



# Federal Contractor

2018 COMPLIANCE UPDATE

COMPLIANCE LAWYER TRACK

## Introduction: Paige Shannon, Vice President, Risk & Compliance, Kforce



- ▶ Paige Shannon joined Kforce Inc. in 2010 and currently serves as Deputy General Counsel and Vice President, Risk & Compliance.
- ▶ She is responsible for corporate legal operations for Kforce as well as the Company's Risk and Compliance Programs. Paige also serves as legal counsel for Kforce Government Solutions Inc. (KGS). In 2015, Paige joined the KGS Board of Directors and is the Chairperson of the Board's Compliance Committee.
- ▶ Paige is a graduate of The Catholic University of America where she earned her Bachelor's Degree and Juris Doctorate. She also earned a Master's Degree in Business Administration from George Mason University.
- ▶ Prior to joining Kforce, Ms. Shannon served as General Counsel for several technology and engineering services companies.

## Introduction: Adelle Elia, Chief Integrity Officer, Louis Berger



- ▶ The first dedicated Ethics Officer at GTSI, a federal contractor. Developed the GTSI ethics and compliance program after suspension of the company by the US Government, operating under an Administrative Agreement and with a Corporate Monitor and sub-monitor in place. Joined US Investigations Services, to support the company as Chief Ethics and Compliance Officer as it prepared to enter a settlement with the U.S. Department of Justice. Subsequently led the program through other challenges related to a data breach, and the successful sale of the company's assets to another federal contractor.
- ▶ Joined Louis Berger in 2017 to lead the ethics and compliance function to the successful conclusion of a three year Deferred Prosecution Agreement related to FCPA violations, which concluded on July 7, 2018. At Louis Berger, she also oversees the programs needed to comply with and ultimately successfully conclude several Integrity Monitoring Agreements under state/municipal agencies.

## Agenda

- ▶ Agency Updates
- ▶ Regulations, Laws and Executive Orders
- ▶ International and Hot Topics
- ▶ Wrap Up



## Agency Updates

- ▶ Department of Labor- Office of Federal Contract Compliance Programs (OFCCP)
- ▶ Agency administers and enforces:
  - ▶ Executive Order (EO) 11246, as amended
  - ▶ Section 503 of the Rehabilitation Act of 1973, as amended
  - ▶ Readjustment Assistance Act of 1974, as amended



## OFCCP

### **What are OFCCP Directives?**

- Directives provide guidance to OFCCP and contractors on enforcement and compliance policy
- Directives do not change laws or regulations
- Directives do not create any legally enforceable rights or obligations
- Directives give insight into OFCCP's focus areas and enforcement methodology

## OFCCP

- ▶ It is illegal for Federal Contractors and Subcontractors to discriminate in employment on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran.
- ▶ Federal Contractors and Subcontractors are also prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or the compensation of others (some limitations exist)
- ▶ Are you a Federal Contractor or Subcontractor?
  - ▶ Do you have 50 or more employees within the United States?
  - ▶ Do you have \$50,000 or more in federal contracts or subcontracts?
  - ▶ If yes, you are a federal contractor /subcontractor.
- ▶ What does I mean if you are a federal contractor/subcontractor?
  - ▶ You are subject to the laws, rules, and regulations enforced and promulgated by the OFCCP

## OFCCP

- ▶ Directive 2018-01- Use of Predetermination Notices (PDN)
- ▶ A PDN is a letter that OFCCP uses to inform federal contractors and subcontractors ("contractors") of the agency's preliminary findings of employment discrimination. In recent years, OFCCP has typically reserved use of the PDN for systemic discrimination cases and permitted regional and district offices discretion in whether to issue the PDN prior to issuing a Notice of Violation (NOV).
- ▶ As part of OFCCP's ongoing efforts to achieve consistency across regional and district offices, increase transparency about preliminary findings with contractors, and encourage communication throughout the compliance evaluation process, OFCCP is instituting a uniform approach to the use of PDNs in compliance evaluations where the agency believes discrimination findings may exist.
- ▶ OFCCP will issue PDNs for preliminary individual and systemic discrimination findings identified during the course of compliance evaluations. The use of the PDN encourages communication with contractors and provides them an opportunity to respond to preliminary findings prior to OFCCP deciding to issue an NOV. Regional discretion is no longer permitted. Compliance officers and other responsible staff must issue PDNs at the conclusion of compliance evaluations where the contractors have not provided adequate explanations to proposed discrimination findings. The PDN, in the form of a letter from OFCCP to the contractor, provides the contractor 15 additional calendar days to rebut OFCCP's proposed findings that sufficient evidence exists of discrimination.

## OFCCP

- ▶ Directive 2018-03-Executive Order 11246 § 204(c), religious exemption
- ▶ Clarifies the Agency's position on religious non-discrimination under EO 11246 in light of cases involving the relationship between federal regulation and the Free Exercise Clause
  - ▶ Masterpiece Cakeshop, Ltd. vs. Colorado Civil Rights Commission
  - ▶ Trinity Lutheran Church of Columbia Inc. vs. Comer
  - ▶ Burwell vs. Hobby Lobby
- ▶ In line with the longstanding constitutional requirement that government must permit individuals and organizations, in all but the most narrow circumstances, to participate in a government program "without having to disavow [their] religious character,"<sup>2</sup> OFCCP staff are instructed to take these legal developments into account in all their relevant activities, including when providing compliance assistance, processing complaints, and enforcing the requirements of E.O. 11246. OFCCP staff should bear in mind that:

They "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices" and must "proceed in a manner neutral toward and tolerant of . . . religious beliefs."<sup>3</sup>

  - ▶ They cannot "condition the availability of [opportunities] upon a recipient's willingness to surrender his [or her] religiously impelled status."<sup>4</sup>
  - ▶ "[A] federal regulation's restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act]."<sup>5</sup>
  - ▶ They must permit "faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . [Federal] contracts."<sup>6</sup>
  - ▶ They must respect the right of "religious people and institutions . . . to practice their faith without fear of discrimination or retaliation by the Federal Government."<sup>7</sup>

## OFCCP

- ▶ Directive 2018-04-Focused reviews of contractor compliance with Executive Order 11246 (E.O.), as amended; Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended; and Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended.
- ▶ To direct that a portion of future scheduling lists include focused reviews as to each of the three authorities that the Office of Federal Contract Compliance Programs enforces - the E.O., Section 503, and VEVRAA- as described in 41 C.F.R. § 60-1.20, 41 C.F.R. § 60-300.60; 41 C.F.R. § 60-741.60; and the Federal Contractor Compliance Manual (FCCM) at IA00.
- ▶ For the remainder of 2018- focus on disability and veteran contractor obligations
- ▶ In the focused reviews anticipated by this Directive, OFCCP would go onsite and conduct a comprehensive review of the particular authority at issue. For example, in a Section 503 focused review, the compliance officer would review policies and practices of the contractor related solely to Section 503 compliance. The review would include interviews with managers responsible for equal employment opportunity and Section 503 compliance (such as the ADA coordinator) as well as employees affected by those policies. OFCCP would also seek to evaluate hiring and compensation data, as well as the handling of accommodation requests, to ensure that individuals with disabilities are not being discriminated against in employment. A similar approach would be used in a VEVRAA focused review to ensure compliance with equal employment opportunity and anti-discrimination obligations as to protected veterans. Finally, an E.O. focused review would ensure compliance with equal employment opportunity and anti-discrimination obligations as to all of the protections in the E.O.

## OFCCP

- ▶ Directive 2018-05-Analysis of Contractor Compensation Practices During a Compliance Evaluation
- ▶ Replaces Directive 2013-03
- ▶ Outlines OFCCP's standard procedures for reviewing contractor compensation practices during a compliance evaluation. More clearly describes OFCCP's approach to determining similarly situated employees, creating pay analysis groups, conducting statistical analysis & modeling, and other analytical matters.
- ▶ Reinforces OFCCP's current commitment to greater transparency, consistency, and efficiency in compliance evaluations
- ▶ Applicable to reviews scheduled on or after August 24, 2018.

## OFCCP

### Directive 2018-05- Compensation Guidance (cont.)

- OFCCP has enormous discretion in choosing how to analyze pay; Internal OFCCP toll allows compliance officers the leeway to run multiple models to find one that allegedly shows discrimination
- What types of pay cases will the OFCCP review?
  - Systemic- pattern of practice discrimination
  - Individual- disparate treatment or cohort comparisons
- Focus on inequities in monetary compensation, training or advancement opportunities, assignment/placement differences

## OFCCP

### Directive 2018-05- Compensation Guidance (cont.)

#### How will OFCCP analyze compensation?

- Base pay and total compensation are separate analyses
- Other elements of compensation such as bonuses, commissions, overtime, and shift differentials may be analyzed
- Likely to conduct multiple linear regression analyses
- May accept performance review results as well as market studies as control variables

## OFCCP

### Directive 2018-05- Compensation Guidance (cont.)

#### What if OFCCP finds problems with compensation?

- Will issue a Pre-Determination Notice
- Will provide contractors with data necessary to replicate OFCCP's regression results
- If the contractor cannot rebut the findings, OFCCP will issue a Notice of Violation and propose a Conciliation Agreement
- OFCCP will seek back pay and benefits plus interest for affected class members
- Debarment is unlikely except in extreme cases

## OFCCP

- ▶ Directive 2018-06- Contractor Recognition Program
- ▶ Intention is to recognize contractors with effective programs and initiatives which aid in the attraction, placement, development, and retention of applicants and employees covered under the EEO laws enforced by the Agency.
- ▶ Establishes peer mentoring programs and highlights model programs to provide covered contractors examples of effective programs to consider for their own organizations.

## OFCCP

- ▶ Directive 2018-07-Affirmative Action Program Vérification Initiative
- ▶ To implement a verification process with the objective of ensuring that all covered federal contractors are meeting the most basic equal employment opportunity (EEO) regulatory requirement, namely, the preparation of a written affirmative action program (AAP) and annual updates to that program
- ▶ OFCCP is concerned that many federal contractors are not fulfilling their legal duty to develop and maintain AAPs and update them on an annual basis.
- ▶ OFCCP will develop a comprehensive program to verify that federal contractors are complying with AAP obligations on a yearly basis. This program includes: • Development of a process whereby contractors would certify on a yearly basis compliance with AAP requirements. 6 • Inclusion of a criterion in the neutral scheduling methodology increasing the likelihood of compliance reviews for contractors that have not certified compliance with the AAP requirements. • Compliance checks to verify contractor compliance with AAP requirements. • Requesting proffer of the AAP by contractors when requesting extensions of time to provide support data in response to a scheduling letter. • Development of information technology to collect and facilitate review of AAPs provided by federal contractors. OFCCP will prepare a public outreach and education campaign on this initiative
- ▶ 85% of the contractors selected for a compliance review are unable to submit a written AAP within 30 days of receiving a Scheduling Letter for the OFCCP



## OFCCP

- ▶ Directive 2018-08-Transparency in OFCCP Compliance Activities
- ▶ To ensure transparency in all stages of OFCCP compliance activities to help contractors comply with their obligations and know what to expect during a compliance evaluation, and to protect workers from discrimination through the consistent enforcement of OFCCP legal authorities.
- ▶ In 2018, OFCCP took several steps to improve transparency, cooperation, and communication with federal contractors including: implementing a 45-day<sup>3</sup> scheduling delay to provide contractors more time to prepare for the audit and participate in one or more OFCCP compliance assistance events across the country; publishing OFCCP's supply and service scheduling methodology on the agency's public web site; issuing Directive 2018-01 requiring the use of pre-determination notices providing contractors the opportunity to respond to potential violation findings before a Notice of Violation (NOV) is issued; and publically releasing "What Federal Contractors Can Expect," outlining OFCCP's commitment to clear, accurate, and professional interactions with OFCCP staff in carrying out compliance assistance, compliance evaluation, and complaint investigation activities. This directive extends OFCCP's transparency initiative to every stage of a compliance evaluation to facilitate consistency of operations, improve efficiency, and resolve collaboratively matters during compliance evaluations.

## OFCCP

- ▶ On August 2, 2018, the OFCCP published "What Contractors can Expect"- guidance which sets forth the Agency's enforcement plans and echoes the message of transparency announced when the current leadership was established.
- ▶ Contractors can expect:
  - ▶ Access to accurate compliance assistance material
  - ▶ Timely response to compliance assistance questions
  - ▶ Opportunities to provide meaningful feedback and collaborate
  - ▶ Professional conduct by OFCCP's compliance staff
  - ▶ Neutral scheduling of compliance evaluations
  - ▶ Reasonable opportunity to discuss compliance evaluation concerns
  - ▶ Timely and efficient progress of compliance evaluations
  - ▶ Confidentiality

## OFCCP's Pay Transparency Rule

- ▶ Federal contractors that have employee handbooks must include the Pay Transparency Nondiscrimination Provision in the handbook.
- ▶ The provision must be posted in the workplace and included on recruitment websites
- ▶ Confidentiality provisions in employee handbooks, policies, contracts, subcontracts, and agreements should be reviewed for compliance
- ▶ Job descriptions should be updated, where applicable, to indicate that the essential job functions of the position include:
  - ▶ Accessing compensation information to perform other essential job functions or other routinely assigned business tasks of the position and/or
  - ▶ Protecting and maintaining the privacy of employee personnel records, including compensation information.

## OFCCP

### **What does all of this mean for you?**

- More audits, quicker closures, faster response time required
- More consistency between regions and offices
- More emphasis on disabled and veteran issues
  - audit and documentation requirement- a list of efforts is not enough. Be prepared with a narrative explanation of efforts
- Compensation
  - Know what your data shows
  - Review your AAP
  - Understand that classes of employees you would traditionally think are not victims of discrimination may be determined to suffer from discrimination i.e. white males
  - Fixing pay equity for one group could actually lead to problems for other groups
  - Conduct all analyses under privilege

## Special Considerations for Federal Contractors

- Federal contractors are required to evaluate compensation at least annually.
  - They must be prepared to prove to OFCCP that the required evaluations have been performed.
  - Affirmative Action Plan self analyses are generally not protected as privileged.
- Contractors should analyze compensation to determine and mitigate risk of adverse audit findings.
  - conduct simple, non-privileged analyses to identify issues and satisfy OFCCP requirements;
  - conduct more robust audits under attorney-client privilege to identify areas presenting significant potential liability.

## Ensure Compliance

- ▶ Evaluate whether policies such as leave, compensation or benefits could have a disparate impact on certain groups of employee
- ▶ Review compensation and compensation related policies and guidelines for compliance with fair pay requirements
- ▶ Modify policies regarding disclosing and/or requesting salary information
- ▶ Inform managers, human resources personnel, and recruiters about equal pay requirements and train and what can and cannot be used to make compensation decisions.

## United States Citizenship and Immigration Service (USCIS)

- ▶ U.S. Citizenship and Immigration Services is an agency of the U.S. Department of Homeland Security that administers the country's naturalization and immigration systems.
- ▶ On April 18, 2017, President Trump signed the Buy American and Hire American Executive Order (BAHA), which seeks to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering our immigration laws. It also directs DHS, in coordination with other agencies, to advance policies to help ensure H-1B visas are awarded to the most-skilled or highest-paid beneficiaries.
- ▶ The H-1B denial rate jumped to 22 percent in the last quarter of the last fiscal year, from 16 percent in the third quarter, a 41 percent increase, according to the institute, which said its findings were based on data from U.S. Citizenship and Immigration.

## USCIS

### ▶ **Current Administration Focus:**

- ▶ Return of supply side enforcement;
- ▶ Increased Department of Labor enforcement (USCIS/DOL MOU)
- ▶ Stricter definitions for current laws
- ▶ More robust adjudication enforcement
- ▶ Travel Ban

## USCIS

### ► Increased Enforcement :

- Increase in I-9 audits- more than 5000 Notices of Intent to audit have been issued between January 29, 2018 and July 20, 2018
- Increase in immigration customs enforcement audits- 3500+ audits between October 1, 2017- August 15, 2018
- Increase in worksite visits and raids

## USCIS

- February 2018- USCIS memo informed employers hoping to hire a foreign born worker that they would have to conclusively prove that no qualified American worker is available.
  - H1B petitions will require employers to include additional information and documentation outlining the work to be done at third party worksites and showing that the employer/employee relationship between petitioner and H1B beneficiary will continue to exist
  - Petitioning employers will also be required to provide documents including the Company's work product, statements of work, letters from each end client company, and contracts.
  - Petition must include dates and locations of the services to be provided and show that the services will be required for the entire time requested in the petition.
  - Petitioning employers should expect increased scrutiny from the USCIS on H1B petitions –particularly for employees who will be working at third party/client sites.

## USCIS

- ▶ June 2018- Supreme Court of the United States (SCOTUS) upheld the third version of the travel ban implemented by the Administration.
- ▶ The Travel Ban restricts immigrant entry from:
  - ▶ Iran
  - ▶ North Korea
  - ▶ Syria
  - ▶ Libya
  - ▶ Yemen
  - ▶ Somalia
  - ▶ Venezuela

## USCIS

- ▶ July 2018- USCIS publishes a Policy Memorandum to provide guidance on Executive Order 13768 which called for enhancing public safety in the United States through immigration policies.
- ▶ Prior to this Memorandum, foreign nationals would typically receive a Notice to Appear (NTA) which requires the foreign national to appear before an Immigration Judge on a certain date to determine the foreign national's status in the United States (this is essentially the beginning of deportation proceedings)
- ▶ Under the new Policy Memorandum NTAs will be issued to a broader group of foreign nationals who are removeable when there is evidence of fraud, criminal activity, or **when the foreign national is denied an immigration benefit and is unlawfully present in the United States.**
- ▶ Employers who employ foreign nationals working pursuant to H1B, F1 visas should note that employees whose visa extension has been denied or their visa expires while USCIS reviews the application will be issued a NTA and placed in removal proceedings.
  - ▶ Previously, visa holders who were unexpectedly denied visa benefits were simply advised to voluntarily leave the country

USCIS

**Update to Notice to Appear (NTA) Policy-**

- Roll out will be staggered beginning October 1, 2018
- First phase of the rollout does not include employment based petitions
- Initial focus is on applications (as opposed to petitions) and the policy affects adjustments of status (Form I-485), applications for naturalization (Form N-400), and applications to extend or change non-immigrant status (Form I-539)
- Employment based petitions and humanitarian applications and petitions are not included in initial roll out
- Generally, USCIS will not immediately issue a NTA upon the denial of an immigration benefit. It will wait for the expiration of the motion or appeal period before issuing the NTA (although they reserve the right to issue immediately)
- NTA policy does not include initial requests for deferred action for arrivals, renewals or requests for DACA related benefits

USCIS

➤ **August 2018- Suspension of H1B Premium Processing**

- USCIS extended and expanded the previously announce temporary suspension of premium processing for cap subject H1B petitions.
- Stated purpose is to discourage frivolous filings and skeletal applications used to game the system and to ensure U.S. Government resources are not wasted and to improve USCIS' ability to efficiently and fairly adjudicate requests for immigration benefits in full accordance with the law.

USCIS

- ▶ **September 2018- USCIS is given authorization to deny, without advising the petitioner, visa applications that in the review process are deemed incomplete or falsified**
  - ▶ Previously questionable submissions were returned with requests for more information/requests for evidence (RFE) or issues a Notice of Intention to Deny (NOID)
  - ▶ Petitioners can no longer rely on the ability to supplement petitions deemed incomplete

USCIS

- Focus on combating fraud and abuse in the H1B Visa Program
- H1B visa program purpose is to help United States companies to recruit highly skilled foreign nationals when there is a shortage of qualified workers in the U.S. Fraud and abuse in the H1B visa program negatively affects qualified U.S. workers
- To further efforts to eliminate H1B visa fraud and abuse USCIS has established a dedicated email tip line to report fraud and abuse
  - Tip line has received 5000+ tips in its first 12 months
  - Report [H1BAbuse@USCIS.dhs.gov](mailto:H1BAbuse@USCIS.dhs.gov)
- USCIS provides examples of H1B fraud indicators on its website.



## USCIS

### ► What's Next?

- Many expect USCIS to announce the rescission of the H-4 employment authorization document program which provides work authorization to certain H1B visa holder spouses. **Update- DHS has clarified when it might issue its pending proposal to rescind work authorizations for H-4 visa holders. Rule will likely be submitted to OMB before the end of 2018. It is then likely that the proposed Rule will be published for public comment in early 2019.**
- Potential revisions to regulations governing the use of public benefits by immigrants such as food stamps and Medicaid

## Regulations, Laws and Executive Orders

### ► Employment/Workplace Update

- Service Contract Act
- Sick Pay Requirements
- MeToo/Anti-Harassment developments
- USAID guidance (SHEA)



## Service Contract Act and Davis Bacon Act

### **Service Contract Act (29 CFR 4.114)**

Requires contractors and subcontractors performing services on federal contracts with a value of \$2500 or greater to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates contained in the predecessor contractor's collective bargaining agreement (CBA).

### **Davis Bacon Act (29 CFR 5.5)**

Requires contractors and subcontractors performing work on federally funded or assisted contracts with a value of \$2000 or greater for the construction, alteration, or repair of public buildings or public works to pay laborers and mechanics employed under the contract no less than the prevailing wage and fringe benefits for the corresponding work on similar projects in the area.

## SCA/DBA

### ► SCA work is typically:

- Scheduled regularly occurring maintenance activities
- Routine to keep something in use
- i.e. custodial service, HVAC maintenance, snow removal, help desk services, installation of computer and network equipment

### ► DBA work is typically:

- One time to fix something which is not functioning
- Restoration, alteration or replacement of fixed components
- i.e. building or extensive mending of fences, painting or decorating, paving repairs, structural repair of buildings

## SCA

- ▶ Directory of Occupations – available from [www.dol.gov](http://www.dol.gov)
- ▶ Wage Determination/Prevailing Wage is the minimum rate that the contractors /subcontractors must pay its' employees working on a covered contract.
  - ▶ Developed based on available data showing the rates that are prevailing in a specific locality.
  - ▶ Prevailing wage = more than 50% of the workers in a classification of service employees engaged in similar work. If a single rate is not paid to 50% + then statistical measures are used to determine the prevailing wage.

## SCA Benefits

**Fringe Benefits-** every covered contract contains a provision specifying the fringe benefits to be provided to employees.

- Must be provided in addition to the minimum wage determination/prevailing wage.
- Contractors may take credit for bona fide fringe benefit und contributions made to insurers if such payments are irrevocably paid and are made regularly.
- The current Health and Welfare Fringe Benefits Rate is \$4.48 per hour for the first 40 hours paid each week, including holidays, sick leave, and paid time off.
- On contracts covered by E.O 13706- Paid Sick Leave, the Health and Welfare Fringe Benefits Rate is \$4.18 per hour for the first 40 hours paid each week.
- In lieu of qualifying existing employer health and welfare benefit plans, employers may make a cash payment to employees in the amounts described above.

## SCA Holiday and Vacation

- Eligible employees on covered contracts are entitled to vacation as described in the wage determination.
- Continuous service determines employees' eligibility for paid vacation benefits and is determined by the length of time the employee has:
  - worked for the contractor and/ or worked for the predecessor contractor in performance on the same contract
- Paid vacation becomes vested on an employee's anniversary date but does not have to be used or paid until the earliest of:
  - the employee's next anniversary date;
  - the date of contract completion;
  - termination of employment.

## SCA Holiday and Vacation

### ► Holidays

- Named holidays are listed on the wage determination.
- Employee is entitled to holiday pay if he/she performs any work during the holiday workweek
- Holiday benefits must be provided regardless of the length of time the employee has worked for the employer at the time a holiday occurs
- Employers may pay holiday pay (in addition to regular pay) if the employee is required to work on a holiday.

## Posting and Notice Requirements

- ▶ **Employers performing work covered by the SCA are required to:**
  - ▶ Provide each employee working on the contract notice of the SCA payment and fringe benefit requirements for the different classes of services employees, and
  - ▶ Post the "Employee Rights on Government Contracts" notice (including any applicable wage determinations) at the site of the work in a prominent and accessible place where it may be easily seen by employees.

## Enforcement

- The Department of Labor is the enforcement agency.
  - Agency relies on audits for enforcement
  - DOL audits may be triggered by complaints or DOL selection
  - Often an initial DOL complaint or audit focuses on an alleged FLSA or FMLA compliance failure
- DOL can and will expand audits to multiple contractors and/or multiple locations where an initial audit shows violations that may be systematic or are found to be willful
- No private cause of action is created by the SCA. However, an employee or union may file a qui tam action under the False Claims Act.

## Penalties

- ▶ Back wages and benefits
- ▶ A “hold” on contract payments by the Agency
- ▶ Contract cancellation and re-procurement costs
- ▶ Personal liability for corporate officials and others who exercise control, supervision or management of contract performance
- ▶ Debarment for three year term from ALL government contracts unless showing of unusual circumstances
  - Debarment applies to contractors in its capacity as both a prime contractor and as a subcontractor

## Sick Pay Requirements

- **Executive Order 13706**- signed by President Barack Obama on September 7, 2015, and requires parties that enter into covered contracts with the Federal Government to provide covered employees with up to 7 days of paid sick leave annually, including paid leave allowing for family care.
- Applies to four major categories of contractual agreements:
  - procurement contracts for construction covered by the Davis-Bacon Act (DBA);
  - service contracts covered by the McNamara-O’Hara Service Contract Act (SCA);
  - concessions contracts, including any concessions contracts excluded from the SCA by the Department of Labor’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.

## Sick Pay Requirements

### **Accrual of Paid Sick Leave:**

- 1 hour for every 30 hours worked on a covered contract
- Contractors may provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue leave based on hours worked.
- Accrual is calculated, and employees are to be notified in writing of the amount of paid sick leave they have available, at the end of each pay period or each month, whichever interval is shorter.

### **Maximum Accrual, Carryover, Reinstatement, and Payment for Unused Leave**

- Can limit the amount of paid sick leave employees may accrue to 56 hours each year and must permit employees to carry over accrued, unused paid sick leave from one year to the next.
- Contractors may limit the amount of paid sick leave employees have accrued to 56 hours at any point in time.
- Contractors are required to reinstate employees' accrued, unused paid sick leave if the employees are rehired by the same contractor within 12 months after a job separation unless contractors provide payment to employees for accrued, unused paid sick leave upon separation. Contractors are not required to pay employees for accrued, unused paid sick leave at the time of a job separation.

## Sick Pay

### **Use**

- Employees may use paid sick leave for an absence resulting from: (i) physical or mental illness, injury, or medical condition of the employee; (ii) obtaining diagnosis, care, or preventive care from a health care provider by the employee; (iii) caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or need for diagnosis, care, or preventive care described in (i) or (ii); or (iv) domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes described in (i) or (ii) or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, or assist an individual related to the employee as described in (iii) in engaging in any of these activities. The Final Rule provides definitions of these terms.
- Contractors must allow employees to use paid sick leave in increments as small as one hour (with a narrow exception for employees whose work makes it physically impossible to leave or return to the job during a shift).
- May only limit the amount of paid sick leave an employee uses at once or per year on the basis of how much paid sick leave the employee has available

## Sick Pay

### Requests to Use Leave

- Request to use paid sick leave may be made orally or in writing.
- Must be made at least 7 calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as is practicable.
- Denial of a request to use paid sick leave must be in writing, with an explanation for the denial
- Employer may require certification for absences of three or more consecutive full days.

### Interaction with Other Laws and Paid Time Off (PTO) Policies

- Contractor may not use paid sick leave required by the Order and Final Rule toward the fulfillment of its SCA or DBA obligations.
- Contractor's obligations under the Executive Order and Final Rule have no effect on its obligations to comply with, or ability to act pursuant to, the Family and Medical Leave Act (FMLA); paid sick leave may be substituted for (that is, may run concurrently with) unpaid FMLA leave, and all notices and certifications that satisfy FMLA requirements will satisfy the request for leave and certification requirements of the Final Rule.
- State or local paid sick time laws- contractors must comply with both any such law that applies, contractors may satisfy their EO obligations by providing paid sick time that also fulfills the requirements of a State or local law provided that the paid sick time is accrued and may be used in a manner that meets or exceeds all of the requirements of the EO and Final Rule.
- Contractor's existing PTO policy can fulfill the paid sick leave requirements of the Executive Order as long as it provides employees with at least the same rights and benefits as the Final Rule require.

## Department of Labor- Joint Employer

- ▶ Browning –Ferris Industries of CA Inc. 362 NLRB No.186- in 2015 the NLRB overturned decades of precedent holding that joint employment status was based on a showing that 2 entities exercised direct and immediate joint control over the essential employment terms of employee. In Browning, the NLRB expanded the definition to "if they share or co-determine those matters governing the essential terms and conditions of employment," based on an employer's *right of control*, which could include indirect control, regardless of the exercise of actual control.
- ▶ Hybrand Industrial Contractors Ltd. 365 NLRB 156 – in 2017 the NLRB overturned the Browning –Ferris decision. The ruling provides that the joint employer status will again require proof that "putative joint employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'"



## Department of Labor-Joint Employer

- ▶ On September 14, 2018, the NLRB published a proposed rule in the Federal Register to establish an updated standard for determining joint employer status under the NLRA.
- ▶ The proposed rule provides "an employer, as defined by Section 2(2) of the NLRA may be considered a joint employer of a separate employer's employees only if the two employers share or co-determine the employees' essential terms and conditions of employment such as hiring, firing, discipline, supervision, and direction.
- ▶ The proposed rule clarifies that a putative joint employer must "possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.
- ▶ The proposed rule will provide clarity for franchisors and companies hiring contractors.

## Federal Minimum Wage

- Federal Minimum Wage was established by President Obama by Executive Order 13658.
- Federal Minimum Wage is the cash wage which must be paid to covered workers.
- DOL announced 2019 minimum wage for federal contractors will increase to **\$10.60** per hour effective January 1, 2019.



## Arbitration Clauses after Epic

**Epic Systems vs. Lewis** (May 21, 2018)- Decision by SCOTUS confirms that the Federal Arbitration Act (FAA) requires arbitration agreements to be enforced according to their terms, even individual arbitration agreements between an employer and an employee.

- ? before the Court- Does an employment arbitration agreement containing a class and collective action waiver violate the National Labor Relations Act (NLRA) or are they permitted by virtue of the FAA.
- In 2012, the NLRB departed from longstanding precedent and ruled that the NLRA effectively nullifies the FAA. The NLRB ruled that requiring individual arbitration is an impermissible restriction on employees' rights under NLRA Section 7- "...to engage in concerted activities for the purpose of mutual aid or protection..."
- Epic vs. Lewis was the consolidation of 3 cases involving employer/employee agreements requiring bilateral /individual arbitration.
- The SCOTUS decision reinforces the FAA and permits employers to continue to include mandatory arbitration clauses, including a mandatory class/collective action waiver, in employment agreements.

## DFAR Restriction on the Use of Mandatory Arbitration Clauses in Employment Contracts

### RESTRICTIONS ON THE USE OF MANDATORY ARBITRATION AGREEMENTS (MAY 2010)

- (a) Definitions. As used in this clause-
- "Covered subcontractor" means any entity that has a subcontract valued in excess of \$1 million, except a subcontract for the acquisition of commercial items, including commercially available off-the-shelf items.
- "Subcontract" means any contract, as defined in Federal Acquisition Regulation subpart 2.1, to furnish supplies or services for performance of this contract or a higher-tier subcontract thereunder.
- (b) The Contractor-
- (1) Agrees not to-
- (i) Enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration-
- (A) Any claim under title VII of the Civil Rights Act of 1964; or
- (B) Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or
- (ii) Take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration-
- (A) Any claim under title VII of the Civil Rights Act of 1964; or
- (B) Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; and
- (2) Certifies, by signature of the contract, for contracts awarded after June 17, 2010, that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce, any provision of any agreements, as described in paragraph (b)(1) of this clause, with respect to any employee or independent contractor performing work related to such subcontract.
- (c) The prohibitions of this clause do not apply with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.
- (d) The Secretary of Defense may waive the applicability of the restrictions of paragraph (b) of this clause in accordance with Defense Federal Acquisition Regulation Supplement 222.7403.

## Sexual Harassment Legislation in 2018

### ► Federal Legislation on Sexual Harassment

- Federal legislation regarding sexual harassment has focused primarily on three areas:
  1. settlement disclosures,
  2. predispute arbitration agreements,
  3. tax deduction denial.

While many of these bills are not expected to advance, they will likely serve as talking points during the upcoming mid-term elections, as eradicating sexual harassment remains a key issue.

## Recent Sexual Harassment Legislation

- Employers may generally deduct amounts of settlements as long as it is directly connected to the employer's trade, business or income-producing activity and is ordinary, necessary, and reasonable
  - See IRC Sec. 162 and Sec. 212
- However, the Menendez Amendment – Section 13307 of the Tax Cuts and Jobs Act of 2017 (Public law no. 115-97) – amended the Internal Revenue Code of 1986 for fiscal year 2018.
- Section 13307—*Denial of Deduction for Settlements Subject to Nondisclosure Agreements Paid in Connection With Sexual Harassment or Sexual Abuse*—amends section 162 of the tax code, which generally allows businesses to deduct certain ordinary and necessary expenses paid or incurred during the year as part of running the business, by prohibiting tax deductions for any payment, including payments pursuant to a settlement agreement, that involve sexual harassment or abuse if the payment is subject to a nondisclosure agreement. Similarly, deductions for attorney's fees are prohibited if they relate to settlements or payments that include nondisclosure agreements that could prevent the disclosure of sexual harassment or assault.
- Payments related to sexual harassment and sexual abuse now require special treatment
- Under the new code, no deduction is allowed for any settlement or payment (or related attorney's fees) related to sexual harassment or sexual abuse if the settlement or payment is subject to a nondisclosure agreement
  - New IRC Section 162(q)
- This new rule has not yet been tested in the courts or by the IRS

## Taxation of Settlements

- ▶ Because the lack of definitions in the Act, there is significant uncertainty regarding:
  - ▶ Identifying which claims are related to sexual harassment or abuse
    - Does including a sexual harassment or abuse claim in the complaint invoke this rule for all associated payments?
    - Must such a claim be credible?
  - ▶ Identifying whether the rule also applies to the plaintiff/complaining party
    - The rule seemingly applies to victims, potentially affecting related but otherwise deductible payments
  - ▶ Identifying whether a blanket release which covers sexual harassment and abuse claims also invoke this rule
  - ▶ Identifying what attorneys' fees are affected
    - Can fees for drafting unrelated portions of the settlement be deducted?

## SAM Registration

- ▶ System for Award Management (SAM) – FAR Council has issued a final rule eliminating inconsistency between FAR 4.1102, FAR 52.204-7(b)(1) which required contractors to be registered and active in SAM before contract award and FAR 52-204-8 which required contractors to have completed their certification in SAM (and therefore be active) at the time of their offer. Contractors must now be registered and active in SAM at the time of their offer/bid.
- ▶ What it means for contractors- SAM is still behind in completing registrations so, if a contractor is establishing a new entity or registering for the first time in order to facilitate a federal contract award, the contractor should begin its registration as early as possible as it might take up to 60 days for a registration to become active.

## International and Hot Topics

- ▶ Foreign Military Sales
- ▶ Trade/Tariffs
- ▶ De-regulation
- ▶ Cybersecurity
- ▶ FCPA/Anti-Corruption
- ▶ DOJ view on credit for existing compliance program



## Growth in Foreign Military Sales (FMS)

- ▶ National Security Presidential Memorandum issued April 2018
- ▶ Reform of the Conventional Arms Transfer policy to streamline ability to sell defense products overseas
- ▶ State Department issued implementation plan in July 2018, suggesting ITAR modifications will follow

October 2018

Defense Security Cooperation Agency

### NEWS RELEASE

[Printer Friendly Version](#)

Breaking Defense

By Paul Cleary

**AUSA CONFERENCE:** The United States sold \$55.6 billion worth of weapons to allies in fiscal 2018, a massive 33 percent increase over 2017 as the Trump administration has given the Pentagon and State Department a green light to sell more, more quickly, overseas.

The \$55 billion represents closed deals, many of which had in in the works for years. But the focus of the administration on trying to pump up US arms sales in order to boost domestic manufacturing jobs has led to officials across the Pentagon and State Department to proclaim pushing American kit is a big part of their international engagements.

In April, the White House released a new arms sales policy, cutting red tape and affirming that American diplomats should do everything they can to encourage foreign governments to buy American.

## Growth in Foreign Military Sales (FMS)

- ▶ Ensure your risk assessment identifies if any of your operations are considering business opportunities in this rapidly expanding market
- ▶ "Bright Lights" case in late 2017
  - ▶ \$400,000 penalty



## Financial Pressure in Supply Chain

- ▶ Administration announced tariffs on over 1,000 items from China, and has publicly considered tariffs on other products such as EU cars
- ▶ Changes to Free Trade Agreements
- ▶ Anticipate pressure on supply chains as prices for certain products and raw materials may fluctuate outside the bounds traditionally expected



## Financial Pressure in Supply Chain

- ▶ Audit the import/export compliance program for proper training and recordkeeping practices and rectify any gaps
- ▶ Ensure your import/export compliance program can adapt to add new items as tariffs are applied
- ▶ Check that your third-party or supplier due diligence program captures customs/import/export brokers and subjects them to an enhanced level of scrutiny



## De-Regulation

- ▶ Environmental Protection Agency (EPA)
  - ▶ Relaxing or removing certain standards
  - ▶ Expediting administrative processes where the EPA has previously failed to meet deadlines for processing various assessments and approval/comment processes



## Themes and Trends Discussion

- ▶ Once assigned to a group, select a team leader who will provide a readout
- ▶ As a group, identify which of the themes and trends is of most interest/impact to your group
- ▶ Discuss the following three questions:
  - ▶ *How much has the theme already impacted your company?*
  - ▶ *Have you changed anything about your ethics and compliance program to address the topic?*
  - ▶ *Do you see a possibility that the themes and trends could impact your company?*
  - ▶ *Are there any aspects of the change that you could use to increase awareness of your program and ensure it is timely and relevant?*



## DFARS 252.204-7012

- ▶ Effective December 31, 2017
- ▶ Controlled Unclassified Information ("CUI")
- ▶ New regulations will continue to push forward on tighter, but fortunately more consistent, expectations





## Data Breach Notifications

- ▶ Continuing state-by-state implementation of data breach notification legislation – as of May 2018, all 50 states have a requirement
- ▶ Varies on how notifications must be made and whether or not state agencies and credit reporting agencies must be notified



## GDPR

- ▶ Detailed requirements on:
  - ▶ What information can be collected
  - ▶ Consent from individual
  - ▶ Providing an individual a copy of the information that is on file
  - ▶ Right to be forgotten



## Compliance Program Implications

- ▶ Ensure increased coordination with the Information Security team to align:
  - ▶ Policies and procedures
  - ▶ Training content and timing
  - ▶ Awareness activities
  - ▶ Investigation triage/cooperation
- ▶ Educate Compliance team to identify data that appears to be uncontrolled or outside the control environment



## Exercise – data security starts here...

- ▶ Select a partner
  - ▶ Select someone you do not know
  - ▶ Do not select a co-worker!
- ▶ Follow the instructions of the presenters
- ▶ *After the activity, break*



## Foreign Corrupt Practices Act (FCPA)

- ▶ FCPA enforcement similar volume in 2018 as 2017
- ▶ First French-US combined resolution
  - ▶ SocGen case
  - ▶ DPA
  - ▶ ~300M USD to both US and French authorities
- ▶ Use of Monitorships



## Anti-Corruption Legislation/Public Interest

- ▶ Updates to anti-corruption legislation
  - ▶ Promote whistleblowing
  - ▶ Increase penalties
  - ▶ Increase scope of anti-bribery rules
  - ▶ Funding of anti-corruption enforcers
  - ▶ DPA-like options (e.g. CJIP)



## Use of Monitorships

- ▶ Several large 2018 DPA/NPA did not include monitorships
- ▶ World Bank expansion of firms eligible to perform monitorships
- ▶ Demonstration of compliance program implementation
- ▶ DOJ guidance issued recently



## False Claims Enforcement

- ▶ Remarks by Acting Associate AG in June 2018
- ▶ Discussion of "consistency" in False Claims Act enforcement
  - ▶ Cooperation credit
  - ▶ Compliance Program credit
  - ▶ No "Piling On"



*...to reward companies that "incorporate [compliance programs] into the corporate culture"...*

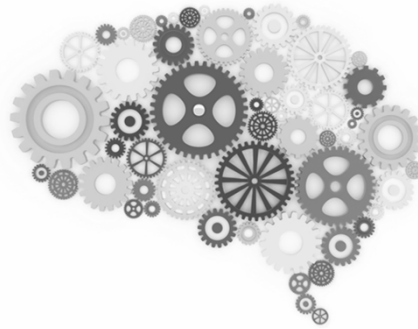
## Exercise Your Imagination

Imagine there has been an FCPA or FCA violation.

You have 30 minutes - the company wants evidence to demonstrate to DOJ that the compliance program is robust.

Name five things from your program that you could quickly demonstrate to show:

- Your program is incorporated into the company culture
- Your program includes anti-trust elements
- Your program responds to regulatory changes



## Wrap Up

► THANK YOU!

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