

A Gov't Contractor's Guide To White House Pro-Union Report

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On Feb. 7, the White House Task Force on Worker Organizing and Empowerment issued a report setting forth extensive recommendations relating to worker organizing and collective bargaining rights for public and private sector employees.

The report is both an aspirational statement of President Joe Biden's goals and principles with respect to organized labor and a policy document that identifies forthcoming requirements that may be imposed on the private sector.

Although the report offers more than 60 recommendations, we have specifically addressed three areas where these recommendations are likely to have an immediate impact across multiple sectors and industries: (1) workers' right to organize; (2) addressing misclassification of employees; and (3) increased coordination and enforcement, including of the Service Contract Act.

As set forth below, each of these efforts may result in additional compliance requirements and regulatory scrutiny for private sector companies in general and, more specifically, for those performing or pursuing federal government contracts.

Encouraging Workers' Right to Organize

The report places a great deal of emphasis on removing barriers to workers' ability to organize and includes multiple recommendations that will impact private sector companies with government contracts.

For instance, the report makes recommendations that federal agencies and offices including the U.S. Department of Defense, the U.S. Department of the Interior, the General Services Administration and the Office of Management and Budget[1] take steps to ensure that union organizers are able to access employees at government premises, including military installations, in connection with collective bargaining or union organizing.

The report makes it clear that this access includes the ability to communicate with private sector employees of government contractors while they are working at federal job sites. If this recommendation is implemented, agencies will institute standardized protocols that guarantee union



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organizers' ability to contact and attempt to organize contractors' employees.

The report also directs the U.S. Department of Labor to review its existing rules and policies and to implement better information sharing with respect to so-called persuader activity.[2] Executive Order No. 13494, signed by then-President Barack Obama, prevents federal contractors from using federal contract funding to attempt to dissuade employees from joining a union.

The report acknowledges that compliance with the reporting requirements in this area has been uneven[3] and seeks to improve information gathering and sharing to ensure that the executive order is consistently enforced. The report specifically identifies a need within the DOD to clarify for its contractors which labor-related costs are unallowable.[4]

This renewed emphasis on combating anti-union persuasion and ensuring that organizers have access to workers has the potential to create additional compliance requirements for federal contractors and is very likely to increase union organizing activities with respect to those contractors' employees.

Particularly with respect to their financial relationships with third parties, contractors will need to strengthen their internal compliance mechanisms to ensure that they are complying with both restrictions on the use of federal dollars and related reporting requirements.

Worker Misclassification

The report also takes aim at preventing misclassification, in where individual workers are identified as independent contractors, as opposed to employees.[5] This practice has significant implications for workers' rights and entitlements, including their access to health and unemployment insurance, their right to family and medical leave and overtime pay, and their right to organize under the National Labor Relations Act.

Misclassification has been and continues to be a focus for civil and criminal enforcement activities and has resulted in the establishment of task forces at the local, state and federal levels.[6] In addition to being a common challenge for government contractors, misclassification issues exist in numerous industries and thus touch every corner of the economy.

The report directs the DOL to continue to prioritize the prevention and remedying of misclassification through "rigorous enforcement" and to partner with state and local agencies, as well as with the U.S. IRS and the U.S. Department of Transportation.[7] The report further recommends education and outreach on the issue to both workers and employers.

Although the report offers recommendations and does not constitute legislation or administrative rulemaking, the immediacy of its impact should not be underestimated. For instance, on Feb. 10, the general counsel of the National Labor Relations Board issued a memorandum to her staff outlining the interagency coordination that the NLRB has been and would be undertaking consistent with the goals and recommendations set forth in the report.

Notably, the NLRB memorandum explicitly identified the NLRB's efforts to establish partnerships with the IRS, the Federal Trade Commission, and the U.S. Department of Justice Antitrust Division for the express purpose of combating misclassification.[8]

Given that there are preexisting enforcement frameworks at every level of government to fight

misclassification, the renewed attention on the issue from the highest level of the federal government suggests that this will be an area of significant regulatory activity.

As misclassification can result in employers facing financial exposure in the form of back wages owed to workers, unpaid payroll taxes and unemployment insurance, and related penalties, those entities who are utilizing the services of independent contractors, particularly on a large scale, should undertake compliance reviews to ensure that they are acting consistently with applicable federal, state and local labor laws.

Coordinated Enforcement

The report also addresses the importance of coordinated enforcement efforts designed to combat wage theft and safeguard workers' paychecks by enforcing existing laws that mandate certain wage rates.

For example, the report directs the DOL to review its regulations and enforcement efforts with respect to the prevailing wage requirements under the Service Contract Act to prevent noncompliant employers from gaining an unfair advantage during bidding for government contracts.[9]

The report similarly directs the U.S. Department of Housing and Urban Development to use its authority to ensure that statutorily mandated rates are being paid by grantees and their subcontractors.[10] As the Service Contract Act has proven challenging for government contractors — who often do not even realize they are covered — this increased enforcement should trigger internal compliance reviews and confirmations.

In the same vein, the report recommends that the GSA should be directed to coordinate with the DOL to determine the feasibility of an automated system designed to improve compliance with the prevailing wage requirements of the Davis-Bacon and Related Acts. Such a system would be significantly more efficient in identifying contractors who were potentially violating the Davis-Bacon and Related Acts by comparing actual certified payroll data with the applicable prevailing wage data to identify and flag discrepancies.[11]

The report does not limit its coordinated enforcement recommendations solely to wage issues. The task force also recommends that NLRB and DOL update their existing memorandum of understanding and improve coordination to ensure that NLRB is better able to investigate and address issues of workers who suffer retaliation for lawfully exercising their rights.[12]

The report also directs the U.S. Department of Homeland Security to coordinate with DOL with respect to workplace safety investigations.[13] As victims or witnesses in the investigations may have concerns relating to their immigration status or their authorization to work within the U.S., the DHS' cooperation is the key to ensuring that witnesses remain available to assist in the process.

Conclusion

As the report clearly explains, workers' rights and labor enforcement are issues that touch every facet of the federal government and those that contract with it. The Biden administration plainly intends to use its authority in the realm of federal contracting to promote the pro-union policy goals and initiatives identified in the report and make good on Biden's campaign promise to lead a pro-union government.

As set forth above, as these recommendations are adopted and acted on by federal agencies and their

state and local partners, private sector employers will need to address both new regulatory requirements and strengthened enforcement of existing laws.

Contractors should take this opportunity to review their unionization practices and strategies and confirm their compliance with current laws. Such actions include:

- Reviewing and updating strategies related to current or anticipated union organizing campaigns for employees, particularly employees working at federal facilities;
- Evaluating fees spent on labor consultants and counsel that might have to be reported under the persuader rule and determining the potential impact those activities might have if publicly disclosed or if they are not reimbursable under federal contracts;
- Assessing the risk of possible misclassification claims by independent contractors or government regulators, especially for large groups of independent contractors that are targets for unionization efforts;
- Auditing compliance with prevailing wage laws, including the Service Contract Act, to correct any noncompliant areas; and
- Training managers on how to identify and handle union organizing campaigns and tactics without creating unfair labor practices.

Contractors should continue to stay tuned for further developments in this area.

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[1] Report at 20.

[2] Report at 22.

[3] Report at 22.

[4] Report at 22-23.

[5] Report at 28-29.

[6] Multiple states have established misclassification task forces. See, e.g., AG Shapiro, DelCo DA Stollsteimer Announce Joint Enforcement Pilot Program to Stop Construction Worker Misclassification – PA Office of Attorney General and Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification (wisconsin.gov).

[7] Report at 29.

[8] NLRB General Counsel Releases Memorandum on Strengthening Inter-Agency Coordination | National Labor Relations Board.

[9] Report at 29.

[10] Report at 29.

[11] Report at 29.

[12] Report at 28.

[13] Report at 28.