

USDA Seeks to ‘Blacklist’ Government Contractors for Labor and Employment Law Violations

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The U.S. Department of Agriculture (USDA) published a [Notice of Proposed Rulemaking](#) (NPRM) on February 17, 2022, seeking to update its contract acquisition requirements. Within the proposed rulemaking, the USDA included two requirements that contractors certify compliance with various labor and employment laws during the term of the proposed acquisition, as well as disclose certain adjudicated labor and employment law violations.

The labor and employment laws and Executive Orders subject to the certification requirement are:

- The Fair Labor Standards Act
- The Occupational Safety and Health Act
- The Migrant and Seasonal Agricultural Workers Protection Act
- The National Labor Relations Act
- The Davis-Bacon Act
- The Service Contract Act
- Executive Order 11246 (Equal Employment Opportunity)
- Section 503 of the Rehabilitation Act of 1973
- The Vietnam Era Veterans’ Readjustment Assistance Act
- The Family and Medical Leave Act
- Title VII of the Civil Rights Act of 1964
- The Americans with Disabilities Act of 1990
- The Age Discrimination in Employment Act of 1967
- Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors)
- Equivalent State laws, as defined by the Secretary of Labor in guidance
- Executive Order 13627 (Strengthening Protections Against Trafficking in Persons in Federal Contracts)

The proposed regulations would require the USDA to include two clauses in every supply and service acquisition — including construction — above the simplified acquisition threshold.

Under the first clause, by accepting a contract, the contractor must certify that it — and its subcontractors and suppliers — are in compliance with specific labor and employment laws, including those above, and equivalent state laws. Contractors and their subcontractors are also required to promptly report to the contracting officer (CO) any future adjudications of noncompliance. Significantly, the NPRM provides that the USDA will consider certification under this clause to be a certification for purposes of the False Claims Act.

Under the second clause — “Past Performance Labor Law Violations” — the contractor is required in its bid to certify that it and all subcontractors, to the best of the offeror’s knowledge and belief, are in compliance with all “previously required corrective actions” for “adjudicated” labor and employment law “violations.” The proposed rule does not define the quoted terms and words. Prior to receiving any award, the contractor must provide a list of

any such violations and will have an opportunity to disclose any steps taken to correct the violations of, or improve compliance with, such labor and employment laws. The contractor must update the CO every six months on the violation and compliance information provided in the bid.

The second proposed clause could lead to blacklisting of various government contractors with adjudicated violations.

The stated purpose of the regulation is “to determine whether a contractor is a responsible source that has a satisfactory record of integrity and business ethics.” By disclosing past performance labor law violations, the CO may determine if the bidding contractor has a satisfactory record of integrity and business ethics and deny future work. The criteria or threshold of past violations that would qualify a contractor as unsatisfactory are unclear.

Compared to [previous attempts to pass blacklisting rules](#), the USDA’s proposed regulation is slightly more measured. Unlike the Obama Administration’s Executive Order 13673, for example, this regulation only considers adjudicated labor and employment law violations, as opposed to both alleged and adjudicated violations. EO 13673 was enjoined by a federal court, and later revoked by an Executive Order under President Donald Trump, and H.J. Resolution 37, which disapproved the Federal Acquisition Regulatory (FAR) Council regulations implementing the Executive Order.

The comment period deadline is currently March 21, 2022, but industry stakeholders are urging the USDA to extend the deadline another 90 days to allow for productive and meaningful comments. Should the USDA adopt the proposed regulations in a final rule, there will be potential widespread effect. Congress recently introduced a \$1.5 trillion spending package, \$25.125 billion of which is slated to go to agriculture and rural-related agencies to address climate change, rural broadband efforts, and equity programs aimed for underserved farmers. All these initiatives will provide myriad acquisition opportunities for federal contractors.

The USDA’s proposed rulemaking could signal the beginning of agency-level efforts to impose blacklisting rules throughout the federal government. The status of potential blacklisting of federal contractors and subcontractors is developing rapidly, and legal challenges are expected.

Jackson Lewis attorneys will continue to monitor Congressional, agency, and executive actions and provide additional insights as necessary. For more information or questions, please contact a Jackson Lewis attorney.

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