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Investigator
Pinnacle Investigations, Inc.

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Proposed anti-human trafficking rules could significantly affect contractor compliance programs

- » The Obama administration proposed two new federal procurement rules.
- » These proposed rules aim to eradicate forced labor.
- » Proposed rules would strengthen the government's zero-tolerance policy regarding human trafficking.
- » US government contractors may need to comply with these rules in the future.
- » Potentially affected companies should review their compliance programs.

Forced human labor and slavery are atrocities that have afflicted human societies for generations. In addition to the moral issues presented, business executives, general counsel, and compliance officials need to consider the potential effects that these violations may have on their companies.

Although this topic may seem far outside the normal course of business, changing definitions of human trafficking may bring standard company practices into the crosshairs of new regulations that carry with them a horrific label. Federal and state authorities have implemented numerous laws to end human trafficking. Companies that are part of an international supply chain have to comply with these laws—and may need to comply with additional new federal rules strengthening protections for individuals who are subjected to forced labor.

Two proposed federal rules

The Obama administration has proposed two new federal procurement rules that could affect numerous US companies, including

government contractors and subcontractors. The public comment period for the “Federal Acquisition Regulation: Ending Trafficking in Persons” ended on December 20, 2013, and the proposed rule will likely become a final rule in the near future.¹

Another proposed rule, the “Defense Federal Acquisition Regulation Supplement: Further Implementation of Trafficking in Persons Policy,” also will pertain to some federal contractors.²

These proposed rules will implement and expand on President Obama's Executive Order 13627, “Strengthening Protections Against Trafficking in Persons in Federal Contracts” (the Executive Order)³ and Title XVII of the National Defense Authorization Act for fiscal year 2013 (NDAA), both of which already affect many US-based companies.

Because the two new proposed federal rules will significantly impact corporate compliance standards,



Farhat



Shepherd



Canale

companies will need to be mindful of them when designing and implementing corporate compliance plans.

Existing anti-human trafficking laws

Both the federal government and individual states have already passed legislation to deal with human trafficking.

President Obama's Executive Order 13627

In the effort to eradicate human trafficking, Executive Order 13627 strengthened the US government's zero-tolerance policy regarding human trafficking and imposed significant standards on companies. It covers many types of unlawful trafficking activities, including: (1) the recruitment, transportation, harboring, provision, or obtaining of a person for labor through the use of force, fraud, or coercion for the purpose of subjecting the person to involuntary servitude, debt bondage, peonage, or slavery; and (2) the procurement of a commercial sex act or sex induced by force, fraud, or coercion, or in which the person induced to commit the sex act is under 18 years of age.⁴

The Executive Order requires companies to comply with basic conduct mandates, including prohibiting: (1) the use of fraudulent or misleading recruitment practices; (2) charging recruitment fees from employees; and (3) destroying, confiscating, or otherwise denying access to employee identification documents.⁵ It also requires contractors and subcontractors to pay return transportation costs for employees travelling to expatriate jobs, permit full audits and inspections, and notify the Inspector General of the pertinent agency of any non-compliance.⁶

California's Transparency in Supply Chains Act

States have additional anti-human trafficking laws. For instance, in September 2010, the

California Transparency in Supply Chains Act of 2010 was enacted, which became effective on January 1, 2012.⁷ It applies to all California businesses that meet certain definitions, whether or not headquartered in California, and imposes anti-human trafficking measures on these companies.

The Act requires any company that is a retail seller or manufacturer, does business in California, and has annual worldwide gross receipts that exceed \$100 million to disclose its compliance programs aimed at eradicating slavery and human trafficking from the company's direct supply chain for tangible goods offered for sale.⁸

- Specifically, the Act covers a company that:
- ▶ is organized or commercially domiciled in California;
 - ▶ has sales in California for the applicable tax year exceeding the lesser of \$500,000 or 25% of the company's total sales;
 - ▶ has real property and tangible personal property in California exceeding the lesser of \$50,000 or 25% of the company's total real property and tangible property; or
 - ▶ pays compensation in California exceeding the lesser of \$50,000 or 25% of the total compensation paid by the company.⁹

The Act also mandates that California businesses governed by the Act have a public statement on their website outlining the company's efforts to ensure its products are free from the influence of human trafficking.¹⁰ The business must disclose the extent, if any, of compliance efforts in five trafficking-related categories on its website, including:

- ▶ Verifying product supply chains to evaluate and address risks of human trafficking and slavery, and disclose if the verification was not performed by a third party;
- ▶ Auditing suppliers to evaluate compliance with company standards for human

trafficking and slavery in supply chains, and disclose if audits were not independent and unannounced;

- ▶ Requiring direct suppliers' certification that materials used in products comply with the laws regarding human trafficking and slavery of the countries in which they are doing business;
- ▶ Maintaining standards for internal accountability and procedures for contractors that fail to meet the company's human trafficking and slavery standards; and
- ▶ Training company employees who have direct responsibility for supply chain management on human trafficking and slavery.¹¹

These five categories of disclosures mandated by the Act must be posted on the company's website with a conspicuous link from the homepage. If no website is maintained, then the company must provide a written disclosure to a consumer within 30 days of a written request.¹²

Summary of the new proposed federal rules

On September 26, 2013, the Federal Acquisition Regulation (FAR) Council published a proposed rule in the Federal Register that would implement the Executive Order and Title XVII of the NDAA.¹³ This proposed rule continues the policy that contractors and subcontractors must act affirmatively against human trafficking. The public comment period for the FAR proposed rule ended on December 20, 2013.¹⁴

In addition, on September 26, 2013, the Department of Defense published a proposed rule to augment the Defense Federal Acquisition Regulation Supplement (DFARS), which would, in certain instances, add the requirements of:

- ▶ Posting a hotline poster regarding human trafficking and whistleblowing when work

is performed either in the United States or outside and, if a substantial portion of the employees do not speak English then the posters must be provided in the language spoken by a substantial part of the workforce;

- ▶ Adding a new representation that hiring practices address combating trafficking in persons and are complying with requirements; and
- ▶ Integrating an employee bill of rights.¹⁵

The proposed FAR rule implements and expands upon core anti-trafficking policies as provided in the Executive Order and Title XVII of NDAA. For all federal contracts, the proposed rule prohibits:

- ▶ destroying, confiscating, concealing, or denying access to an employee's identification documents;
- ▶ using fraudulent or misleading practices during employee recruitment;
- ▶ charging recruitment fees from employees, or arranging housing that fails to meet host country's standards;
- ▶ failing to provide written employment contracts or recruitment agreements in the employee's native language prior to the employee leaving his or her country of origin; and
- ▶ failing to provide return transportation or the cost of return transportation at the end of the employment contract.¹⁶

Contractors would also be required to interview and protect all suspected victims or witness employees prior to returning to their country of origin. Furthermore, the proposed rule would require the contractor to include, in the Federal Awardee Performance and Integrity Information System, any substantiated allegations in an Inspector General Report for violations of the Executive Order or the Trafficking Victims Protection Act.¹⁷

In addition, the proposed rule would implement additional requirements for contracts where the portion of the contract performed outside the United States exceeds \$500,000. For contracts of this size, it would require that contractors establish and publish, at their workplace and on their website, a compliance plan appropriate to the size of the contract and nature and scope of activities performed.¹⁸ Contractors would be required to include the following in their compliance plans:

- ▶ An awareness program informing employees about the US government’s zero-tolerance human trafficking policy, the contractor’s prohibited trafficking-related activities, and actions that will be taken against violating employees.
- ▶ A process for employees to report activities inconsistent with the zero-tolerance policy of the government.
- ▶ A recruitment and wage plan permitting only the use of recruitment companies with trained employees, prohibiting the charging of recruitment fees to the employee, and ensuring that wages meet applicable legal requirements of the host country or provides explanations of variances.
- ▶ A housing plan (if housing is arranged or provided) ensuring compliance with host country housing and safety standards or explanations of variances.
- ▶ Procedures to prevent agents and subcontractors from engaging in trafficking, and to monitor, detect, and terminate any agents or subcontractors who have engaged in such activities.¹⁹

In addition to compliance plans, prior to receipt of an award and on an annual basis thereafter, federal contractors would have to certify implementation of the compliance plan and certify that neither the contractor nor agents

or subcontractors have engaged in trafficking or that appropriate remedial measures have been taken if abuse has been found.²⁰

Next steps for doing business with the US government

Again, the proposed FAR rule builds on President Obama’s Executive Order 13627 and furthers the zero-tolerance stance of the federal government. It would impose substantial requirements on contractors and subcontractors. As a result:

- ▶ Companies that contract with the US government or act as subcontractors should revisit and begin updating compliance plans to comport with potential new responsibilities.
- ▶ Companies will need to update their compliance plans and train employees in the new policies and procedures once the rule becomes final.
- ▶ Federal government contractors and subcontractors should consider reviewing and revising corporate compliance plans in anticipation of the promulgation of this proposed rule. *

1. 78 Fed. Reg. 59317 (Sept. 26, 2013). Available at <http://1.usa.gov/1fbbwg7>; and 78 Fed. Reg. 69812 (Nov. 21, 2013). Available at <http://1.usa.gov/1ifQdBX> (extending comment period deadline).
 2. See 78 Fed. Reg. 59325 (Sept. 26, 2013). Available at <http://1.usa.gov/NXU2xD>
 3. Exec. Order No. 13627 (Sept. 25, 2012). Available at <http://1.usa.gov/1cdkrmi>
 4. See *id.* at §1.
 5. *Id.* at §2 (a)(1)(A).
 6. *Id.* at §2 (a)(1)(A)-(C).
 7. California Senate Bill No. 657 (filed Sept. 30, 2010).
 8. California Civil Code §1714.43(a)(1).
 9. *Id.* at §1714.43(a)(2)(A) and California Revenue & Tax Code §23101.
 10. California Civil Code §1714.43(b).
 11. *Id.* at §1714.43(c).
 12. *Id.* at §1714.43(b).
 13. 78 Fed. Reg. 59317.
 14. 78 Fed. Reg. 69812.
 15. 78 Fed. Reg. 59325-59326.
 16. 78 Fed. Reg. 59318.
 17. *Id.*
 18. 78 Fed. Reg. 59318-59319.
 19. *Id.*
 20. 78 Fed. Reg. 59319 (The compliance plan and certification requirements do not apply to a contract solely for “commercially available off-the-shelf items.”)

Vince Farhat (vince.farhat@hkllaw.com) is a Partner at Holland & Knight LLP in Los Angeles, CA. *William N. Shepherd* (william.shepherd@hkllaw.com) is a Partner at Holland & Knight LLP in West Palm Beach, Florida & Washington, D.C. *John A. Canale* (john.canale@hkllaw.com) is an Associate at Holland & Knight LLP in Los Angeles, CA.