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Guilty Until Proven Innocent: NLRB Leveraging Executive Order to Pressure Contractors to Settle

By

The National Labor Relations Board (NLRB) recently announced that it intends to lord a new disclosure requirement over the heads of federal contractors to squeeze them to settle any allegations of labor violations, even though regulations implementing the requirement have not been finalized.

Two years ago, President Obama signed an Executive Order on Fair Pay and Safe Workplaces that, among other things, would require contractors and subcontractors bidding on federal agency opportunities to disclose as part of their proposal "any administrative merits determination, arbitral award or decision, or civil judgment" against the employer in the last three years for any violations of certain labor laws and regulations. This disclosure requirement applies to any contracts worth more than $500,000 in services and/or supplies, and it covers adverse determinations under an array of federal labor laws. It also applies to adverse determinations under equivalent State laws.

The policy idea behind this rule was to allow agency contracting officers to consider labor violations, along with remedial measures taken by offerors, in weighing "whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics," and presumably as a deterrent against labor violations by contractors generally.

Last year, the Department of Labor (DOL) issued proposed guidance applying a broad interpretation of the phrase "administrative merits determination" in the Executive Order, such that even a preliminary agency finding of probable cause to pursue a claim of a labor violation would be considered an "administrative merits determination" that must be disclosed by the contractor. This means that before a claim has been fully adjudicated, a contractor would still be required to disclose it as a "merits determination" that a labor violation occurred.

The proposed guidance explicitly lists several types of preliminary agency steps, specific to various agencies, that should be considered "administrative merits determination." Among these are complaints issued by any Regional Director of the NLRB. The mere issuance of such a complaint would constitute an "administrative merits determination" against a contractor under DOL's proposed guidance.

Although the proposed guidance from DOL has not yet been made final, NLRB's Office of General Counsel released a memorandum on July 1, 2016 instructing its Regional Directors to send a form e-mail to advise federal contractors when a complaint is imminent. The form e-mail warns the contractor that it risks an adverse "administrative merits determination" under the Executive Order, which will be reported by NLRB in a government database, thus jeopardizing its ability to compete for federal contracts, "absent prompt settlement" of the matter prior to issuance of the complaint. This approach puts the contractor between a rock and a hard place. Unless it quickly settles the matter, it will be required to disclose in future proposals responding to agency solicitations that it has an "administrative merits determination" against it simply because a NLRB complaint was formally issued, regardless of whether the complaint would ever ultimately lead to an actual adjudication that the contractor committed any labor violation.

Additionally, as of July 1, NLRB is now collecting additional information on federal contractors under investigation for labor violations, with the intent to share that information with Labor Compliance Advisors in agencies throughout the federal government. NLRB appears to be the first agency leveraging the sweeping definition of "administrative merits determination" in DOL's nonfinal guidance to pressure settlements in this way, and contractors should prepare to deal with the risks associated with such tactics by NLRB and possibly other agencies, particularly as the guidance is anticipated to be incorporated into a final regulation later this year. Indeed, in conjunction with publication of DOL's proposed guidance last year, DOD, GSA, and NASA published on the same date a proposed amendment to the Federal Acquisition Regulations that implements the Executive Order and incorporates by reference the definition of "administrative merits determination" in DOL's proposed guidance. The rule will become final pending OMB review. Contractors should continue to carefully monitor the process for finalizing the regulations

and guidance interpreting the Executive Order to determine how the final language will affect them.

