Association of Corporate Counsel
NATIONAL CAPITAL REGION

ACC NCR: Employment Issues in Government Contracting

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Federal Government Contractors: High Expectations

Contractors Are the Front Lines

- Higher level of scrutiny (and risk)
- DOL
- OFCCP
- Joint Employer Rule
- Independent Contractor
- NLRB Protected Concerted Activity
- Executive Orders

Minimum Wage Executive Order

- Executive Order went into effect January 1, 2023
- Judge Drew B. Tipton of the US District Court for the Southern District of Texas struck down
- President violated federal law when he unilaterally raised the minimum wage for federal contractors to $15 per hour
- The Procurement Act does not give the president the authority to use an executive order to increase the starting pay for workers who contract with the federal government
- Texas, Louisiana, and Mississippi sued to block the contractor wage increase in 2022
- Tipton enjoined Biden and the US Department of Labor from enforcing the minimum wage order and the DOL rule implementing it against the three states and their agencies.

What Does the Supreme Court's *Students for Fair Admissions, Inc.* Ruling Mean for Employers?

The Decision Is About Student Admissions

- SFFA alleged Harvard's admissions policy intentionally discriminates against Asian-American applicants
- SFFA alleged that UNC's admissions process unfairly uses race to prefer underrepresented minority applicants to the detriment of White/Caucasian and Asian American applicants

The Holding

- Using race in admissions violates the Equal Protection Clause
- *Grutter* NOT overturned, BUT
- Using race in admissions does not pass *strict scrutiny* standard
- Programs are not "'sufficiently measurable to permit judicial review' under the rubric of strict scrutiny"
- "'[c]lassifying and assigning' students based on their race 'requires more than . . . And amorphous end to justify it.'"

Not About Employment

- Case on its face does not apply to Title VII (etc.), EO 11246
  - Case does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background.
  - It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.
  - But, it is being relied on to challenge employer DEI measures.

Private Employer Rubric is Different

- Private Employer Rubric is Different
- Title VII of the Civil Rights Act of 1964 protects against discrimination on the basis of protected characteristics, including race
- Executive Order 11246 applies to covered federal contractors and subcontractors and prohibits discrimination against employees on the basis of protected characteristics, including race
- For government contractors, affirmative action requirements related to recruiting and hiring

Objectives for DEI Initiatives Remain for Many Employers

- Discrimination against the under-represented remains an issue
- Increasing representation remains a business priority for many employers
- Discrimination on the basis of protected characteristics remains unlawful

More of the Push & Pull

- Anticipate more challenges to DEI measures and initiatives
- Under Court's ruling, "member" organizations may argue standing to sue private employers even if members were not employed
- Expect more challenges by organizations saying DEI measures go too far and are evidence of discrimination
- Expect more challenges by organizations saying DEI measures don't go far enough
- Be mindful of legislative mandates – e.g., Stop WOKE Act

To Do

- Do become part of the process
- Do take stock of the DEI measures in place – everything from statements/proclamations to operations
- Do understand the operations and implementation
- Do conduct the risk analysis, in light of your organization’s values, priorities

Risk Evaluation – Sliding Scale

Best Practices – Continue to Review:

- Statements, policies
- Hiring/Recruiting Practices
- Promotion Practices
- Performance Metrics
- Compensation
- Recognize potential future risks

OFCCP

Priority 1: Strengthen Enforcement & Promote Greater Contractor Compliance

Contractor Portal

- Platform where covered contractors and subcontractors must certify, on an annual basis, whether they are meeting their requirement to develop and maintain annual AAPs.
- Largely considered a success in increasing contractor compliance.
- Reiterated that if you don't certify, much greater chance of being selected for audit
  - Working on developing CSAL, but declined to state whether it would be exclusively non-certifiers

Year	Parent Companies	Establishments
2022	8,721	79,329
2023	9,448	98,627

Priority 1: Strengthen Enforcement & Promote Greater Contractor Compliance

Revised Scheduling Letters

- New Corporate Scheduling Announcement List – 9/8/2023
- Revised Scheduling Letter and Itemized Listing – 8/24/203
  - Request Promotion policies so that OFCCP can better analyze promotion opportunities given
  - Request Compensation policies so that OFCCP can better analyze the process for evaluating and deciding compensation data and the factors used
  - Two snapshots of compensation data to better analyze possible pay disparity
  - Validating compensation self analysis data and ensuring that contractors are meeting their obligations
  - Emphasis on recruiting efforts and the contractor's assessment in determining whether efforts are effective and when not implementing alternatives

Priority 1: Strengthen Enforcement & Promote Greater Contractor Compliance

A Focus on Artificial Intelligence

- Plans to fully investigate use of AI to ensure it does not result in hiring disparities – Now requesting information on AI tools used in recruiting and hiring in Scheduling Letter
- Contractors must evaluate selection process to determine if barriers to EEO exist and “can’t bury their heads in the sand just because they are told something is proprietary”
- Concerns that technology gives employers false sense of objectivity
- OFCCP releasing FAQs and best practices on AI for contractors
  - Will align its processes and procedures on AI with those of other federal agencies
  - Must validate selection procedures even with AI – how are algorithms working

Priority 1: Strengthen Enforcement & Promote Greater Contractor Compliance

What Else to Expect?

- Limiting unnecessary extensions! 30 days and extensions will only be given under extraordinary circumstances like medical leave of absences or key personnel departures
- Addressing denial of access – may result in enforcement action
  - Failure to respond fully to scheduling letter and itemized listing
  - Failure to provide employee contact information during on-sites
  - Failure to provide records maintained by third-parties in hiring process
- New individual complaint intake process rolling out early next fiscal year

Priority 2: Dismantle Hiring Barriers

- Ensuring that workers get access to good quality jobs created by infrastructure investments in construction
- Women in construction trades
  - "Women are nearly half of the labor force but only 3 percent of construction trades."
- Launched Mega Construction Program in March 2023
  - Tracking data and results to ensure effectiveness of program
- Still conducting audits of non-mega construction contractors and will be designating additional mega projects in the future
  - ***OFCCP Regional Director Panel****: Seeing trends in construction audits with failure to post jobs, unequal access to OT, time in job issues, onsite issues*
  - ***EEOC Chair****: Seeing most egregious cases in construction industry*

Priority 3: Expand Outreach Efforts

- Building coalitions with organizations to connect people with good paying jobs
  - Continued focus on educating contractors through compliance assistance and conducting internal outreach to connect workers with good jobs
- Encourage veteran outreach and hiring
- 50th Anniversary of the Rehabilitation Act
  - Unemployment rate for those with IWDs is twice as high as those without
  - Pandemic has shown that remote work can empower IWDs
  - Revised Self-ID form for IWDs
  - ***OFCCP Regional Director Panel Tip****: Establish oversight in reasonable accommodations!*

OFCCP Publishes Final Pre-enforcement and Conciliation Procedures Rule

Context: Pre-enforcement Notice and Conciliation

- The PreDetermination Notice (PDN) is a letter informing contractors of the Agency's preliminary findings of potential employment discrimination and gives opportunity to respond prior to OFCCP issuing Notice of Violations (NOV)
- New final rule went into effect on September 5, 2023, replacing the 2020 rule
- According to OFCCP, the new rule *"restores flexibility to OFCCP's pre-enforcement and conciliation procedures, promotes efficiency in resolving cases, strengthens enforcement and promotes alignment of the standards of Title VII"*

The New Rule: What Hasn't Changed?

- OFCCP must still issue a PDN *before* issuing an NOV in audits
- Retains early resolution provisions allowing OFCCP and contractor to resolve issues without issuance of PDN and NOV, if contractor so chooses

The New Rule: What Changed and What Does It Mean for Contractors?

- Removes all evidentiary requirements
  - No longer required to show qualitative and quantitative evidence
  - No longer required to show, upon request, the model and variables used in any statistical analysis and an explanation of why contractor's proposed variables were excluded
  - No longer required to show practical significance
- Removes requirement that OFCCP Director approve each PDN
- Reduces contractors' time to respond to PDNs from 30 days to 15 days
- Removes requirement that OFCCP address all relevant concerns and defenses raised by contractor in response to PDN in the NOV
- OFCCP can issue NOVs and show cause notices for violations not included in PDNs
- Clarifies "reasonable standard" for conciliation to align with Title VII

Litigation Risks

Litigation Risks

- Teaming Agreements
- Non-Solicitation Agreements
- Contractor Non-Compete Agreements
- Tortious Interference with Business Relationships
- Trade Secret Misappropriation

Litigation Risks: Teaming Agreements

- Yes, we're talking 'bout "Teaming Agreements"
- Quick Overview
- What is a Teaming Agreement?
  - A teaming agreement is a contract between a potential prime contractor and another company to act as a subcontractor to pursue federal government contract opportunities
- Why are Teaming Agreements important?
  - Teaming agreements are frequently used between contractors when submitting a bid or responding to a government RFP
  - Specifically encouraged by the Federal Acquisition Regulations
  - Provide efficiencies for both the government and contractors

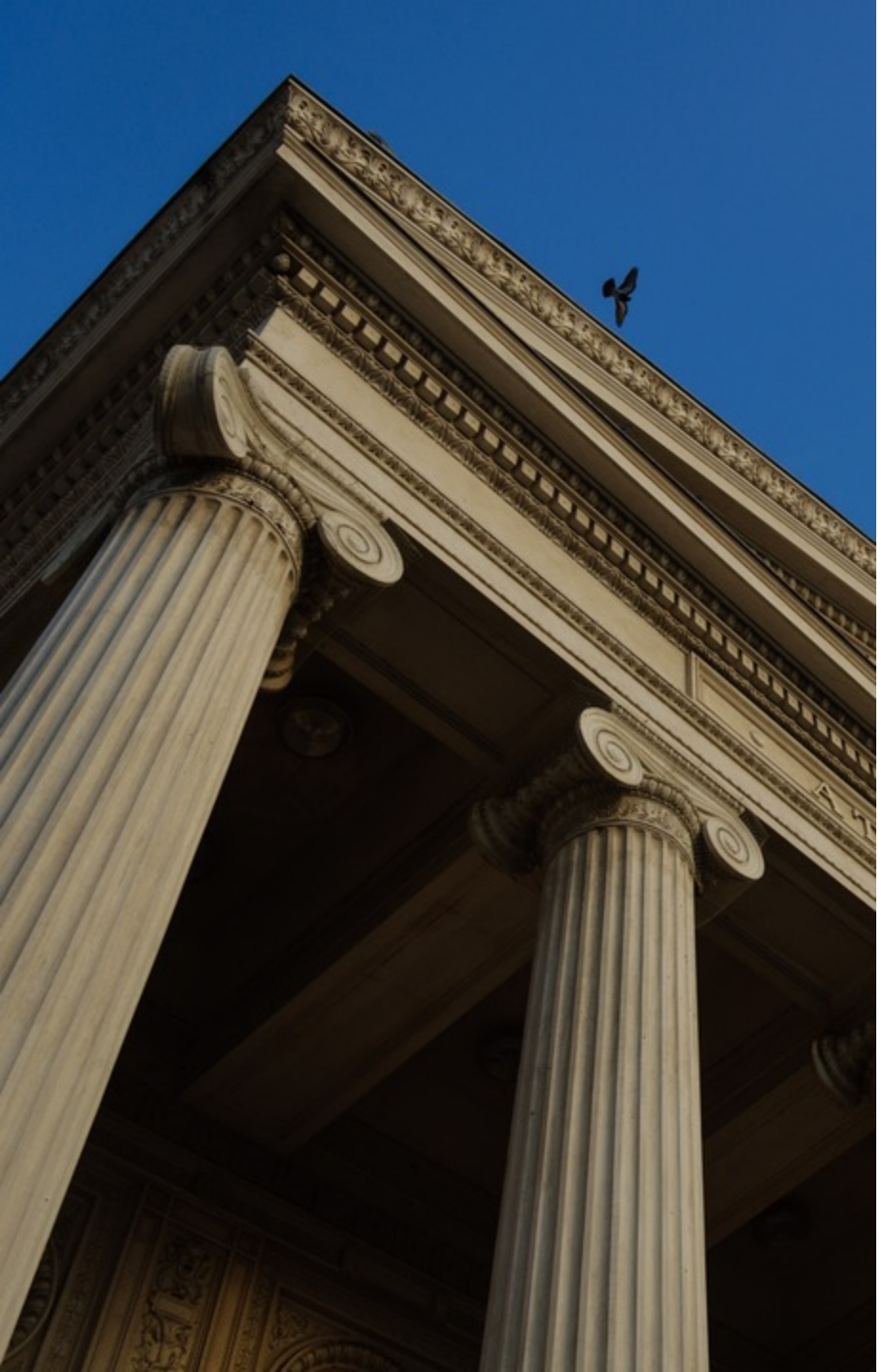
Litigation Risks: Teaming Agreements

Benefits

- Allow unfamiliar parties to pursue a solicitation, complement each other's capabilities, and present a strong proposal
- Limit the parties' obligations to one another
- Allow the parties to tailor their relationship to the specific solicitation
- Provide for a number of termination provisions
- Require each party to bear their own proposal preparation costs
- Provide other contractual protections (e.g., non-disclosure of confidential information, exclusivity, non-solicitation of employees, etc.)

Litigation Risks: Teaming Agreements

- Drawbacks
  - Create the prospect of litigation if the parties' relationship deteriorates during the solicitation and award process
  - Teaming Agreements are contracts
  - **The Dreaded Scenario**: The prime contractor is awarded the prime contract. But, the prime contractor and subcontractor are unable to reach an agreement on the terms of a subcontract. What happens now?
  - Litigation ensues
- Frequent Questions
  - Is the Teaming Agreement enforceable?
  - If unenforceable, what parts of the teaming agreement survive termination of the parties' relationship?



Litigation Risks: Teaming Agreements

- Generally speaking, courts consider Teaming Agreements to be “agreements to agree” on a future subcontract and are *not* enforceable
  - *See, e.g., Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 939 F. Supp. 2d 572, 578 (E.D. Va. 2013) (“[A]greements to negotiate at some point in the future are unenforceable.”).
  - This is so even if the parties are "fully agreed on the terms of their contract"
- But, courts have held that certain provisions of Teaming Agreements *are* enforceable

Litigation Risks: Teaming Agreements

- Frequently Litigated Provisions of Teaming Agreements
  - Non-solicitation agreements
  - Exclusivity provisions
  - Confidentiality provisions (proprietary information)
  - Termination clauses
  - Disputes provisions
    - Arbitration clauses
  - Oral modifications

Litigation Risks: Teaming Agreements

- Choice of law
  - Very important. Parties need to know if they are in an unenforceable relationship. Virginia has large body of law in this area.
- Party Perspective (prime contractor vs subcontractor)
- Division of Responsibilities for Proposal Preparation
- Non-Disclosure/Confidentiality of Information
- Termination
- Disputes provision
  - Arbitration
- Limitations on damages
- Exclusivity
  - Beware of FAR 52.203-6 “Restrictions on Subcontractor Sales to the Government”
- Merger Clause (No oral modification)
- Severability

Litigation Risks: Non-Solicitation

- Teaming Agreements and Subcontracts often contain contractual clauses prohibiting either party from “soliciting” the other’s employees
  - Also commonly referred to as a “no-hire” provision
  - Duration is for a specified period of time (e.g., one year is common)
- Talent is a valued commodity in the government contracting space
- Common Scenarios that lead to litigation
  - Subcontractor wins recompete
  - Prime Contractor wants to perform 100% of the prime contract work and no longer needs a subcontractor

Litigation Risks: Non-Solicitation

- What is “soliciting” or “solicitation” of another’s an employee?
  - This is defined by the parties’ contract
- Common non-solicitation clause: “During the term of this Agreement, and for one-year thereafter, neither party will solicit for employment or employ as an employee any employee of the other party without the prior written agreement of the party whose employee is being considered for employment.”
- However, oftentimes the term “solicit” is not defined in the parties’ contract

Litigation Risks: Non-Solicitation

- Where the contract does not define a term, courts often look to established definitions
  - *E.g. Legal Tech. Grp., Inc. v. Mukerji*, No. 17-631, 2019 WL 9143477, at *10 (D.D.C. June 10, 2019) (quoting *Solicit*, Black's Law Dictionary 1607-08 (10th ed. 2014)).
  - Conduct a party is complaining of may not violate a dictionary definition
- Claims of breach of contract for violation of non-solicitation clauses often survive motions to dismiss
- Case law is sparse concerning conduct that does not constitute "solicitation"

Litigation Risks: Non-Solicitation

- Take care when drafting “non-solicitation” and “no-hire” clauses in your teaming agreements and subcontracts
  - Define what constitutes “solicitation”
  - Define what is permissible and what is not permissible
  - Limit duration
    - Non-solicit agreements existing in perpetuity are viewed as anti-competitive and unenforceable. *E.g. Anteon Corp. v. BTG Inc.*, 62 Va. Cir. 41, 44 (Fairfax Cnty. 2003) (“Clearly, a non-solicitation or hiring clause in perpetuity violates Virginia’s public policy.”).
  - Carve out for employees to pursue job opportunities
- *See, e.g., Enhanced Network Sols. Grp., Inc. v. Hypersonic Techs. Corp.*, 951 N.E.2d 265, 267-68 (Ind. Ct. App. 2011) (posting an employment opportunity on LinkedIn that would be viewed by a contractually prohibited class did not constitute solicitation).

Litigation Risks: Non-Compete

- Non-compete agreements are typically found in employment agreements between employers and their employees
  - In the government contracting space, non-compete agreements are often used in subcontracts
- Whether between contractors or between an employer and employee, non-compete agreements are restraints on trade
  - Restraints on trade are disfavored and are scrutinized by courts
- Business-to-business non-compete agreements are generally subject to less scrutiny than employee non-competes

Litigation Risks: Non-Compete

- However, business-to-business non-competes by their very nature are anti-competitive. Be strategic in employing non-compete clauses in subcontracts.
  - Can violate public policy
  - Raise antitrust concerns
  - Can violate the Federal Acquisition Regulations (FAR 52.203-6 “Restrictions on Subcontractor Sales to the Government”)
- Fact intensive inquiry to determine reasonableness and states differ in their analysis

Litigation Risks: Non-Compete

- Contractors also frequently have their employees performing on contracts sign non-competes
  - Frequently sue to enforce non-competes
- Beware: non-competes are invalid when used to try and corner the labor market in contract performance
- *Metis Grp., Inc. v. Allison*, No. CL 2019-10757, 2020 WL 8813756, at *1 (Fairfax Cnty. Jan. 8, 2020).
  - Contractor awarded BPA with the U.S. Army and required its workers on the contract to sign non-compete agreements
  - BPA task orders were not renewed by the government
  - Workers later obtained employment with a different contractor who provided services to the Army under the same BPA
    - Contractor sued employees and new employer

Litigation Risks: Non-Compete

- Fairfax County Circuit Court dismissed the Contractor's lawsuit *with prejudice*
  - The Circuit Court determined that, under the circumstances, the non-compete agreements violated Virginia public policy
- Workers hired to work on this specific contract
- When completed, the Contractor had no further work for them to perform and did not keep them on payroll
- "A contract that prohibits a party from seeking employment at a time the employer had no work for the contractor and did not offer[] to subsidize the contractor's livelihood is almost unconscionable."

Litigation Risks: Non-Compete

- While virtually “all businesses would happily enjoy the economic benefit of being a sole source contractor, an interest in having monopolistic control over possible profits is not a factor that supports a restrictive covenant.”
- Lessons learned
  - Do: Carefully analyze your business and business needs when using non-competes
  - Do: Ensure you have work for your employees
  - Don’t: Simply try to ban competition

Litigation Risks: NLRB Recent Positions

- May 2022, the NLRB's General Counsel, Jennifer Abruzzo, released Enforcement Memorandum 23-08
  - Claiming certain non-compete provisions in employment contracts and severance agreements violate the NLRA
    - NLRB GC Memos are not binding law
    - But, they are guidance to the agency's field offices of the position that the GC is instructing them to take when investigating unfair labor practice charges
  - Non-competes infringe on the ability to engage in protected concerted activities
    - GC Memo does recognize that narrowly tailored non-competes may be lawful
- September 2023, NLRB filed complaint where employer required its employees to sign non-solicitation agreements (employees and customers)
  - Non-solicitation provisions infringed on ability to engage in protected concerted activities

What is the False Claims Act?

Origins

- Civil War Era Statute (1863) enacted to combat fraud by unscrupulous contractors to the Union Army
  - Unscrupulous Contractors
  - No remedy available under then-existing federal law
  - “Lincoln’s Law”
- What is a “False Claim?”
  - Any demand for money or property made to the government

Potential Liability

- Civil Liability (31 U.S.C. § 3729)
  - Knowingly Presenting a False Claim
  - Causes Another to Make a False Claim
  - Knowingly Making a False Statement
  - Reverse False Claims
  - Conspiracy
- Criminal Liability (38 U.S.C. § 287)
- Anti-Retaliation Provision (31 U.S.C. § 3730(h))
- 30 states, as well as Puerto Rico and DC, have their own FCA

The “Qui Tam” Provisions

- Private citizens may file on behalf of the United States
- The government may intervene, decline, or dismiss
- Bounty law, whistleblowers are incentivized to bring complaints because they get a share of the government’s recovery
- Why bring a Qui Tam?
  - The relator is entitled to a portion of the recovery
  - A range of 15-25% of the government’s recovery if the government intervenes in the lawsuit
  - A range of 25-30% of the government’s recovery if the government does not intervene in the lawsuit and relator, with the assistance of counsel, pursues the lawsuit on their own

How Is an FCA Case Prosecuted?

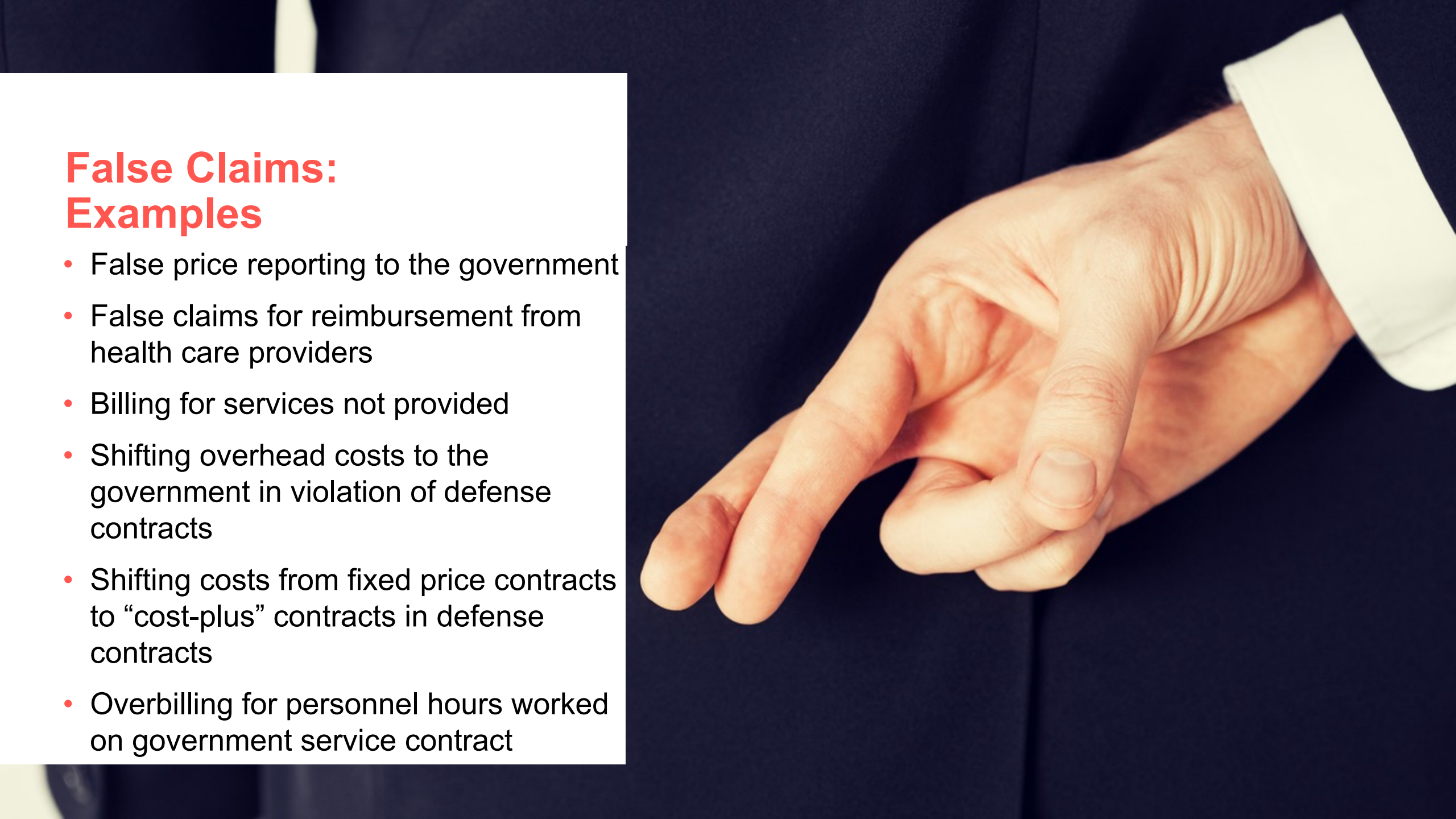
- A qui tam complaint must be filed with the court under seal
- Relators then wait until the United States decides to “intervene” in the case. If so, the case is taken out of seal and filed on the public docket
- If the United States intervenes, it will take over the litigation and proceed to prosecute the fraudster, with the whistleblower as a party in the case
- If the intervention is declined, the whistleblower has the right to proceed with the lawsuit
- If the government intervenes in the qui tam action it has the primary responsibility for prosecuting the action
- It can dismiss and settle the action, even over the objection of the relator
- If a relator seeks to settle or dismiss a qui tam action, it must obtain the consent of the government

How to Identify FCA Complaints

- Questions to Ask Yourself:
  - Does my company submit bills to the government for payment?
  - Does my company have a federal contract?
  - Is my company a federal grantee?
  - Does my company have to comply with federal and/or state regulations as a condition of payment?
  - Does my company submit certified payroll to the government?
  - Does my company bill Medicare or Medicaid?
- If you answered “Yes” to any of these, complaints about fraud, financial obligations, and/or regulatory violations may implicate the FCA.

False Claims: Examples

- False price reporting to the government
- False claims for reimbursement from health care providers
- Billing for services not provided
- Shifting overhead costs to the government in violation of defense contracts
- Shifting costs from fixed price contracts to “cost-plus” contracts in defense contracts
- Overbilling for personnel hours worked on government service contract



False Claims: Examples (cont'd)

- Misrepresenting compliance with regulations as a condition of winning government contract
  - minority business;
  - small business;
  - human trafficking;
  - data security compliance;
  - Generic certification of no involvement in illegal activity.

FCA Fraud: Damages

- A company found in violation of the FCA is liable for:
  - A civil penalty of approximately $11,000 to $22,000 for each false claim
  - Three times the amount of damages the government sustains
  - The costs of bringing the civil action to recover penalties and damages
- Criminal Penalties

Whistleblower Retaliation

- Defense Contractor Whistleblower Protection Act (DCWPA)
  10 U.S.C. § 4701
- DCWPA Extended to Federal Civilian Agencies
  41 U.S.C. § 4712
- False Claims Act
  31 U.S.C. § 3730(h)

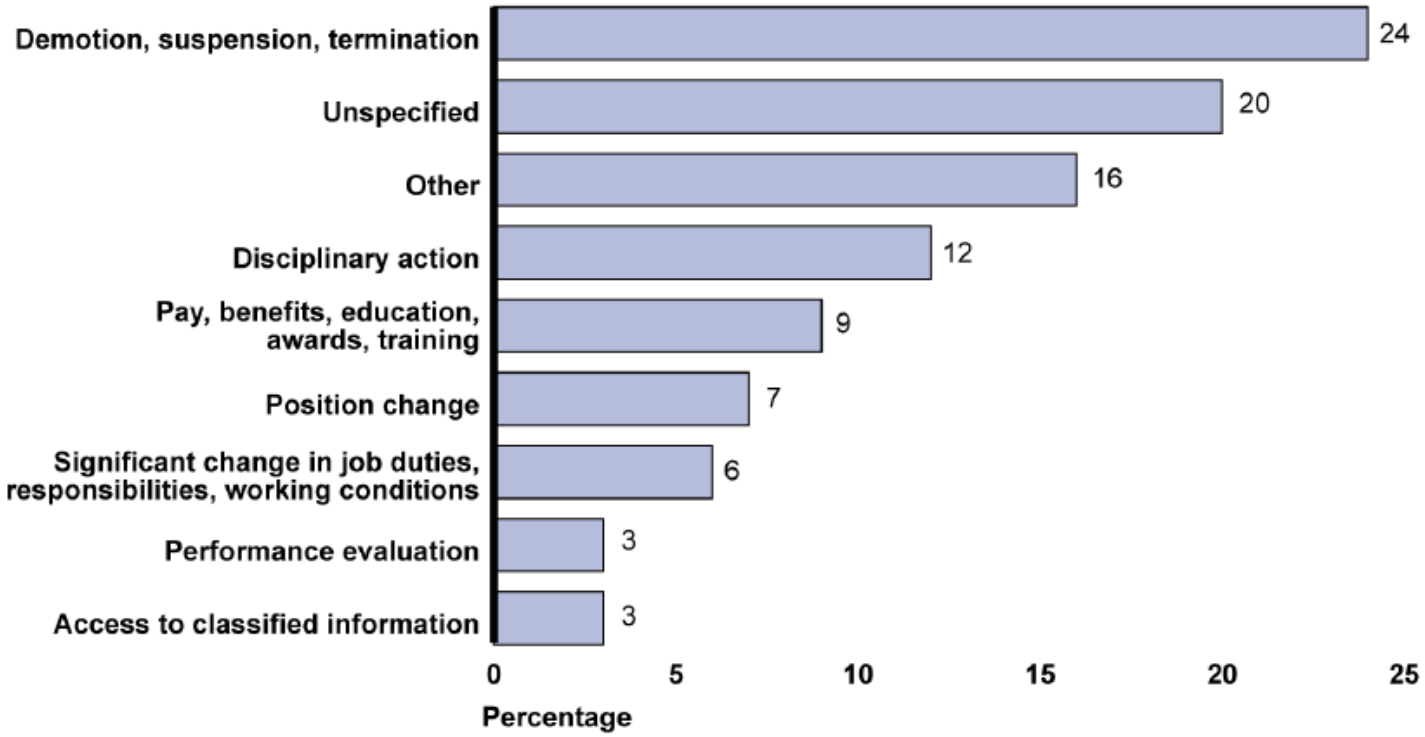
Whistleblower Rights and Remedies

- Protected disclosure—information employee reasonably believes is evidence of:
  - Gross mismanagement of Federal contract
  - Gross waste of Federal funds
  - Abuse of authority
  - Substantial and specific danger to public health and safety
  - Violation of law, rule, or regulation related to Federal contract
- EXCEPTION
  - Disclosure of classified information, unless permitted by law

Prohibitions on Retaliation

- "discharged, demoted, or otherwise discriminated against" (FAR 3.908–4)
- Majority of protected disclosures involve violations of rule, law, or regulation

Figure 7: Percentage of Alleged Prohibited Personnel Actions Received by the Department of Defense Office of Inspector General (DODIG) from Fiscal Year 2013 through Fiscal Year 2015

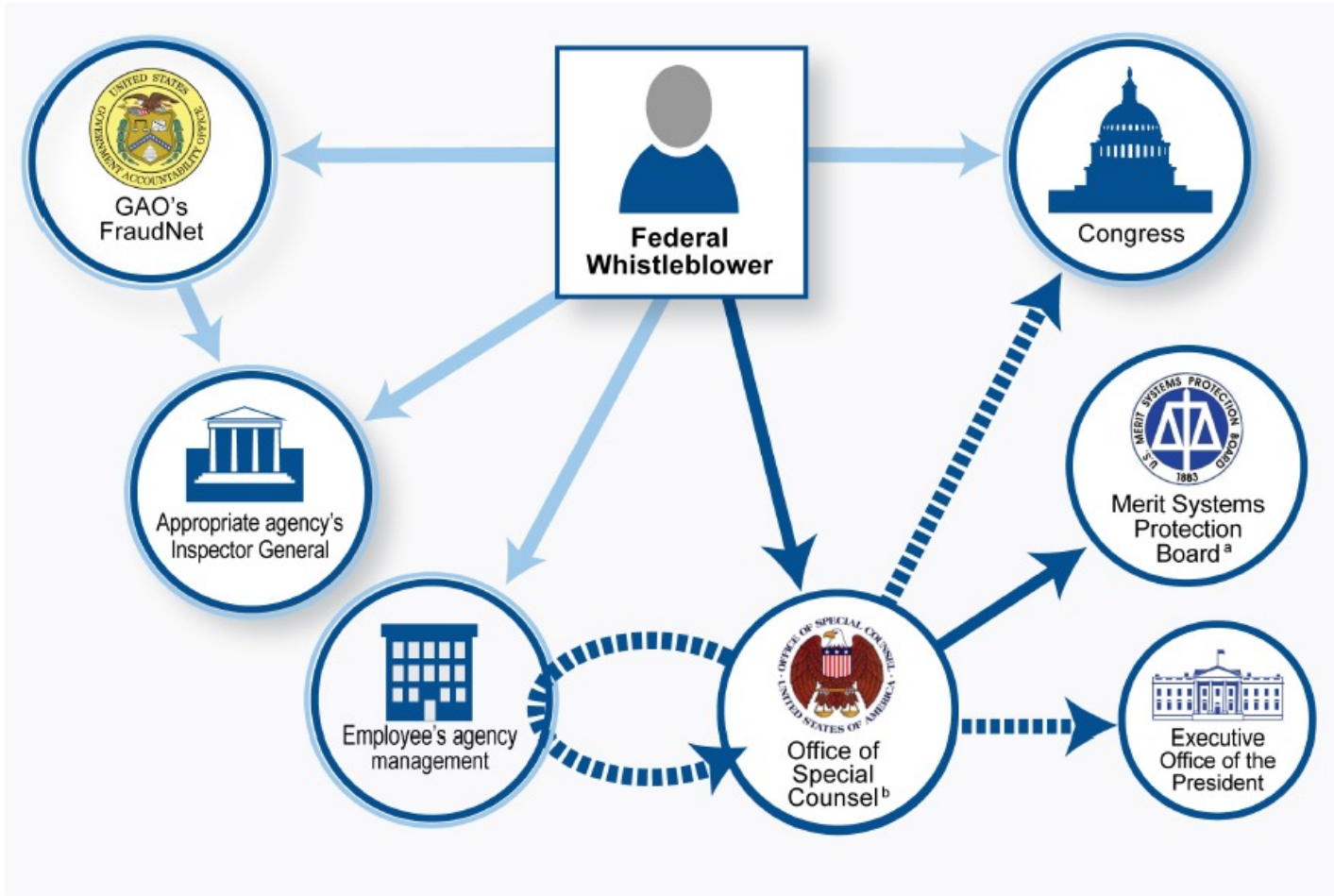


Source: GAO analysis of Department of Defense Office of Inspector General (DODIG) data. | GAO-17-506

Where can whistleblowers report?

- Internal: Contractor employee with responsibility to investigate, discover, or address misconduct
- Also—agency employee responsible for contract oversight or management

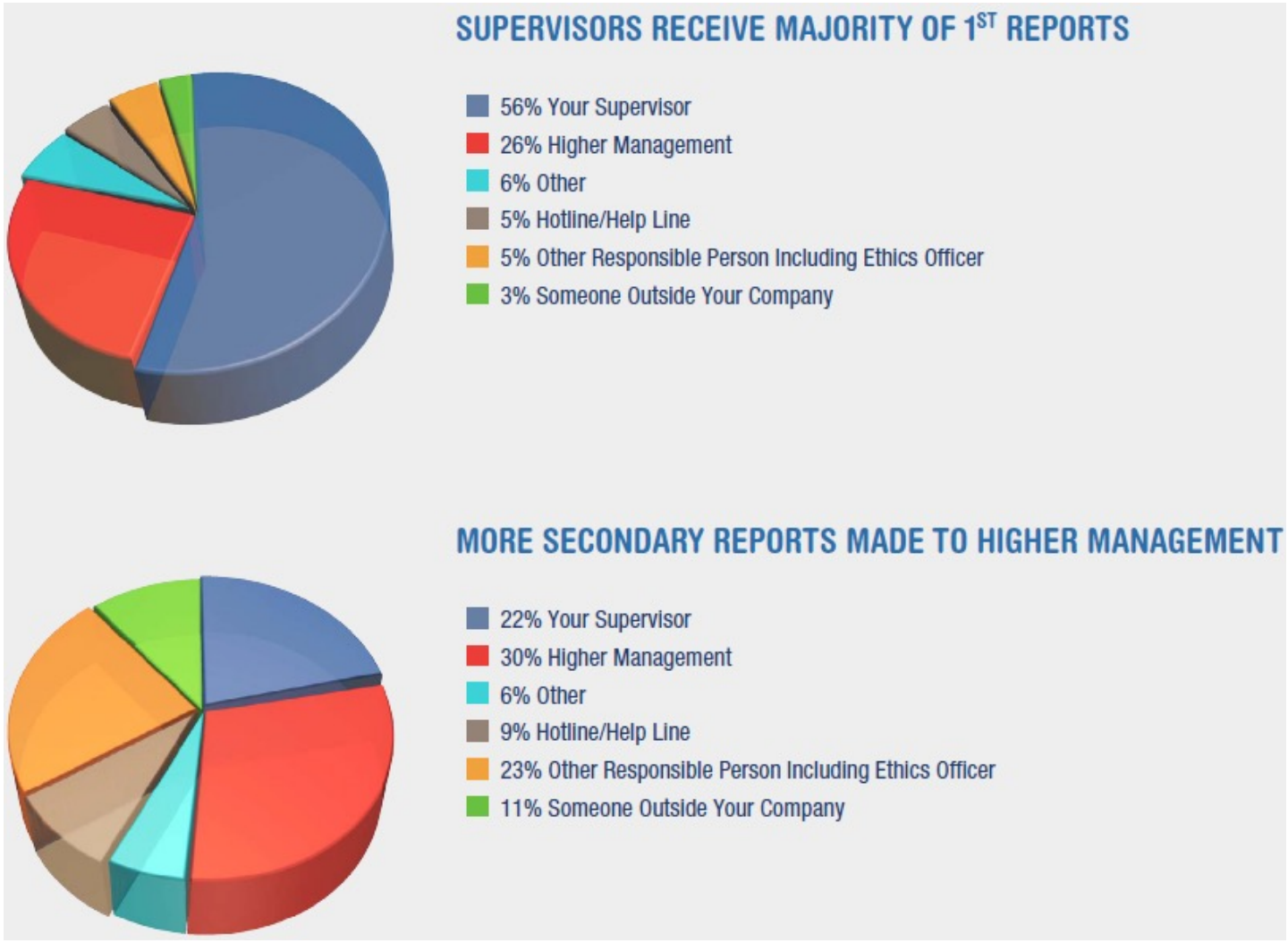
Figure 1: Federal Whistleblower Options Available to Federal Civilian Employees, Contractors, and Grantees



Source: GAO analysis of applicable laws and procedures. I GAO-19-432

Where do whistleblowers report?

- Relationships matter
- Encourage internal reporting
- Train supervisors to recognize informal reports



Source: Ethics Resource Center, *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey* 12-13 (2012).

Duty to Inform Employees of Whistleblower Rights and Remedies

- Contractor must inform all employees of whistleblower rights and remedies (FAR 52.203–17; DFARS 252.203–7002)
  - In writing
  - In “the predominant language of the workforce”
- Flow down to all subcontracts above $250,000 (civilian agencies)
- Flow down to all subcontracts (DoD)

The Drug Free Workplace

Drug Free Workplace Act and Marijuana

- Requires government contractors to have a policy notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited **in the workplace** and specify what actions will be taken for violations of the prohibition
- Under the federal Controlled Substances Act, marijuana is prohibited as a Schedule 1 illegal drug.
- The ADA prohibits employers from discriminating against qualified individuals on the basis of a disability and requires employers to provide reasonable accommodations to employees with disabilities.
- But the ADA specifically excludes protection for individuals "currently engaging in the illegal use of drugs."
- Compliance with DFWA does not require employers to terminate employees for drug-related violations.

Federal Contractor Drug Testing and Tolerant State Laws

- The “Fairness in Federal Drug Testing Under State Laws Act” would remove limitations on **federal employment** for anyone using marijuana in accordance with state law.
- Under the bill, if an employee resides in a state that permits private use of marijuana, he can’t be denied employment or suffer any other adverse employment action as a result of a positive marijuana drug test. The bill won’t apply to positions requiring top security clearances or failed drug tests resulting from probable cause, such as suspected impairment on the job.

State and Local Marijuana Laws: Nationwide

- 38 states (+ DC) have medical marijuana laws.
- 22 states (+ DC) have recreational marijuana laws.
- 18 states have medical CBD laws (separate from medical marijuana laws).
- Many states provide protection for medical marijuana users, but some new recreational marijuana laws also protect off-duty recreational use.

States with Lower Legal Risk for Employers (Medical Marijuana laws)

States with Case Law Favorable to Employers

- California (but 2024 is coming)
- Colorado
- Michigan
- Oregon
- Washington

States That Prohibit Legal Claims Against Employers

- Alabama
- Florida
- Kentucky
- Mississippi
- Ohio

Davis Bacon Act Updates

U.S. Department of Labor's Update of the Davis-Bacon Regulation

New Provisions Big Takeaways

- Health & Welfare – "Clarifies" long-standing DOL position
  - Credit for costs incurred by a contractor's insurance carrier, third-party trust fund, or other third-party administrator that *are directly related to the administration and delivery of bona fide fringe benefits to the contractor's laborers and mechanics may be eligible for a Davis-Bacon credit.*
  - Premiums and the costs for administration and delivery of such benefits, including evaluating benefit claims, deciding whether they should be paid, approving referrals to specialists, and other reasonable costs of administering the insurance plans.

U.S. Department of Labor's Update of the Davis-Bacon Regulation

New Provisions Big Takeaways

- Health & Welfare – "Clarifies" long-standing DOL position
  - May not take credit for expenses incurred in connection with the administration of a fringe benefit plans if such expenses are *primarily for the benefit or convenience of the contractor*
  - Contractor may not take credit for the costs of performing tasks such as filling out medical insurance claim, paying and tracking invoices from insurance carriers or plan administrators, updating the contractor's personnel records, sending lists of new hires and separations to insurance carriers or plan administrators, or sending out tax documents to the contractor's workers, *nor can the contractor take credit for the cost of paying a third-party entity to perform these tasks*
  - Recordkeeping costs associated with ensuring the contractor's compliance with the Davis-Bacon fringe benefit requirements, such as the cost of tracking the amount of a contractor's fringe benefit contributions or making sure contributions are made to carriers and providers

U.S. Department of Labor's Update of the Davis-Bacon Regulation

New Provisions Big Takeaways

- DOL returned to a three-step process for determining what the prevailing wage and fringe benefit rate will be for certain classifications in certain geographic areas.
  - If majority (50%) of rates are the same, then prevailing wage and fringe benefit rate
  - If there is no majority, then the wage rate and fringe benefit earned by the greatest number of workers, provided that at least 30% earn that rate, is the prevailing wage and fringe benefit rate
  - If no wage rate or fringe benefit rate is earned by at least 30% of workers in the classification, use a weighted average

U.S. Department of Labor's Update of the Davis-Bacon Regulation

New Provisions Big Takeaways

- Adjustments for Non-Collectively Bargained Rates. Periodically adjustments of non-collectively bargained rates based on U.S. Bureau of Labor Statistics Employment Cost Index (ECI) data. Such rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication
- Adoption of Wage Rates Set by State and Local Governments. When the Administrator determines that that the State or local government's method and criteria for setting prevailing wage rates are substantially similar to those the WHD uses in making wage determinations

U.S. Department of Labor's Update of the Davis-Bacon Regulation

New Provisions Big Takeaways

- Subcontractor Flow Downs.
  - Upper-tier subcontractors (in addition to prime contractors) may be liable for lower-tier subcontractors' violations. Both prime contractors and any responsible upper-tier subcontractors are required to pay back wages on behalf of their lower-tier subcontractors
  - Lower-tier subcontractors' violations may subject prime and upper-tier contractors to debarment in appropriate circumstances

U.S. Department of Labor's Update of the Davis-Bacon Regulation

New Provisions Big Takeaways

- Increased Recordkeeping Requirements.
  - Adds requirements that contractors and subcontractors maintain DBRA contracts, subcontracts, and related documents, as well as worker telephone numbers and email addresses.
  - All Records retained for at least 3 years after all the work on the prime contract is completed.
  - Certified payroll records may be requested and must be produced even with no open investigation.
- Anti-retaliation. Adds anti-retaliation provisions and corresponding remedies in the contract clauses

For the past two years, President Biden has continued to implement new executive orders affecting government contractors.

Executive Order 14055: Nondisplacement of Qualified Workers Under Service Contracts

- On November 18, 2021, President Biden issued EO 14055. The order proposed a rule that would require successor contractors under federal government service contracts to offer employment to certain employees of the predecessor contractors whose employment would otherwise be terminated as a result of the predecessor's loss of the contract.
- This executive order reinstates an Obama-era executive order that was revoked by President Trump in 2019

Executive Order 14063: Use of Project Labor Agreements for Federal Construction Projects

- On February 4, 2022, President Biden implemented EO 14063 proposed a rule to mandates government contractors and subcontractors working on federal construction projects valued at $35 million or more must “become a party to a project labor agreement [PLA] with one or more appropriate labor organizations.”
- If adopted, the new rule would apply to solicitations issued after the effective date of the final regulation
- President Biden states:

“Project labor agreements . . . avoid labor-related disruptions on projects by using dispute-resolution processes to resolve worksite disputes and by prohibiting work stoppages, including strikes and lockouts.”

Executive Order 14069: Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency

- On March 15, 2022, President Biden directed the Office of Personnel Management to issue a rule that will address the use of salary history in the hiring and pay-setting processes for Federal Employees

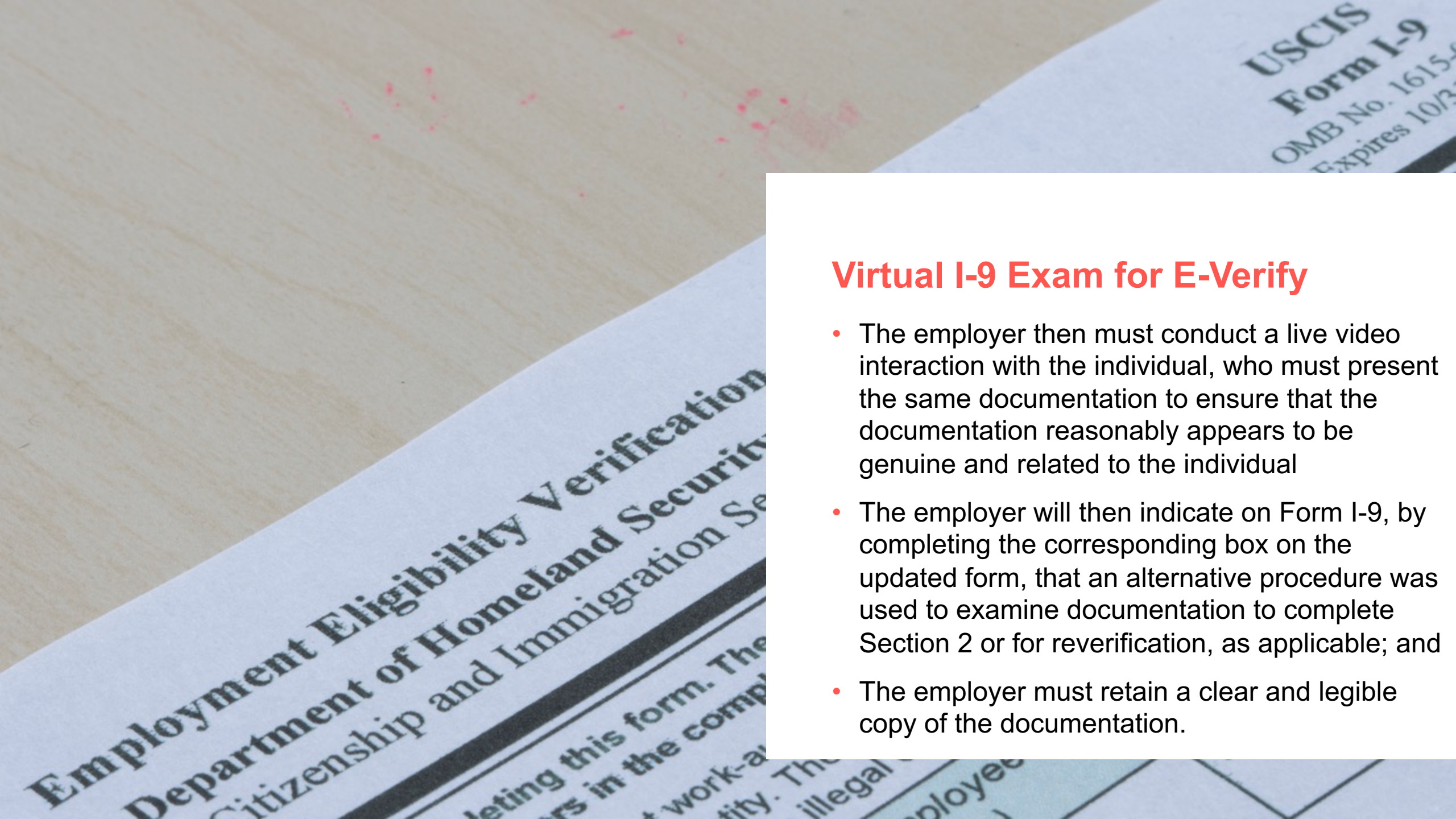
Immigration Developments

Virtual I-9 Exam for E-Verify

- Department of Homeland Security (DHS) has published a final rule that provides government contractors an optional alternative to the in-person physical document examination method that employers have followed as part of the Form I-9 process.
- DHS also announce a new version of Form I-9.
- Contractors who participated in E-Verify and created cases for employees whose documents were examined virtually during the COVID-19 flexibilities period (March 20, 2020, to July 31, 2023) may choose to use the new alternative procedure to satisfy the physical document examination requirement.
- Employers not enrolled in E-Verify during the COVID-19 flexibilities period must complete an in-person physical examination.

Virtual I-9 Exam for E-Verify

- The optional alternative verification process requires the following to occur within three business days of the first day of employment:
  - The employee must transmit a front and back copy of the identity and employment authorization documentation to the employer
  - The employer must examine the copies of the Form I-9 documentation or an acceptable receipt to ensure that the documentation presented reasonably appears to be genuine



Virtual I-9 Exam for E-Verify

- The employer then must conduct a live video interaction with the individual, who must present the same documentation to ensure that the documentation reasonably appears to be genuine and related to the individual
- The employer will then indicate on Form I-9, by completing the corresponding box on the updated form, that an alternative procedure was used to examine documentation to complete Section 2 or for reverification, as applicable; and
- The employer must retain a clear and legible copy of the documentation.

Virtual I-9 Exam for E-Verify

In the event of a Form I-9 audit or investigation by a relevant federal government official, the contractor must make available the clear and legible copies of the identity and employment authorization documentation presented by the employee.

A qualified contractor may offer the alternative procedure for remote hires only, but require physical examination procedures for all on-site or hybrid employees, so long as the employer does not adopt such a practice for discriminatory purposes or to treat employees differently based on a protected characteristic (citizenship, immigration status, or national origin).

Prospect for Legislation?

- Divided Congress
  - Comprehensive Reform
  - Smaller legislative efforts
- Border Security and Enforcement Act (HR 2640)
- Secure the Border Act (HR2) – passed House

Tik Tok Ban

Tik Tok Ban: What Is It?

- Prohibits use of TikTok (or any other applications by ByteDance Limited) on all devices used in the performance of the government contract regardless of whether they are owned by:
  - the government,
  - the contractor, or
  - the contractor's employees, including phones used as part of a "bring your own device" program
- Does *not* cover personally-owned phones not used in the performance of a federal contract
- Does *not* cover devices "incidental to a Federal contract"
  - *Not yet defined but likely means HR, finance or other support service work*

Tik Tok Ban: Effective Date & Contract Coverage

- Applies to all prime contracts including: (1) those below the simplified acquisition threshold, and (2) contracts for commercial products and services
  - *Prime contractors will be required to flow down the clause to their subcontractors at any tier*
- Interim rule effective immediately (June 2nd)
  - *Federal agencies must include FAR 52.204-27 in all new solicitations after June 2, 2023*
  - *Contracts issued before effective date will need to be amended if award of resulting contract(s) occurs on or after effective date*
  - *Existing indefinite-delivery contracts will also need to be amended*

Tik Tok Ban: What's Next?

- No information about enforcement, self-certification, or self-reporting in interim rule
- Covered companies are not currently required to report non-compliance by employees
- In the meantime:
  - Review contracts and bids/solicitations for applicability
  - Identify which jobs perform directly in furtherance of a federal contract
  - Notify impacted employees
  - Update policies and procedures
  - Block TikTok on company-issued devices

Questions?

JacksonLewis

Thank you.

Association of Corporate Counsel
NATIONAL CAPITAL REGION

ACC NCR: Employment Issues in Government Contracting

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