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## *Client Update*

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### **Government Agencies Issue Proposed Guidance and Regulations That Could Lead to “Blacklisting” of Certain Government Contractors**

The U.S. Department of Labor (DOL) has issued proposed guidance and the Federal Acquisition Regulatory Council (FAR) has issued proposed regulations requiring government contractors and subcontractors to report regularly on workplace law violations found by administrative agencies, the courts, and arbitrators. President Obama’s Fair Pay and Safe Workplaces Executive Order (E.O. 13673) will take an employer’s record of violations into account when deciding whether to award future Federal contracts of over \$500,000, whether to cancel existing contracts, and potentially demand further action to address a pattern of violations. The DOL Guidance and the FAR Rule proposals both have 60-day public comment periods closing on July 27, 2015.

The stated goal of the “Executive Order” is to promote efficiency in government procurement by ensuring “federal agencies contract only with responsible contractors” who comply with federal and state workplace laws. The FAR regulations historically defined a responsible contractor as one that met the requirements of the contract, performed successfully and had a satisfactory record of integrity and business ethics. Once final, the new regulations will add an employer’s workplace law compliance record as a criterion to determine whether an employer should be awarded, or be allowed to retain, federal contracts.

The President’s Executive Order has often been called the “Blacklisting” executive order and it is possible that some contractors are afraid that it may unearth some of their past misdeeds and there will now be consequences for past violations. Those consequences will not be true blacklisting or boycotting, but rather, contracts will likely be awarded to those with fewer violations than others. The DOL proposed guidance, which is a companion document to the FAR Council’s proposed regulations, seeks to define a “violation” and to explain how federal contracting agencies should analyze the violations data to determine whether to award or deny contracts.

The regulations could restrict federal agencies from working with companies that have been accused of labor violations or have long track records of “serious” or “pervasive” violations.

Government agencies will employ Labor Compliance Advisors to oversee contractors and companies will be compelled to disclose pay determinations to employees and regulators over the course of the contract. Cooperation with those in the new positions will be noted and contractors who make efforts to meet regulations and follow the laws will still be eligible for future contracts.

While some companies are worried about past violations catching up with them and are expressing outrage over the Executive Order, some contractors see it as leveling the playing field. By ensuring that its contractors are in compliance, the Federal Government can allow contractors who comply with the law to better compete with those who have dominated in the past. “Those contractors who invest in their workers’ safety and maintain a fair and equitable workplace should not have to compete with contractors who offer slightly lower bids — based on savings from skirting labor laws — and then ultimately deliver poor performance to taxpayers,” the guidance says. “The objective of the Order is to help contractors come into compliance with federal labor laws, not to deny them contracts.”

Although adhering to the new regulations may be time consuming, costly and cumbersome, there is nothing to do at this point but accept it as a new condition of doing business. The request for a contractor to disclose three years of past violations will not necessarily stop any one company from winning a federal contract. According to the Executive Order, there will be conditions in place for those contractors who are making an effort to comply with labor laws even if they have past violations. It does show, however, how important it is to comply with regulations and laws moving forward.

The Key Provisions of the Order are as follows:

**Required Violation Disclosure:** Federal contractors will have to represent to agencies whether they have had any administrative merit determination, arbitral award or decision or civil judgment rendered against them within a three year period for a violation of any one of the 13 major federal labor and employment laws, executive orders or state laws, and for certain contracts, to require subcontractors to disclose the same information to the prime contractor.

**New Integrity and Ethics Standards:** Contracting officers will consider violation information provided by a contractor to determine whether the contractor is a “responsible source” with a satisfactory record of “integrity and business ethics” in determining whether the company is eligible to perform federal contracts.

**Continued Reporting:** During the performance of a contract, contractors will be required to update their violation information every six months and, for certain contracts, obtain the same

violation information from their covered subcontracts and consider whether action is necessary.

**Prohibition on Arbitration:** Pre-dispute arbitration agreements are prohibited for key claims under contracts exceeding \$1 million. Under certain contracts, contractors will only be permitted to arbitrate claims arising under Title VII of the Civil Rights Act of 1964, or torts related to or arising out of sexual assault or harassment, based on voluntary, post-dispute agreements with employees or independent contractors.

**Pay Information Disclosure:** Under certain contracts, contractors will have to provide certain workers with documentation detailing hours worked, overtime hours, pay, and additions or deductions from pay, and where appropriate, provide exempt workers with documentation detailing that status, which implements controversial misclassification disclosure and recordkeeping requirements that previously had been listed among the new regulations that DOL would propose. Contractors will also be required to incorporate this requirement into certain subcontracts and to provide written notification to independent contractors of their status.

With the disclosure requirements looming, contractors should review their violation records and assess their current compliance programs to determine whether more robust programs are needed to help ensure the ability to win and keep federal government contracts. Reviewing past violations and doing compliance audits will put contractors in the best position to win the larger bids. This is the time to contact counsel and determine how your company is positioned for these new changes. If you have questions about how the Executive Order will impact your organization, please contact Peter Bennett ([pbennett@thebennettlawfirm.com](mailto:pbennett@thebennettlawfirm.com)) or Rick Finberg ([rfinberg@thebennettlawfirm.com](mailto:rfinberg@thebennettlawfirm.com)) of The Bennett Law Firm.