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New FAR Provision Implements Sweeping Definition of “Recruitment Fees” in Human Trafficking Prohibition

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On January 22, 2019, a new rule went into effect providing much-needed guidance on the definition of “recruitment fees” under the FAR human trafficking prohibition. Many government contractors may be surprised to learn that a wide range of seemingly-innocent policies requiring employees or applicants to pay (whether upfront, through deduction, or in any other way) the employer for costs relating to hiring, recruitment, or training may now qualify as impermissible “human trafficking” and subject the contractor to potentially rigorous penalties under the FAR.

Since March 2015, all federal government contracts and solicitations have included a clause prohibiting human trafficking pursuant to FAR 22.1705 and 52.222-50. One of the prescribed forms of trafficking-related conduct is charging “recruitment fees” to employees or potential employees. While “recruitment fees” were previously undefined in the FAR, the new rule makes clear that the term has a sweeping definition, encompassing “fees of any type” that are “associated with the recruiting process.”

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The rule takes a functional approach and makes clear that the manner, form, or timing of the payment is not relevant. Charges can be recruitment fees if they are paid up front by the employee or potential employee, deducted from the person’s wages, or even if they are collected by a third-party such as a labor broker, recruiter, staffing firm, or agent. The rule and its agency commentary are clear, however, that contractors may require employees or applicants to incur charges themselves in connection with the recruiting process, so long as the payment is not made to the contractor or any of its agents.

The new rule lists several categories of exemplary recruitment fees, including fees for:

- Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing, recommending, or placing employees or potential employees;
- Advertising;
- Obtaining labor certifications, visas, or processing applications or petitions;
- Acquiring photographs and identity or immigration documents, such as passports;
- Medical examinations and immunizations;
- Background, reference, and security clearance checks and examinations;
- The employer’s recruiters, agents, or attorneys;
- Language interpretation or translation;

- Government-mandated fees such as border crossing fees, levies, or worker welfare funds;
- Transportation and subsistence costs;
- Security deposits, bonds, and insurance; and
- Equipment charges.

Contractors should note that the listed categories are only examples, and other charges "associated with the recruiting process" qualify even if the specific type of charge is not listed.

Because every federal government contract prohibits contractors from charging these fees and some require annual certifications and compliance plans, contractors should review their hiring processes to ensure that no such fees are being charged to employees or *potential* employees, including applicants. The penalties for non-compliance with the human trafficking clause can range from the suspension of contract payments to contract or subcontract termination or even debarment. Because contractors are responsible under the rule for fees charged by agents like recruiters (or even sub-recruiters), contractors should ensure that their contracts with recruiters, staffing agencies, or others prohibit passing along any recruitment costs to employees or applicants.

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