

## 7 Lingering Questions On Contractor Labor Violation Reports

By **Dietrich Knauth**

*Law360, New York (August 06, 2014, 7:22 PM ET) --* While contractors are on notice about new costs and scrutiny associated with a new requirement to report labor violations to the federal government, plenty of questions remain about how the rules will work in practice.

The self-reporting regime, established by executive order on Thursday, will take effect in 2016 and require contractors to report wage-and-hour violations under the Fair Labor Standards Act, discrimination under Title VII of the Civil Rights Act of 1964, unfair labor practices that violate the National Labor Relations Act, and leave violations under the Family and Medical Leave Act.

Attorneys say that the rule will require significant changes — and significant investments — from both the government and its contractors and that it raises many questions about implementation to be ironed out as regulations develop.

Here are some issues that need to be addressed in the coming months:

### **What Happens After a Disclosure?**

While contractors are concerned about the practical costs of tracking and reporting violations of labor laws, they're also left wondering exactly what the government will do with the disclosures. The executive order says that contracting officers should examine the disclosures when making contract award decisions and that agencies should use disclosures to consider later enforcement or potential debarment for repeat violators, but many specifics are left vague.

"A significant open question is what happens to the information when it is disclosed, and that is something that industry is going to be very interested in going forward," said Peter Eyre, an attorney in Crowell & Moring LLP's government contracts group. "The disclosure itself is only half of the equation."

The self-reporting raises questions similar to the recent mandatory disclosure rule, which requires companies to report credible evidence of fraud or significant overpayments on government contracts, Eyre said. That rule also caused consternation about what the government would do with the disclosures, and a similar period of uncertainty will follow the implementation of the new executive order.

"It is an open question, and a critical one," Eyre said. "It's taken years to get clarity on what happens to

the information when it's disclosed [under the mandatory disclosure rule], and here, too, industry will need clarity on how the government will weigh and act upon these new disclosures.”

### **How Will Agencies Adapt?**

The order would significantly shake up the way agencies enforce contractor labor violations, creating a new position of “labor compliance adviser” within each agency. That adviser will be responsible for raising awareness about labor laws within the agency's contracting workforce, assisting contracting officers in reviewing the new disclosures, and determining whether the disclosures represent “serious, repeated, willful or pervasive” behavior that could warrant suspension or debarment.

The position will create a new level of oversight and force agencies to take a more active role in enforcing labor violations that they may have previously left to the Department of Labor, according to Valerie Hoffman of Seyfarth Shaw LLP.

“This is a new layer of bureaucracy for each of the agencies, and it's a novel approach to monitoring compliance,” Hoffman said. “It will be interesting to see if those labor compliance advisers communicate across the agencies and share information about particular contractors, especially those who have contracts with multiple agencies.”

The Office of Federal Contract Compliance Programs, the DOL agency charged with enforcing contractors' affirmative action and labor regulations, recently received a substantial increase in its enforcement budget, but the new rules will require even more federal spending on additional enforcement staff and a new database and information technology system.

“I don't know whose budget this is going to come out of,” said Connie Bertram of Proskauer Rose LLP.

Hoffman said the new regime's costs will be substantial and wondered whether the government would be better off by simply adding more resources to the OFCCP or other existing enforcement mechanisms.

“It would seem more appropriate and more beneficial to have competent and coordinated enforcement activity without adding another layer on top,” Hoffman said. “I think there's a serious question as to whether this program adds enough value, in terms of compliance, to offset the necessary expenses that will be required to implement it.”

### **How Will Agencies Coordinate on Punishment?**

The rule requires agencies to consider remedial measures, including potential contract termination, suspension or debarment, for “serious, repeated, willful or pervasive violations” of labor laws. Each piece of that definition is likely to be picked over by regulators, contractors, agency enforcers and attorneys before there is a consensus on what kinds of conduct will trigger further enforcement, according to Bertram.

The rule will require close coordination among agency labor advisers, contracting officers, the DOL, and suspension and debarment officials, and those relationships may need to be hammered out in formal regulations or guidelines.

“The coordination piece will be an important one, and the issue of whether it is reviewed by the contracting officer, the DOL, or a debarment official all will need to be sorted out in forthcoming

guidance,” Eyre said. “Because of some of the executive order's discussion of suspension and debarment, I think people will be watching this carefully because of the impact this could have, especially if bright-line, inflexible rules are crafted without regard to the nuances of these issues.”

### **Could Self-Reporting Hurt Cos. in Contract Competitions?**

The executive order says that the disclosures could be used to prevent a company with labor violations from winning a contract or subject them to further enforcement after a contract award, and both pieces raise concerns for companies, according to Michael McGill of Hogan Lovells. The disclosures could also be fodder for bid protests if a company feels that it should have been awarded a contract over another company that has disclosed labor violations into the new database.

“Industry is concerned that contracting officers are going to err on the side of being risk averse, and if there are reports in the system, the contracting officers may decline to award a contract to that entity,” McGill said. “There is going to be a lot of attention paid to the rule-making process, to the risk of this type of de facto debarment, and to ensuring that contracting officers don't go overboard and that they have sufficient guidance and support, including from the new labor compliance officer, to weigh reports of labor-related issues in their broader responsibility determinations.”

For companies that fail to win a contract, they could likely use existing bid protest procedures to challenge those decisions, but challenging adverse findings after winning a contract could be more difficult, Bertram said.

“It's completely unclear exactly who's going to be assessing the information in the database, what standards they will apply and what mechanisms are going to be used for investigating, auditing or prosecuting a contractor when such a finding is made,” Bertram said. “Obviously, there has to be some due process built into the regulations.”

### **Is Database Consolidation Ahead?**

The executive order directs the General Services Administration to develop a new website for federal contractors to use “for all federal contract reporting requirements related to this order, as well as any other federal contract reporting requirements to the extent practicable.” The open-ended directive raises questions about whether the new database could be used to address current, or even future, reporting requirements in a way that eases the government's collection of contractor data.

The GSA is currently in the process of linking up nine contractor databases through its System for Award Management, and the new database will likely be included in that effort. While it's too soon to say what other reporting requirements could be rolled in to the new website, attorneys say the focus on improving and centralizing data fits with the government's current strategy for managing contractors.

The “OFCCP has been trying to improve its information technology systems in order to do its job more efficiently, so I'm not surprised to see a focus on improving systems more generally,” Hoffman said. “This should work to ensure that the agencies work with each other and communicate, as well as sharing a central database. Hopefully, it will provide a method for the agencies to consult and coordinate with each other.”

## **How Will the Order Affect Arbitration Agreements?**

For companies with contracts worth \$1 million or more, the executive order bans the use of agreements that require contractor employees to arbitrate “claims arising under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment.” That expands a prohibition that currently exists for DOD contractors to civilian contractors as well.

While the definition may seem clear cut, the Civil Rights Act could encompass many kinds of disputes, and companies will need to think about how to rewrite policies, such as including a carveout to existing arbitration agreements or doing away with such agreements entirely, attorneys said.

Because DOD contractors have already been dealing with similar questions since Sen. Al Franken, D-Minn., championed an amendment that was adopted in the 2009 defense appropriations act, civilian agency contractors can learn from DOD contractors' experience, Bertram said.

“A lot of those issues have been worked through by DOD contractors, and I think civilian contractors are going to be able to draw on that experience in implementing the new ban,” Bertram said. “There are a lot of different templates and models to follow if you're a civilian contractor facing this issue for the first time.”

## **Will the Requirements Push Cos. to Settle Labor Disputes?**

While the executive order will affect companies' attempts to win and perform federal contracts, it also has the chance to have a broader impact on the way companies handle labor disputes. Since the executive order is triggered by violations, it could make companies more willing to settle disputes rather than risk an adverse finding that can have a rippling impact on their business, Bertram said.

“Are companies going to be concerned enough about this requirement that it will change the risk management analysis when trying to resolve an individual claim or making a difficult termination decision?” Bertram said. “It may encourage additional settlements to avoid the chance of a finding against the company.”

--Editing by Jeremy Barker and Philip Shea.