered; and the name of the court, arbitrator(s), agency, board, or commission that rendered it." The Final Rule requires prospective contractors to publicly disclose whether they have violations of covered laws within the reporting period and, for prospective contractors being evaluated for responsibility, this additional information about such violations.

At this point, if not previously voluntarily disclosed, the contractor can provide mitigating circumstances and remedial efforts. The agency will then determine whether the bidder "is a responsible source that has a satisfactory record of integrity and business ethics." This determination will be made by the agency's CO in concert with the ALCA, and will be driven by whether the violations reported were "serious", "repeated",

"willful" or "pervasive." Like the Proposed Rule, the Final Rule further requires COs to report information received through this process to their agency's suspending and debarring official, as required by their agency's procedures.

In an effort to assist contractors, the DOL will launch a "pre-assessment process" the week of September 12, 2016, whereby contractors may come to the DOL to discuss their past labor laws compliance outside and apart from a particular contract bidding opportunity. As of the time of publication, the DOL's website describing the pre-assessment process contains limited details.

The Parameters of Violations

The Final Rule and the DOL Final Guidance attempt to define whether violations are "serious", "willful", "repeated", or "pervasive", as required by the EO. Congress has already defined some of these terms in the labor laws covered by the new rules, but some terms, such as "pervasive," do not appear in any of the statutes.

Under the Final Rule and Final Guidance, a violation will be deemed to be "**serious**" if it involves the violation of any one of the listed criteria. The Final Rule has broken up this category into two subparts:

- An OSHA or OSHA-approved state plan citation specifically designated as serious,
- Other violations of labor laws—including non-citation OSHA violations— will be "serious" if the violation meets the following criteria:
    - The violation affects at least **10** of the company's workers at the worksite, and the affected workers made up at least 25% of the workforce overall;
    - Fines and penalties of at least $5,000 were assessed, or back wages of at least $10,000 were due. Note that the threshold amounts are measured by the amount "assessed" – so even if an administrative merits determination of $7,000 is lowered to a $4,000 settlement, for example, the fine will be considered a "serious" violation. Additionally, these thresholds are cumulative, and can be satisfied by aggregating the fines and penalties/ back wages assessed for all affected workers;
    - The contractor's or subcontractor's conduct violated any labor law and caused or contributed to the death or serious injury (defined as requiring the care of a medical professional beyond first-aid treatments or results in more than five days of missed work) of one or more workers;
    - OSHA or OSHA-approved state plan issues a notice of failure to abate an OSH Act violation, or an imminent danger notice was issued under the OSH Act or an OSHA-approved state plan;
    - Employment of a minor who was too young to be legally employed or was employed in violation on a Hazardous Occupations Order;
    - The contractor or subcontractor engaged in an adverse employment action (including discharge, refusal to hire, suspension, demotion, or threat), retaliation (adopting the Burlington Northern standard)[7] or is responsible for unlawful harassment against one or more workers for exercising any right protected by any of the labor laws;
    - The findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor engaged in a pattern or practice of discrimination or systemic discrimination;
    - The findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor "interfered" with the enforcement agency's

7 Under *Burlington Northern*, to prove retaliation under Title VII, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

investigation. In the Final Guidance, the DOL expressly defined the only two situations that would constitute "interference"; or

- The contractor or subcontractor breached the material terms of any agreement or settlement entered into with an enforcement agency, or violated any court order, any administrative order by an enforcement agency, or any arbitral award.

The Final Rule expressly defines a "**repeated**" violation as any of those listed immediately below.[8]

- For a violation of the OSH Act or an OSHA-approved State Plan that was enforced through a citation or an equivalent state document, the citation at issue was designated as "repeated," "repeat," or any equivalent state designation and the prior violation that formed the basis for the repeated violation became a final order of the OSHRC or equivalent state agency no more than three years before the repeated violation;
- For all other labor law violations, the contractor has committed a violation that is the same as or substantially similar to a prior violation of the labor laws that was the subject of a separate investigation or proceeding arising from a separate set of facts, and became uncontested or adjudicated within the previous three years. The following is an exhaustive list of violations that are substantially similar to each other for these purposes:

For the FLSA:

- Any two violations of the FLSA's child labor provisions.
- Any two violations of the FLSA's provision requiring break time for nursing mothers.

For the FLSA, DBA, SCA, and Executive Order 13658:

- Any two violations of these statutes' minimum wage, subminimum wage, overtime, or prevailing wages provisions, even if they arise under different statutes.

For the FMLA:

- Any two violations of the FMLA's notice requirements.
- Any two violations of the FMLA other than its notice requirements.

For the MSPA:

- Any two violations of the MSPA's requirements pertaining to wages, supplies, and working arrangements.
- Any two violations of the MSPA's requirements related to health and safety.
- Any two violations of the MSPA's disclosure and recordkeeping requirements.
- Any two violations related to the MSPA's registration requirements.

For the NLRA:

- Any two violations of the same numbered subsection of section 8(a) of the NLRA.

For Title VII, section 503 of the Rehabilitation Act of 1973, the ADA, the ADEA, section 6(d) of the FLSA (known as the Equal Pay Act, 29 U.S.C. 206(d)), Executive Order 11246 of September 24, 1965, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974:

8 This language is quoted directly from the Final Guidance, 347-48.

- Any two violations, even if they arise under different statutes, if both violations involve: (1) the same protected status, and (2) at least one of the following elements in common: (a) the same employment practice, or, (b) the same worksite.

For all of the labor laws, including those listed above, even if the violations arise under different statutes:

- Any two violations involving retaliation;
- Any two failures to keep records required under the labor laws; or
- Any two failures to post notices required under the labor laws.

A violation is "**willful**" if:

- For purposes of a citation issued pursuant to the OSH Act or an OSHA-approved state plan, the citation at issue was designated as willful or any equivalent state designation (i.e., "knowing"), and the designation was not subsequently vacated;
- For purposes of the FLSA (including the Equal Pay Act), the administrative merits determination sought or assessed back wages for greater than two years or sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding the contractor or subcontractor liable for back wages for greater than two years or affirming the assessment of civil monetary penalties for a willful violation;
- For purposes of the ADEA, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages;
- For purposes of Title VII or the ADA, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor or subcontractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual; or
- For purposes of any of the other labor laws, the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor knew that its conduct was prohibited by any of the labor laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the labor laws.

Finally, violations are "**pervasive**" if they show a pattern of serious or willful violations that reflects "a basic disregard by the contractor for the labor laws." In other words, there must be multiple violations, although "the number of violations necessarily depends on the size of the contractor or subcontractor, because larger employers, by virtue of their size, are more likely to have multiple violations." Violations need not have had similar requirements under labor laws, unlike repeated violations. Additionally, pervasive violations can have arisen in the same proceeding or investigation – such as multiple but different OSH Act violations discovered in the same investigation. Violations under many different labor laws are also indicative of pervasiveness.

Each contractor's disclosed violations will be "assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractors, and any mitigating factors." In an effort to assuage contractors about the effects of this evaluation process, the DOL explained "that to serve as the basis for a determination that a violation is serious, repeated, willful, and/or pervasive, the relevant criteria must be readily ascertainable from the labor law decision itself. This means that ALCA should not second-guess or re-litigate actions or the decisions of reviewing officials, courts, and arbitrators." It is yet to be determined what the effects of this disclosure and evaluation process will be in actuality.

The Final Guidance contains a table of examples showing the changes made from the Proposed Guidance.

Assessing Violations and Mitigation

Of particular concern to contracting officers are pervasive violations, violations that meet two or more of the categories above, violations reflected in final orders, and violations of "particular gravity." A difference between the Proposed Guidance and the Final Guidance is the treatment of an award of injunctive or equitable relief against a contractor or subcontractor. In the Proposed Guidance, such an award was treated, in and of itself, as a "serious violation." In the Final Guidance, the DOL recognized that the grant of injunctive relief as a remedy is rare, and therefore "the ALCA should take this into account as a factor that increases the significance of that violation to the contractor's overall record of labor law compliance."

In determining whether a bidder has a satisfactory record of integrity and business ethics, the CO must also consider any corrective steps that the bidder has already taken to correct the violations, including steps to prevent their recurrence (including those taken pursuant to any agreements entered into with the relevant enforcement agency), as well as information communicated by the respective enforcement agency itself regarding necessary remedies, compliance assistance, or future corrective actions. Other mitigating factors include recent legal or regulatory changes, good faith, and a significant period of compliance following violations. Excluded from consideration are violations that are "inadvertent or minimally impactful." The Guidance explains that a "labor compliance agreement" may be warranted where the ALCA has concluded that a contractor has an unsatisfactory record of labor law compliance. Although DOL noted that commenters raised the concern that a contractor may feel pressured to negotiate or sign a labor compliance agreement and forgo a challenge to a non-final administrative merits determination in order to receive a pending contract, the Department did not modify the Final Guidance to address this concern.

Successful bidders must update their disclosures every six months during the pendency of the contract. Using the updated disclosures, as well as "similar information obtained through other sources," COs would be empowered to take remedial measures up to and including contract termination and referral to the agency's suspending and debarring official. The Final Rule provides that this update can be done universally, and need not be done on a contract-by-contract basis. If the bidder/ award recipient is a joint venture that is not itself a separate entity, then each concern in the joint venture must separately comply with the pre- and post-award disclosure requirements.

Additional Discussion of Paycheck Transparency Provisions

In addition to requiring contractors to disclose violations of labor laws, the Final Rule also requires contractors holding federal contracts for goods and services (including construction) worth more than $500,000 to provide certain information to employees with each paycheck. This provision has long been sought by labor unions and employee advocacy groups but had been rejected by previous administrations as unduly burdensome and likely to increase litigation challenges. Although the DOL's so-called "Right-to- Know" rulemaking remains a separate item on the Department's long-term regulatory agenda, the blacklisting Final Rule effectively applies it to government contractors.

The new Final Rule requires all government contractors to include with each of their employees' paychecks the following information:

- the number of hours worked during the period for which overtime is calculated and paid;
- the number of overtime hours worked during the period for which overtime is calculated and paid;
- rate of pay;
- gross pay; and
- any additions to or subtractions from pay (like bonuses, awards and shift differentials).

Hours worked would not be required to be provided to employees who are exempt from the overtime compensation requirements of the FLSA, provided the contractor has informed the employees of their exemption status. If the worker is not fluent in English, then the statement must also be in the language(s) other than English in which the significant portion(s) of the workforce is fluent.

For independent contractors for whom contractors must maintain wage records under the FLSA, the DBA, the SCA, or equivalent state laws, a document informing the individual of his or her independent contractor status must be provided. This document must be given before the worker performs any work under the contract, and must be separate from any contract entered into between the contractor or subcontractor and the independent contractor. The first notice must be provided as of the effective date of the notice requirement, and thereafter each time the independent contractor is engaged to perform work under each covered contract. It is important to note that the determination of independent contractor status under a particular law is governed by that law's definition of employee.

Contractors are further required to incorporate this requirement into qualifying subcontracts worth more than $500,000, and to inform independent contractors of their status, in writing.

These pay notice requirements, like the disclosure requirements, also are being phased-in. Under the Final Rule, contractors and subcontractors on contracts awarded prior to the January 1, 2017 effective date of this provision will not be required to issue the wage statements and independent contractor notices at all, not even after the effective date of the Final Rule. This requirement only becomes effective with new solicitations that include these requirements.

Additional Discussion of Arbitration Provisions

Finally, the Final Rule prohibits contractors from agreeing with employees in advance to arbitrate certain civil rights claims, provided the contractor has a contract for goods and services worth more than $1 million. This provision of the Final Rule covers all claims arising under Title VII, as well as all tort claims related to sexual assault or harassment. Contractors would be able to arbitrate such claims only if the employee filing the claim voluntarily agrees to arbitration after the dispute arises. Contractors are required to include this provision in subcontracts worth $1 million or more.

This prohibition of pre-claim arbitration agreements does not apply in three circumstances. First, if a contractor's employees are covered by a collective bargaining agreement that the contractor negotiated with a labor organization, the contractor would not be bound by this provision. Second, agreements to arbitrate such claims, if signed before the contractor or subcontractor became covered by this provision of the Final Rule, would still be valid – unless the contractor or subcontractor has the ability to change the terms of the contract. This latter exception expires "when the contract is renegotiated or replaced." Third and finally, the prohibition of pre-claim arbitration agreements does not apply to contractors who are providing commercial items or commercially available off-the-shelf items.

Until now, only defense contractors had been prevented from requiring such arbitration agreements. The new Final Rule's broader restriction on government contractors' use of the arbitration process appears to conflict with the U.S. Supreme Court's decision in *CompuCredit v. Greenwood*, and other similar rulings upholding the enforceability of arbitration agreements under the Federal Arbitration Act.

Conclusion

The EO, the Final Rule, and the DOL Final Guidance represent a significant change in federal contracting practices. While much regarding the actual effects of these new requirements will undoubtedly unfold over time, and legal challenges are likely, it is expected that the EO will increase contracting costs and may delay necessary procurement decisions. The "blacklisting" provision would enable federal agencies to reject

a bid or cancel an existing contract – as well as initiate suspension and debarment proceedings – based on violations that a contractor may have already resolved or that have not been fully adjudicated. This pre-award review may result in uncertainty for both contractors and the government, and delay the procurement process.

The threat of cancellation, suspension, and debarment of contracts may also significantly impact contractors' approaches to charges, demands, and matters pending before enforcement agencies, perhaps forcing contractors to settle matters rather than seeking vindication of their position and thereby risking a reportable "violation" that could affect their contract rights. The cost of compliance will be high, and may skew particularly against small contractors, who have more limited resources, and may deter new contractors from choosing to compete for and perform government contracts. Furthermore, the Final Rule explains that while inadvertent mistakes in the disclosure process will likely not result in additional False Claims Act exposure, any intentional or knowing failure to disclose, or make a representation, could possibly result in FCA liability.

Next Steps

Littler will hold a complimentary webinar on Thursday, September 8, 2016, at 10:00 a.m. PT/ 1:00 p.m. ET to discuss the Final Rule and the DOL Guidance. Littler will also continue to provide updates on any new developments regarding the EO, the Final Rule, and the Final Guidance.[9]

9 Littler's Workplace Policy Institute, in conjunction with its Government Contractors Industry Group and Whistleblowing and Corporate Ethics Practice Group, have been engaged in voicing the concerns of the contractor community with the Administration, in Congress, and in the courts.