

Employment and Labor Standards Issues in Government Contracting

In recent years, employment and labor-related laws affecting government contractors (and oversight and enforcement of these laws) have expanded and changed the regulatory and compliance landscape. Wiley's Government Contracts Practice regularly counsels and represents clients regarding nondiscrimination and affirmative action requirements of the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP), as well as contractor requirements and investigations that arise under federal labor standards statutes such as the Service Contract Act (SCA), and the Davis-Bacon and Related Acts (DBA/DBRA).

We also advise federal contractors on traditional employment issues, such as compliance with the Fair Labor Standards Act (FLSA) and other wage-and-hour laws, covenants not to compete relating to current and prospective employees, the differences between an "employee" and an "independent contractor," and discrimination and sexual harassment allegations and investigations. These matters can involve representation during audits and investigations by other DOL agencies, such as the Wage and Hour Division and the Occupational Safety and Health Administration (OSHA).

Office of Federal Contract Compliance Programs

Our attorneys regularly counsel clients on the nondiscrimination and affirmative action requirements administered by OFCCP: Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 covering individuals with disabilities, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. We advise on affirmative action plans and compliance policies, along with preparing for and responding to OFCCP reviews and audits.

Recent successful OFCCP engagements include:

- Negotiated the creation of a Functional Affirmative Action Program (FAAP) for a new government contractor, including working one-on-one with the OFCCP's office for FAAPs.
- Successfully represented contractors in connection with OFCCP compliance reviews, responded to OFCCP inquiries, and negotiated conciliation agreements. In one recent example, Wiley helped a contractor show OFCCP it should close the file without pursuing a spurious data correlation further. In another, Wiley represented the contractor in successfully negotiating an audit resolution that limited a disputed data analysis to retroactive analysis, with go-forward compliance measured using more

reasonable data groupings advocated by the contractor.

- Responded on behalf of contractor to OFCCP complaint of disability discrimination and retaliation under Section 503 of the Rehabilitation Act.
- Advised clients on OFCCP's recent final rules amending Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

Service Contract Act

Compliance with the wage and fringe benefit obligations under the SCA (now also referred to as the Service Contract Labor Standards) is a key concern for federal service contractors. Noncompliance with the SCA can lead to substantial back wage or fringe benefit liabilities, contract termination, or debarment from federal contracting. Wiley attorneys regularly provide guidance and representation on a wide range of SCA issues and related obligations such as the federal sick leave requirements under Executive Order 13706 and minimum wage requirements under Executive Orders 13658 and 14026. We also handle related issues arising under wage and hour requirements, pension contribution issues, and the employment matters that arise when a contract is transitioned from one federal contractor to a successor.

Recent representative SCA experience includes:

- Represented a large manufacturing contractor in an audit of an SCA-covered contract for maintenance services. Most notably, Wiley persuaded DOL to withdraw its unreasonable initial position on mapping employees to SCA labor categories, saving hundreds of thousands of dollars in potential backpay by obtaining DOL's agreement on a reasonable compromise labor category. Wiley also obtained conformances from DOL to add labor categories to wage determinations as requested by the auditor.
- Assisted multiple contractors with requesting and obtaining compensation from contracting agencies that cover the costs of addressing DOL audit findings such as directing the SCA to be incorporated into a contract and applied retroactively.
- Represented multiple contractors in achieving favorable outcomes of SCA audits with significant compliance findings. Examples include persuading DOL not to debar a contractor with multiple major noncompliance issues and resolving a DOL audit with over \$20 million in potential backpay for less than a half-million dollars.
- Prepared successful petitions on behalf of several large service contractors seeking approval of use of a self-funded insurance plan as a bona fide fringe benefit under the SCA. Wiley has honed its process over the years to make it increasingly resource- and cost-effective for clients to pursue these approvals.
- Conducted a comprehensive SCA compliance audit of a business unit with more than \$1 billion in service contracts and prepared report summarizing findings and recommendations to mitigate SCA compliance risk.
- Counseled multiple contractors with primarily non-government business on strategies for incorporating SCA compliance into their commercial business and performance models cost-efficiently.

Davis-Bacon Act

The DBA and DBRA apply to a wide range of federally funded construction projects, and the DOL aggressively monitors and enforces compliance with these laws. Our attorneys have performed internal reviews to determine contractor and subcontractor compliance with DBA/DBRA requirements and regularly assist contractors on DOL DBA/DBRA audit matters, including DOL audits arising under the American Recovery and Reinvestment Act of 2009 (ARRA), which incorporates DBA requirements.

Recent DBA engagements include:

- Performed an internal compliance review to assess subcontractor compliance with the DBA on a multimillion-dollar project covered by the DBRA.
- Assisted client in facilitating retroactive DBA back wage payments to subcontractor employees.
- Counseled clients on interactions of SCA and DBA requirements in various types of contracts.
- Counseled client on application of public utility exception to DBA coverage to non-ARRA-funded project.

Covenants Not to Compete

Our practice often provides contractors counsel and representation regarding covenants not to compete, including noncompetition and non-solicitation provisions. We advise clients in analyzing covenants not to compete, and on how to narrowly draft scope and duration provisions to address unique requirements for government contractors. In addition, we provide representation in enforcement of these provisions to ensure that former employees and prospective employers understand the requirements of the covenants not to compete. For example, we recently secured a temporary restraining order in federal district court in Virginia against a former employee of our client that violated his noncompete obligations and helped to secure a contract award for a competitor.

Fair Labor Standards Act and Employment Investigations

The FLSA governs wage and hour requirements for employers and establishes standards to define who is exempt from the minimum wage and overtime requirements of the law. The FLSA also raises unique issues for service contractors given SCA prevailing wage requirements. Our practice is adept at counseling clients on FLSA compliance issues and creating company policies and procedures to minimize the risk of potential litigation. We assist employers in conducting wage and hour self-audits and have successfully resolved several national collective action wage and hour disputes.

In addition, we have conducted hundreds of time-charging, discrimination, and sexual harassment investigations for both large and small government contractors. Wiley attorneys also have significant experience defending employers before federal and state courts and agencies, such as the Equal Employment Opportunity Commission (EEOC), with respect to claims involving employment discrimination, harassment, wrongful termination, and breach of express or implied employment contracts.

ITAR/EAR Non-Discrimination Obligations

There is an inherent conflict between compliance with International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) and an employer's nondiscrimination obligations under Title VII of the Civil Rights Act of 1964 and the Immigration and Nationality Act (INA). The current landscape makes it difficult to comply with both a contractor's ITAR/EAR requirements and non-discrimination obligations, but there are various strategies for minimizing those risks. Wiley has developed a number of hiring practices that are further designed to minimize potential liabilities, and can assist in creating such a policy, as well as addressing specific issues, providing guidance, and assisting in the event of a claim of discrimination. More information on our ITAR/EAR non-discrimination obligation capabilities is available [here](#).

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