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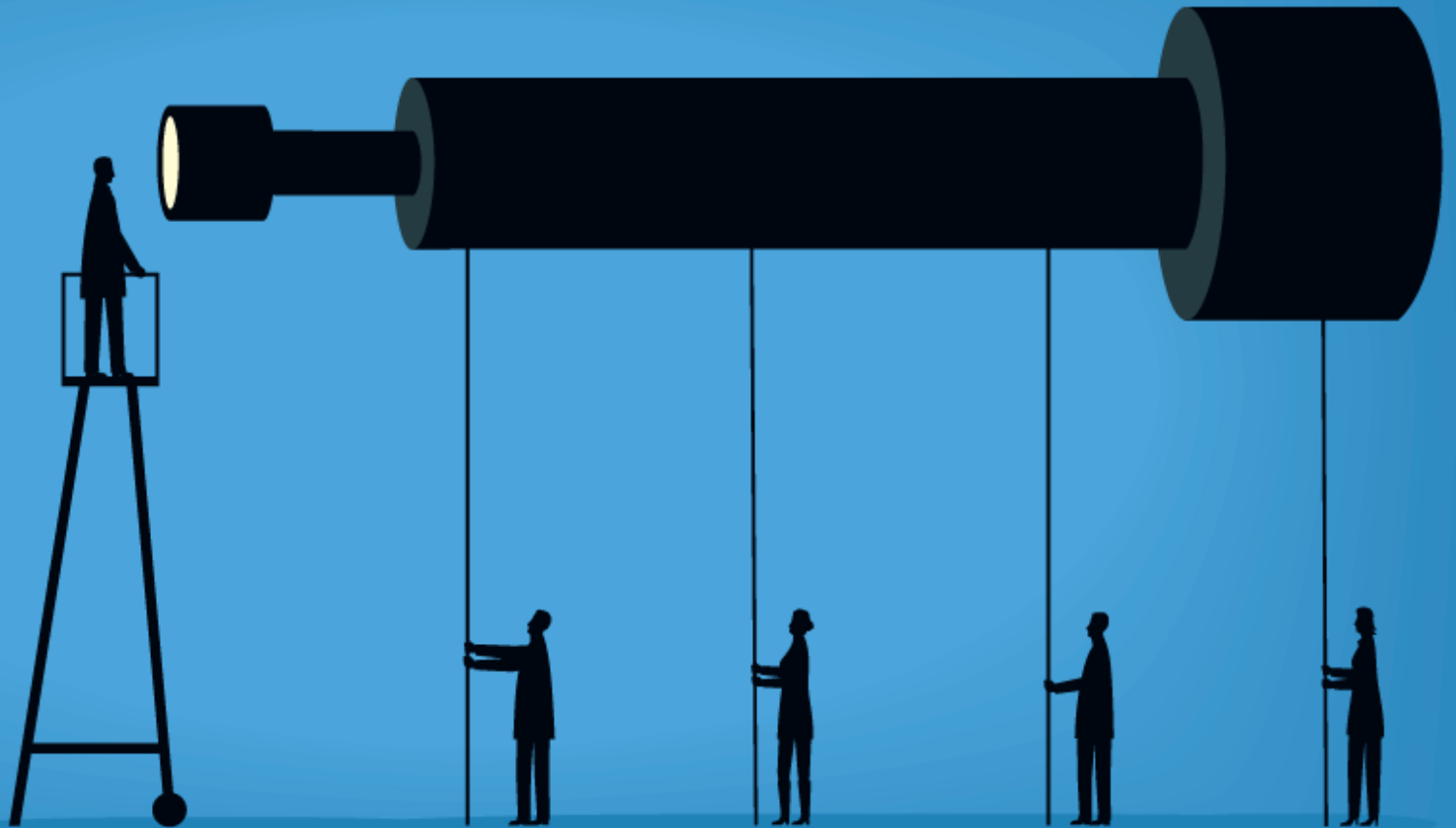
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Executive Orders and Labor Laws: New "Proposed" Guidance - Clarity or Concern?

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- \$10.10 minimum wage
- Equal Pay
- Pay Transparency
- Update to FLSA Salary Basis Test
- Fair Pay Safe Workplaces
- More to come...

- Executive Order 13673 issued July 31, 2014
- Requires government contractors and subcontractors with contracts over \$500,000 to disclose violations of 14 different employment laws and state equivalents
- New contracts beginning in 2016
- 3-year look back requirement
- Contractors to disclose corrective actions related to violations
- Designed to improve contractor compliance with labor laws and increase efficiency and cost savings in Federal contracting

We will cover...

- Summary of proposed FAR
- Summary of proposed guidance
- Remaining questions and potential problems



- 80 Fed. Reg. 30.547
- Published on May 28, 2015
- Comments due on ~~July 27~~ August 11, 2015
- The responsibility determination
- Contracting Officer, with Agency Labor Compliance Advisors (ALCAs) will consider the disclosures as part of their decision to award a contract
- DoL compliance assistance

- For contracts worth over \$500,000 contractors must report:
 - Administrative merits determination(s);
 - Civil judgment(s);
 - Arbitration award(s) or any other decision(s)
during the preceding three years to the date of the offer for violations
 - 14 identified federal labor laws, executive orders, or equivalent state laws
- Three stages
 - I. Response to Solicitation
 - II. Apparent Awardees
 - provide specific violation information (including mitigating circumstances) upon request from the contracting officer before responsibility determination
 - I. During Performance
 - semi-annually new violations and updates on previously disclosed violations
- Annual representations and certifications in SAM
- Report on single website hosted by GSA (not yet developed)
- Basic information about violations publically available in FAPIIS (Federal Awardee Performance and Integrity Information System)

Assessment of Disclosure: Contracting Officer

- Must request additional information from contractor
- Must request review by ALCA
- Consider recommendation of ALCA
- Make responsibility determination
- During contract performance a CO may:
 - Take no action;
 - Refer the matter to the Department of Labor (“DoL”);
 - Decide to not exercise an option year;
 - Terminate the contract; or
 - Notify the agency suspending and debaring official

Role of the Agency Labor Compliance Advisor (“ALCA”)

- One per agency in general
- The ALCA must consider:
 - Whether violation(s) considered “serious, repeated, willful, or pervasive”;
 - The number of violations;
 - Any remedial measures taken by the contractor;
 - Whether the contractor is adhering to labor compliance agreements or remedial measures;
 - Whether the contractor is negotiating in good faith a labor compliance agreement; and
 - Other factors the ALCA sees fit.
- The ALCA renders a recommendation whether the contractor has:
 - A satisfactory record;
 - Could be found to have a satisfactory record with additional assistance; or
 - Does not have a satisfactory record and the agency suspending and debriefing official should be notified.
- All within 3 days of CO request!
- Monitor SAM

- Prime contractors must:
 - Require violation disclosures from all subcontractors,
 - At any tier,
 - Prior to awarding a subcontract,
 - In limited circumstances within 30 days after an award is made
 - Does not apply to commercial off-the-shelf items
 - Prime may seek assistance from DoL
- Alternatives to Proposed Rule
 - Phase in of subcontractor disclosure requirements
 - Prime directs subcontractor to consult with DoL and make representation to Prime
 - 3-5 day wait period

- Provide a pay stub or wage statement to all individuals performing work every pay period
- The pay stub or wage statement must include:
 - Hours worked
 - Overtime hours
 - Must be broken down by the period in which the overtime was earned
 - Pay and additions to or deductions from pay
- Exempt employees must be notified of exempt status
- Independent contractors:
 - Notifying the individual of their status as an independent contractor (not the IC agreement)
 - Prior to the commencement of work
 - Provide notice each time the independent contractor is engaged to perform work under a contract
- Concerns
 - Burdens
 - Revise Existing Systems
 - Small business

- Pre-dispute Arbitration Agreements prohibited
- Claims
 - Civil Rights Act of 1964
 - Any tort related to or arising out of sexual assault or harassment
 - Contracts and subcontracts in excess of \$1,000,000
 - Employees and independent contractors
- Exceptions
 - Contracts for the acquisition of commercial items
 - Collective bargaining agreement
 - Pre-existing arbitration agreement
- Concerns
 - Conflict with Judicial preference for arbitration
 - Burdens
 - Confidentiality

- Sets out important definitions for implementation of the Proposed Rules
- Encompasses most of DoL's obligations under the EO
 - DoL needs to set up a structure for contractors to consult with labor advisors and to ensure consistency in working with the ALCAs
 - Equivalent state laws
 - More guidance expected

- Any determination made by an agency including:
 - WH-56 from DoL;
 - A letter indicating violations of Section 6 and/or 7 of the FLSA;
 - A letter or notice assessing civil monetary penalties;
 - An order from an ALJ;
 - An OSHA citation;
 - An imminent danger notice;
 - A notice of abatement;
 - A show cause notice from the OFCCP;
 - A letter of determination of reasonable cause or civil action filed by the EEOC;
 - A complaint from the Regional Director of the NLRB
- Report even if challenging the determination
- DoL recognizes that good faith disputes may arise

- A judgment or order that is not final or is subject to appeal
- A granting of a partial summary judgment may be a civil judgment if a labor law violation is found
- Any award by an arbitrator or arbitral panel in which it is determined that the contractor violated a covered labor law

- Serious:
 - Classified as serious under OSHA regulations
 - More than 25% of the workforce at a worksite are affected
 - Fines and penalties of at least \$5,000 or back wages of at least \$10,000 or injunctive relief
 - Death or serious injury or violation of child labor laws
 - Findings of agency demonstrate a pattern and practice
 - Finding that the contractor interfered with an investigation or breached an agreement with the enforcement agency
 - Adverse employment action or harassment filed against a worker for exercising protected right under labor laws
 - Pattern or practice of discrimination

- **Willful** is reckless disregard for or acting with plain indifference to the matter of whether its conduct was prohibited by labor laws.
- An agency will find that a contractor engaged in willful misconduct if:
 - Agency classifies as willful
 - Back wages assessed for greater than a 2 year period;
 - Liquidated or punitive damages
 - If there is a finding that the contractor knew that the conduct was prohibited and showed reckless disregard or acted with indifference.

- Contractor has one or more violations of the same or substantially similar requirement in the past 3 years, except for:
 - If a violation has been reversed or vacated, it cannot be used to render a subsequent violation as repeated;
 - If a single investigation reveals violations of more than one labor law such violations are not deemed repeated;
- For an administrative merits determination to be used a predicate, it must have been adjudicated or uncontested;
- But the second violation does not need to meet the adjudicated or uncontested standard;
- May be considered on a company wide basis
- Substantially similar determined by reviewing the nature of the violation and the underlying obligation



- Actions reflect basic disregard by the contractor for labor laws
- Demonstrated by a pattern of serious, willful, continuing or numerous violations
- Must be multiple violations of the same labor law, regardless of similarity
 - There is no specific threshold number
- For small companies, a small number of violations may be sufficient for a finding of pervasiveness

- Facts and circumstances should be considered
- DoL notes concern with:
 - Pervasive violations that affect 2 or more categories;
 - Violations reflected in final orders; or
 - Violations of a “particular gravity”
- DoL is looking for a good faith effort to comply by changing company policies
- Remediation should correct the violation and should demonstrate efforts to prevent similar violations in the future
- The role of the labor compliance agreement

- Suspension and Debarment (x2)
- Public Disclosure (FOIA, FAPIIS)
- Bid Protests
- False Certification
- Prime/Subcontractor Tensions
- Defamation/Torts

- Defining Roles (CO, ALCA, DoL)
- Blacklisting
 - Will COs lean toward awarding or passing over?
- Process
 - How informed will COs/ALCAs be and how will this play out?
- Due Process
 - Implication of wrongdoing before final adjudication.
- Costs
 - Systems implementation
 - Personnel
 - Legal
 - Contract
- Admissions of liability
- Misuse of information (Prime vs. Subcontractor)
- Corporate matters (mergers/acquisitions)
- Relationship between contract and violation
- Breadth of definitions
- Unreported violations

- Comment substantively
- Evaluate compliance
- Implement new policies and procedures
- Track and Report
- Train
- Internal dispute resolutions
- Revise subcontracts

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Questions?

