

HR Compliance Challenges:

What Should be Keeping you Up at Night?



Redstone
Government Consulting

Helping You Navigate the Maze of Government Contracting



Instructors

Jamie Brabston, J.D.

Sheri Buchanan

About Redstone Government Consulting, Inc.



Who Are We?

- A consulting team of the most experienced industry veterans, ex-DCAA auditors, and the brightest new talent in the industry.
- Our expert consultants focus solely on the needs of Government Contractors.
- Many of our Consultants previously worked in CPA firms, DCAA, law-firms, and Executive-level positions with Government Contractors.

What Do We Do?

- FAR/CAS Compliance, DCAA and DCMA Approved Systems, Outsourced Accounting, HR Compliance and Outsourcing, Contracts/Subcontracts Consulting, Costpoint, Unanet, and Training Programs for Government Contractors.

Why Redstone?

- We help you navigate the maze of government contracting. Our mission is to provide you the expertise and support you need to comply with all the government regulations impacting your back office and administration, thus allowing you to focus on what you do best – Supporting your customers and fulfilling the needs of our Government and the Warfighter.



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- Lanier Ford – Attorney & Shareholder (1994-2006) Counseled & Defended employers, including government contractors on a wide range of employment law issues
- Digital Fusion/Kratos - General Counsel, VP of HR & Corporate Secretary (2006-2009)
- Small Business Consultant (2009-2013)
- Lehr Middlebrooks – Attorney (2013-2017)

- Redstone Government Consulting (2017-present)
 - Client Support – Counseling on complex HR, employment law and gov con compliance issues
 - Investigations - Support in DoL and DoD IG investigations/audits; Responding to EEOC Charges of Discrimination; Assisting with Internal investigations
 - Training – Live and Webinars

- BA in English & Political Science – University of Alabama
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Sheri Buchanan

Director – Human Resources Consulting

- Diverse Human Resources Experience
 - Federal Government Contracting, Banking, Healthcare
 - Member SHRM and NASHRM
 - Member WorldatWork
- 10 Years with Redstone Government Consulting
 - Management of Outsourced HR Functions
 - OFCCP and AAP Compliance
 - Compensation Planning & Reasonableness
 - Service Contract Act & Davis Bacon Act Compliance
 - Contract Transition Support
 - Policy and Procedure Development, Implementation, Training
 - Human Resources Assessments
- BSBA in Human Resource Management, University of Alabama in Huntsville

Department of Labor (DoL)



- **DOL includes many agencies including:**
 - Office of Federal Contract Compliance Programs (OFCCP)
 - Wage and Hour (W&D)
 - Equal Employment Opportunity Commission (EEOC)
 - Occupational Safety & Health Administration (OSHA)

Office of Federal Contract Compliance Programs



The mission of the Office of Federal Contract Compliance Programs (OFCCP) is to protect America's workers by ensuring nondiscrimination and supporting voluntary compliance by federal contractors and subcontractors, promote diversity through equal employment opportunity, and enforce the law...

- Executive Order 11246
- Section 503 of the Rehabilitation Act of 1973
- Vietnam Era Veterans' Readjustment Assistance Act of 1974

... these laws prohibit discrimination in employment based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran.

OFCCP

[Jurisdictional Thresholds \(dol.gov\)](#)

[OFCCP By the Numbers | U.S. Department of Labor \(dol.gov\)](#)

Budget Increased 33% in FY 2022 – largest increase of any DOL enforcement agency!

- 188 new enforcement specialists

Changes to Audit Approach and Scope

OFCCP Contractor Portal

OFCCP continued

Directives

- March 15, 2022 Directive 2022-01 addresses contractors obligations to analyze their compensation and provide to OFCCP during audit (Revised August 2022)
- March 31, 2022 Directive 2022-02 clarifies the scheduling of OFCCP compliance evaluations, eliminates delays and describes the timely data submission requirements of contractors
 - Rescinds and replaces four directives from the Trump Administration

OFCCP continued

2023 Budget Requests

- Seeks Additional \$41 Million
- Increase Headcount by Additional 208
- Justification
 - Hiring Specialized Employees
 - Increased Training
 - Promote Workplace Equity (i.e., HIRE)
 - Continued Focus on Pay Equity
 - Construction Enforcement
 - Major Enhancement to Compliance Management System
 - Less Single-Establishment and More Company-Wide Audits

Executive Order 14069



March 15, 2022 President Biden issued EO 14069 Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency

Secretary of Labor, Heads of Executive Departments & Agencies and FAR Council to Consider:

- Issuing proposed rule “enhancing pay equity and transparency for job applicants and employees of Federal contractors and subcontractors”
- “whether any such rules should limit or prohibit Federal contractors and subcontractors from seeking and considering information about job applicants’ and employees’ existing or past compensation when making employment decisions”

Allowability and Reasonableness of Compensation

FAR 52.205-6 Compensation for Personal Services

- Consider Allowability
 - Policy!
 - Procedure!
- Consider Reasonableness

Do your Homework

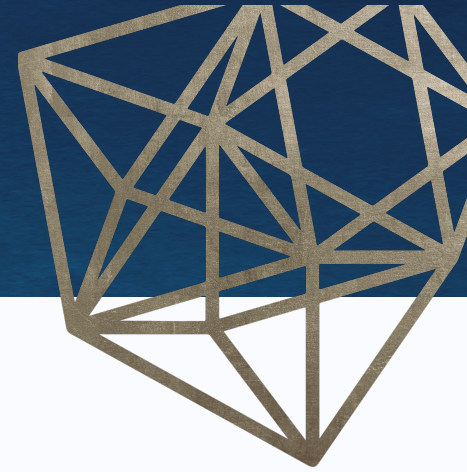
- Starts with your policies and philosophy on compensation planning (Lead, lag, competitive?)
- Evaluate and document your benchmarking efforts
- Consider revenue growth or other measurable factors directly related to compensation
- What is needed to attract, retain and motivate your workforce?
- Specific components of compensation are at company discretion (e.g. more incentive compensation versus less base pay)---ultimate measure is aggregate amount of allowable total compensation

Wage and Hour Division



- The Fair Labor Standards Act (FLSA)
- The Family and Medical Leave Act (FMLA)
- The Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
- The Employee Polygraph Protection Act
- Certain employment standards and worker protections under the Immigration and Nationality Act
- The Davis-Bacon and related Acts (DBA/DBRA)
- The McNamara-O'Hara Service Contract Act (SCA)

DOL - Wage and Hour Division



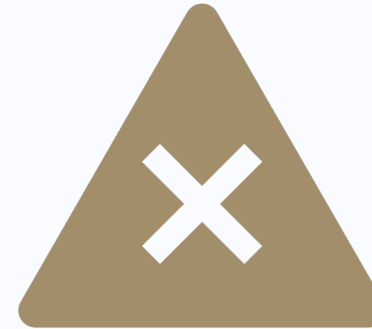
- **DOL's W&H Division Investigates Compliance Issues such as:**

- Are your workers classified correctly as a W2 employee vs. 1099 contractor? **HOT TOPIC**
- Are your employees classified correctly as exempt from the overtime requirements of the Fair Labor Standards Act?
- Do you pay your non-exempt workers for all hours actually worked?
- Do you pay your non-exempt hours for all time worked over 40 hours in a workweek?
- What are your risks of joint employment findings? **HOT TOPIC**

DOL Wage & Hour



Most Wage and Hour Investigations arise due to an employee complaint. However, some investigations are chosen by DOL's WH Division based upon specific geographic areas, high rates of violations, employment of vulnerable workers or based on other priorities of DOL.



All complaints are confidential and DOL will not disclose the reason for the investigation.

Service Contract Act/Service Contract Labor Standards

- Contracting Agency has a vital role but DOL has ultimate authority.
- Must be flowed to subcontractors. Prime is jointly and severally liable for violations.
 - Encourage routine self and sub assessment!
- Increased Applicability/GSA MAS
- November 2021 Nondisplacement of Qualified Workers was revived as EO 14055
 - July 2022: Proposed Rule to implement same
- May 2022 GAO Update: Opportunities Remain for DOL to Improve Enforcement of Service Worker Wage Protections

DOL Wage and Hour Audit Process



- **Letter notifying contractor/employer of investigation**
- **Request for documents**
- **Onsite Review:**
 - Entrance Conference
 - Interviews –during or after the “on-site”
 - Additional Request for documents to be provided prior to onsite
 - Discussions/Negotiations of any Findings, calculation of possibly Back Wages
 - Closing conference
- **Possible Outcomes:**
 - Finding of Compliance
 - Back Wages
 - Liquidated (double) damages are common
 - SCA provides authority to withhold contract funds, terminate contract and possible debarment from future government contracts

Potential Damages & “Penalties”



- When a violation is found, the "look back" period can go back for 3 years (*if willfulness is found; 2 years if not*)
- Individuals (such as owners/directors of the company) may also be held *personally liable* for damages awards if the manager had control over what the employees were paid/making decisions on wage/hour issues!
- Attorneys' fees /expenses
- Interest
- Fines and/or imprisonment
- Punitive damages (if there is a retaliation claim)

Wage & Hour – **HOT** Topic



INDEPENDENT CONTRACTOR CLASSIFICATION

Background



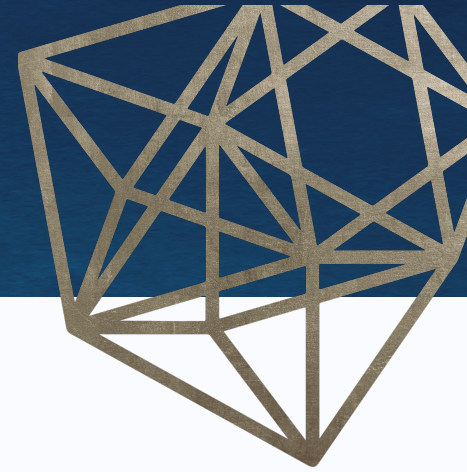
- Under President Trump, DOL announced a “Final Rule” clarifying the standard for determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). This rule reaffirmed the “economic reality” test as the primary factor for determining employee status. The final rule was published in the Federal Register on January 7, 2021, with an effective date of March 8, 2021.
- The Biden Administration directed a "regulatory freeze" and delayed the effectiveness of the new rule until May 7, 2021. On March 11, 2020, President Biden’s DOL announced plans to rescind the “Final Rule” and invited comments from the public on the proposed rule through April 12, 2021.
- The Biden Administration’s stated reasoning for rescinding the Rule was that the “economic reality” test was not supported by the Wage and Hour Division of DOL, or by the text of the FLSA or applicable case law and signaled its intent to more strictly apply the worker classification analysis.
- On May 5, 2021, DOL officially announced the withdrawal of the Trump administration “Final Rule,” effective May 6, 2021.
- On March 14, 2022, the U.S. District Court for the Eastern District of Texas ruled that the Biden Administration violated the Administrative Procedure Act when it delayed and then withdrew the Trump Independent Contractor Rule. Accordingly, the Court ruled that the Contractor Status Rule became effective on its original effective date, March 8, 2021.

Current Status



- On October 11, 2022, DoL announced that it is seeking comments on a newly proposed rule for determining whether a worker is an employee or IC.
- This proposed rule would fully rescind the 2021 Trump Admin rule.
- This rule proposes a much broader definition of “employee” and is intended to “encompass as employees ALL workers who, as a matter of economic reality, are economically dependent on an employer for work,” as opposed to an “independent contractor” who is a worker who “as a matter of economic reality, works for him/herself.”
- “Totality of the Circumstances” Analysis

Totality of the Circumstances



1. Opportunity for profit or loss depending on managerial skill.
2. Investments by the worker and the employer.
3. Degree of permanence of the work relationship.
4. Nature and Degree of CONTROL.
5. Extent to which the work performed is an integral part of the employer's business.
6. Skill and initiative.

What is Next?



Employers and other interested parties have until Monday, November 28, 2022, to submit their concerns and arguments to the DOL.

The DOL will then decide whether to promulgate a final rule. (LIKELY!)

Bottom Line

The DOL's proposed rule, if enacted in its current form, will likely have a significant impact on industries that rely on contract workers, and even those companies that use just a handful. Under the proposed rule, many independent contractors may be reclassified as employees, which would financially impact employers by way of entitlement to overtime pay, potential benefits implications, taxes, and possibly subject them to employment-based lawsuits, etc.

What is “Joint Employment?”



- Under the National Labor Relations Act (“NLRA”), “joint employment” refers to a situation where two or more separate entities “share or codetermine” essential terms and conditions of employment, such as decisions about hiring, firing, disciplining, supervision, and direction of employees.
- This issue arises often in the context of contractor/subcontractor relationships, entities that engage temporary staff, professional employment organizations, parents/ subsidiaries and franchisor/franchisee situations.

Under the Trump administration, a new, less pervasive standard was developed, but it has since been pulled back by the Biden Administration

Status of the Joint Employment Rule



- Effective September 28, 2021, the 2020 Joint Employer Rule was rescinded – *86 FR 40939*.
- On September 6, 2022, the NLRB released a Notice of Proposed Rulemaking proposing a change to the Joint Employer Rule. Under the proposed rule, two or more employers would be considered joint employers if they “share or codetermine those matters governing employees’ essential terms and conditions of employment,” such as wages, benefits and other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment, and work rules.
- The proposed rule explicitly states that this is a non-exhaustive list, meaning the Board might consider other facts it finds relevant. Importantly, the rule defines “share or codetermine” as to “possess the authority to control (whether directly, indirectly, or both) or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees’ essential terms and conditions of employment.” Thus, the key difference under the new rule is that there only needs to be a showing of the authority to control, rather than the actual exercise of that control.
- This proposed rule seeks to return the joint employer status to its pre-2020 interpretation leaving the impression that the NLRB will be quick to find joint employer status.

What /Who is the EEOC?

The Equal Employment Opportunity Commission (EEOC) is an independent federal agency that promotes equal opportunity in employment through administrative and judicial enforcement of the federal civil rights laws and through education and technical assistance.

Applicants and employees of most private employers, state and local governments, educational institutions, employment agencies and labor organizations may be assisted by the EEOC.

What Laws are Enforced by the EEOC?

- **Title VII of the Civil Rights Act of 1964**
 - ☐ Sex/gender discrimination, including pregnancy, sexual orientation and gender identity
 - ☐ Race/Color
 - ☐ National Origin
 - ☐ Religion
 - ☐ Sexual Harassment and Other Harassment
- **PDA - Pregnancy Discrimination Act**
- **ADEA -Age Discrimination in Employment Act**
- **GINA –Genetic Information Nondiscrimination Act**
- **ADA - Americans with Disabilities Act**
- **The Equal Pay Act of 1963**
- **Sections 501 & 505 of The Rehabilitation Act of 1973**

New EEOC Poster

- On October 19, 2022, the EEOC announced the release of its updated “Know Your Rights” poster.
- Provides information about equal pay discrimination for federal contractors, clarifies that sex discrimination includes claims based on pregnancy, sexual orientation and gender identity and notes that harassment is a type of discrimination.
- Contains a new QR code for individuals that links directly to instructions on how to file a Charge of Discrimination.
- [Know Your Rights: Workplace Discrimination is Illegal \(eeoc.gov\)](https://www.eeoc.gov/knowledge-portal/eeoc-posters-and-graphics/know-your-rights-workplace-discrimination-is-illegal)

Questions and Discussion



Consulting Services



- Compliant Approved Accounting Systems
- Small Business Compliance
- Accounting Outsourcing & CFO Consulting
- Accounting & Billing Systems
- Human Resources Compliance
- Proposal Pricing & Cost Volume Support
- Government Property
- Material Management & Accounting System (MMAS)
- Contractor Purchasing System Review (CPSR)
- Cost, Pricing, & Budgeting
- Application of Labor Laws to Government Acquisitions
- REA's, Claims, & Terminations
- Incurred Cost Proposals
- CAS Advisory Services, Cost Impact Calculation & Disclosure Statement Preparation & Review
- DCAA Audit Support
- Contracts Management & Closeout Assistance
- Indirect Rate Strategy & Design
- Government Compliance Training

Webinars and Blogs



Sign up for our blogs and whitepapers to receive information on:

- Current industry trends in Government Contracting
- Latest DCAA and DCMA audit issues
- Accounting and FAR Compliance
- Contracts Administration
- HR for Government Contractors
- Employment Law
- Project Management
- Deltek and Unanet Implementation Guidance and User Best Practices

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