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August 26, 2015

Ms. Tiffany Jones
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Room S-2312
200 Constitution Avenue, NW
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Ms. Hada Flowers
General Services Administration
Regulatory Secretariat (MVCB)
1800 F St. NW, 2nd Floor
Washington, DC 20405

Re: Comments on FAR Proposed Rule Case 2014-025 and DOL Proposed Guidance 2015-12562: Regulations and Guidance Implementing the Fair Pay and Safe Workplaces Executive Order

Dear Ms. Jones and Ms. Flowers:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States, we write to express our strong support for the proposed rule and guidance implementing Executive Order 13673, Fair Pay and Safe Workplaces. Implementation of these new provisions will improve the lives of millions of workers—helping to ensure they have access to fair pay, benefits, and working conditions.

On July 31, 2014 the President signed Executive Order 13673,¹ designed to improve the federal contracting process by ensuring that federal contractors comply with labor laws. It directs the Department of Labor (DOL) to issue guidance for implementing this Executive Order (EO) and directs the Federal Acquisition Regulatory (FAR) Council to promulgate regulations for contracting agencies and contractors to apply when determining whether certain types of labor law violations demonstrate a lack of integrity or business ethics. On May 28, 2015, the DOL and the FAR Council issued guidance and a proposed rule to assist federal agencies in the implementation of Executive Order 13673. Both have invited comment from interested parties on these proposals.

The proposed guidance and regulations will make our contracting system fairer and ensure that companies receiving taxpayer-funded contracts meet basic wage and workplace standards. There is broad public support for such a measure. A 2008 survey conducted by Hart Research found that 86% of voters believe companies that consistently violate labor laws should not receive federal contracts, and 71% of voters believe contracts should be given to companies that treat workers fairly.²

The federal government contracts out hundreds of billions of dollars' worth of goods and services every year.³ While existing regulations require that the government only contract with responsible companies with a satisfactory record of integrity and ethics,⁴ the federal procurement system does not effectively review the responsibility records of companies

before awarding contracts, nor does it impose conditions on violators to encourage them to clean up their acts.

As a result, contractors that violate workplace laws have little incentive to come into compliance, and companies with the most egregious violations of these laws continue to receive federal contracts. For example, according to a 2013 report from the Senate Health, Education, Labor and Pensions Committee, the government awarded \$81 billion in federal contracts in a single year to companies with the most egregious violations of wage and workplace safety laws.⁵ Rather than disincentivizing contractors from violating labor laws, the current status quo of federal contracting allows companies that engage in the worst violations to continually benefit from their misconduct and repeat violators are permitted to benefit from their unlawful behavior.

The Department of Labor estimates that there are roughly 24,000 businesses with federal contracts, employing about 28 million workers—at least 20 percent of the civilian workforce. By cracking down on federal contractors that break the law, this guidance will help ensure that all hardworking Americans get the fair pay and safe workplaces they deserve. By requiring that an employer's workplace violations be taken into consideration when the government awards federal contracts, it will no longer be acceptable to award contracts to companies that routinely violate workplace health and safety protections, engage in age, disability, race, and sex discrimination or withhold wages, and other labor violations.

The draft regulations and guidance put forth by the administration will allow contracting agencies to partner with the Department of Labor to evaluate bidders' records of compliance with workplace laws and, when necessary, work with companies to ensure that they come into compliance before receiving any new contracts. Allowing companies with labor law violations to receive early guidance on potential problems and providing opportunities to remedy those problems is a necessary change which will reward companies that comply with labor laws while assisting those that don't to come into compliance, providing for better working conditions for all citizens.

We applaud these draft regulations and guidance overall, which will enhance the contracting process by affirmatively promoting employer compliance with labor law requirements. We also write to provide the following additional specific comments.

Arbitration

We strongly support the limitations on the use of forced arbitration in the case of civil rights claims and claims related to sexual assault or abuse. In general, forced arbitration makes dozens of antidiscrimination laws unenforceable in court, allowing employers to circumvent civil rights and labor laws intended to protect people from employment discrimination. By limiting the use of forced arbitration clauses involving disputes arising from Title VII and tort claims related to sexual assault and sexual harassment, this guidance will have an important impact on safeguarding workplace rights.

Forced arbitration is an abusive practice because it erodes employee's traditional legal safeguards. Forced arbitration clauses create a one-sided process that leaves employees with little chance of prevailing in a dispute. Empirical studies of how employees with civil rights complaints fare in arbitration versus in state or federal court have consistently found that workers compelled to arbitrate are far less likely to win their cases, and to win far less in damages, than workers who are able to bring their cases to court.⁶ Limiting the use of forced arbitration reduces discrimination generally by promoting the effective enforcement of anti-discriminatory laws through our civil justice system. With little oversight or

accountability, the employer or their chosen arbitration firms set the rules for arbitration proceedings, often severely limiting the procedural protections and remedies otherwise available to individuals in a court of law.⁷ Moreover, because arbitration decisions are not required to be made public, employees have little chance of uncovering an arbitrator's potential bias.⁸ Society benefits from an open legal process that exposes civil rights and sexual assault-related abuses instead of hiding them. Forced arbitration, on the other hand, restricts the public's ability to obtain such information and keeps abusive practices hidden.⁹ Further, arbitration is costly for employees. In many cases employees must pay filing fees and the arbitrators' costs which can amount to thousands of dollars, a burden they are often unable to bear.¹⁰

As a result of these factors, we fully support limitations on the use of forced arbitration. The restrictions on forced arbitration contained in the E.O. and its accompanying regulations and guidance will have a direct and positive impact on American employees. It will protect their legal rights and ensure their access to justice. Limiting forced arbitration is a fundamental component to the overall goal of decreasing systemic discrimination by holding employers accountable for violating federal laws aimed at decreasing discrimination.

While these protections are important, the Executive Order and its implementing rules have not gone far enough to ensure employees are protected. Here are a few recommendations for clarifying the changes to unilateral arbitration:

a) Make the rules apply to all employees, not just those working on the federal contract:

Currently, the regulation only applies to employees or independent contractors that are doing work directly on a federal contract. It should specify that the prohibition applies to all employees and independent contractors working at the company, whether or not they are working on the federal contract.

b) Contractors should not be allowed to split claims: It is unclear from the language of the current regulation whether a contractor can split claims that arise out of the same set of facts. For example, if an African American woman charges race and disability discrimination, the contractor may still be allowed to move forward in arbitration for the disability discrimination claim, complicating the resolution of workers' claims. The regulations should specify that contractors should be barred from enforcing any remaining forced arbitration provisions in the event that disputes arise out of the same set of facts under statutes both covered and not covered by the E.O.'s limits.

c) Require bidders to report on continued use of forced arbitration provisions: Requiring bidders to report their continued use of forced arbitration would provide additional transparency. Because forced arbitration can have a chilling effect on workers bringing complaints in the first place, their use should be monitored. A contractor's continued use of such clauses can be a tip off that many complaints may have been suppressed or avoided. Forced arbitration clauses are an undesirable limitation on workers' rights that should be documented.

The above recommended clarifications would strengthen protections for workers who may now be forced to arbitrate their claims.

General Recommendations

In addition to the clarifications we recommend for the arbitration provision, we also encourage the FAR Council and the Department of Labor to strengthen the final versions of the new guidance and regulations by incorporating the following recommendations into the final rule.

1. The definition of “serious” violations should be bolstered to ensure it captures all major violations: We largely support the proposed Guidance’s definition of a “serious” violation, as each of the categories of violations identified is appropriately characterized as serious. However, as proposed, the list fails to capture some additional violations that should be deemed serious for the list to be considered exhaustive.

a) Clarification on systemic discrimination is needed. It is important to make clear that a systemic discrimination case need not be brought as a class action or by a government agency in order for a finding of systemic discrimination to be sufficiently “serious” for the proposed rule’s reporting requirements. A finding of systemic discrimination in a case brought by multiple plaintiffs, for example, even if they do not constitute a class, or in a case brought by a single plaintiff challenging a broadly applicable practice or rule, should still fall within the definition of a “serious” violation of the Labor Laws.

b) Serious violations should include systemic labor law violations, in addition to discrimination. The misclassification of employees as independent contractors is one such type of violation. It can occur in an isolated instance, as when an employer makes a genuine mistake, but it can also be a regular way of doing business, built into the business model of certain companies or even entire industries, such as construction. By using a model that rests upon a significant labor law violation, the company may be able to underbid companies that do comply with the labor laws. If the business model becomes common, it can permeate and drag down labor standards in an entire industry. The pattern and practice/systemic subcategory of seriousness should be expanded to encompass this type of systemic labor law violation.

c) The 25% threshold is too high. The guidance proposes to define as “serious” those violations that affect 25 percent or more of the workers at a worksite. The “25 percent” threshold is too high and we recommend that the DOL lower it to more accurately reflect the impact that a serious violation may have on a workforce. By requiring that a full quarter of the workforce at any given worksite be affected by a violation in order for it to be considered “serious,” the threshold will fail to capture many serious violations that affect a smaller number of employees.

d) The definition is unduly narrow. In its definition for “serious,” the proposed guidance references specific labor laws. We strongly suggest that the Department of Labor ensure that *any* labor law violation that causes or contributes to the death or serious injury of one or more workers is considered a serious violation by revising the regulations to remove the specific references to the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and child labor provisions of Fair Labor Standards Act (FLSA).

e) Physical assault should be added to the list of what constitutes a serious violation. While some instances of physical assault at work may fall within the Department of Labor’s definition of engaging in “unlawful harassment against one or more workers for exercising any right protected by any of the labor laws,” it does not necessarily include physical assault. The definition should be changed to specifically identify physical assault as a serious violation.

2. In addition, adjustments should be made to the proposed definitions of willful, repeated and pervasive violations as well.

a) Willful Violations: The proposed definition of “willful” violations should be strengthened by allowing the reckless disregard/plain indifference standard of willfulness to apply to violations of any of the Labor Laws. To ensure that the definition of willfulness captures violations of any Labor Laws in which the “findings...support a conclusion that the contractor or subcontractor knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws,” we urge the Department of Labor in the final Guidance to revise this willfulness standard to apply to any of the Labor Laws, not only those for which no alternative statutory standard exists.

b) Repeated Violations: The DOL guidance proposes that instances in which the contractor was found to have committed the same or substantially similar violations within the preceding three-year period will be considered to have committed repeat violations. Three years is the relevant disclosure period, but in the world of employment complaints, investigations and decisions can take months and often many years. It will be difficult for contracting officials and Agency Labor Compliance Advisors (ALCA) to identify patterns of repeated violations if the lookback period is only three years. The initial disclosure period may be only three years, but DOL should expand the lookback period applicable to responsibility determinations and post-award reporting. Should the contractor reach the responsibility determination phase, and the contractor previously disclosed violations, the contractor should be asked if they were found to have committed any similar violations during the previous five years. This will enable the ALCA to better determine whether the contractor has committed repeat violations. At a minimum, DOL should enlarge the lookback period in the post-award phase to include all years in which the contractor has held contracts. As the contractor updates their disclosures during this period, their record of violations should be examined over the course of the entire contract (or multiple contracts), not simply the most recent three years.

c) Pervasive Violations: The DOL guidance specifies many facets of pervasiveness, including the number of violations relative to the size of the employer, patterns of serious or willful violations, and evidence of a culture that disregards violations, such as when high-level officials are involved or treat sanctions as a cost of doing business. The Leadership Conference supports this multifaceted definition of pervasive violations, and simply cautions against hinging a finding of “pervasiveness” to the employer’s size. If high-level officials are involved, for instance, size should make no difference.

3. The regulations should provide penalties for violations of pre-award and post-award disclosure requirements. The draft regulations do not specify any penalties for violations of pre-award and post-award disclosure requirements. Without sufficient remedies for non-compliance, contractors will have little incentive to change their behavior. In order to improve accountability, we propose that the Contracting Officer be granted the ability to impose penalties for misrepresentations in the contractor’s or subcontractor’s pre-award and post-award labor law violation disclosures.

4. Remedies and efforts to ensure contractor and subcontractor compliance must be strengthened. Without sufficient remedies for non-compliance and incentive to comply with new rules, contractors will have no reason to change their behavior. Contractors should face penalties for failing to comply with a Labor Compliance Agreement during the performance of the contract. Additionally, ensuring subcontractor compliance should be a joint effort between the prime contractor and the government. The regulations should provide an additional incentive for the prime contractor to hire responsible subcontractors.

5. The regulations and guidance should incorporate stakeholder involvement to improve reporting and compliance. The current proposal does not specify how third parties would report violations to contracting officers (COs) or how and when COs or Agency Labor Compliance Advisors (ALCAs) would be required to consider them. Third party involvement is essential in a system dependent on contractors' self-disclosure. Since there is no government investigation of contractors' failure to disclose, the only way fraud would come to light would be through third parties. One of the best ways to hold contractors accountable is to involve stakeholders. Worker representatives and advocates, community groups, and other relevant third parties should be allowed to report unresolved grievances, violations of monitoring arrangements, and violations to the CO or ALCA. We propose that the ALCAs establish procedures in which third party stakeholders can report any violations to the CO or ALCA.

6. Information regarding violations should be available to the government and public. Strong public disclosure requirements are essential to effective stakeholder involvement, which is the most effective means to capture contractor misrepresentations or ongoing violations. Contractors' and subcontractors' pre- and post-award disclosures and Labor Compliance Agreements should be posted on public websites or online databases. This will increase incentives to comply with labor laws and improve transparency. If the regulations were to contain strong public disclosure requirements, worker representatives and advocates as well as community groups and other relevant third parties could provide input when contractors or subcontractors fail to disclose or misrepresent relevant information.

7. The definition of "contractor" should cover all associated businesses or individuals. The draft regulations do not clearly define what is meant by the term "contractor." In order to improve reporting requirements and transparency, when reporting labor law violations, a contractor should be required to report the violations of all of its affiliates in addition to violations by the contracting company itself. Companies often conduct their public contracting work through a legally separate entity, such as a subsidiary, partnership, or a joint-venture. Contractors could evade the E.O.'s intent if the term "contractor" were given a narrow reading restricted to the specific corporate entity that has contracted with the government. In order to effectuate the intent behind the E.O., the term "contractor" should be interpreted broadly and should focus on ownership and control rather than just the corporate entity.

Recommendations for "Equivalent State Laws" Definition

The DOL and FAR Council have invited feedback on how to define and identify "equivalent state laws" moving forward. They will issue a second guidance document and proposed regulation describing how these laws will be incorporated upon receiving input. In addition to the above recommendations, we would suggest a robust interpretation of what constitutes an equivalent state law. It is important to incentivize contractors to comply with federal and state labor laws. The DOL should include state laws that effectuate a similar purpose to the relevant federal law. If the federal law has multiple purposes, state

laws that effectuate any or all of those purposes should be included and state laws should be considered equivalent even if the scope of their protection is broader than the federal law. This will provide greater protections for workers, which is the intent of the E.O.

Additionally, we strongly support the proposed rule's implementation of paycheck transparency, requiring that contractors and subcontractors provide, every pay period, a document listing an individual worker's hours worked, overtime hours, pay, and all additions to or deductions from pay. Paycheck transparency is critical to meeting the Executive Order's goal of ensuring fair pay, as it allows workers and employers to see and efficiently resolve any errors. Paycheck transparency benefits employees and employers alike. When employees can easily understand whether they have been paid fairly and correctly for their work, litigation and feelings of being undervalued decline.

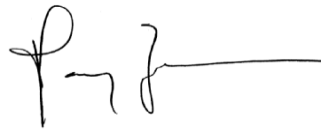
In order to obtain the objective set out in the Executive Order for transparency in pay, the definition of "state law equivalents" should be defined as those state laws that require wage statements to include the essential elements of overtime hours or overtime earnings, total hours, gross pay, and any additions or deductions. The greater the clarity on the face of the wage statement, the easier it will be for an employee to notice any errors and bring them to the attention of his or her employer. Using a definition that would allow for the inclusion of "rate or pay" laws would allow employers to omit overtime hours or earnings in their pay statements. Without this inclusion, failure to pay overtime would not be immediately identifiable from the face of the paycheck. Employers have this information readily available and should be required to include it on wage statements to ensure as much transparency as possible.

Overall, we believe the proposed changes will have a positive impact and applaud the DOL and FAR Council for their careful consideration of improving compliance with labor laws. The Leadership Conference appreciates your leadership in this area and we thank you for the opportunity to comment. We urge the administration to act swiftly to implement final regulations in order to help ensure that the federal government upholds its commitment to contract only with companies with a satisfactory record of integrity and ethics. Please contact Lisa Bornstein, Legal Director and Senior Legal Advisor at (202) 466-3311 or bornstein@civilrights.org, if you have any questions.

Sincerely,



Wade Henderson
President & CEO



Nancy Zirkin
Executive Vice President

¹ Executive Order—Fair Pay and Safe Workplaces (July 31, 2014) See <https://www.whitehouse.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>

² Mobert, David, *Making the Feds Model Employers*, In *These Times* (Jan 16, 2009) http://inthesetimes.com/article/4145/making_the_feds_model_employers

³ USA Spending; See <https://www.usaspending.gov/Pages/Default.aspx>

⁴ 48 C.F.R § 9.103

⁵ *Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk*, Majority Staff Report, Senate Committee on Health, Education, Labor and Pensions (December 2013).

⁶ M. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91 (2015), available at <http://scholarship.law.berkeley.edu/bjell/vol35/iss1/6>.

⁷ Moses, Margaret L., *Arbitration Law: Who's in Charge?* Seton Hall Law Review, Vol. 40, p. 147-189 (2010), available at <http://ssrn.com/abstract=1287303>.

⁸ Schwartz, David S., *Claim-Suppressing Arbitration: The New Rules*, Indiana Law Journal, Vol. 87 (2012), available at <http://ssrn.com/abstract=1761675>.

⁹ Resnik, Judith, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, Yale Law Journal, Vol. 124, p. 2808-2943 (2015), available at <http://ssrn.com/abstract=2601132>.

¹⁰ Nagele-Piazza, Lisa A., *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, University of Miami Business Law Review, Vol. 23, p. 40-68 (2014), available at <http://repository.law.miami.edu/umblr/vol23/iss1/4>.