Statement of the U.S. Chamber of Commerce

ON: **The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat**

TO: **U.S. House of Representatives**
Committee on Education and the Workforce
Subcommittees on Workforce Protections and Health, Education, Labor and Pensions

DATE: **February 26, 2015**

BY: **Willis J. Goldsmith, Jones Day**

1615 H Street NW | Washington, DC | 20062

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Prepared Remarks of Willis J. Goldsmith

For testimony before the
United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections Jointly with the
Subcommittee on Health, Employment, Labor, and Pensions

February 26, 2015

Chairman Roe, Chairman Walberg, Ranking Member Polis, Ranking Member Wilson, and Members of the Subcommittees, thank you for inviting me to testify today.

By way of background, I am a partner with Jones Day, resident in our firm's New York City office. I have practiced labor and employment law for over forty years in New York and in Washington, D.C., and chaired our firm's labor and employment practice from 1991 through 2006. Since 1974, I have advised employers regarding compliance with seven of the federal statutes and/or regulations encompassed by the Executive Order, and tried cases and argued appeals — including in six United States Courts of Appeal and in the United States Supreme Court — arising under various of those or related laws as well as, in the language of the Executive Order, various "equivalent State laws".

I am pleased to be here today on behalf of the United States Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses of all sizes, industry sectors, and geographical regions. A significant portion of the Chamber's members are federal contractors and subcontractors. The Chamber also represents many state and local chambers of commerce and other associations which, in turn, represent many additional contractors and subcontractors. The Fair Pay and Safe Workplaces Executive Order will significantly impact these entities.

I realize my testimony is quite lengthy, but I think I can summarize the Chamber's objections to the Executive Order very quickly with the following points:

- First, the Alice in Wonderland-like structure of the Executive Order makes it completely unworkable in the real world, and no amount of "clarification" through rulemaking or guidance will cure this underlying problem. To the extent my testimony leaves any doubt on this matter, I believe the statements of the procurement experts testifying here today will make that point crystal clear. I realize that is a strong statement, but one that needs to be made and should be of concern to anyone, regardless of their political views.

- Second, the Executive Order is unnecessary. The laws identified in the Order already contain strong enforcement mechanisms to punish those who would violate those laws and only Congress can address any identified gaps in those enforcement mechanisms.

- Third, the Executive Order imposes extremely onerous and expensive compliance obligations on regulated contractors and subcontractors and, as a result, will drive many employers from the contracting world to the detriment of both the taxpayers who benefit from increased competition, and the employees who work for those companies.

- Fourth, the Order is simply, and fundamentally, unfair in that it may punish contractors and subcontractors for violations that have not yet been proven or finally adjudicated, thereby shortchanging companies' rights to due process and creating the potential that competitors and union corporate campaigns will misuse the data provided.

- Fifth, the Executive Order is so Byzantine and riddled with uncertainties that it will be impossible to predict how it will be applied in the contracting universe, leading to gross uncertainties among the regulated community as to who will qualify for a contract or not.

- Sixth, the Order imposes impossible burdens on those who will be charged within the agencies to implement it, in part driven by the enormous paperwork and in part driven by the impossibility of trying to untangle the enormous complexities of the laws involved.

- Lastly, the Executive Order clearly exceeds the President's executive authority and is unconstitutional.

Perhaps all of these logistical burdens would make sense to some degree if the Executive Order could accomplish an otherwise unattainable result. But there is little evidence to demonstrate that existing authorities are not, or could not be, effective to ensure that federal contractors comply with relevant labor laws. At bottom, the Executive Order is an unnecessary and duplicative administrative overreach that will harm agencies and the entities with which they contract. It will ultimately raise costs, hamper efficiency, and create delay and backlog in the procurement process. The House blocked similar efforts by the Clinton administration, and it should do the same here.

I. Executive Order: Fair Pay and Safe Workplaces

First, let me provide a brief overview of the President's Fair Pay and Safe Workplaces Executive Order. In addition to affirming the preexisting requirement that all federal contractors comply with labor laws, the Executive Order also imposes a new requirement on contractors and subcontractors to self-report labor law violations. The reporting requirement extends to "any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor" rendered against contractors or subcontractors within the preceding three years for violations of the following 14 federal labor laws and Executive Orders, as well as "equivalent State laws":

- the Fair Labor Standards Act;

- the Occupational Safety and Health Act of 1970;
- the Migrant and Seasonal Agricultural Worker Protection Act;
- the National Labor Relations Act;
- the Davis-Bacon Act (40 U.S.C. chapter 31, subchapter IV);
- the Service Contract Act (41 U.S.C. chapter 67);
- Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);
- Section 503 of the Rehabilitation Act of 1973;
- the Vietnam Era Veteran's Readjustment Assistance Act of 1972 and the Vietnam Era Veteran's Readjustment Assistance Act of 1974 (38 U.S.C. 3696, 3698, 3699, 4214, 4301-4306);
- the Family 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; and
- Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).[1]

In other words, the Executive Order covers close to the entire landscape of labor and employment law. Each of these laws is highly complex and is continuously evolving through extensive rulemaking and/or litigation.[2] And, of course, as elaborated upon below, "administrative merits determination[s], arbitral award[s] or decision[s] or civil judgment[s]" are subject to being set aside on appeal.

[1] Exec. Order No. 13673, 79 Fed. Reg. 45,309 (Aug. 5, 2014, amended Dec. 11, 2014) ("E.O.") § 2(a)(i)(A)-(O).

[2] To say that employment law is highly complex is indeed an understatement. The underlying statutes are in turn interpreted by thousands of pages of fine print in the Code of Federal Regulations, as well as thousands of court cases. One leading treatise on employment discrimination law stretches over 3,500 pages and two volumes. *See* Lindemann, Grossman, & Weirich, EMPLOYMENT DISCRIMINATION LAW (4th ed. 2007). A treatise on the National Labor Relations Act comes in at just under 3,500 pages and stretches over two volumes. *See* Higgins, THE DEVELOPING LABOR LAW (5th ed. 2006). A treatise on the Occupational Safety and Health Act runs over 1,200 pages. *See* Rabinowitz, OCCUPATIONAL SAFETY & HEALTH LAW (2d ed. 2002). Each of these volumes also has supplements, adding hundreds more pages of text. As any practitioner would admit, these treatises simply provide an employer with an initial window into its compliance obligations. In sum, the seemingly simple naming of the laws listed in the Executive Order is only the very tip of a very large and complex iceberg.

The Executive Order also requires contracting officers to make responsibility determinations and, in consultation with the agency's Labor Compliance Advisor (an entirely new position created by the Executive Order), to determine whether the contractor is "a responsible source that has a satisfactory record of integrity and business ethics."[3] A contractor, in turn, is required to make similar responsibility determinations for its subcontractors, also in consultation with the Labor Compliance Advisor.[4]

When a contract is being performed, contractors and subcontractors must update information regarding labor law violations every six months.[5] If that information discloses a violation, the contracting officer must consult with the Labor Compliance Advisor and consider whether any action is necessary.[6] Such action may include agreements requiring remedial measures, compliance assistance, decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official.[7]

These aspects of the Executive Order apply to all contracts and subcontracts, including construction contracts, expected to exceed $500,000.[8]

In addition, for all contracts and subcontracts with an estimated value exceeding $1 million, new solicitation and contracts clauses are required to enforce an employer's contractual right to arbitrate Title VII claims or any tort claims arising from sexual assault or harassment.[9] Even if the employee has signed an agreement to arbitrate such claims, the employer may enforce that agreement only if the employee or independent contractor voluntarily consents to arbitration a second time, *after* the claim arises.

To implement the Executive Order, the President has directed several amendments to the Federal Acquisition Regulations ("FAR"), including accounting for and providing guidance for determining whether "serious, repeated, willful, or pervasive violations" of the included labor laws demonstrate a lack of integrity or business ethics.[10] The breathtaking scope of the Executive Order's language virtually ensures that no Labor Compliance Advisor, much less any agency contracting officer — however well-intentioned either or both might be — will be able to perform their mandated functions with anything approaching a reasonable degree of consistency, correctness, or predictability.

---

[3] E.O. § 2(a)(iii).

[4] E.O. § 2(a)(iv)(B); § 2(b)(iii).

[5] E.O. § 2(b)(i).

[6] E.O. § 2(b)(ii).

[7] *Id.*

[8] E.O. § 2(a)(i); § 2(a)(iv).

[9] E.O. § 6(a).

[10] E.O. § 4(b)(i).

II. The Executive Order is an Administrative Overreach

At the most fundamental level, the Executive Order is an impermissible and unnecessary administrative overreach.

First, the Executive Order alters the enforcement mechanisms that Congress has established for the underlying statutes. For each of those laws, Congress has created detailed enforcement schemes which, in some cases, have been in place for decades and which often include significant financial penalties. For example, employers that violate OSHA may be fined up to $70,000 for each violation of a particular type.[11] The EEOC has authority to enforce Title VII and the ADA through conciliation proceedings and in federal court.[12] Other federal labor laws included in the Executive Order have similar enforcement mechanisms.[13] In addition to incentivizing compliance by penalizing violations, these statutory schemes reflect legislative determinations regarding the appropriate balance to strike in these sensitive areas of the law.

In light of the comprehensive and detailed nature of these statutory remedial schemes, the President's action oversteps the bounds of his authority. By directing the Department of Labor to develop guidance that will establish levels of violations that are not included in the underlying statutes,[14] the Executive Order alters the enforcement mechanisms that Congress has established for these laws. In particular, it changes the penalties that Congress envisioned for these laws. Contractors may even suffer "double jeopardy" as a result of the Executive Order's additional penalties for noncompliance. The President simply does not have the authority to take these steps.[15] This is particularly obvious with respect to the NLRA, where — in addition to the traditional principles articulated in *Youngstown Sheet & Tube Co.*[16] — the President has no authority to provide his "own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act."[17]

Second, the Executive Order is invalid to the extent that it encroaches on employers' rights under the Federal Arbitration Act ("FAA"). The FAA gives employers the right to require

---

[11] 29 U.S.C. § 666(a).

[12] 42 U.S.C. § 2000e-5; 42 U.S.C. § 12117(a) (incorporating enforcement proceedings available under Title VII into ADA).

[13] *See, e.g.*, 29 U.S.C. § 626 (ADEA enforcement provisions); 29 U.S.C. § 162 (NLRA penalties); 29 U.S.C. § 216 (FLSA penalties); 29 U.S.C. § 659 (OSHA enforcement procedures).

[14] E.O. § 4(b)(i)(B).

[15] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb …."); *United States v. East Texas Motor Freight Sys., Inc.*, 564 F.2d 179, 185 (5th Cir. 1977) ("an order of the Executive has the force of law only if it is not in conflict with an express statutory provision") (internal quotation marks omitted); *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986); *see also Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1337-39 (D.C. Cir. 1996).

[16] 343 U.S. at 637 (Jackson, J., concurring).

[17] *Gould*, 475 U.S. at 286; *see Reich*, 74 F.3d at 1338-39 (applying *Garmon* preemption to invalidate Executive Order).

employees to agree to pre-dispute arbitration clauses.[18] Well-settled case law confirms that this right extends to Title VII claims.[19] Indeed, as to this issue, every court of appeals has recognized that employers have the right to require employees to agree to pre-dispute arbitration of any future claims arising under Title VII.[20] The President has no authority to restrict employers' rights under the FAA, yet the Executive Order does just that.[21]

III. The Extent of the Executive Order's Overreach is Unclear

As if these problems were not enough, the extent of the Executive Order's administrative overreach remains uncertain. We know the Executive Order is too broad; but because it contains several ambiguities, we do not yet know exactly how far it will extend.

a. What is an "administrative merits determination"?

As already noted, the Executive Order requires contractors and subcontractors to report "any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor."[22]

But what constitutes an "administrative merits determination"? For the time being, federal contractors and subcontractors are left to guess. Preliminary reports suggest that forthcoming DOL guidance may interpret the phrase broadly to include such things as an EEOC probable cause determination, an NLRB decision to issue an unfair labor practice complaint, or an OSHA citation — in other words, actions by the agency that have not yet been subject to any form of judicial or even quasi-judicial review and that attach to a contractor before it has been given the opportunity to exhaust its due process rights. Labeling such decisions as

---

[18] 9 U.S.C. § 2 ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[19] *See, e.g.*, *Weeks v. Harden Manufacturing Corp.*, 291 F.3d 1307, 1313-14 (11th Cir. 2002) (affirming employers' right to require mandatory arbitration of claims under Title VII and collecting cases from other courts of appeal).

[20] *See EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc); *Weeks*, 291 F.3d at 1313-14; *Desiderio v. National Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 204-06 (2d Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365 (7th Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482-83 (D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

[21] Contrast the President's attempt to restrict employers' rights under the FAA with the congressionally enacted limitation under the FY 2010 Department of Defense Appropriations Act (the "Franken Amendment"). Ironically, although this amendment is clearly the inspiration for this provision of the Executive Order, rather than bolster the argument for this provision, the comparison highlights the illegitimacy of trying to do this through an executive order.

[22] E.O. § 2(a)(i).

"administrative merits determinations" — possibly even while pending appeal — makes no sense because such "determinations" are not final, or necessarily even close to final.

Defining the phrase "administrative merits determinations" to include agency determinations that are not "final", and thus not yet subject to judicial review, is improper. An employer issued an OSHA citation or an unfair labor practice complaint, for example, must first exhaust the administrative process through the ALJ and agency board before challenging the agency's action in court.[23] Requiring employers to report unadjudicated agency actions before they even have an opportunity to challenge the agency's judgment on the issue would be fundamentally unfair and highly inappropriate. Our legal system provides those alleged to have violated laws the opportunity to defend themselves to the extent they wish. Until a party has no other recourse, or has agreed to a settlement, it should not have its eligibility for a federal contract undermined; this is an improper second penalty imposed based solely on an agency's claims. Stated otherwise, if active and non-final labor determinations and complaints are considered by the contracting officer as part of the responsibility determination, an employer may lose a contract as a result of mere allegations.

Another consequence of allowing non-final charges to be held against contractors is that doing so could be used as leverage to force settlement of matters that a company would otherwise contest. Contractors facing allegations or citations, knowing that contesting them to the point of exoneration will not benefit them, will likely cut their losses and accept an unfavorable settlement. With millions of dollars in contracting in the balance, the priority will be on preserving their contracting status rather than fighting a citation or other allegation, regardless of how meritless these allegations may be.

This is particularly troublesome given that a significant number of allegations are prompted by union corporate campaigns. In a coercive attempt to secure their demands, unions often bury employers with all sorts of spurious allegations involving, among other things, claims under the statutes included in the Executive Order.[24] OSHA, in particular, often plays a prominent role in many union corporate campaigns, and the number of OSHA complaints is significantly higher among employers experiencing labor unrest.[25]

---

[23] *See, e.g.*, *Northeast Erectors Ass'n v. Secretary of Labor*, 62 F.3d 37, 40 (1st Cir. 1995) (holding that federal courts have no jurisdiction to review pre-enforcement challenge to OSHA citation); *Vapor Blast Mfg. Co. v. Madden*, 280 F.2d 205, 209 (7th Cir. 1960) (NLRB decision to file complaint is not final agency action); *Irwindale Div. of Lau Indus. v. NLRB*, No. 74-2206, 1974 U.S. Dist. LEXIS 6450 (C.D. Cal. Oct. 3, 1974) (dismissing for lack of jurisdiction complaint seeking to enjoin pending NLRB complaint for unfair labor practices); *see Georator Corp. v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979) (EEOC cause determination is not final agency action for purposes of APA); *Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 836 (D.C. Cir. 2001) (same); *Bell Atl. Cash Balance Plan v. EEOC*, 976 F. Supp. 376, 380-81 (E.D. Va. 1997) (same).

[24] *See generally* Jarol B. Manheim, TRENDS IN UNION CORPORATE CAMPAIGNS (U.S. Chamber of Commerce 2005) (discussing background and evolution of methodology behind union corporate campaigns), *available at* https://www.uschamber.com/sites/default/files/legacy/reports/union_booklet_final_small.pdf.

[25] U.S. Gov't Accountability Office, GAO/HEH5-00-144, *Worker Protection: OSHA Inspections at Establishments Experiencing Labor Unrest*, at 5 (Aug. 2000), *available at* http://www.gao.gov/new.items/he00144.pdf (entities experiencing labor unrest are 6.5 times more likely to be inspected by OSHA than entities not experiencing labor unrest); Howard Mavity, *Multiple Embarrassing OSHA*

Relying on mere allegations would not only be unfair to employers; it would also overwhelm the contracting officer and Labor Compliance Advisor with information about active and non-final agency determinations — proceedings that, due to their preliminary nature, have little probative value in assessing a contractor's "record of integrity and business ethics."[26] The EEOC, for example, receives nearly 100,000 charges a year, but not even 0.5% of those charges mature into lawsuits.[27] Once again, it makes no sense to require contractors and subcontractors to report mere allegations as "merits determinations". Allegations simply are not anything of the sort.

It is important to understand in this context that agency allegations often turn out to be meritless. Thus, even final agency decisions concluding that an employer violated labor laws are often subsequently overturned by a court. Indeed, between 1974 and 2013, courts of appeals reversed or remanded NLRB decisions approximately 30% of the time.[28]

Defining "administrative merits determinations" to include allegations would be unfair in situations where an agency finds a labor violation through its administrative process and the violation is later overturned in court. As noted, this happens frequently,[29] but never quickly. The average administrative agency appeal takes more than a year to resolve once it gets to court,[30] but it is not uncommon for the adjudication process to drag on for a decade or more due to agency inaction. For example, in *Entergy Mississippi, Inc. & International Brotherhood of Electrical Workers*,[31] 11 years passed between the initial charge and the NLRB's resolution. And in *Dayton Tire, a Division of Bridgestone Firestone, Inc. v. Secretary of Labor*,[32] a case in which I served as lead trial and appellate counsel for Dayton Tire throughout the entirety of the case, the D.C. Circuit remanded the case for OSHRC to reassess liability 18 years after the initial OSHA citation. Nor was the delay related in any way to employer inaction; the case went to trial less than a year after the citation issued, but the OSHRC failed to act for more than 12 years on the appeal once it was fully briefed. These cases are not outliers. In *Simon DeBartolo Group*,[33]

(continued…)

Citations: The Next Union Organizing Tactic? (June 1, 2010), *available at* http://www.laborlawyers.com/multiple-embarrassing-osha-citations-the-next-union-organizing-tactic.

[26] E.O. § 2(a)(iii).

[27] EEOC Litigation Statistics, FY 1997 Through FY 2014, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

[28] NLRB Appellate Court Decisions, 1974-2013, *available at* http://www.nlrb.gov/news-outreach/graphs-data/litigations/appellate-court-decisions-1974-2013. NLRB appeals represent more than 20% of all administrative agency appeals. *See* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B03Sep13.pdf (data excludes the Court of Appeals for the Federal Circuit and excludes BIA appeals, which comprise the overwhelming majority of all administrative agency appeals).

[29] *See id.*

[30] http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B04CSep13.pdf.

[31] 361 N.L.R.B. No. 89 (Oct. 31, 2014).

[32] 671 F.3d 1249 (D.C. Cir. 2012).

[33] 357 N.L.R.B. No. 157 (Dec. 30, 2011).

more than 11 years passed between the initial charge and the NLRB's resolution, and in *New York New York Hotel & Casino*,[34] the NLRB issued a decision on remand from the D.C. Circuit almost ten years after the Board's original decision. It is profoundly unfair to require employers to report these violations for years, even as they attempt — in the face of agency inaction — to clear their names.

As a practical matter, the length of time that it takes to adjudicate these matters counsels against considering them at all. The Order requires entities to report decisions "rendered" in the previous three years.[35] Today, for Bridgestone, that would include the Dayton Tire matter because the final decision issued in 2013. But how can that matter, which dealt with events that occurred in the early 1990s at a facility that is no longer open, possibly have any bearing on the company's integrity and business ethics today?

Reliance on mere allegations, rather than final adjudications, is particularly troubling when the Supreme Court has not spoken on the underlying legal question, and the agencies in question refuse to follow relevant appellate precedent. Examples of this abound. In *D.R. Horton, Inc. v. NLRB*,[36] the NLRB took the position—rejected by every court of appeals that has addressed it—that employee class action waivers violate Section 7 of the NLRA.[37] The Fifth Circuit rejected the NLRB's cavalier interpretation, joining three other circuits and holding that arbitration agreements containing class waivers are enforceable.[38]

But even these uniform decisions do not provide full assurance to employers. As demonstrated by the NLRB's recent decision in *Murphy Oil USA, Inc.*,[39] which reaffirmed the Board's views on employee class action waivers, the NLRB generally refuses to acquiesce to any court of appeals decision with which it disagrees. This means that the exact same labor practices may result in a violation in one jurisdiction but not another. Indeed, that is exactly what happened to Murphy Oil, whose practices were perfectly lawful in the Second, Fifth, Eighth, and Ninth Circuits.[40] Thus, if the NLRB issues a complaint in one of the eight circuits that has not addressed the enforceability of employee class action waivers, that violation could lead to debarment or remedial action under the Executive Order — even though every court to address the issue has approved such practices and repudiated the NLRB's position. In these instances, it is unclear whose view should prevail for purposes of determining whether a violation has occurred. Moreover, this uncertainty will persist until the NLRB believes the issue is settled — either by the U.S. Supreme Court or by uniform decisions from every court of appeals, which obviously could take years.

---

[34] 356 N.L.R.B. No. 119, 2011 NLRB LEXIS 130 (Mar. 25, 2011).

[35] E.O. § 2.

[36] 737 F.3d 344 (5th Cir. 2013).

[37] 29 U.S.C. § 157.

[38] *D.R. Horton*, 737 F.3d at 362.

[39] *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (Oct. 28, 2014).

[40] *See D.R. Horton*, 737 F.3d at 362.

b. How broad is the reporting requirement?

In a related vein, the Executive Order is unclear whether self-reporting is limited to violations issued "in connection with the award or performance … of a Federal contract," similar to the current reporting obligations under the Federal Awardee Performance and Integrity Information System,[41] or if the requirement extends to all activities of the corporate entity. As written, the Executive Order appears to cover any violation regardless of whether it occurred in the course of performing a federal contract. Particularly for large employers, a reporting requirement that extends to all activities of the corporate entity will inundate the contracting officer and Labor Compliance Advisor with information that will almost certainly have little relevance to the contract at issue. A flood of unnecessary information would further complicate these officials' already formidable tasks.

c. What are "equivalent State laws"?

As noted above, the Executive Order extends to 14 federal labor laws and Executive Orders, as well as "equivalent State laws."[42] But some of the federal provisions listed are not actually laws. Neither the "Paycheck Transparency" provision in this Executive Order[43] nor Executive Order 13658 raising the minimum wage for federal contractors[44] has been enacted by Congress. Yet the Administration is elevating these provisions to the full status of laws and holding employers accountable for any state equivalents.[45]

In addition, the number of "equivalent state laws" is potentially vast. Many states have their own state OSH plans[46] and minimum wage and overtime laws[47], not to mention laws governing paid leave and civil rights. Moreover, because such laws often apply to smaller employers than their federal counterparts, the pool of businesses subject to the Executive Order is enormous. In New York, for example, an employer with just four employees is subject to at

---

[41] 48 C.F.R. 52.209-7 (2013).

[42] E.O. § 2(a)(i)(O); *see* E.O. § 5(a).

[43] E.O. § 5.

[44] Exec. Order No. 13658, 79 Fed. Reg. 9,851, (Feb. 20, 2014).

[45] *See* E.O. § 2(a)(1)(N); § 5(a).

[46] Merely because a state maintains its own safety and health law (known as a State Plan State) does not mean its law is exactly equivalent. In many cases, states have requirements in their state occupational safety and health plan that are either more stringent than the federal counterpart, or for which there is no federal equivalent. For instance California, which is a State Plan State, requires employers to comply with regulations on ergonomics and maintaining an Injury and Illness Prevention Program, neither of which are required under the federal Occupational Safety and Health Act. *See* Cal. Code Regs. tit. 8 § 3203; Cal. Code Regs. tit. 8 § 5110. California also has a separate list of levels restricting exposure to hazardous chemicals. Cal. Code Regs. tit. 8 § 5155.

[47] California also maintains a very different set of exemptions from overtime compensation than the federal scheme including requiring employers to demonstrate that employees are spending more than 50% of their time performing specific duties, rather than the qualitative standard that applies at the federal level. *See* Cal. Code Regs. § 515(e).

least 11 different state laws.[48] This means that, for federal contractors located in New York, contracting officers and Labor Compliance Advisors must understand and evaluate violations of at least 25 different state and federal laws — and even more if local and municipal regulations are considered.

State antidiscrimination laws, in particular, are considerably broader than their federal counterparts. For example, while Title VII does not apply to employers with fewer than 15 employees,[49] state antidiscrimination laws generally apply to very small employers.[50] State antidiscrimination laws also typically prohibit discrimination on much broader grounds than Title VII. For example, in Alaska, an employer with just one employee is prohibited from discriminating on the basis of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy, or parenthood.[51] Is a law that extends broader protections to a broader set of employees than its federal counterparts "equivalent"?

Depending on how equivalence is defined, there may be literally hundreds of "equivalent State laws". A contracting officer and the Labor Compliance Advisor not only need to understand each such law; he or she will also need to understand how different state laws relate to other state laws — from the same or different states — as well as applicable federal laws. Different state laws may also have different terminology defining the severity of violations. The Labor Compliance Advisors and contracting officers will have to reconcile these variations with the federal terms. This will be no small feat, and basically impossible to achieve. In addition, state laws are moving targets, frequently undergoing changes. But without such extensive expertise, the contracting officer will not be able to make accurate or consistent responsibility determinations.

This is particularly true with respect to large employers operating in multiple states who may be alleged to have violated several different state or federal laws for a single, company-wide policy. By way of example, large employers often have corporate social media policies, restricting posts on Facebook and other social media that "damage the Company, defame any individual or damage any person's reputation", or reveal "confidential information", such as employees' names and addresses, and information about FMLA leave or ADA accommodations. [52] In light of recent decisions from the NLRB invalidating such polices which,

---

[48] New York Business Litigation and Employment Attorneys Blog, *Which New York Employment Laws Apply to My Small Business?* (Apr. 2, 2013), *available at* http://www.davidrichlaw.com/new-york-business-litigation-and-employment-attorneys-blog/2013/04/which-new-york-employment-laws-apply-to-my-small-business/.

[49] 42 U.S.C. § 2000e(b).

[50] *See, e.g.*, Alaska Stat. § 18.80.300(5) (1 or more employees); N.M. Stat. Ann. §§ 28-1-2 (4 or more employees); Ohio Rev. Code Ann.. § 4112.01(a)(2) (4 or more employees); Cal. Gov. Code § 12926(d); (5 or more employees); Tenn. Code Ann. § 4-21-102(5) (8 or more employees); Wash. Rev. Code § 49.60.040(11) (8 or more employees).

[51] Alaska Stat. § 18.80.200.

[52] *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, at 1 (Sept. 7, 2012); *see also Knauz BMW*, 358 N.L.R.B. No. 164 (Sept. 28, 2012) (invalidating policy that required employees to be "courteous, polite and friendly" to

to be sure, are decidedly unclear,[53] an employer may face numerous violations of the NLRA based on one policy. Furthermore, because social media policies are critical to an employer's defense against Title VII harassment claims,[54] an employer attempting to navigate the tension between the NLRA and Title VII may inadvertently run afoul of both statutes, as well as any "equivalent state laws" — again, all for a single policy. Without a thorough understanding regarding the relationship and overlap between such supposed violations, a contracting officer cannot make accurate and consistent responsibility determinations.

For all of these reasons, the Administration has set itself an impossible and constantly changing task.

d. What constitutes "serious, repeated, willful, or pervasive"?

Contracting officers, along with the Labor Compliance Advisors, are also tasked with determining whether violations are sufficiently "serious, repeated, willful or pervasive" to warrant remedial action.[55] This is so even though courts often disagree about the meaning of these terms. How then could DOL fairly be called upon to define these phrases to allow for some level of consistency in responsibility determinations and remedial actions? Yet the definitions and guidance must be clear before a FAR Council should be permitted to proceed.

Many of the included federal labor laws are exceedingly complex and are extremely challenging for employers to implement correctly. Even the best-intentioned employers have run afoul of these laws in isolated circumstances or in situations where the rules remain ill-defined. As currently written, the Executive Order presumes clarity where it does not exist and unfairly slants the field against contractors with even minor infractions, which may indicate little or nothing about the company's actual workplace standards.

Even deliberate violations of certain laws may say nothing about an entity's integrity or business ethics. Consider that under the NLRA an employer that objects to a bargaining unit determination made by the NLRB has no direct right to appeal the decision to the courts. Instead, an employer who wishes to challenge the bargaining unit determination must refuse to bargain with the union, commonly known as a "technical" violation of § 8(a)(5) of the NLRA.

(continued…)

customers, vendors, suppliers, and co-workers, and prohibited "disrespectful [conduct] or [the] use [of] profanity or any other language which injures the image or reputation of the Dealership").

[53] *Triple Play Sports Bar & Grille*, 361 N.L.R.B. No. 31 (Aug. 22, 2014) (holding that employer violated NLRA when it discharged two employees for Facebook posts that the employer deemed "disparaging and defamatory"); *Knauz BMW*, 358 N.L.R.B. No. 164; *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106.

[54] *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2442 (2013) (employer may escape vicarious liability for harassment by establishing, among other things, that it "exercised reasonable care to prevent and promptly correct any harassing behavior"); EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, *9 ("It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. … An anti-harassment policy and complaint procedure should contain … [a] clear explanation of prohibited conduct.").

[55] E.O. § 3(d)(i).

Only after the Board finds that the employer has committed this technical violation can the employer challenge the bargaining unit determination in court. This technical violation has no bearing on the entity's integrity or business ethics. Indeed, it is necessary and perfectly appropriate in order to challenge erroneous unit determinations – which, after all, may force union representation on employees who do not want it – and yet the Executive Order may exclude entities from federal contracts on this basis. This is one example of how the Executive Order could exclude a contractor on a plainly inappropriate basis.

"Serious" and "repeated" violations may also be an unreliable proxy for assessing an entity's integrity or business ethics. Any business — and especially a large employer with numerous worksites — can accumulate "serious" and "repeated" violations very quickly. But what do the terms mean? For example, under OSHA, a violation is "serious" if there is the potential for an employee to have been harmed as a result of the violation — regardless of whether anyone was actually harmed.[56] And a "repeated" violation is any violation for the same or substantially similar standard within 5 years, at any location.[57] Given this low threshold, any large employer with several worksites could have "repeated" violations, at least as OSHA defines that term. Indeed, as a result of the Administration's changes in OSHA enforcement, the number of willful and repeat violations increased by more than 215% between 2006 and 2010.[58] Subsequent changes by this Administration, including the decision in 2011 to expand the window for repeat violations from 3 years to 5 years,[59] have expanded the definition of "repeated" such that it has no logical nexus to a business's ethics or integrity.

If the purpose of the Executive Order is to identify entities with a "track record[] of non-compliance,"[60] whatever that may mean, looking at higher-level violations — such as those that are willful or pervasive (notwithstanding the complete absence of the term "pervasive" in any of the statutes listed) — might appear to make more sense. But imposing new penalties based on such violations is still problematic not only from a definitional perspective but also because, as already discussed, doing so alters the enforcement scheme enacted by Congress and would put a contracting officer in a position to make decisions that courts are often unable to make with any degree of consistency.

---

[56] 29 C.F.R. § 1960.2(v).

[57] OSHA, *Employer Rights and Responsibilities Following an OSHA Inspection* (2014), at 8, *available at* https://www.osha.gov/Publications/osha3000.pdf; OSHA, *OSHA Administrative Penalty Information Bulletin*, *available at* https://www.osha.gov/dep/administrative-penalty.html; *OSHA's Field Operations Manual*, at 4:31-4:34 (Nov. 9, 2009), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf.

[58] Alexis M. Downs and Eric J. Conn, *Enterprise Enforcement: OSHA's Attacks on Employers with Multiple Locations* (Feb. 29, 2012), *available at* http://www.oshalawupdate.com/2012/02/29/enterprise-enforcement-oshas-attack-on-employers-with-multiple-locations/; OSHA, *OSHA Enforcement: Committed to Safe and Healthful Workplaces*, *available at* https://www.osha.gov/dep/2010_enforcement_summary.html.

[59] OSHA Administrative Penalty Bulletin (Mar. 27, 2012), *available at* https://www.osha.gov/dep/enforcement/admin_penalty_mar2012.html.

[60] E.O. § 1.

IV. The Executive Order Will be Impossible to Implement

In light of its breadth and complexity, the Executive Order will be impossible to implement at every level.

Let's start with contracting officers, the government employees most directly involved in the procurement process. The Executive Order complicates each and every aspect of these individuals' already difficult jobs. First, it requires them to master a complex web of hundreds of interrelated state and federal laws. That, alone, is impossible for any one person or even a group of people to accomplish. Then it inundates them with a flood of information regarding violations — most of which, for all the reasons I have discussed, have little bearing on an entity's integrity or business ethics. Contracting officers must sift through this deluge of data, consult with the Labor Compliance Advisor, and make a responsibility determination. Even then, however, the contracting officer's tasks are not complete: He or she must repeat this process every six months. This simply is not doable in the real world.

These burdens are entirely unnecessary and completely impractical. Faced with burgeoning workloads and pressure to get contracts awarded quickly, contracting officers may simply avoid making any award to a contractor with any supposed labor violation. Because many violations have no bearing on an entity's integrity or business ethics, this practice would unnecessarily bar hundreds of competent and capable entities from federal contracts. Artificially reducing the pool of eligible businesses is hardly likely to "enhance productivity" or "increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government" as the Executive Order is purportedly designed to do.[61]

By imposing substantial burdens on contractors and subcontractors, the Executive Order is likely to unnecessarily decrease the number of qualified bidders, further increasing costs to the government without any discernible benefit. As an initial matter, it will be difficult for contractors and subcontractors to accurately self-report and update violations. For large employers that operate in several states, the number of applicable federal and state laws may be in the hundreds. Moreover, as already noted, the Executive Order apparently extends the reporting requirement to *all* violations — not just those that occurred during the performance of a federal contract. To say it would be extremely onerous, burdensome, and costly for contractors to update both their own and their subcontractors' information every six months is, to put it mildly, a considerable understatement.

Regardless of whether a potential contractor has a labor law violation, the reporting requirement and the burden associated with collecting subcontractor information will serve as yet another barrier to entry for companies that are considering entering the federal market — particularly given that a contractor could be criminally prosecuted for failing to list any violations.[62] These burdens will disproportionately affect small businesses and, in turn, further restrict opportunities for women and minorities. Small businesses are an especially important

[61] *Id.*

[62] *See* 18 U.S.C. § 1001.

entry point into the economy for these groups,[63] and federal contracts present tremendous opportunities for growth.[64] But women and minority-owned small businesses are underrepresented among federal contractors,[65] and the Federal Government routinely fails to meet the statutorily mandated contracting goals.[66] This Executive Order imposes yet another obstacle to their success. Thus, this and the other recent contractor-focused executive orders run counter to the Administration's rhetoric about increasing access to the federal marketplace.[67]

Contractors also face the additional burden of making an initial responsibility determination for subcontracting entities.[68] This assessment will require contractors to master the infinite web of interrelated state and federal laws. They will also need assistance from Labor Compliance Advisors to make determinations about the responsibility of their subcontractors. Labor Compliance Advisors, in turn, will need extensive training on effective mitigation techniques implemented by contractors to ensure present responsibility. For some large prime contractors that have several thousand subcontractors and suppliers, the reliance on the Labor Compliance Advisor could be tremendous.

This brings me to one of the key obstacles facing implementation of the Executive Order: There is no existing infrastructure to support its implementation. In order for the Executive Order to be implemented in a workable manner, the federal agencies will have to hire a

---

[63] SBA, *The Small Business Economy: A Report to the President*, at 11 (2009), *available at* http://archive.sba.gov/advo/research/sb_econ2009.pdf; IFA Educational Foundation, Inc., *Franchised Business Ownership: By Minority and Gender Groups* (2011), *available at* http://www.mbda.gov/sites/default/files/MinorityReport2011.pdf; U.S. Dept. of Commerce, Minority Business Development Agency, *Executive Summary: Disparities in Capital Access Between Minority and Non-Minority Businesses*, at 3 (Jan. 2010), *available at* http://www.mbda.gov/pressroom/publications/executive-summary-disparities-capital-access-between-minority-and-non-minority-businesses; U.S. Department of Commerce, Economics & Statistics Administration, *Women-Owned Businesses in the 21st Century* (Oct. 2010), *available at* http://www.esa.doc.gov/Reports/women-owned-businesses-21st-century.

[64] *Women and Minority Federal Small Business Contractors: Greater Challenges, Deeper Motivations, Different Strategies, and Equal Success*, at 6-7, *available at* http://www.womenable.com/content/userfiles/VIP-women_and_minority_report_public.pdf.

[65] *Id.* at 5-6.

[66] *See* U.S. Gov't Accountability Office, GAO-09-16, *Agency Should Assess Resources Devoted to Contracting and Improve Several Processes in the 8(a) Program* (Nov. 2008) (reporting that more than half of agencies surveyed failed to meet at least two contracting goals or other criteria), *available at* http://www.gao.gov/assets/290/283654.pdf; Nat'l Ass'n of Gov't Contractors, *Enforce Small Business Procurement Goals: Agencies Continue to Fall Short of Their "Goals"*, *available at* http://web.governmentcontractors.org/content/letters/Enforce_Small_Business_Procurement_Goals.aspx; *see also* Max Timko, *Failed Efforts to Create Federal Transparency: Over $600 Billion Goes Undocumented While Government Celebrates Small Business Goals* (Aug. 11, 2014), *available at* http://governmentcontractingtips.com/2014/08/11/failed-efforts-create-federal-transparency-600-billion-goes-undocumented-government-celebrates-small-business-goals/.

[67] *See, e.g.*, Exec. Order 13665, 79 Fed. Reg. 20,749 (Apr. 8, 2014) (prohibiting federal contractors from retaliating against employees who disclose compensation information); Exec. Order No. 13658, 79 Fed. Reg. 9,851, (Feb. 20, 2014) (raising minimum wage for federal contractors); Exec. Order 13495, 74 Fed. Reg. 6,103 (Jan. 30, 2009) (nondisplacement of qualified workers under federal service contracts).

[68] *See* E.O. § 2(a)(iv)(B).

significant number of new staff to serve as — and support — the newly created role of Labor Compliance Advisor. Within the Department of Defense alone, the Labor Compliance Advisor would be required to support the activities of approximately 24,000 contracting officers and hundreds of contracting entities.[69]

Even if the federal government could somehow relatively quickly ramp up its capacity to provide Labor Compliance Advisors and related resources to federal agencies and prime contractors, a great deal of time would be needed to effectively train personnel in the new positions to correctly carry out their duties in a fair and consistent manner. Given the complexity of federal and state laws this is likely to be a difficult and time consuming task. The cost of hiring and training new personnel will be staggering.

The costs that U.S. companies incur in their efforts to comply with state and federal labor laws provides meaningful insight to the resources needed to implement the Executive Order. Employers spend $2.028 trillion on compliance (an average of $233,182, or 21% of payroll)[70] and even with extreme vigilance and good faith they can still find themselves with citations — even repeat citations that, under the terms of the Executive Order, could jeopardize their contracting status. The costs of equipping Labor Compliance Advisors for their tasks under the Executive Order are astounding, yet the Executive Order is silent as to who will bear them.

V. History Has a Way of Repeating Itself: The Clinton Administration's Blacklisting Regulation

This Executive Order is reminiscent of the Clinton administration's failed blacklisting regulation. In February 1997, former Vice President Al Gore spearheaded a proposal that would "seek to bar companies with poor labor records from receiving government contracts."[71] Among other things, the Clinton regulation would have required contracting officers to make "responsibility determinations" by assessing whether the contractor had "a satisfactory record of integrity and business ethics, including satisfactory compliance with the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws."[72] In making that determination, contracting officers would have been required to consider "all relevant credible information." They were directed to consider not only convictions and court findings of unlawful practices, but also adverse agency decisions and "other relevant information such as civil or administrative complaints or similar actions."[73]

---

[69] Jason Miller, *Jordan Exits OFPP Knowing Progress Toward Buying Smarter is Real*, FEDERAL NEWS RADIO (Jan. 17, 2014), *available at* http://www.federalnewsradio.com/517/3544369/Jordan-exits-OFPP-knowing-progress-toward-buying-smarter-is-real.

[70] W. Mark Crain and Nicole V. Crain, *The Costs of Federal Regulation to the U.S. Economy, Manufacturing, and Small Business*, A Report for the National Association of Manufacturers (Sept. 2014), *available at* http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf.

[71] Dan Balz and Frank Swoboda, *Gore, Gephardt Court Organized Labor in Precursor to 2000 Campaign*, THE WASHINGTON POST at A14 (Feb. 19, 1997).

[72] § 9.104-1(d), 65 Fed. Reg. 80,256, 80,264 (Dec. 20, 2000).

[73] § 9.104-3(c)(1), 65 Fed. Reg. at 80,265.

For many of the reasons discussed above, the regulation was viewed as very controversial by both the business community and a bipartisan coalition of Members of Congress. Indeed, on July 20, 2000, the House of Representatives passed an amendment that would have prohibited the Clinton administration from proceeding with the regulation. The amendment, sponsored by Rep. Tom Davis (R-VA) and Rep. Jim Moran (D-VA), passed by a vote of 228-190.[74] In addition, after the regulation became final, the Chamber and other business groups filed a lawsuit to block it from taking effect.[75] The Bush administration ultimately repealed the rule, rendering the lawsuit moot.[76]

The Obama administration's Executive Order resurrects all of the problems inherent in the Clinton administration's blacklisting regulation, and adds more. In light of insurmountable obstacles to the Executive Order's implementation and the unnecessary burdens that the Order imposes, it must be withdrawn. If not, the Subcommittees should be opposed to this administrative overreach. The President does not have authority to alter the enforcement schemes that Congress has created or to restrict employers' rights under the FAA. For that reason alone, the Subcommittees should do everything in their power to block the Administration from proceeding with this Executive Order.

[74] *See* 106th Cong., 2nd Sess. Roll Call No. 423 and 146 Cong. Rec. H6672-84 (daily ed. July 20, 2000).

[75] *See* Mark Cutler, *Chamber, Business Groups File Lawsuit Challenging Contractor Compliance Rule*, DAILY LABOR REPORT (BNA) at A-2 (Dec. 28, 2000).

[76] 66 Fed. Reg. 66,984, 66,986 (Dec. 27, 2001).