

Employment Issues in Government Contracting ACC NCR September 26, 2018

Panelists:

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Overview

- Contractor Blacklisting Rule and Repeal
- Pay Transparency
- Post-Government Employment Requirements
- Paid Sick Leave
- Nondiscrimination and Affirmative Action
- Service Contract Act
- Anti-Human Trafficking
- False Claims Act
- Government Audits and Investigations
- Labor Mapping
- Cybersecurity and Insider Threat

The Blacklisting Rule and Its Repeal

- Executive Order (EO) 13673, “Fair Pay and Safe Workplaces,” and the rule implementing it, 81 Fed. Reg. 58,562 (also referred to as the **Blacklisting Rule**), would have imposed strict disclosure and other employment related requirements upon contractors, including:
 - Disclosure of violations of 14 federal labor laws, including the Fair Labor Standards Act, Occupational Safety and Health Act, Family and Medical Leave Act, Davis-Bacon Act, Title VII of the Civil Rights Act, Americans with Disabilities Act, Age Discrimination in Employment Act, and Service Contract Act
 - Adoption of a “paycheck transparency” clause requiring disclosure of specific information to workers each pay period regarding their wages, including information regarding overtime pay, deductions, and hours worked on each paystub
 - Prohibition of certain pre-dispute arbitration agreements with workers that encompass claims under Title VII and tort claims for sexual assault or harassment
- On March 27, 2017, President Donald Trump signed into law a Congressional Review Act resolution **repealing** the Blacklisting Rule and signed EO 13782 revoking EO 13673

Pay Transparency

Prohibitions Against Pay Secrecy Policies and Actions

- On April 18, 2014, President Barack Obama signed EO 13665 prohibiting federal contractors from engaging in certain pay secrecy policies and actions
- As a result, the **Equal Opportunity Clause** now prohibits contractors from **discharging** or in any other manner **discriminating** against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the **compensation** of the employee or applicant or another employee or applicant (41 C.F.R. § 60–1.4(a)(3))
 - This prohibition does not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee’s **essential job functions** discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, **unless** such disclosure is in response to a formal complaint or charge; in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer; or is consistent with the contractor’s legal duty to furnish information
- Contractors are also required to (1) incorporate the **Pay Transparency Nondiscrimination Provision** (available at <https://www.dol.gov/ofccp/PayTransparencyNondiscrimination.html>) into employee manuals and handbooks; and (2) disseminate the Provision either by electronic posting or by posting a copy of the provision in conspicuous places available for employees and applicants (41 C.F.R. § 60–1.35(c))

OVERVIEW OF STATE AND LOCAL LAWS

- **SALARY HISTORY BANS: 7 states, 1 territory and 6 local jurisdictions**
 - States: California, Delaware, Massachusetts, Michigan, New Jersey, New York, Oregon
 - Territory: Puerto Rico
 - Local: San Francisco, CA; Albany County, NY; New York City, NY; Philadelphia, PA; Pittsburg, PA; New Orleans, LA
 - Federal: already to federal contractors via executive order from President Obama
- **PAY TRANSPARENCY: 17 states**
 - States: California, Colorado, Connecticut, Delaware, D.C., Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Vermont

Employer Best Practices

- Remove inquiries regarding salary history from all job applications.
- Train all hiring personnel and recruiters on how to negotiate salary without inquiring about salary history.
- Regularly review, update, and redraft job descriptions such that they reflect the accurate duties of that particular position.
- Outline salary position expectations, potential compensation ranges, and limits on what hiring personnel can and cannot ask applicants.

Employer Best Practices

- If applicants voluntarily disclose salary history, be sure to rely upon more than just salary history to set compensation.
- Conduct periodic audits of compensation levels to ensure there is no evidence of unfair disparity based on gender.
- Conduct annual review of market/industry compensation, and adjust if applicable.
- Develop written policies and guidelines, with an emphasis on objective factors.

Post-Government Employment Requirements

Post-Government Employment

Statutory and regulations of primary concern to contractors:

- Criminal statutes: 18 USC § 207, 18 USC § 208
 - Financial and representational conflicts of interest (“switching sides”)
- Procurement Integrity: 41 USC § 2104; FAR 3.104(3)(d)
 - Compensation ban (financial conflicts of interest)
- Organizational Conflict of Interest: FAR subpart 9.5
 - Unequal access to information

Post-Government Employment – Discussions with Current Government Employees

- A US Government employee working on a particular matter that directly impacts a company's financial interests may not enter into employment discussions with that company, either directly or through and intermediary (18 USC § 208)
- . . . UNLESS the employee officially disqualifies herself or himself in writing from matters related to the company *prior to* discussions
- Procurement Integrity statute has similar disqualification requirement (41 USC § 2103)

Post-Government Employment – Representational and Compensation Restrictions

- Terminal leave restriction (active duty military): may not work on a military installation for contractor while on terminal leave (18 USC § 205)
- Lifetime representational restriction with respect to particular matter involving specific parties which employee participated personally and substantially (18 USC § 207(a)(1))
- Two-year representational restriction with respect to particular matter involving specific parties under employee's official responsibility (18 USC § 207(a)(2))
- One-year “cooling-off period” for Senior Employees (18 USC § 207(c))
- One-year compensation ban for employees who performed certain procurement-related roles for contracts over \$10M (41 USC § 2104(a))

Post-Government Employment – OCI-like Scenarios

- Organizational Conflict of Interest (FAR subpart 9.5)
 - OCI considerations not strictly applicable to employment situations, but can still create problems for employer
 - Scenario: former Government employee who helped write RFP requirements and retired prior to draft RFP release is hired by bidder to help write proposal and serve on proposed management team
 - Possible disqualification by Government
 - Possible protest or other complaint by competitor
- Avoid OCI-like and Procurement Integrity-like situations by reviewing candidate's anticipated or potential responsibilities against previous Government roles

Post-Government Employment – Best Practices

- Document restrictions in company procedures and train regularly
 - Use questionnaires/forms to elicit relevant information from candidates
- Before commencing employment discussions, request copy of recusal/ disqualification if applicable (preferably including acceptance/ acknowledgment by supervisor)
- Before making offer to current or former Government employee, request copy of Designated Agency Ethics Official opinion (mandatory for some former DoD employees, but request it even if not required)
 - Review DAEO conclusions and follow up on any questions

Post-Government Employment - Resources

- Office of Government Ethics – <https://www.oge.gov/web/oge.nsf/Post-Government+Employment>
- DoD Standards of Conduct Office – http://ogc.osd.mil/defense_ethics/
 - Guidance for Ethics Officials – http://ogc.osd.mil/defense_ethics/ethics_counselors/resources/dod_guidance.html
 - Guidance for DoD Employees – http://ogc.osd.mil/defense_ethics/handouts/handouts.html
 - Ethics Counselor's Deskbook – Post-Government Employment Restrictions http://ogc.osd.mil/defense_ethics/resource_library/deskbook/post_employment_ppt.pdf
- Other agency resources (on DoD SOCO site) - http://ogc.osd.mil/defense_ethics/external_links.html
- ACC website - <https://www.acc.com/legalresources/publications/topten/ttegcskapeardr.cfm>

Paid Sick Leave Requirements

Paid Sick Leave for Federal Contractors

- Executive Order 13706 establishes paid sick leave for federal contractors, and is in effect.
 - For these covered employees, the Order applies new contracts or contract-like instruments, as defined by the Secretary of Labor in the regulations, if the contract is:
 - a procurement contract for services or construction;
 - a contract or contract-like instrument for services covered by the Service Contract Act;
 - a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations;
 - a contract or contract-like instrument entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

Paid Sick Leave for Federal Contractors

- Other details of the Order include:
 - An hour of paid leave is earned for every 30 hours of work
 - Leave can be used care for the worker or family members
 - Unused leave can carry over from year to year
 - Unused leave will be reinstated for employees rehired by a covered contractor within 12 months after a job separation
- Payment for unused leave upon job separation is not required
 - The Order also explicitly states “it does not supersede other federal, state, or local laws or collective bargaining agreements that provide greater benefits”
- Any problems implementing?

State and Local Paid Leave Requirements

- Arizona
- California
- Emeryville, California
- Oakland, California
- San Francisco, California
- Connecticut
- Massachusetts
- Oregon
- Portland, Oregon
- District of Columbia
- Vermont
- New Jersey cities of Bloomfield, East Orange, Irvington, Montclair, Newark, Passaic, Patterson, and Trenton
- New Jersey
- Seattle, Washington
- Tacoma, Washington
- New York, New York
- Maryland
- Montgomery County, Maryland

Nondiscrimination and Affirmative Action

OFCCP Developments

- Key personnel at DOL/OFCCP
- Acting Director Craig Leen
- New Directive (2018-3) regarding religious freedom
- New Directive (2018-4) regarding focused reviews

OFCCP Developments

- Directive (2018-3) regarding religious freedom states that 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.”
 - They cannot “condition the availability of [opportunities] upon a recipient’s willingness to surrender his [or her] religiously impelled status.”
 - “[A] federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act].”

OFCCP Developments

- 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.”
- They must respect the right of “religious people and institutions ... to practice their faith without fear of discrimination or retaliation by the Federal Government.”

OFCCP Developments

- New Directive (2018-4) regarding focused reviews:
- More on-site visits
- Focus on hiring and compensation data
- Use of opinion letters
- More conciliation
- No fishing expeditions
- Contractor Bill of Rights

Service Contract Act

Overview

- The McNamara-O'Hara Service Contract Act of 1965 (SCA) requires contractors and subcontractors to pay their service employees no less than the minimum monetary wages and fringe benefits found in a particular locality in accordance with the applicable wage determination or collective bargaining agreement.
- The SCA applies to Federal contracts:
 - In excess of \$2,500;
 - Performed in the U.S., its territories and possessions
 - That are principally for services performed through the use of **service employees** (i.e., concession staff, IT services, intermittent labor services, etc.)

SCA Exemptions

- The SCA does NOT apply to contracts principally for **construction** (including repair) or **supplies**.
- The SCA also does NOT apply to certain classes of employees (29 CFR Part 541):
 - Executives/Supervisors
 - Administrative/Managers
 - Professionals – performing primarily intellectual work requiring advanced knowledge
 - Teachers
 - Computer employees – performing design, development as opposed to IT
 - Creative professionals – i.e. artists, musicians
 - Outside salespersons

Wage Determinations (WDs)

- Wage Determinations set the minimum wage and fringe benefits for job classifications for a specific geographical area. Employers must meet minimums for all four categories:
 - Minimum hourly **wage** for equivalent jobs – via hourly rates, salary, piecework, bonuses, or a combination of any/all of these.
 - Minimum hourly **Health and Welfare** benefits – via cash, bona fide benefits, or a combination of both.
 - Minimum annual **Vacation** benefits – accrual determined by WD.
 - Minimum **Holiday** benefits – specific holidays are detailed by the WD.

Wage Determinations (cont.)

- Minimum wages/benefits are determined by the Secretary of Labor and will be specified in the SCA WD included in every applicable contract.
- Contractors/subcontractors are required by law to inform employees of required compensation, either by individual delivery or by posting a notice in a prominent place at the work site.
 - Requirement applies to every new employee commencing work on an SCA covered contract.
- Collective Bargaining Agreements (CBAs)
 - Successor contractors are obligated to provide wages/benefits employees would have received under the previous CBA for the first year of the contract, to ***all employees, even those not employed by previous contractor.***

SCA Enforcement

- Department of Labor has sole enforcement authority
 - It alone issues information and record requests
- Most investigations come about as the result of employee complaints
 - Complaints are confidential
- However, there has been a recent increase in targeted investigations initiated by DOL
- Health and Welfare Fringe Benefit Rates are increasing
- EO 13658: New hourly minimum wage \$10.35 in 2018

SCA Best Practices

- Ensure contract contains BOTH SCA clause AND incorporated WDs.
 - DOL can retroactively apply SCA requirements if contractor complies with wrong WD, resulting in back wages and benefits.
- Maintain accurate and detailed records of wages, hours, and benefits.
- Ensure clear employee job descriptions where possible, and accurate timekeeping per job for employees holding multiple positions.
- Post SCA information and WD on-site, or make otherwise available to employees.

SCA Best Practices (cont.)

- Train compliance team, including people from all relevant departments: legal, contracts, finance, accounting, project management, HR.
- Avoid comingling wages and benefits in payroll materials.
- Ensure compliance with the correct WD.
 - Use the incorporated WD in the relevant contract.
 - Contractors should not select a WD on their own.
 - In the event that a new WD is issued for one's locality, wait until it is incorporated into the contract before altering existing wage/benefit scheme.

Combating Trafficking in Persons

Anti-Human Trafficking Regulations

Human Trafficking-Related Prohibitions

- In March 2015, the FAR and DFARS were amended to expand existing human trafficking-related prohibitions for all federal contractors and subcontractors
 - Effective May 30, 2018, DoD removed the DFARS provision, stating it was “no longer necessary and duplicative” of the FAR clause
- Current obligations are found in FAR 22.1703 and FAR 52.222-50, which prohibit various actions by all contractors, subcontractors, employees and agents performing any work under a federal contract, including a GSA Schedule Contract

Prohibited Actions

- Engaging in severe forms of trafficking in persons during the period of performance of the contract;
- Procuring commercial sex acts during period of performance of the contract;
- Using forced labor in the performance of the contract;
- Denying access in any way to an employee's identity or immigration documents;
- Using fraudulent or misleading recruiting and hiring practices;
- Charging employee recruitment fees;
- Failing to provide return transportation to an employee who is not a national of the country where the work is to take place;
- Providing housing where required that fails to meet host country safety or housing laws; and
- Failing to provide an adequate, written employment contract where required.

Human Trafficking Compliance Plan

- Heightened requirement for contracts of non-COTS supplies or services valued over \$500,000 acquired or performed outside the US.
- Must at a minimum include:
 - An awareness program
 - A reporting process – including promotion of the Global Human Trafficking Hotline
 - Both a recruitment and wage plan as well as a housing plan
 - Procedures to prevent agents and subcontractors from violating the Human Trafficking policy, as well as to monitor, detect, and terminate violators
- Contractors must certify implementation of and compliance with this Plan prior to award and annually thereafter.
- The plan, including the certification requirement, must be flowed-down to subcontractors.

Disclosure Requirements and Government Remedies

- Any credible information received regarding a violation of this policy must immediately be disclosed to the CO and the agency IG.
- Government remedies include:
 - Removal of noncompliant employees/termination of subcontract
 - Suspension of contract payments pending remedial action
 - Loss of award fees
 - Termination for default or cause
 - Suspension or Debarment
 - Violations will be entered into the Federal Awardee Performance and Integrity Information System (FAPIIS)
 - These specified remedies are “in addition to any other remedies available” to the Government

Anti-Trafficking Best Practices

- Designate individual and position to have direct responsibility for implementation of company's anti-trafficking compliance plan.
- Develop codes of conduct/policies regarding hiring recruiters and conducting recruitment, complying with host country employment and housing laws, and disciplining employees that commit violations.
- Train employees on anti-trafficking requirements and implement whistleblower protection mechanism that allows anonymous complaints to be filed; and ensure the same for subcontractors.
- Verify that subcontractors are directly hiring workers or using licensed recruiters.

Anti-Trafficking Best Practices (cont.)

- Identify potential high-risk portions of supply chains through third party audits, external consultants or experts, or other mechanisms.
- Ensure strong Anti-Human Trafficking Compliance Plan is in place where required, and consider implementing one even if not required.
- Immediately report any discovered incidents and take action to remediate violations prior to Government involvement.

FCA Whistleblowers

Anti-Retaliation Regulations

31 U.S.C. §3730(h)(1)

- This provision of the False Claims Act (FCA) provides protection for:
 - Employees, contractors, and agents;
 - Who engage in protected activity;
 - From retaliation in the form of their being “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment.”
- Whistleblowers must be able to prove:
 - They engaged in protected activity;
 - The employer knew they were engaged in protected activity; and
 - Their employer imposed an adverse employment action ***as a result of their protected activity.***

What is Protected Activity?

- Protected activity consists of “lawful acts...in furtherance of an action under [the FCA]” and “other efforts to stop 1 or more [FCA] violations.”
- Many courts have adopted the “distinct possibility” standard, under which “a plaintiff must be investigating matters that reasonably **could** lead to a viable FCA action” in order to be protected. *Glynn v. EDO Corp.*, 710 F.3d 209, 214 (4th Cir. 2013)(emphasis added)
- Examples of protected activity include:
 - Opposing attempts to receive payment from Government under a false claim
 - Collecting information about a possible fraud
 - Reporting fraud to a supervisor or filing an internal complaint
 - Initiating a *qui tam* action, in some cases even if it is ultimately unsuccessful

Reasonable Belief Requirement

- While the scope of the retaliation provision is wide, it is not unlimited.
- Courts have limited the provision by requiring that an employee have a subjectively **and** objectively reasonable belief that the employer has engaged or is engaging in fraud.
- “To determine whether an employee’s conduct was protected, we look at whether (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government.” United States ex rel. Uhlig v. Fluor Corp., 839 F.3d 628, 635 (7th Cir. 2016) (internal quotation marks omitted).

Whistleblower Remedies - 31 U.S.C. § 3730(h)(2)

- In finding a contractor has retaliated against a whistleblower, courts may proscribe the following remedies:
 - Reinstatement to position whistleblower would have had but for the retaliation;
 - Double the amount of back pay plus interest;
 - In *U.S. ex rel. Mooney v. Americare, Inc.*, 2016 WL 1237385 (E.D.N.Y. Mar. 28, 2016), the district court held that back pay is to be doubled “prior to subtracting any mitigation,” in order to prevent defendants from “avoiding the double-damages provision by tendering the undoubled amount in mitigation prior to judgment.”
 - Compensation for any special damages sustained as a result of the retaliation, including litigation costs and attorney fees.

Whistleblower Remedies (cont.)

- Some courts have also held that compensation for emotional distress is available under the retaliation provision.
 - In *Neal v. Honeywell*, 191 F.3d 827, 831-32 (7th Cir. 1999), the court awarded \$200,000 for emotional injury where the plaintiff received threats of physical injury.

'But-for' Causation Now Required

- In January 2018, the Third Circuit held that employees alleging retaliation against them because they made a complaint under the FCA must prove the adverse employment action would not have occurred “but-for” the complaint. *DiFiore v. CSL Behring, LLC*, No. 16-4297 (3d Cir. Jan. 3, 2018).
- The court stated that “the language of the FCA anti-retaliation provision uses the same ‘because of’ language that [compels] the Supreme Court to require ‘but-for’ causation.”
- This is a more stringent standard, and requires employees to prove that unlawful retaliation would not have occurred without the employee engaging in protected activity.

FCA Whistleblower Best Practices

- Establish clear, written anti-retaliation policies and encourage internal reporting of fraud.
 - This should include information regarding to whom issues should be reported, and allow for anonymous complaints.
 - Provide training to all employees on these procedures and policies.
- If a Government investigation is initiated:
 - Contact agency early in the process to understand the scope of the investigation.
 - Be proactive in scheduling interview times that will minimize disruption of normal business.
 - Advise employees of rights and obligations prior to interviews.

FCA Whistleblower Best Practices (cont.)

- If identity of whistleblower is known:
 - Where possible, avoid spreading that information, to minimize risk of adverse response by other employees which could lead to retaliation claim.
 - Ensure any necessary adverse actions against the whistleblower are in full compliance with previously-existing policies and procedures, and that there is a clear, legitimate, documented business reason for the adverse action.
 - Document all performance reviews, discipline records, and post-complaint communications related to the whistleblower.

Government Audits and Investigations

Government Audit Vehicles

- The Government has various methods to ensure contractors are in compliance with procurement regulations
- Broadly speaking, Government audits can be broken down into two categories:
 - Performance Audits – related to contract administration
 - Office of Inspector General (OIG) Audits – related to allegations of fraud

Performance Audits

- The Defense Contract Audit Agency (DCAA) conducts audits of DoD contracts from proposal stage through contract closeout, focusing on the financial/accounting elements of specific contracts.
 - DCAA conducts audits in three areas:
 - Preaward – focusing on pricing proposals, preaward survey support
 - Postaward – focusing on incurred costs, Truth in Negotiation Act and Cost Accounting Standards compliance, claims
 - Contractor Internal Control Systems – focusing on accounting, billing, labor, purchasing, compensation, etc.
- The Defense Contract Management Agency (DCMA) provides a wide range of contract-related reviews, focusing on systems, processes, quality assurance, and accountability over government property.
- DoL has broad powers under its audit rights, and is required to audit vendors that hold contracts in excess of \$10 million.

OIG Audits

- Agency OIGs typically have broad authority to perform audits in response to fraud allegations.
- DoD OIG “combats fraud, waste and abuse in the Department of Defense,” by auditing DoD operations, systems, programs, and functions.
 - Transmits a Semiannual Report to Congress available to the public regarding recent actions, reports issued, and changes in the auditing structure.
- GSA OIG performs various audits as well
 - Preaward – focusing on vendor’s sales data to ensure disclosures are current, accurate, and complete
 - Postaward – to assess compliance with the Price Reduction and Industrial Funding Fee clauses

Recent Developments

- Section 820 of the 2017 National Defense Authorization Act (NDAA) authorizes defense contractors to present commercial auditors' findings concerning their indirect rates to DCAA.
 - This avoids any additional DCAA audits so long as the commercial auditor used "relevant commercial accounting standards...for the relevant accounting period."
 - Exception for contractors with a "predominance of cost-type contracts."
 - This new development could speed up the audit process and reduce the risk of lengthy, disruptive, and potentially inaccurate DCAA indirect costs audits.
- Section 803(b) of the 2018 NDAA now requires DCAA to contract with private auditors and to delegate review of as many audits as necessary to eliminate the incurred cost audit backlog by 10/2020.

Recent Developments (cont.)

- Between October 2017 and March 2018 DoD OIG issued 68 audit reports, an increase of approximately 40% compared to the previous two years.
- In the previous reporting period, DoD OIG reorganized its Audit division in part to emphasize and increase oversight of DoD's cyber capabilities.
 - This will likely be a focus moving forward in auditing DoD contracts.

Government Audit Best Practices

- Thoroughly assess company's policies and procedures, compliance obligations, and infrastructure in order to develop a contract management program that identifies and minimizes risks of noncompliance unique to the organization.
- Ensure company's document retention policies are aligned with basic government standards and information is organized to allow ease of access in case of an audit.
- Provide recurring and targeted training to personnel involved in management and performance of all government contracts.
- To the maximum extent possible, segregate job duties between contract management and sales to avoid conflicts of interest that may pose noncompliance risks.

Government Audit Best Practices

- Consider enhancing company's code of ethics and conduct policies, and improve monitoring activities across the organization.
- Administer periodic internal or third-party audits of major business systems to assess risks and identify compliance gaps; and implement improvements recommended by audit findings.
- During an audit, maintain regular communication with auditing team in order to ensure complete understanding of the basis for each area being audited. Comply with reasonable auditor requests, and discuss both preliminary findings and final audit results with the auditing team.

Contractor Labor Mapping

Complying with Contractual Labor Qualification Requirements

Labor Mapping

- Contractual labor category qualification requirements for personnel
 - Education, Experience, etc.
- Focus of DCAA and GSA IG audits
- Potential False Claims Act liability
 - \$1.5M settlement (July 2018) – <https://www.justice.gov/usao-md/pr/united-states-reaches-153-million-dollar-settlement-defense-contractor-resolve-contract>
 - \$27.5M settlement (Dec 2014) – <https://www.justice.gov/opa/pr/defense-contractor-agrees-pay-275-million-settle-overbilling-allegations>
 - \$13.7M settlement (Oct 2014) – <https://www.justice.gov/opa/pr/defense-contractor-agrees-pay-137-million-settle-allegations-overbilling>

Labor Mapping Best Practices

- Establish process for verifying new employees meet contractual qualification requirements - including fixed price contracts
- Regularly review employee qualifications and compliance
 - Include as a required element of regular program reviews
 - Periodic internal audits
- Consider reviewing compliance for prior periods that have not yet been audited by Government
- Address qualification shortfalls by requesting waivers if appropriate, even retroactively
 - Note that in most cases, only Contracting Officer has authority to waive requirements, even if COR has approved personnel

Cybersecurity and Insider Threat

Cybersecurity

- Requirements applicable to you depend upon:
 - Data type and classification
 - Type of customer
 - Contract scope of work
 - E.g., Contractors managing systems “on behalf of” the government v. non-federal systems
 - Cloud service providers
- Remember: Compliance ≠ Security

Cybersecurity

- The FAR and DFARS require protection of certain unclassified government data based on National Institute of Standards and Technology (NIST) Special Publication 800-171
 - FAR 52.204-21: Basic Safeguarding
 - DFARS 252.204-7012: Safeguarding and Cyber Incident Reporting
- Individual agencies have their own policies and regulations
- Requirements relating to Awareness and Training
- Your employees can be your best or worst defense against a cyber incident

NIST SP 800-171

- Training requirements – managing the human element
 - 3.2.1 - Ensure that managers, systems administrators, and users of organizational systems are made aware of the security risks associated with their activities and of the applicable policies, standards, and procedures related to the security of those systems.
 - 3.2.2 - Ensure that personnel are trained to carry out their assigned information security-related duties and responsibilities.
 - 3.2.3 - Provide security awareness training on recognizing and reporting potential indicators of **insider threat**.
 - 3.6.1 Establish an operational incident-handling capability for organizational systems that includes preparation, detection, analysis, containment, recovery, and user response activities.

Insider Threat

- A current or former employee, contractor, or business partner
 - With authorized access to an organization's network, system, data, premises, or assets
 - Who may misuse that access to damage or compromise the confidentiality, integrity, or availability of the organization's information or information systems
 - Can include outsiders that have stolen or been given valid user credentials
- May be merely negligent OR malicious/ideologically motivated

NISPOM Conforming Change 2

- Applies to classified information/facilities
- Contractors must establish and maintain an insider threat program to detect, deter, and mitigate insider threats
 - Designate Insider Threat Program Senior Official
 - Implement written plan
 - Training and awareness
 - User monitoring
 - Government reviews
 - Annual self-inspections
- Immediately report relevant and credible information that may be indicative of potential or actual insider threats

NISPOM Conforming Change 2

- In-house Legal, Information Security, and Human Resources must collect and share information related to 13 personnel security adjudicative guidelines:

(1) US Allegiance	(7) Alcohol Consumption
(2) Foreign Influence	(8) Drug Involvement
(3) Foreign Preference	(9) Psychological Conditions
(4) Sexual Behavior	(10) Criminal Conduct
(5) Personal Conduct	(11) Handling Protected Info.
(6) Finances	(12) Outside Activities
	(13) Use of Information Technology System

Insider Threat Best Practices

- Know your business and your employees
- Approach the threat holistically
- Create and enforce clear policies and procedures
- Ensure concise and coherent documentation, consistent enforcement, and periodic employee training on these policies
- Ensure the punishment fits the crime
- Periodically review and update your Insider Threat Program

Employment Issues in Government Contracting Questions

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