Special Report

A Guide to Labor and Employment Obligations for Federal Contractors

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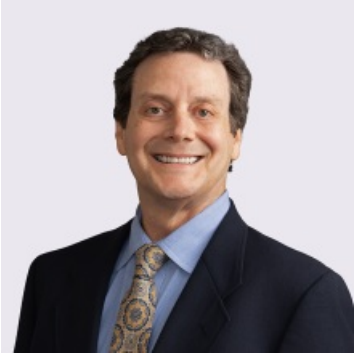

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Companies doing business with the federal government must comply with a litany of complex laws and regulations that affect their day-to-day business operations. To assist government contractors, this guide discusses some of the labor and employment laws and regulations that should be considered when pricing and performing a government contract. Given the complexities involved, employers would be well-served to address their particular situations with experienced counsel.

I. Obligations under the Service Contract Act

Service Contract Act (SCA) Section 4c requires service contractors to comply with prevailing wage determinations and minimum fringe benefit payments.

A successor contractor for a contract to provide services of a predecessor contractor with a collective bargaining agreement (CBA) in place which replaced the U.S. Department of Labor's (DOL) Wage Determination for the contract must honor the wage rates and covered fringe benefit provisions of that CBA for the first year of the contract. A successor contractor will be required to pay the hourly wage rates in the CBA and any wage increases that occur during the first year of the contract. It also must pay the covered fringe benefits in the CBA, which usually includes health insurance, disability benefits, life insurance, 401k plans, pension plans, rate differentials, premium pay provisions, holidays, vacation, paid sick leave, military pay, severance pay, jury duty pay, bereavement pay, and uniform and shoe allowances. Overtime pay provisions (other than the Fair Labor Standards Act requirements) are not included.

A successor contractor can satisfy its obligation to provide the same health insurance benefits of the predecessor contractor by matching the benefit. This would be impractical unless the contractor chooses to adopt the CBA and the health insurance was provided through a union-sponsored plan. Alternatively, the contractor can spend at least the same amount on health insurance benefits. For example, if the CBA required the predecessor to pay $4.50 per hour to the union's health and welfare fund to provide medical insurance and related benefits, the contractor can spend at least $4.50 per hour on these benefits by either using its medical plan or any other plan. Any shortfall can be paid to the employee in cash or be contributed to a retirement plan (such as a 401k plan) on the employee's behalf. Similarly, instead of making contributions to a union-sponsored pension plan, the contractor can make the contributions to its company's 401k or a similar retirement plan. Some employers do not wish to make contributions to a union's multiemployer pension plan because of the risk of incurring potentially significant withdrawal liability in the future.

Even though a contractor's SCA Section 4c obligations apply for only one year, if the contractor staffs its workforce with a majority of the predecessor contractor's employees who were subject to the CBA, it cannot change wages and benefits (or any other term of employment) when the year is up without first negotiating with the union.

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Related Services

Affirmative Action, OFCCP and Government Contract Compliance

This is discussed in more detail below.

II. Obligations Under the Davis-Bacon and Related Acts

The Davis-Bacon Act (DBA) establishes the requirement for paying prevailing wages on projects involving the construction, alteration, or repair (including painting and decorating) of public buildings or public works. DBA states that all government construction contracts over $2,000 to which a federal agency or the District of Columbia is a party must include provisions for paying workers on-site no less than the local prevailing wages and benefits as set by the DOL. The DBA prevailing wage requirements is extended by the Davis-Bacon Related Acts (DBRA) to many federally funded or assisted construction activities.

As evidence of their compliance with the requirement to pay workers the prevailing wage, covered contractors must maintain records during the work and for three years after job completion reflecting the following:

- Name, address, and Social Security Number of each employee
- Each employee's work classification(s)
- Hourly rates of pay and contributions for fringe benefits or their cash equivalents
- Daily and weekly numbers of hours worked
- Actual wages paid and deductions made
- If applicable, detailed information on fringe benefits and approved apprenticeship or trainee programs

Employers must pay workers covered by the DBA/DBRA weekly. They must provide the contracting agency, also weekly, a certified copy of all payrolls providing the information above for the previous week's payroll period. The Wage and Hour Division of the DOL has created a standard form (WH-347) that contractors can use to submit the information. Each payroll submitted must include a "Statement of Compliance," which is provided in the WH-347.

Every contractor or subcontractor who performs work covered by the DBA/DBRA must post an "Employee Rights under the Davis-Bacon Act" poster at the worksite. The poster must be displayed in a prominent and accessible place where it can be seen easily by employees. The contractor also must post the applicable Wage Determination.

If a contractor or subcontractor disregards its obligations under the DBA/DBRA, in addition to being on the hook for back pay that may be owed to employees, it may be subject to contract termination and debarment from awards of future contracts for up to three years. Further, payments to a contractor or subcontractor may be withheld by the funding agency to cover unpaid wages or penalties that result from overtime payment violations.

III. Obligations under the National Labor Relations Act

The National Labor Relations Act (NLRA) governs the relationship between employers and the unions that represent their employees. When a successor contractor hires a majority of the predecessor contractor's employees, it must recognize and bargain with any union that represents those employees regarding wages, benefits, and all other terms of employment. This is known as the duty to bargain. When the successor contractor initially solicits the predecessor contractor's employees for employment, it must state that the contractor will not be honoring the prior contractor's CBA if the

contractor does not wish to be bound by it. Failure to do so will result in a "perfectly clear successorship," which would bind the successor contractor to all the terms of the previous contractor's CBA. If a successor contractor timely disavows the previous contractor's CBA, it may establish its own terms and conditions of employment, subject to honoring the wages and covered fringe benefits of the CBA required by Section 4c of the SCA as discussed above.

Once a successor contractor establishes its initial terms and conditions of employment, the contractor may only make changes to those terms of employment (called the status quo) after bargaining with the union and reaching an agreement or bargaining in good faith to impasse. When a bargaining impasse occurs, the employer may implement terms it proposed to the union during bargaining. Bargaining impasse often is difficult to establish; the employer must demonstrate both that the parties are deadlocked and that further discussions likely will not lead to an agreement.

If after a contractor has a duty to bargain and before a CBA is negotiated, the contractor must discuss suspending or terminating an employee with the union before so doing, unless exigent circumstances exist. The contractor need not obtain the union's consent to proceed, as long as it follows established disciplinary procedures. Lesser disciplinary actions may be discussed with the union after the action is taken. The contractor also must process grievances filed by the union before a formal grievance procedure has been negotiated. No specific procedure is required and, if a grievance cannot be resolved, the employer is not required to arbitrate the grievance. Before conducting an interview with an employee that could lead to disciplinary action, the employee is entitled to union representation during the interview upon request.

Once there is a duty to bargain, the contractor must respond to the union's information requests within a reasonable time. A union may request anything reasonably related to the union's performance of representation duties, such as bargaining, contract administration and enforcement, and investigating and pursuing potential grievances. This can include disciplines, schedules, wages and benefits (of bargaining unit employees), personnel files, medical information, policies and procedures, payroll records, and the like. Confidentiality of the records or information is not a valid reason to withhold the requested information, but the contractor can require a non-disclosure agreement. Generally, a contractor is not required to provide pricing, profit, or sensitive customer information unless the contractor uses inability to pay, its bid proposal, or lack of competitiveness as a justification for its positions during bargaining.

Finally, a successor contractor who has a duty to bargain with a union is not required to deduct dues and fees from employees' pay, unless the contractor agrees to do so in a written agreement. By agreeing to make such deductions before a CBA is negotiated, a contractor may be giving up important leverage during bargaining.

IV. Negotiating a Bridge Agreement or New CBA

Many successor contractors negotiate a Bridge Agreement or a new CBA with the union that represented employees of the previous contractor. A Bridge Agreement is designed to be short-term to fill the gap until a completely new CBA can be negotiated. A Bridge Agreement usually is based on the previous contractor's CBA with changes to the provisions that do not apply or do not work for the new contractor for business reasons.

The Bridge Agreement should address differences among the previous contractor and

the successor contractor in pay periods and paydays, benefits plans, and employer-specific policies addressing work rules and disciplinary procedures, attendance, leave procedures, drug testing, and similar matters. Whether or not a Bridge Agreement is negotiated, a successor employer has an obligation to meet with the union and negotiate in good faith for a CBA.

No specific terms or language is required to be included in a CBA. However, the results of negotiations will depend on a variety of factors, such as the parties' leverage, bargaining strategy, bargaining objectives, the union's willingness to strike, the contractor's ability to continue operating during a strike, the scope and degree of changes desired, the level of support for the union among employees, and the resolve of the contractor's management and the government client to resist union pressure. When setting its negotiating strategy and objectives, the contractor should know which cost increases are budgeted for the contractor to pay and which expenses are reimbursable by the government client. Wage increases and other increases conditioned upon reimbursement by the government are not permissible under the SCA. If the contractor agrees to provide for increased wages and benefits and its client refuses reimbursement, these additional costs must be paid by the contractor.

While every CBA is unique in some respects, some sample provisions that should be considered in government contracting include:

Government Supremacy/Rights: Because a contractor is subject to its government client's directives, consider a provision on the rules, regulations, directives, orders, or work statements that are, or may be, imposed by the government, including on removal of an employee, that will apply and not be subject to the grievance and arbitration procedure.

Union Security: Unions often request inclusion of a provision requiring union membership (or the payment of dues and fees by nonmembers) as a condition of employment. In a right-to-work state, such provisions are prohibited unless the worksite is a federal enclave, meaning, it is exclusively subject to federal (and not state) law. Enforcement of such a union security provision can leave a contractor with inadequate staffing. Therefore, consider including a clause providing that the requirement that the employer terminate an employee for failing to maintain good standing with the union will not be enforced if the termination would cause the employer to be non-compliant with its contract with the government client or to incur additional overtime expense. It also should state that the employer is not required to terminate the employee until a replacement has been hired, cleared, and trained.

Union Access: Because a contractor is subject to its government client's requirements applicable to visitors, consider including a clause stating that any union representative who wants to visit the employer's offices or other places of employment must comply with those requirements.

Grievances: As the union should not direct any grievances to the government client, consider including a provision stating that the union will only use the procedure in the CBA to raise and remedy grievances and not direct any grievances to the government client.

Arbitration: Consider a provision that limits the arbitrator's authority. Subjects may

include the issues presented by the employer or the union that have been processed through the grievance procedure, the terms of the CBA, and the type of remedy available to an aggrieved employee. In addition, if required by the government contract, consider requiring reinstatement be subject to approval by the government client. In addition, because a contractor cannot require a successor contractor to reinstate the grievant, the CBA should state that the contractor's back pay and reinstatement obligations end when the contract ends.

Depending on the contractor's specific organizational needs, other provisions should be considered. In addition, when a CBA expires, the parties must maintain the terms and conditions at the status quo while negotiations take place. Further, if no agreement is reached and incorporated by the government client, and the U.S. DOL does not replace the Wage Determination before the contract is rebid, other prospective bidders may only be required to comply with the Wage Determination. This places the current contractor at a distinct disadvantage by permitting its competitors to avoid the effect of SCA Section 4c and bidding a lower price.

The terms of a CBA apply to all employees in the bargaining unit, regardless of whether they join the union.

V. Non-Discrimination and Affirmative Action

Under Executive Order (EO) 11246, employers with a covered supply or service federal contract or subcontract of at least $50,000 must engage in affirmative action efforts to increase the workforce representation of women and minorities.

Covered employers with at least 50 employees must prepare annually a written affirmative action plan (AAP) for each of their "establishments" (physical work locations) with at least 50 employees. Additionally, such employers must follow non-discrimination and related provisions, as well as comply with a host of recordkeeping, data collection, and technical obligations. Chief among the data requirements is the obligation to track and maintain applicant data for analyses. AAPs require a number of annual workforce and personnel activity analyses, including a Workforce Analysis, Job Group Analysis, Utilization Analysis, and Placement Goals. In addition, covered contractors must conduct annual analyses of their applicant flow, hiring, promotion, termination, and compensation practices. The primary source of data for these AAP analyses is race and gender data collected through pre- and post-offer applicant and employee invitations to self-identify. Other technical obligations include drafting, implementing, and disseminating a prescribed equal employment opportunity (EEO)/Policy Statement, ensuring that all job postings contain an "EEO Tag Line," annually providing all vendors a notice of the employer's federal contractor status, incorporating an "Equal Opportunity Clause" in each of the employer's covered subcontracts, notifying all unions of the employer's federal contractor status (if applicable), and posting a number of notices on the employer's careers website, including an applicant-accessibility statement.

Construction contractors with a federal construction contract or federally assisted construction contract, or subcontract, of at least $10,000 must follow the non-discrimination and related provi¬sions of EO 11246. While they need not have a written AAP, they must implement an AAP that includes 16 specified requirements that are substantially similar to the obligations for supply and service contractors. For construction contractors, there is no employee-count threshold.

Federal contractors and subcontractors with a single government contract or subcontract of at least $150,000 must follow the non-discrimination and related provisions concerning "protected veterans" covered under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). If the contractor also has at least 50 employees, it must annually prepare a written AAP for each establishment with at least 50 employees. As with EO 11246, VEVRAA imposes a number of technical obligations, including the listing of job openings with the state workforce agency in the state where the opening occurs. Under VEVRAA, covered employers must engage in documented outreach efforts to attract qualified protected veterans in a good faith effort to annually attain a veteran hiring benchmark of 5.9%.

Employers with at least 50 employees and a single federal contract or subcontract of at least $50,000 must comply with non-discrimination and affirmative action provisions of Section 503 of the Vocational Rehabilitation Act, including the requirement to annually prepare a written AAP for each establishment with at least 50 employees. Section 503 also imposes a number of technical obligations and restrictions similar to those of the Americans with Disabilities Act. The primary objective of Section 503 is documented outreach efforts to attract qualified individuals with disabilities such that the employer attains a utilization goal for disabled individuals in each of its AAP job groups of 7%.

As with race and gender data under EO 11246, VEVRAA and Section 503 require covered employers to invite pre- and post-offer applicants and employees to self-identify for status as a protected veteran or disabled individual. OFCCP prescribes a specific form for inviting applicants and employees to self-identify for disabled status.

These requirements apply not only to the contractor's employees working directly on a federal contract, but generally to their entire workforce, including locations where no federal contract work is performed. Depending on a number of factors, including the extent of common ownership and control, AAP obligations also may extend to other related companies.

EO 13672 prohibits discrimination based on sexual orientation and gender identity. It also requires: (1) inclusion of "sexual orientation" and "gender identity" in EEO Taglines where protected statuses are listed (rather than abbreviated Taglines), and (2) posting of updated "EEO is the Law" posters.

VI. Government Reporting (EEO-1 and VETS-4212)

In addition to the primary aspects of affirmative action compliance described above, covered contractors and subcontractors must prepare and submit both EEO-1 and VETS-4212 reports to the government annually. The EEO-1 Deadline is March 30 each year, and the VETS-4212 deadline is September 30 each year. Although all private employers with at least 100 employees must prepare annual EEO-1 reports, covered contractors and subcontractors must identify themselves as such on those reports. The EEO-1 report collects gender and race/ethnicity data by type of position. Contractors must maintain three years of EEO-1 reports as part of their AAPs.

Likewise, employers who are covered by the VEVRAA must submit VETS-4212 reports. This report collects data about the number of protected veterans in an employer's workforce.

VII. E-Verify

A federal contractor with a contract for a term of performance of at least 120 days and with a value of at least $100,000 ($3,000 for subcontractors) must agree to use E-Verify to verify the employment eligibility of: (1) all employees hired during the contract term that will be performing work within the U.S.; and (2) all individuals assigned to perform work in the U.S. on the federal contract. Contractors should check with their government contracting official or staff to clarify their obligations.

With a couple of exceptions, verification of employment must be completed within three business days after a newly hired employee's start date. The E-Verify system must be used for checking the eligibility of individuals only after the employee has been offered and has accepted the job. A contractor awarded a covered contract or subcontract requiring use of E-Verify, if not already enrolled, will have 30 calendar days after the contract award date to enroll in the E-Verify program. Contractors may decide whether they want to use E-Verify for all new hires and all existing non-exempt employees assigned to a federal contract, or for their entire non-exempt workforce (all new hires and all existing employees) throughout the entire company.

Details on E-Verify are available in the E-Verify Manual for Federal Contractors and Subcontractors.

VIII. Withdrawal Liability and Multiemployer Pension Plans

Contractors who participate in a multiemployer pension plan (MPP) through a CBA may be subject to significant liabilities created by statute. The chief statutory sources of liability to an MPP pension fund beyond the contributions required under the CBA are: (1) the withdrawal liability rules in Title IV of ERISA; (2) the Pension Protection Act of 2006 (PPA); and (3) the minimum funding rules.

MPPs are subject to the withdrawal liability rules under Title IV of ERISA. Under these rules, an employer who completely or partially withdraws from the MPP is liable for their allocable share of the MPP's unfunded vested benefits. The amount of a withdrawn employer's withdrawal liability is based on a number of factors and requires an actuarial calculation. Generally, the employer's withdrawal liability obligation is satisfied by making annual payments determined by a formula intended to approximate the employer's annual contributions to the MPP. In a standard withdrawal, the employer continues to make payments until its withdrawal liability is satisfied (with interest charged at a rate determined by the MPP) or the employer makes 20 annual payments, whichever occurs first. The 20-year limitation on annual payments does not apply in the event of a mass withdrawal; this can result in the employer making withdrawal liability payments in perpetuity.

Some MPPs have a "Free Look" rule, which allows new employers to join the plan for up to five years without incurring any withdrawal liability, provided: (1) the new employer's contributions are less than 2% of the total employer contributions for each year in the MPP; (2) the MPP had an 8-to-1 ratio of assets to benefit payments in the year before the employer was required to make contributions; (3) the MPP provides that any credit for service before the employer joined the plan will be lost on the employer's early withdrawal; (4) the new employer did not previously have a "free look"; and (5) the MPP is not amended to remove the Free Look provision. In addition, there is a Building and Construction Industry exception for withdrawal liability that allows an employer in that industry to avoid incurring withdrawal liability if they cease performing any services

within the jurisdiction of the CBA.

Although withdrawal liability is a corporate obligation, all trades or businesses with sufficient common ownership are treated as a single employer, and each such trade or business is jointly and severally liable for withdrawal liability. Accordingly, under certain circumstances, a shareholder or business owner may be found personally liable for withdrawal liability.

In addition to withdrawal liability, other statutory liabilities applicable to the MPPs include the PPA. The PPA creates additional contribution responsibilities for employers obligated to contribute to "critical status" or "red zone" MPPs and the minimum funding rules, which establish mandatory annual contribution requirements.

An MPP also may impose additional costs on employers pursuant to trust documents, which usually are incorporated by reference in the CBA or participation agreement. These "blank check" provisions can result in "contractual" withdrawal liability and "exit fees" (in pension and welfare plans), midterm contribution increases, and special assessments, among other midterm surprises.

IX. Subcontracting

Contractors must recognize that their obligations under these laws and executive orders also apply to their subcontractors. Many CBAs provide that the agreement applies to any subcontractor used by the contractor to perform work done by covered employees, and the contractor is responsible for the subcontractor's failure to comply with the terms of the CBA. When a CBA does not exist and the contractor is negotiating an agreement with the union, if the contractor becomes involved in the subcontractor's union negotiations, the contractor can become a joint employer of the subcontractor and responsible for violations committed by the subcontractor. Any agreement negotiated also may apply automatically to separate contractors who are found to be joint employers. Under the NLRA, a joint employment relationship will be found when one employer directly controls the terms and conditions of employment for another. During contract performance, if the contractor becomes involved in the labor relations matters of the subcontractor, it can become responsible for the subcontractor's actions under federal labor laws.

X. Drug-Free Workplace Act of 1988

The Drug-Free Workplace Act of 1988 (DFWA) requires certain federal contractors to agree to provide drug-free workplaces as a condition of receiving a contract from a federal agency. Contractors are subject to the requirements of the DFWA if the contract with the government has a value of at least $100,000, will be performed in the U.S., and the primary purpose of the contract is other than acquisition of commercial items.

XI. The Government Funding Transparency Act of 2008

The Government Funding Transparency Act of 2008 (GFTA) requires the Office of Management and Budget (OMB) to establish a free, public website containing full disclosure of all federal contract award information. Federal contractors must report the names and total compensation for the contractor's five most highly compensated officials and first-tier subcontractor awards on contracts expected to reach at least $25,000. These reports are submitted to the Federal Funding Accountability Transparency Act Subaward Reporting System.

XII. Defense Contract Audit

The records of a contractor with a contract with the U.S. Department of Defense (DoD) are subject to audit by the Defense Contract Audit Agency (DCAA), which also performs audits for other government agencies. The DCAA is concerned with identifying and evaluating all contractor activities that contribute to or have an impact on the costs of government contracts. To do this, the DCAA evaluates contractors' internal cost-control systems, management policies, accuracy of cost representations, adequacy and reliability of records, and accounting systems.

According to the DCAA, "[T]imekeeping procedures and controls on labor charges are areas of utmost concern." One area of the DCAA's attention is whether the contractor has a timekeeping system to track an employee's time spent on each work activity. In connection with this, the DCAA evaluates whether costs are allocated to coincide appropriately with each employee's division of time.

Risk of civil and criminal exposure also exist under the False Claims Act if a contractor knowingly allows employees to make false charges in connection with a federal contract. It is critical, therefore, to maintain labor-charging internal control systems and educate employees on their responsibility to accurately record their time charges on federal contract work.

XIII. Cybersecurity Protection Requirements

Contractors with a federal acquisition contract or subcontract must apply 15 basic cybersecurity safeguarding requirements and procedures to protect "federal contract information." The requirements are based on security requirements published in the National Institute of Standards and Technology's (NIST) Special Publication (SP) 800-171, "Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations." Specific requirements are in FAR Subpart 4.19 and FAR Clause 52.204-21.

Government contractors with non-acquisition contracts could have separate, specific contractual obligations establishing protections for controlled unclassified information.

XIV. Executive Orders

The following are some of the Executive Orders currently in effect that have significant implications for federal contractors.

A. EO 13706 (Paid Sick Leave)

Some federal contracts and subcontracts may require the contractor to provide paid sick leave. EO 13706 applies to the following types of federal contracts:

- Procurement contracts for construction covered by the DBA, but not by the DBRA;
- Service contracts covered by the SCA;
- Concession contracts, including any concessions contract excluded from the SCA by DOL's regulations at 29 CFR 4.133(b);
- Contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public (this includes leases).

The EO requires contractors to provide covered employees one hour of paid sick leave for every 30 hours worked on or in connection with a covered federal contract or subcontract. Leave may be used for: (1) illness and injury; (2) diagnosis, care, and preventive care; (3) caring for family members and family-equivalent members; and (4)

domestic violence care. Covered employees must be allowed to accrue leave up to at least 56 hours annually. They must be allowed to carry over unused paid sick leave from year to year, although contractors can limit accrual to 56 hours. Employers need not pay for unused accrued leave upon an employee's separation from employment.

To use leave, employees need only make an oral or written request to the employer, with the expected duration of leave, at least seven days before the scheduled leave, or as soon as practicable if the need for leave is unforeseeable. An employer's right to seek medical certification for the leave is limited. Interference and discrimination based on the use of sick leave are prohibited.

Existing paid time off (PTO) policies may be acceptable satisfaction of these obligations if they comply with all of the elements of EO 13706. A CBA may not provide for less paid sick leave than required by the EO.

B. EO 13494 (Economy Government Contracting)

To promote economy and efficiency in government contracting, President Barack Obama declared certain labor relations costs (those not directly related to a contractor's provision of goods or services to the government) not eligible for reimbursement or payment by the contracting agency. Only costs incurred in maintaining a satisfactory relationship between the contractor and its employees, including costs of union stewards and labor management committees, are allow for payment.

C. EO 13496 (Notification of Employee Rights under Federal Labor Law)

To promote an environment in which federal contracts for goods or services will be performed by contractors whose work will not be interrupted by labor unrest, President Barack Obama signed into law a mandate that federal contractors inform employees of their rights under the NLRA.

The EO states that federal contractors and subcontractors subject to the NLRA must post a notice containing information proscribed by the DOL that informs employees of their rights under the NLRA in all plants and offices where employees are performing work on the federal contract. Contractors also are required to include this language in their contracts and purchase orders.

D. EO 13502 (Use of Project Labor Agreements for Federal Construction Projects)

A project labor agreement (PLA) is a prehire CBA designed to systemize labor relations at a construction site. The EO gives federal agencies the authority to require contractors to enter into PLAs for "large-scale" construction projects, each of which is a project with a total cost exceeding $25 million.

Although the EO and the corresponding regulations apply only to large-scale construction projects, the wording of both the EO and the implementing rules reiterate federal contracting agencies are "not prohibited" from requiring PLAs on projects that do not fall within the $25-million threshold. Given this, and the effect PLAs can have on labor and other project costs, contractors submitting bids on construction projects should diligently review each contract solicitation to determine if a PLA will be required. This will allow the contractor to understand the extent to which the PLA will affect the

costs of the work and bid accordingly.

E. EO 13627 (Combatting Trafficking in Persons)

FAR Clause 52.222-50 prohibits trafficking in persons, including certain defined trafficking-related activities. In contrast to other FAR provisions, Clause 52.222-50 must appear in all solicitations and contracts.

Clause 52.222-50 provides that during performance of the contract, contractors, their employees, and their "agents" may not: (1) engage in "severe forms of trafficking in persons"; (2) procure "commercial sex acts"; (3) use "forced labor" in performance of the contract; (4) withhold or destroy employee identification or immigration documents; (5) use fraudulent tactics in recruiting workers or use recruiters who engage in such tactics; (6) charge employees recruitment fees; (7) fail to provide, in certain circumstances, return transportation at the end of employment; or (8) provide substandard housing.

Contractors also must: (1) affirmatively notify employees and agents of the above prohibitions and the corrective action it will take for any violations; (2) include the substance of the Clause in certain subcontracts and contracts with agents; (3) take appropriate action in response to any violations; (4) notify the agency contracting officer of (i) any credible information it receives regarding any violation by the employees or agents of the contractor or subcontractor; and (ii) any actions taken against any such violator; and (5) cooperate fully with the government in investigating alleged violations.

For contracts in excess of $500,000 for supplies (other than for commercial off-the-shelf or COTS) acquired outside the U.S. or for services performed outside the U.S., the contractor must develop an "appropriate" compliance plan that, at a minimum, includes certain proactive steps. The contractor also must certify annually to the contracting officer that it has implemented a compliant plan (including due diligence investigation) and that, to the best of its knowledge, it is not aware of any violations.

F. EO 13658 (Minimum Wage for Contractors)

This EO established the minimum wage $10.10 an hour for employees of covered federal contractors and made it effective for new contracts entered into on or after January 1, 2015, and existing contracts if modified by the contracting agency to include the requirement. The minimum wage rate is annually increased by the Secretary of Labor. On January 1, 2020, the rate was increased to $10.80 an hour. Additionally, beginning January 1, 2020, tipped employees performing work on or in connection with covered contracts generally must be paid a minimum cash wage of $7.55 an hour.

Covered contracts are contracts subject to procurement contracts for construction covered by the DBA (but not contracts subject only to the DBRA); service contracts covered by the SCA; concessions contracts, including any concessions contract excluded from the SCA by the DOL's regulations at 29 CFR 4.133(b); and contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

G. EO 13672 (Sexual Orientation and Gender Identity Nondiscrimination)

This EO amends EO 11246, which imposes anti-discrimination and affirmative action requirements upon federal contractors, to prohibit discrimination on the basis of sexual

orientation and gender identity.

H. EO 13665 (Non-Retaliation for Disclosure of Compensation Information)

This EO, often referred to as the Pay Transparency Executive Order, prohibits discrimination or retaliation against "any employee or applicant because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant."

Under the final regulations, which became effective on January 11, 2016, employers entering into new contracts (or modifying existing contracts) after January 11, 2016, must incorporate proscribed nondiscrimination language into their nondiscrimination policies, as well as have required postings on their websites and in their workplaces.

XV. Ethics Requirements

Contractors with federal contract awards of at least $5 million (entered into on or after December 12, 2008) are subject to Federal Acquisition Regulation ethics rules. They must implement written codes of business ethics and conduct, an employee awareness and compliance program, and an internal control system. In addition, covered contractors must self-disclose credible evidence of violations of certain criminal laws or the civil False Claims Act and "significant over-payment."

XVI. Security Clearance

Some federal contracts require contractors to have the ability to access classified information. There must be a bona fide procurement requirement to have access to U.S. classified information or facilities. When this need has been established, a procuring agency of the government, or a cleared contractor (in the case of subcontracting), may request the clearance for the bidding contractor. The request for clearance must come from the contracting agency; the contractor cannot apply for security clearance on its own.

Once the contractor has obtained facility clearance, it can request the applicable security clearance for its employees. The process of obtaining a Facility Security Clearance and a Personnel Security Clearance is established by the Defense Security Service (DSS), which is the interface between the government and the contractors who need clearance.

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Jackson Lewis attorneys are available to discuss these and other issues that affect government contractors.