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August 26, 2015

Thomas E. Perez
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Proposed Guidance Implementing Executive Order 13673, ''Fair Pay and Safe Workplaces" [ZRIN 1290–ZA02]

Dear Secretary Perez,

The Blue Cross and Blue Shield Association ("BCBSA") appreciates the opportunity to provide comments on the Department of Labor's (DOL's) proposed "Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces'" published in the Federal Register on May 28, 2015 (the "Proposed Guidance").[1]

BCBSA is a national federation of 36 independent, community-based and locally operated Blue Cross and Blue Shield companies that collectively provide healthcare coverage for more than 106 million members – one-in-three Americans. Blue Cross and Blue Shield Plans (Plans) offer coverage commercially in every market and every zip code in America. Blue Plans partner with the government in Medicare, Medicaid, the Children's Health Insurance Program (CHIP), the Multi-state Plan (MSP) Program, and the Federal Employees Health Benefits Program (FEHBP).

We have significant concerns that the Proposed Guidance (and any forcoming proposed regulations implementing the Executive Order) will result in excessive and burdensome reporting of any determination, award or judgement, including those where no violation of law has been established, without adequate protections to assure the confidentiality of such disclosures. Our detailed comments on the guidance follow.

On July 31, 2014, President Obama signed Executive Order 13673 entitled "Fair Pay and Safe Workplaces" which requires prospective federal contractors to disclose "any administrative merits determination, arbitral award or decision, or civil judgment" to the contracting agency under fourteen federal statutes, Executive Orders and all equivalent state labor laws addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil

[1] 80 Fed. Reg. 30574.

rights protections.[2] The Executive Order applies to contracts for goods and services over $500,000 and requires potential contractors or subcontractors to disclose any labor law violations described above within the preceding three-year period to the contracting agency.

Generally, the Proposed Guidance would require federal contractors and subcontractors to report any administrative merits determination, arbitral award or decision, or civil judgment both prior to being awarded, and for the duration of, a federal contract, and sets forth the proposed definition of "administrative merits determination." It would also allow contracting officers and/or labor compliance officers to disqualify potential contractors where any violations are deemed "serious, repeated, willful or pervasive," and sets forth potential definitions of these terms.

1. Issue: Definition of "Administrative Merits Determination"

For purposes of the Proposed Guidance, "administrative merits determination" means any notice or finding, whether final or subject to appeal or further review, issued by an enforcement agency following an investigation.[3] The notices include, but are not limited to, a WH-56 "Summary of Unpaid Wages" from DOL's Wage and Hour Division ("WHD"), a citation from OSHA, a show cause notice from the OFCCP, a reasonable cause letter of determination from the EEOC, or any complaint issued by a regional director at the NLRB.[4]

Recommendation:

The definition of "administrative merits determination" should be more narrowly constructed.

Rationale:

The DOL states that the "administrative merits determination" notices or findings listed in the Proposed Rule "indicates that the contractor or subcontractor violated . . . Labor Laws."[5] Almost all of the examples listed as an administrative merits determination in the Proposed Guidance do not actually establish a violation of the law. This definition gives excessive deference to administrative determinations that do not have the full force and effect of the law. For example, an EEOC reasonable cause determination is the product of an investigation undertaken by members of the agency staff. It is not the same as a judgement of liability. It is not reasonable for contractors to suffer negatively by having to report on administrative determinations and agency complaints where the agency findings are administrative in nature and do not amount to violations of the law, unless proven in a court of law or an administrative trial where the contractor can defend itself by introducing evidence and confronting adverse witnesses through cross examination.

[2] The laws include the Fair Labor Standards Act, the Occupations Safety and Health Act, the Migrant and Seasonal Worker Protection Act, the National Labor Relations Act, the Davis-Bacon Act, the Service Contract Act, Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, the Family and Medical Leave Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination Act of 1967, Executive Order 13658, and equivalent State laws.
[3] Proposed Guidance, 80 Fed. Reg. at 30579.
[4] *Id.*
[5] *Id*. at 30579.

The Proposed Guidance would create additional roadblocks in the government procurement process in the absence of an established violation of the law. Any OSHA citation, reasonable cause finding from the EEOC, complaint at the NLRB or notice from WHD could form a basis for a contracting agency to deny awarding a federal contract to any particular contractor (or subcontractor). It practically incentivizes federal contractors to settle claims before any administrative merits determination occurs, even where it is unlikely that any allegations against it are true.

Further, there is no showing of the correlation between "adverse merits determinations" of the type listed and performance under a federal contract. Instead, it would create added administrative costs and financial burden to federal contractors and subcontractors who will be required to track and report the numerous "administrative merits determinations" listed in the Proposed Guidance. This is not only a pre-award cost, but continues during the life of the contract. Such costs may ultimately become a barrier to entry for some entities. In order to keep the federal contracting system fair and efficient, the definition should be narrower.

2. Issue: Definition of "Serious, Repeated, Willful or Pervasive" Violations

Under the Proposed Guidance, a "serious" violation must take into account "the number of employees affected, the degree of risk posed or actual harm done by the violation to the health, safety or well-being of a worker, the amount of damages incurred or fines or penalty assessed with regard to the violation, and other considerations the Secretary finds appropriate."[6] The Proposed Guidance goes on to say that any fines and penalties over $5,000, back pay in excess of $10,000 or the provision of injunctive relief is considered "serious" for purposes of the Executive Order.

A "willful" violation depends on "whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by" various labor laws.[7] The Proposed Guidance indicates that if an enforcement agency seeks liquidated or punitive damages in its administrative merits determination, then the violation will be considered willful for purposes of the Executive Order, even if punitive damages are never awarded.

A "repeated" violation considers "whether the entity has had one or more additional violations of the same or substantially similar requirement in the past 3 years."[8] Two or more predicate administrative merits determinations need only be adjudicated by the enforcement agency or uncontested when determining whether a violation is repeated for purposes of the Executive Order.

According to the Proposed Guidance, the standard for "pervasive" should consider "the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity."[9] Pervasive violations need not be substantially similar, meaning single violations of multiple statutes can reflect a basic disregard of the labor laws, and be pervasive for purposes of the Executive Order.

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[6] *Id.* at 30582.
[7] *Id.* at 30585.
[8] *Id.* at 30587.
[9] *Id.* at 30588.

Recommendations:

1) The DOL should provide more guidance on the meanings of "serious, repeated, willful or pervasive" violations.

2) The DOL should raise the amount of fines, penalties and back pay that trigger what is considered a "serious" violation.

Rationale:

1) The proposed definitions of "serious," "repeated," "willful" or "pervasive" violations would establish an extremely a low bar to trigger a government contractor's reporting requirements. This reporting obligation continues throughout the bidding process and contract performance, requiring prospective contractors to update their disclosures throughout the term of the contract. Subcontractors must report violations as well.

   After contractors comply with the reporting requirements, contracting officers or labor compliance advisors will assess those types of reported violations (from both contractors and subcontractors) to determine if the violations are serious, repeated, willful or pervasive. Virtually every determination, settlement, or ongoing litigation meets one or more of these definitions. However, the Proposed Guidance provides very little detail on how the contracting officer will assess the violations of one contractor versus violations of another contractor. One can imagine the procurement process having many large companies, some with multiple violations, vying for a contract worth millions of dollars. In the absence of guidance on how to assess the competing violations, a contracting officer would be left to his or her whims on what company should be awarded the contract.

2) Under the Proposed Guidance, any fines and penalties over $5,000, back pay in excess of $10,000 would be considered a "serious" violation. The back pay provision does not take into account the reason for the duration of back pay or the rate of pay involved. $10,000 may be one month of back pay or several months. Also, the amount of back pay is usually determined by the amount of time it takes to resolve the legal issue (which in federal court may be two years or more) rather than a reflection of how serious the violation might have been. This is a low threshold and drastically increases the burdens on federal contractors to report and ultimately be awarded federal contracts.

3) **Issue: Confidentiality**

As previously stated, prospective federal contractors must disclose any administrative merits determination to the contracting agency.

Recommendation:

We ask that the DOL clarify that an administrative merits determination may be confidential.

Rationale:

The Proposed Guidance would potentially expose confidential charges and settlement agreements to public scrutiny under the Freedom of Information Act. Many statutes require that administrative merits determinations are confidential in order to protect the confidentiality of the employee who reported the violations and of witnesses. However, under the Proposed Guidance any reports could be subject to a losing bidder making a FOIA request for the winning bidder's reports. In addition, coworkers and future employers would have access to this confidential information. We ask that the DOL prevent the exposure of confidential information.

We appreciate your consideration of our comments. We look forward to continuing to work with you on these issues. If you have any questions concerning these comments, please contact Kate Romanow at (202) 626-8619 or kate.romanow@bcbsa.com.

Sincerely,

Kris Haltmeyer
Vice President, Health Policy and Analysis
Blue Cross and Blue Shield Association