



August 26, 2015

SUBMITTED VIA: www.regulations.gov

U.S. Department of Labor
Room S-2312
200 Constitution Ave., NW
Washington, D.C. 20210

**Re: Guidance For Executive Order 13673 Fair Pay and Safe Workplaces
(ZRIN 1290-ZA02)**

To Whom It May Concern:

These comments are submitted on behalf of the members of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW”). Our union is the largest industrial union in North America. We represent 1.2 million active and retired workers in the US and Canada. Our members work in many sectors of the economy including manufacturing, metals, mining, paper, rubber, glass, shipbuilding, oil refining, chemicals, transportation, healthcare, government, education, and the service sector.

Many of our members work for federal contractors. For example, our members build ships for the U.S. Navy and work at Department of Energy sites around the country. For these reasons, we strongly support Executive Order 13673 and its requirement that violations of labor laws be considered when public dollars are spent via a federal agency granting a contract. This Executive Order can protect workers and can help the federal government avoid the risks associated with violators of labor law including delays, unpredictability, and unsatisfactory completion of a contract. We appreciate the opportunity to comment on Guidance.

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Coverage of Subcontractors

The regulations and guidance should clearly specify that the requirements of the Executive Order apply to subcontractors with contracts exceeding \$500,000 of any tier, as is already found in flowdown provisions of some labor laws. Throughout these comments, the term “contractors” refers to both contractors and subcontractors covered under the Executive Order.

Coverage of Corporate Affiliates

Contractors must be required to disclose and remediate violations of all affiliated entities and all locations in a multi-establishment company—not just the violations of the site receiving the contract. In other words, the Guidance should make clear that the labor law violations of a contractor’s parent, subsidiaries, and affiliates will be considered as part of the contracting decision. This clarity will help prevent some contractors from evading the requirements of the Executive Order by creating subsidiaries or affiliate entities for the sole purpose of contracting.

Definition of “Administrative Merit Determination”

The Executive Order requires contractors and subcontractors to report administrative merit determinations, among other things, related to the federal and their equivalent state labor laws. In defining an “administrative merit determination,” the Department of Labor should not require only final decisions related to enforcement, which would create incentives for contractors to prolong appeals or litigation in an effort to prevent required disclosure. USW supports the guidance that administrative merit determinations include those that a contractor has the opportunity to or is actively appealing.

A plain meaning of the term should be used, which would include any notice, letter, complaint, citation, etc., from an enforcement agency indicating a violation of the labor laws included in the Executive Order. Reaching a settlement either before or after a formal citation is filed should also be included in the definition of administrative merit determination. However, the willingness of the contractor and promptness of corrective action should be taken into account as a mitigating factor in assessing the severity of the violation for the purposes of the Executive Order.

Definition of Aggravated Violations

With the exception of the Occupational Safety and Health Administration (“OSHA”), enforcement agencies do not have criteria for categorizing violations as serious, willful, repeated, or pervasive. For these reasons, these categorizations

under the Executive Order must identify the employers that show systematic disregard for the rights of workers and their obligations under labor laws.

Care must be taken to avoid targeting employers that are not the worst actors but do have a record of violations for reasons other than blatant disregard for workers' rights. This may include contractors whose workers are members of a union and are more informed of their rights and less likely to fear speaking out to correct violations. Weighing the violations must also consider mitigating factors, such as prompt corrective action or worker/union involvement in corrective action.

In defining "serious" violations, the Guidance indicates that OSHA citations categorized as serious will also be serious violations for the purposes of the Executive Order. USW supports that decision and the inclusion of other OSHA violations as serious under the Executive Order including receipt of an imminent danger notice, violation of anti-retaliation provisions, violations of settlement agreements, and court orders for failure to abate a citation.

In defining "repeated" violations, USW supports the approach taken in the guidance to include repeated violations on a company-wide basis. In our members' experience, a violation at one site of a multi-establishment company is often indicative of a company-wide problem rather than an issue that just needs to be corrected at one facility. Additionally, the guidance should make clear that contracting officers should consider all serious and willful violations in determining if violations are repeated, rather than just relying on citations or violations already labeled as repeated by OSHA.

Remediation Agreements and Mitigating Factors

Under the Executive Order, remediation agreements must ensure both that past violations are remedied and that future violations are prevented. Just remedying past violations would provide a loophole for contractors to evade the Executive Order.

Remediation agreements must be entered into with enforcement agencies, but they must also be available to the Labor Compliance Advisors for other agencies who are overseeing a federal contract. Should a remediation agreement be necessary, it must be entered into prior to a contractor getting a federal contract and written into the contractual agreement, rather than after a contract is already issued. This way, violation of a remediation agreement can be taken seriously by federal agencies with the potential for real repercussions for contractors who are bad actors.

Additionally, remediation agreements should be able to go beyond the simple correction of a violation and be designed to ensure future compliance. USW members

have experience with OSHA settlement agreements that do just that. For example, a recent OSHA settlement agreement with Republic Steel required the company to implement a comprehensive safety program, hire a third party to monitor compliance, convene a joint labor-management safety committee with our members, and provide extensive safety training for the workers. These types of agreements under OSHA help prevent identical repeat violations and violations of other OSHA regulations. This concept would be especially useful in ensuring future compliance by a contractor.

USW acknowledges that mitigating factors should be included in the assessment. However, we disagree with the mere existence of a safety and health program as a mitigating factor. Our members have seen a myriad of safety and health programs across the spectrum of our employers. Some safety programs are good, comprehensive programs that aim to fix hazards and respect workers. Others blame workers for injuries rather than addressing the root causes. For these reasons, we believe that the existence of a safety and health program should not outweigh serious, willful, and repeated violations in determining the integrity of a contractor.

Coverage of Contractors Not Covered By OSHA

USW appreciates and supports the determination that OSHA-approved State Plans will be considered equivalent state laws in the context of the Executive Order. These plans function in lieu of federal OSHA in those states, and their requirements must be either the same or more protective than federal OSHA.

However, the Guidance does not include contractor safety and health violations where the Occupational Safety and Health Act does not apply, for example at Department of Energy (“DOE”) nuclear facilities and laboratories covered under the Atomic Energy Act and enforced by the DOE. USW members work for private contractors at many of these federally owned facilities where they are exposed to highly hazardous substances and working conditions. It is both feasible and necessary that the safety and health performance of these contractors be included under the Executive Order. Violations of other labor laws by these contractors will be assessed during this process, so it does not make sense to exclude safety.

Currently, DOE contractors can have contract payments withheld or can lose a contract if they are not in compliance with DOE safety requirements; and DOE tracks safety compliance of its contractors. The final guidance and regulations for implementation of the Executive Order should ensure that this compliance information is available to contracting officers and Labor Compliance Advisors at federal agencies other than just the DOE.

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Paycheck Fairness

As the Guidance states, paycheck transparency is important in the relationships between workers and employers and is something that our members achieve through collective bargaining. For these reasons, USW fully supports both the wage statement and independent contractor disclosure requirements included in the Executive Order.

Transparency

USW urges the Department of Labor and the FAR council to ensure that there is maximum transparency in implementing the Executive Order. Because the determinations rely on self-reporting by contractors, the public should have access to the information the federal agencies are using to inform contracting decisions via a user-friendly database. Some of the relevant information is already publicly available, but we urge DOL to expand the amount of data available and ensure that it is user-friendly. For example, currently OSHA does not collect and make publicly available information on violations under its whistleblower program or settlement agreements, which contractors should disclose under the Executive Order. Transparency and public disclosure allow the public and workers at a contractor to engage in the process by verifying reporting and weighing in.

The United Steelworkers appreciates this and other opportunities to comment on the implementation of Executive Order 13673. Please do not hesitate to contact us if you have questions about these comments.

Sincerely,



Holly R. Hart

Assistant to the International President
Legislative Director