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 Government Solutions Inc. (KGS). Prior to joining Kforce, Ms. Shannon served as General Counsel for several technology and engineering services companies. 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 in Business Administration.

Introduction: Adelle Elia, Chief Integrity Officer, Louis Berger

The first dedicated Ethics Officer in the industry, Adelle Elia is a seasoned professional with a strong background in risk management and compliance. As the Chief Integrity Officer at Louis Berger, she is responsible for developing and implementing the company’s Integrity Program. Prior to joining Louis Berger, Ms. Elia held leadership positions in the areas of compliance, risk management, and internal audit at a number of companies, including a global financial services firm. She holds a degree in Economics from the University of Pennsylvania and has been actively involved in the field of compliance for over 20 years.
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 apply).

Are you a Federal Contractor or Subcontractor?

- Do you have 10 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 it mean if you are a federal contractor/subcontractor?

You are subject to the laws, rules, and regulations enforced and promulgated by the OFCCP.

OFCCP

Effective 2016-01-15 of Precedent Decision notices (PDNs)

A PDN is a letter that OFCCP uses to inform federal contractors and subcontractors of its finding that their pay practices are unlawful.

Following the issuance of a PDN, the contractor has 15 additional calendar days to rebut OFCCP's proposed findings that sufficient evidence exists of discrimination.

OFCCP will issue PDNs for preliminary individual and systemic discrimination findings identified during the course of compliance evaluations. The use of the PDN encourages contractors to address pay practice issues prior to a final determination. This process helps value and protect OFCCP's oversight of Federal contracts.

If you receive a PDN, you are subject to OFCCP's regulations and enforcement actions.

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Reinforces OFCCP's current commitment to greater transparency, consistency, and efficiency in compliance evaluations and observations.

In the focused reviews anticipated by this Directive, OFCCP would go onsite and conduct a comprehensive review of contractor compliance with the Executive Order 11246 (E.O.), as amended. This review would include interviews with managers responsible for equal employment opportunity and Section 503 discrimination obligations as to protected veterans. Finally, an E.O. focused review would ensure compliance with the Readjustment Assistance Act of 1974 (VEVRAA), as amended.

- 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.

Directive 2018-06-Compensation Guidance (cont.)
- OFCCP has enormous discretion in choosing a pay: internal OFCCP tells 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 2018-05 - 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

  - To implement a verification program with the objective of ensuring that all covered federal contractors are meeting their legal duty to develop and maintain AAPs and update them on an annual basis.
  - 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 can expect to receive an annual scheduling delay to provide federal contractors more time to prepare for the audit and participate in one or more OFCCP compliance assistance events across various locations.
    - Improvement of the OFCCP’s compliance methodology on the agency’s public website, the Federal Register, and through the use of pre-scheduling initiatives for contractors who have conducted OFCCP self-audits.
    - Standardized criteria in the neutral scheduling methodology that will increase the likelihood of compliance reviews for contractors who have conducted OFCCP self-audits.
    - MRR of the contractor selection for compliance reviews are unable to submit a written AAP within 30 days of receiving a scheduling letter for the 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 permit contractors, in conjunction with the development of a transparent enforcement strategy, to provide reasonable opportunity to discuss compliance evaluation concerns.
  - OFCCP’s professional conduct by OFCCP’s compliance staff and the OFCCP’s commitment to OFCCP’s compliance staff,
  - On August 2, 2018, the OFCCP published “What Contractors can Expect”, guidance which also fulfills 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 materials
    - Timely response to compliance assistance questions
    - Opportunities to provide meaningful feedback and collaboration
    - 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, e.g., white males
    - Filing 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 employees.
- 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 opportunities for U.S. workers and to protect their economic interests by rigorously enforcing and administering our immigration laws.
- 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 USCIS and Immigration and Customs Enforcement agencies, to advance policies to help ensure H-1B visas are awarded to the most-skilled or highest-paid beneficiaries.

### 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.
Increased Enforcement:
- Increase in I-9 audits: more than 3000 Notices of Intent to audit have been issued between January 29, 2018 and July 20, 2018.
- Increase in workplace visits and raids.

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 work sites 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.

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
July 2018, USCIS publishes a Policy Memorandum to provide guidance on Executive Order 13830 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, NTA’s will be issued to a broader group of foreign nationals who are deemed to be inadmissible when there is evidence of fraud, criminal activity, or when the foreign national is deemed to be present in the United States.

Employers who employ foreign nationals working pursuant to H1B, F-1 visas should note that employees whose visa extension has been denied or have an expired while USCIS reviews the application will be issued a NTA and placed in removal proceedings.

Previously, visa applicants who were unexpectedly denied visa benefits were simply advised to voluntarily leave the country.

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-751), applications for legalization (form I-485), and applications to waive inadmissibility (form I-290).

Employment based petitions and humanitarian applications and petitions are not included in rollout.

Generally, USCIS will not immediately issue a NTA upon the denial of an immigration benefit. However, USCIS will issue a NTA upon a notice of 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.

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.
UCIS

- 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

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
- USCIS provides examples of H1B fraud indicators on its website.

UCIS

- What’s Next?
- Many expect USCIS to announce the rescission of the H-4 employment authorization document program which provides work authorization to certain H-1B 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 (SHESA)

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
  - Task 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 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 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 F.D. 1371a, Paid Sick Leave, the Health and Welfare Fringe Benefits Rate is $4.16 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 of 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.
  - 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 13759: 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 at least 56 hours 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.

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 be at least 56 hours of paid sick leave.
- Contractors are required to reinstate employees' accrued, unused paid sick leave if the employee is rehired by the same contractor within 6 months after separation, unless the contractor proves payment to employees for accrued, unused paid sick leave at the time of separation.
- Contractors are not required to pay employees for accrued, unused paid sick leave at the time of a job separation.
Sick Pay

Due
- 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 prevention care from a health care provider; (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; or (iv) to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take needed 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 or a fraction of an hour, except for employees whose work makes it physically impossible to do so.
- 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.

Requests to Use Leave
- Request to be made orally, by phone, in writing, or by any other method of communication that allows the employee to communicate the needed absence for the leave.
- Time 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 practicable.
- May only require the employee to provide written notice where no reasonable alternative for the request is available.

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.
- 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.

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 employees. In Browning, the NLRB expanded the definition of "joint employment" to include 2 or more entities that share or co-determine those matters governing the essential terms and conditions of employment, "for example, the terms and conditions of employment that may have an impact on an employee’s right of control, which could include indirect control, regardless of the exercise of actual control.
- Hybrid Indus. Contractors, Ltd. 363 NLRB 136 - in 2017 the NLRB overturned the Browning-Ferris decision. The ruling provides that the joint employer status will again require proof that "[t]he joint employer entities have exercised joint control over essential employment terms other than merely having the opportunity to exercise control, such as the decision to hire, fire, or discipline employees, the decision to maintain or impose a title, salary, or other condition of employment that is uniform across all facilities or clients, the decision to require an employee’s right of control, which could include indirect control, regardless of the exercise of actual control."
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 that 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 franchisees 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.
- Federal Minimum Wage was established by President Obama by Executive Order 13658.

Arbitration Clauses after Epic

- Epic Systems Corp. v. 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.
- Federal Minimum Wage was established by President Obama by Executive Order 13658.
- FAA, effective date is January 1, 2019. The FAA requires that arbitration agreements be enforced according to their terms, even individual arbitration agreements between an employer and an employee.
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Any claim under title VII of the Civil Rights Act of 1964; or

Clauses in Employment Contracts

(A) Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or

Clauses in Employment Contracts

(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

DFAR Restriction on the Use of Mandatory Arbitration

(a) 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 resolve through arbitration-

Contractor resolve through arbitration-

As used in this clause-

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 foci points during the upcoming midterm elections, as escalating sexual harassment remains a key issue.

Recent Sexual Harassment Legislation
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 credited?
- Identifying whether the rule also applies to the plaintiff/complaining party
  - To rule applies only to victims, potentially affecting unpaid 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 4.102; FAR 32.204-7(b)(1) which required contractors to be registered and active in SAM before contract award and FAR 32.204-6 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

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

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

State Department issued Memorandum issued April 2018 suggesting ITAR modifications will follow in response to the “Bright Lights” case in late 2017.

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:
  1. How much has the theme already impacted your company?
  2. Have you changed anything about your ethics and compliance program to address the topic?
  3. Are there any aspects of the change that your ethics and compliance program and ensure its 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 the 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 to 2017.
- First French-US combined resolution.
  - Sncerel case.
  - CPA.
  - ~$300M USD to both US and French authorities.
- Use of memberships.
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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