PUBLICATION

The White House's So-Called "Black List" Order Aims to Deny Federal Contracting with Companies Not in Compliance with Federal Labor Laws

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In July 2014, President Obama issued an Executive Order dubbed the Fair Pay and Safe Workplaces order that, once implemented, will allow the government to deny a company a contract if it or certain subcontractors violated – or even allegedly violated – federal labor laws within the previous three years. The Order's scope is deep and wide: it will change the procurement process for contracts worth more than $500,000, require contractors and subcontractors to provide workers information each paycheck that allows them to verify the accuracy of the check, and prohibit companies with federal contracts worth $1M or more from requiring employees to arbitrate Title VII claims and tort claims arising out of alleged sexual harassment. (The Franken Amendment already prohibits defense contractors from entering into such arbitration agreements.) So, in addition to piling on more reporting requirements, the Order also puts contractors at risk of being "black listed" by the federal government if a federal agency decides that the contractor has been accused of one too many labor violations.

Reporting of Labor Law Violations

Once the Order is implemented, companies vying for a government contract must disclose during the bidding process "any administrative merits decision, arbitral award or decision, or civil judgment" to the contracting agency under fourteen federal statutes, including FLSA, OSHA, NLRA, FMLA, ADA, ADEA and Title VII, within the previous three years. Violations of all equivalent state labor laws addressing wage and hour, safety and health, collective bargaining, family and medical leave, civil rights protections and even violations of other Executive Orders during the same period must also be disclosed. The contractor must also certify that any subcontractors providing services valued over $500,000 will make the same disclosures. Based on these disclosures, the contracting officer will determine whether the company "is a responsible source that has a satisfactory record of integrity and business ethics," and is thus eligible to bid on the contract. Read that standard again. Though guidelines will be issued to assist with this determination, it is staggeringly subjective and ripe for manipulation.

The reporting requirements do not end with the award of the contract. Contractors must update their disclosures every six months during the performance period of the contract, and their $500,000-plus subcontractors must do the same. A company could therefore lose its status as "a responsible source that has a satisfactory record of integrity and business ethics" after being awarded the contract; whether it would then lose the contract is not clear. And what if a contractor or subcontractor fails to comply with the Order's reporting requirements? Misleading the federal government carries consequences, and such a company could face liability under the False Claims Act and other laws.

Paycheck Transparency

The Order also requires that each pay period contractors provide information to each employee about his "hours worked, overtime hours, pay, and any additions made to or deductions made from pay." Again, certain subcontractors must do the same. In addition, a contractor has to notify in writing any worker it considers an independent contractor that he is an independent contractor and not an employee.

Anti-Arbitration Agreement

The Order even prohibits otherwise enforceable arbitration agreements. It bars a company bidding on a contract worth more than $1M from entering into a pre-dispute agreement with its employees to arbitrate claims under Title VII and tort claims arising out of sexual harassment and assault. The only arbitration agreement allowed between the company and its employers on a $1M-plus contract is one in which "the voluntary consent of employees or independent contractors" is provided only "after such disputes arise." The same prohibition must also be included in contracts with subcontractors providing services valued at more than $1M. How this squares with the federal government's long-standing support for arbitration under the Federal Arbitration Act remains to be seen.

Coming Implementation

The White House has said that it intends for the Order to be implemented on new contracts in stages during 2016. But on March 6, the Department of Labor submitted its proposed guidance to the Office of Management and Budget for review, which is the final step before publication. Once the guidance is published in the Federal Register, stakeholders will have an opportunity to submit questions and comments.

There will be more than a few.

How else can they determine if the agencies implementing this Order are responsible sources with satisfactory records of integrity and business ethics?