

August 2, 2016

Howard Shelanski, Ph.D.
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
1650 Pennsylvania Avenue, NW
Suite 262
Washington, DC 20503

Re: Guidance for Executive Order 13673, "Fair Pay and Safety Workplaces"
ZRIN 1290-ZA02; 80 Fed. Reg. 30,574 (May 28, 2015)

Dear Dr. Shelanski:

The International Safety Equipment Association (ISEA) writes to express its serious concern with an aspect of the Department of Labor's (DOL) proposed guidance implementing Executive Order 13673, "Fair Play and Safe Workplaces."¹ The proposed guidance would expose businesses that provide products to the government, including ISEA members, to a risk of losing this privilege based on alleged violations of labor laws without a hearing, final determination, or judicial review. This approach is contrary to basic, fundamental due process rights. The guidance would also pressure manufacturers to quickly settle even the most spurious allegations to avoid jeopardizing their ability to complete for future government contracts. To address these issues, ISEA urges the Office of Management and Budget to recommend that DOL revise the guidance to require contractors to report final determinations of labor law violations, not preliminary rulings or those that remain subject to appeal or modification.

Background

ISEA is the U.S. association for companies that design, test, manufacture and supply personal protective equipment, including eye and face protection, fall protection, gloves, head protection, hearing protection, high visibility apparel, protective garments, gas detection instruments, respirators, emergency eyewash and shower equipment and first aid kits. Many ISEA members supply the federal government with items listed above and more.

The Fair Play and Safe Workplaces Executive Order requires contracting agencies to include provisions in their solicitations requiring that the contractor represent, to the best of its knowledge and belief, whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against it within the preceding three years for violations of fourteen identified federal labor laws and executive orders as well as equivalent state laws. Agency officials will consider these reports in determining whether a contractor has a satisfactory record of integrity and business ethics to qualify for federal contracts. The Department of Labor's proposed guidance defines "administrative merits determinations," "civil judgments," or "arbitral awards or decisions" that must be included in a response to a solicitation for a federal contract and updated semi-annually.² The definitions included in the guidance are impermissibly broad in including agency actions and rulings in private lawsuits that are preliminary, not final, or subject to appeal.

¹ See 80 Fed. Reg. 30,574 (May 28, 2015).

² See *id.* at 30,579-80.

Using Initial, Untested Agency Actions as a Basis for Denying Government Contracts Is Inappropriate

The proposed guidance defines an “administrative merits determination” as including notices or findings issued by an enforcement agency even if they are “subject to appeal or further review.”³ Under the guidance, a letter from an agency indicating that it believes a violation occurred, a “show cause” notice, an agency determination that “reasonable cause exists” that a unlawful practice has occurred, among other agency letters and notices, are sufficient to constitute an “administrative merits determination” that triggers a reporting obligation.⁴ An agency’s mere filing of certain complaints alleging a labor law violation can hurt a contractor,⁵ even if the complaint is later dropped or the business is found to have acted appropriately. An administrative finding must be reported even if it is not the result of a fair adjudicative process and regardless of whether the company is challenging it.⁶

For example, a reportable administrative merits determination under the proposed guidance would include a citation issued by the Occupational Safety and Health Administration (OSHA). Such an allegation may pend before the Occupational Safety and Health Review Commission for years before it is dropped.⁷ Another reportable administrative merits determination under the proposed guidance is a “Letter of Determination” issued by the Equal Employment Opportunity Commission (EEOC).⁸ A letter of this kind indicates only that the EEOC has found “reasonable cause to believe” that an unlawful employment practice may have occurred, based on a limited investigation, and invites the parties to work with the agency to resolve the concern.⁹ The EEOC only litigates a small portion of cases in which it makes such a preliminary determination.¹⁰ Indeed, when EEOC actions are appealed, they are often overturned.¹¹ Basing eligibility for federal contracts on National Labor Relations Board (NLRB) complaints raises similar concerns.¹²

³ *Id.* at 30,579.

⁴ *Id.*

⁵ *Id.* at 30,579-80.

⁶ *Id.* (“Administrative merits determinations are not limited to notices and findings issued following adversarial or adjudicative proceedings such as a hearing, nor are they limited to notices and findings that are final and unappealable. Thus, administrative merits determinations that must be reported under the Order include an administrative merits determination that the contractor or subcontractor is challenging, can still challenge, or is otherwise subject to further review.”).

⁷ *Secretary of Labor v. Action Elec. Co.*, [OSHRC Docket No. 12-1496](#) began with an OSHA citation issued on May 31, 2012, which was vacated by the Commission on July 6, 2016 – more than four years later. In another recent case, an OSHA citation issued on August 29, 2011 was vacated by an Administrative Law Judge following a hearing in July 2013, and vacated, on different grounds, by the Commission on February 26, 2016. See *Secretary of Labor v. The Davey Tree Expert Co.*, [OSHRC Docket No. 11-2556](#).

⁸ 80 Fed. Reg. at 30,579.

⁹ See EEOC, What You Can Expect After a Charge is Filed, at <http://www.eeoc.gov/employers/process.cfm>.

¹⁰ For example, in FY 2015 there were 3,239 reasonable cause determinations by EEOC. EEOC Enforcement & Litigation Statistics, FY 1997 – FY 2015, at <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>. That year, there were 1,807 unsuccessful conciliations. See *id.* However, the EEOC filed only 174 lawsuits in FY 2015. See EEOC Litigation Statistics, FY 1997 through FY 2015, at <https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

¹¹ See, e.g., *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749, 754 (6th Cir. 2014) (“The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted by only by the [EEOC’s] witness himself.”); *EEOC v. Freeman*, 778 F.3d 463, 473-74 (4th Cir. 2015) (Agee, J., concurring) (“The Commissions’ conduct in this case suggests that its exercise of vigilance has been lacking.”).

¹² An NLRB Complaint indicates only that a regional director has reasonable cause to believe that a violation may have occurred and initiates an adjudicative process. See 2 NLRB Rules and Regulations § 102.15. It does not represent a final agency action or a finding of a violation by the NLRB. See *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124-26 (1987) (finding decision of NLRB General Counsel to file a complaint does not constitute final agency action); *Independent Stave Co.*, 287 NLRB 741, 742 (1987) (recognizing that a complaint represents only an “alleged violation of the Act,” which is filed after an investigation and determination that

An employer's ability to contract with the federal government should not depend on a mere appearance or possibility of a violation, one that has not been subject to a full investigation, hearing before a neutral decision maker, cross-examination, or judicial review.

Considering Preliminary Court Rulings and Non-Final Arbitral Awards as Violations is Equally Problematic

The proposed guidance's definition of "civil judgment" is similarly broad and problematic. Under the guidance, businesses are at risk of losing the ability to compete for federal contracts based on a judgment or order entered by a federal or state court "that is not final or is subject to appeal."¹³ The non-final order or judgment can result not only from an action filed by or on behalf of an enforcement agency, but also by plaintiffs' lawyers who file a complaint under a state labor law that provides for a private right of action.¹⁴ The guidance notes that a preliminary injunction and "[e]ven a decision granting partial summary judgment" constitutes a "civil judgment" that a contractor must include on a response to a solicitation to a federal contract.¹⁵ As with adjudicative merits determinations, civil judgments under the guidance include an "order or decision [that] is subject to further review in the same proceeding, is not final, can be appealed, or has been appealed."¹⁶

The inclusion of a reporting obligation with respect to private lawsuits under "equivalent state laws" exacerbates this concern. For example, California's Private Attorneys General Act (PAGA) allows current or former employees to step into the shoes of the state's labor commissioner to directly enforce any provision of the state's labor code through private rights of action.¹⁷ Such suits, which are enticed by the potential to recover significant civil penalties and attorneys' fees, often allege minor technical violations of the labor code, not just violations dealing with health and safety. California's labor code includes thousands of provisions, some of which are obscure and pose a trap for employers. PAGA is notorious for generating excessive and unjust lawsuits against employers.

Likewise, the proposed guidance's definition of an "arbitral award or decision" includes a decision that "is subject to further review in the same proceeding, is not final, or is subject to being confirmed, modified, or vacated by a court."¹⁸

The Proposed Guidance Will Coerce Innocent Employers into Unjust Settlements

Considering initial agency determinations and non-final court and arbitral rulings as violations of labor laws in evaluating eligibility for federal contracts is likely to coerce innocent employers into settlements.

The proposed rule states that the extent to which an employer has remediated a "violation" (which, as noted above, may be no more than an initial finding) "typically [is] the most important factor that can mitigate the existence of a violation."¹⁹ Faced with the potential loss of federal contracts, defendants who face spurious accusations may enter "labor compliance agreements" because challenging the agency's action will count against them. For example, in the OSHA case noted above, the employer could have been required to sign a labor compliance agreement or be barred from federal contracting even though the final adjudicated decision found the company did not commit a violation.

there is reasonable cause to believe the allegations occurred, and that a remedy can be enforced only after an adjudication supported by witnesses and documents).

¹³ 80 Fed. Reg. at 30,580.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Cal. Labor Code §§ 2698 to 2699.5.

¹⁸ 80 Fed. Reg. at 30,580.

¹⁹ *Id.* at 30,603.

The proposed guidance also provides that while preliminary, non-final court orders and rulings must be reported, a private settlement where the lawsuit is dismissed by the court without any judgment entered is not a civil judgment and does not need to be reported to an agency.²⁰ As a result, employers will be under inordinate pressure to settle meritless lawsuits alleging labor law violations. Rather than risk an adverse judgment that, while likely to be overturned on appeal, will damage their ability to apply for federal contracts, employers may feel compelled to enter an unjust settlement. For example, under PAGA, a disgruntled former employee would have substantial leverage to pressure an employer into settling a meritless lawsuit or lawsuit alleging obscure technical violations of California labor law, to avoid a ruling that, even if overturned, will hurt the employer's ability to serve as a government contractor.

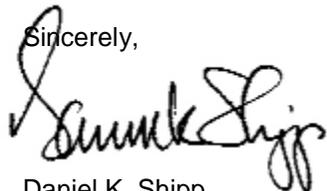
Recommendation

Considering preliminary agency findings and non-final court and arbitral rulings as "violations" turns the time-honored principle of innocent until proven guilty on its head. The proposed guidance will require a contractor to report such actions before the contractor has had full opportunity to present all the facts and properly defend itself before an agency or court. The guidance would require contracting agencies to assess a contractor's fitness for contracting with the federal government based on mere allegations of wrongdoing. Even if the allegations are ultimately dropped, found to be meritless, or reversed on appeal, an employer will face serious consequences. Employers should not be denied government contracts based on alleged violations of labor laws.

DOL's response to this obvious due process issue is to invite the contractor to submit any additional information that the agency may consider in "assessing the violations at issue," including whether the business has or will appeal or otherwise challenge the decision, or seek to have it vacated or modified.²¹ This does not change the guidance's misplaced and potentially unconstitutional reliance on preliminary or non-final actions as "violations" in the first place.

Because the definitions listed above violate the most fundamental notions of even minimal due process, ISEA urges OMB to recommend to DOL that it revise the definitions of "administrative merits determination," "civil judgment," and "arbitral award or decision" in the final guidance to apply to final adjudications only.

Sincerely,



Daniel K. Shipp
President

²⁰ *Id.* at 30,580.

²¹ 80 Fed. Reg. at 30,580.