More than sixteen states and localities, including Montgomery County, Prince George's County, Baltimore City and the District of Columbia have passed "ban the box" statutes and ordinances which ban asking about an applicant's criminal record on the employment application question. Quite a number of other jurisdictions have such legislation applicable either to government employees or private employers with government contractors. The four in this area go way beyond "ban the box" to regulate both the timing of criminal background check inquiries and the circumstances under which they can be asked at all. See Montgomery and Prince George's Counties Join Baltimore City in Banning the Box" published herein.

It is important to pay close attention to the jurisdictions where a business operates or an employee works in this area as the four jurisdictions now have laws that differ in significant ways and present significant challenges for multi-jurisdiction employers.

Employers need to monitor developments in this area, review their background check policies against the EEOC Guidance and the plethora of new laws regulating the use of background checks. If the EEOC is unable in future cases to make its statistical case that employer policies have an adverse impact, the role of the EEOC will be sharply limited. Employers must also be sure they are complying with the Fair Credit Reporting Act requirements, especially since there has been a sharp uptake in lawsuits challenging employer failures to comply.

At the same time, however, the battle is shifting to state and local lawmakers who are passing laws without having to make or defend the assertion that there is an adverse impact. It can be expected that this trend will continue as the exclusion of those who have criminal convictions from employment and voting continues to grow as a large public policy issue.

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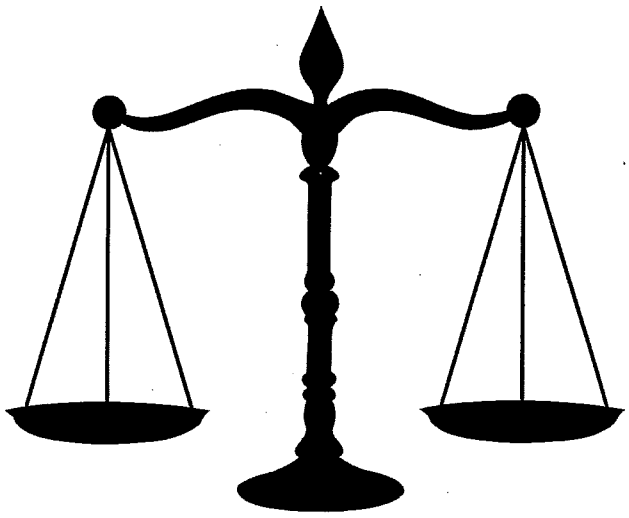
[1] *EEOC v. BMW Manufacturing Co., LLC,* Case No. 13-cv-01583 (Filed Jun. 11, 2013, D.SC) and *EEOC v. Dolgencorp, LLC,* (Filed Jun. 11, 2013, N.D. Ill.).



OFCCP UPDATE: EXECUTIVE ORDER 13673, FAIR PAY AND SAFE WORKPLACES

By Hope B. Eastman, Paley Rothman

Since April 2014, President Obama has signed a long list of Executive Orders affecting government contractors' relationships with employees. None has triggered more opposition than Executive Order 13673 which calls for greater scrutiny of government contractor bidders' compliance with a myriad of federal and state laws relating to labor law and workplace safety and creates a vast new compliance mechanism. Not surprisingly, there is a sharp difference of opinion between proponents of the Executive Order and opponents who have dubbed it the "Blacklisting Order." The opposition has been escalating in 2015.

Along with issuance of the Executive Order on July 31, 2014, the White House issued a Fact Sheet. Based on the Order and the accompanying Fact Sheet, the law's provisions and purposes are as follows:

- Agencies will require prospective contractors to disclose labor law violations from the past three years before they can get a contract. Contractors will be responsible for getting this information from many of their subcontractors as well. The fourteen covered Federal statutes and equivalent state laws identified in the Executive Order include those addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections.
- The purpose of the Executive Order is to crack down on repeat offenders. Contracting officers will take into account only the most egregious violations. Each agency will designate a senior official as a Labor Compliance Advisor to provide consistent guidance on whether contractors' actions rise to the level of a lack of integrity or business ethics. The Labor Compliance Advisor will support individual contracting officers in reviewing disclosures and consult with the Department of Labor. The Executive Order states that this process will ensure that the worst actors, who repeatedly violate the rights of their workers and put them in danger, don't get contracts and thus can't delay important projects and waste taxpayer money.
- The goal of the process created by the Executive Order is to help more contractors come into compliance with workplace protections, not to deny contracts to contractors. Companies with labor law violations will be offered the opportunity to receive early guidance on whether those violations are potentially problematic and remedy any problems. Contracting officers will take these steps into account before awarding a contract and ensure the contractor is living up to the terms of its agreement.
- The Executive Order directs companies with federal contracts of $1 million or more not to require their employees to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment (except when valid contracts already exist). This builds on a policy already passed by Congress and successfully

implemented at the Department of Defense, the largest federal contracting agency, and will help improve contractors' compliance with labor laws.

- As a normal part of doing business, most employers give their workers a pay stub with basic information about their hours and wages. To be sure that all workers get this basic information, the Executive Order requires contractors to give their employees information concerning their hours worked, overtime hours, pay, and any additions to or deductions made from their pay, so workers can be sure they're getting paid what they're owed.

The Executive Order is "effective immediately" but in actuality will not go into effect until the Federal Acquisition Regulatory (FAR) Council (consisting of the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of the General Service Administration) adopts amendments to the current Federal Acquisition Regulations. The public will have an opportunity to submit comments before final amendments are adopted. These amendments are not expected to appear in proposed form before 2016.

The burden on the contracting community from the new process is clear when you look at what will now be required. Once the Executive Order is fully implemented, the contractor must go through these following seven steps when each contract is bid prior to each contract award and every six months thereafter:

- The prime contractor must report labor violations at the federal and state level from the past three years under definitions that do not clarify the scope of what constitutes a violation;
- The Contracting Officer must review the labor violations submitted by the prime contractor;
- The Labor Compliance Advisor in each agency must review the labor violations submitted by the prime contractor;
- The Labor Compliance Advisor must consult with enforcement authorities at the federal and state level to determine whether agreements are in place or are otherwise needed to address appropriate remedial measures, compliance assistance, steps to resolve issues to avoid further violations, or other related matters. This, of course, is the most troublesome as reported violations often have resolutions already agreed to by the employers and the employees or government agencies involved. This provision gives the DOL the power to second guess these resolutions.
- The Contracting Officer must consult with the Labor Compliance Advisor subsequent to the Labor Compliance Advisor's consultation with federal and state enforcement authorities.
- The Contracting Officer must determine whether the prime contractor is a "responsible" source that has a satisfactory record of integrity and business ethics.

The Executive Order requires all seven steps for each contract award at each federal agency, even when separate awards are being made to the same company. If one contractor has 100 different contracts at ten different agencies, the labor violations will need to be considered individually, 100 different times by each Contracting Officer and Labor Compliance Advisor on each contract for the same company.

Additionally, each prime contractor must require each subcontractor with a potential subcontract value exceeding $500,000 to report labor violations at the federal and state level prior to subcontract award. Prior to the award of a subcontract exceeding $500,000, the prime contractor must review the information on labor violations at the state and federal level and determine whether the subcontractor is a "responsible source" that has a satisfactory record of integrity and business ethics." This too will have to be repeated every six months.

The Executive Order has drawn fire from business groups and the contractor community. Representatives have met with government officials to express their concern and a coalition of twenty organizations representing government contractors called upon the Obama Administration to withdraw the proposal in November 2014.

On February 26, 2015, two subcommittees of the House Education and Workforce Committee, the Subcommittee on Workforce Protections and the Subcommittee on Health, Employment, Labor, and Pensions held a joint hearing on the Executive Order. Labeled "The Blacklisting Executive Order: Rewriting Federal Labor Policies through Executive Fiat" hearings, the Subcommittees heard testimony from Karla Walker, the Assistant Director of the American Worker Project of the Center for American Progress Action Fund, the U.S. Chamber of Commerce, the Professional Services Council, and Angela Styles, the former Administrator for Federal Procurement Policy at the Office of Management and Budget.

Ms. Walter testified that the Executive Order is needed because too many "bad companies" with a record of violations of the covered statutes are being allowed to get government contracts and the existing mechanisms are inadequate to prevent these abuses. She cited a 2013 report by the Majority Committee Staff of the Senate Health, Education, Labor and Pensions Committee which reported that nearly thirty percent of the top violators of wage and workplace safety laws were federal contractors still receiving contracts after having committed violations. She also cited an analysis from the Center for American Progress Action Fund showing that companies that committed the worst workplace violations - including wage and safety violations - had significant performance problems in their government contracts.

Ms. Styles' testimony succinctly described the concerns of the contractor community. In her words,

> I can tell you with a high degree of certainty that this [Executive Order] will: (1) grind essential federal purchases to a standstill, (2) alter the current legal relationship between prime contractors and subcontractors, (3) illegally and unfairly exclude responsible companies from doing business with the federal government, (4) devastate small businesses, and (5) substantially increase the government's costs of buying goods and services. The potential disruption and damage is particularly troubling because adequate mechanisms already exist in our current procurement system to exclude companies with unacceptable labor practices.

Several aspects of the Executive Order's reporting requirements have the business community particularly concerned. At the same time the Obama Administration issued this new Executive Order creating a whole new pre-award process, it conceded that most contractors were responsible bidders. The existing procedures are adequate to weed out violators, far less burdensome on the contractor and the government, and use a well-established process with significant due process protections in place for contractors. The new procedures, in contrast, may well needlessly add uncertainty, subjectivity and onerous and costly new data collection and reporting requirements for federal contractors. Contractors are further concerned that the definition of violations does not clearly exclude agency "administrative" violations and therefore could include requiring disclosure of government actions that are not equivalent to a finding of liability.

Most troubling of all is that the Executive Order creates a process whereby the contracting agency can and must second guess resolutions and settlements entered into with respect to violations. The Labor Compliance Advisor in each agency, as indicated above, is given the authority and the obligation to go in and determine that further remedial programs are necessary both by the contractor *and* by its subcontractors, with pre-bid exclusion, contract loss and debarment as possible results. The Executive Order empowers the Labor Compliance Advisor to pursue suspension and debarment referrals for "appropriate" violations without providing any clear guidance to define such violations. The broad range of laws covered by the Executive Order, the many types of claims that these laws have been violated and the relationship of these claims to union organizing activity which typically triggers complaints to government agencies will put contractors in the position of having to settle baseless claims in order to avoid loss of government contracts. This is problematic for very large employers which very often do have multiple complaints and or litigation involving employment laws, but also a problem for small prime contractors and subcontractors. This Executive Order has dramatically raised the stakes and vastly diminished the ability of government contractor employers to contest claims they in good faith believe are without merit.

The Executive Order also takes aim at pre-dispute arbitration agreements used by government contractors. In 2010, Congress adopted a provision barring pre-dispute arbitration for certain DOD contractors with contracts of more than $1 million. Known as the Franken Amendment, it barred pre-dispute arbitration for claims arising under Title VII or any tort related to or arising out of sexual assault or harassment. Only arbitration agreed to after a claim had been made was to be permissible. This Executive Order extends this prohibition to all government contractors but, like the Franken Amendment, it only applies to contracts valued at more than $1 million. It does not, however apply to preexisting arbitration agreements unless the employer has discretion to modify the agreement and does so.

The controversial Executive Order will likely invite litigation by trade associations as to whether there is statutory authorization for the new requirements and whether the Executive Order conflicts with federal law, especially the Federal Arbitration Act (FAA), as well as policy statements in Title VII and the Civil Rights Act of 1991 that favor arbitration. In recent years, the Supreme Court has unambiguously ruled in favor of binding pre-dispute arbitration provisions as fulfilling the mandate of the Federal Arbitration Act. It has also ruled that binding pre-dispute arbitration provisions should be upheld unless there is a contrary Congressional command to override the FAA.

STAND ALONE HRAS, EMPLOYER PAYMENT PLANS AND THE ACA'S MOST OVERLOOKED EMPLOYER PENALTY

By Jessica B. Summers, Paley Rothman

Employers that currently sponsor employer payment plans or stand-alone health reimbursement arrangements, which likely violate the Patient Protection and Affordable Care Act (ACA), are running the risk of being liable for an excise tax of $100 per day, per plan participant. Unfortunately, many employers do not seem to know that their plans may now violate the ACA.

Since its passage, the vast majority of employer community attention given to the ACA as focused on the ACA's employer mandate. By now, most employers have a general understanding of the employer mandate. Unfortunately, many employers remain unaware of the ACA's additional restrictions and the related penalties that extend to the other health-related benefits they may have historically offered their employees.

Two of the most common types of benefits that have been significantly affected by the ACA are Employer Payment Plans (EPPs) and Health Reimbursement Arrangements (HRAs). The ACA also affected Flexible Spending Accounts (FSAs) and Health Savings Accounts (HSAs) but to a somewhat lesser extent. These latter types of benefits are not addressed in this article.

An EPP (as defined by IRS Notice 2013-54) is an arrangement under which the employer either (1) reimburses employees for the premiums that the employee has paid for health coverage that is not sponsored by the employer, or (2) makes direct premium payments to an insurance company for employee health coverage that is not sponsored by the employer. In 1961, the IRS (in Revenue Ruling 61-146) confirmed that these premium payments by the employer, (whether directly to the insurance company or in the form of a reimbursement to the employee), were excludable from an employee's gross income and permissible for the employer. Prior to the passage of the ACA, EPPs were seen as a good option for employers who wanted to help their employees cover the cost of obtaining health insurance but did not want to sponsor a plan themselves.

An HRA is a plan funded solely by the employer which reimburses employees for certain permitted medical expenses up to a set dollar amount. Reimbursements from an HRA are excluded from an employ-