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Ensuring billing compliance for government contracts with a remote workforce and responding to incidents of labor mischarging

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With unparalleled state and federal contracting set to take place in response to the pandemic, such as under the Coronavirus Aid Relief and Economic Security (“CARES”) Act and the Defense Production Act, companies must act to ensure compliance with the terms and conditions of awarded contracts, including honest and accurate billing for labor costs. At the same time, COVID-19 health and safety precautions and government edicts have driven many government contractors to suddenly proceed with unprecedented numbers of employees in a work from home (“WFH”) status. Employees are juggling WFH challenges—including childcare and family obligations—that may interfere with their work performance, while employers are encountering difficulty ensuring accurate billing without the on-site management or other in-person work verification protocols typically utilized. While employers attempt to accommodate the myriad needs of their employees during this time, they must keep in mind their responsibilities to certify that employees are actually performing the time billed to government contracts. The need for compliance remains unchanged, and the Department of Justice [has announced](#) that it will focus on COVID-19-related fraud and criminal conduct.

An employer’s discovery that an employee has misrepresented the time worked on a government contract may trigger mandated self-disclosure to the contracting agency. In addition, whether or not an employee’s conduct prompts a self-disclosure to the government, it could violate company policies regarding billing and represent a fraud on the employer. If disciplinary action is contemplated, employers should proceed carefully to avoid issues of employment discrimination, retaliation, or violation of union collective bargaining agreements or individual employment contracts. This alert suggests ways to mitigate the risk of labor mischarging on government contracts by WFH employees, reviews mandatory disclosure requirements, offers suggestions for investigating potential violations, and discusses protocols for reporting billing fraud as well as potential consequences for the contractor and employee. Additionally, we offer advice for employers considering discipline related to an employee’s falsification of time records.

Mitigating risk

In managing a remote workforce, employers must maintain strong internal controls over timekeeping and payroll processes. They should review written timekeeping policies and procedures to ensure applicability to WFH status. Any necessary changes should be made to accommodate the new circumstances. An essential step will be to provide necessary training to WFH employees early on to mitigate risk. Employers should make clear that all the same rules about accurate and honest recording of time worked on a government contract apply when working from home. Employees should be advised that if they encounter any difficulties completing their work, they must abide by the rules of the contract concerning when time can be worked and recorded, and that under no circumstances may they make up time in an unauthorized manner or charge the government for work that was not performed.

Mandatory disclosure

Nearly every contract with a government entity requires self-reporting of labor mischarging. Federally, FAR 52.203-13 requires government contractors to make a timely, written disclosure whenever, in connection with the performance of a contract, there is “credible evidence” that the contractor’s principal, employee, agent, or subcontractor has committed a federal crime involving fraud, conflict of interest, bribery, or gratuity, or has violated the civil False Claims Act (31 U.S.C. §§ 3729-3733). There is no minimum amount of fraudulent overbilling that prompts a report. Disclosure is made to the Office of the Inspector General (IG) of the contracting government agency, typically through an electronic filing on a designated form, with a copy provided to the contracting officer. For defense contracts, a report is made to the Department of Defense IG (DODIG).

Investigations

When faced with evidence suggesting potential labor mischarging by an employee, a contractor should conduct at least a preliminary investigation to ascertain whether the mandatory disclosure rule applies. Contractors will need to assess whether a potential criminal fraud or false claim against the government took place, and for this reason, particular focus should be placed on the employee’s intent and the materiality of the employee’s activity. During the course of an investigation concerning billing on government contracts, we recommend that employers consider the following:

- Examine what the government contract requires in terms of the employee’s work performance. For example, does the contract dictate when the employee is expected to perform the work, such as on certain days and during certain hours?
- If the government contract is silent on the timing of the employee’s performance, ascertain what evidence demonstrates that the employee actually worked the hours they charged, even if the work was performed outside the hours the employee recorded. For example, if an employee recorded a 9:00 a.m.–5:00 p.m. weekday performance on the government contract, but actually performed some of those hours after 5:00 p.m. or on the weekend, the improper recording of time worked may be immaterial.
- Proof that the employee actually worked the hours required by the contract or conducted full performance as required by the contract could include:

- A credible statement by the employee that any hours missed during the “normal” work day or work week were “made up” at another time during the billing period.
 - Tangible proof that the employee performed the amount of work reasonably expected for the time recorded.
 - Corroboration by colleagues that the employee interacted with them (e.g., through calls and emails) during the time period when the employee claims to have made-up the billed contract work.
 - Other corroboration, such as network or electronic records, that demonstrates work by the employee during the “make up” time (e.g., evidence of a remote log-in, mobile phone records, related email traffic).
- If the investigation concludes that the employee fraudulently billed work on the government contract, the investigation should establish the “loss” amount—that is, the amount of overcharging to the government that took place.
 - Further, investigators should determine whether the employee’s misconduct is an isolated event or perhaps took place on several occasions and/or across several contracts. The contractor should consider whether the employee’s improper billing represents a wider problem among employees or a deficiency generally in procedures or employee training, and if so, investigate those issues to ensure proper compliance and remediation. In the case of lengthy internal investigations concerning more widespread problems, a preliminary disclosure to the agency IG or DODIG may be in order while the investigation continues.

If a contractor discovers an employee’s mischarging of time before the time was billed to the government and the contractor does not bill the time or, in the absence of a contractual requirement prohibiting it, the employee made up the time during the billing period outside recorded hours, the self-disclosure obligation likely is eliminated. In such cases, either no “claim” was made to the government or full performance took place and the employee’s possible violation of company policies is immaterial under the False Claims Act. However, if it becomes known to the government (including possibly through a whistleblower), a contractor must be prepared to justify its failure to disclose an employee’s labor mischarging under a government contract to the agency IG. For this reason, all investigations should be carefully conducted and documented, and the reasons for decisions recorded, both ideally with assistance of counsel.

Reporting misconduct and possible consequences

If a contractor determines that credible evidence of labor mischarging exists, it should make a report to the agency IG or to the DODIG, as applicable. If multiple contracts are affected, disclosure to multiple IGs may be in order. Disclosure should include pertinent facts and circumstances, and identify actions the company will take to remediate the problem, including disciplinary employment actions anticipated or taken against employee. The amount of loss should be identified with a proposal for timely repayment. Care should be taken to properly mark confidential and proprietary information included with the self-disclosure, to avoid re-disclosure to third parties without advanced notice to the company, such as through a FOIA disclosure.

Once the IG notifies the agency’s suspension and debarment official, as is required, and depending on the nature and extent of the billing overcharging reported, a contractor could face possible criminal or civil False Claims Act action and penalties, as well as suspension and debarment consequences.

Employee discipline

An employee's improper submission of time under a government contract likely also will violate company policies. Many employers would view this conduct as a form of dishonesty, lying, cheating, or falsification of time or business records, and would terminate for an admitted violation or a reasonable conclusion of violation following an internal investigation. Therefore, irrespective of whether a self-report of time falsification is required to a government agency, employers will need to consider whether it is appropriate to discipline employees for falsifying time entries.

When addressing an instance of employee misconduct of this nature, the first step is to review the time accounting policy and any other applicable policies (such as policies concerning standards of conduct or falsification of business records) and determine whether the conduct appears to violate the policies and how the policies have been applied in the past. In addition, determine what education, if any, has been provided to employees regarding time reporting, particularly with respect to federal contracts. If the time accounting policy or other company policy clearly covers the employee's misconduct or the conduct violates clearly communicated standards or procedures, and the employer has consistently applied the policies in the past to discipline employees in similar situations, then an employer likely can comfortably take similar disciplinary action against the employee for false or improper recording of time. If the policy is ambiguous, there has been little or no training on the policy, and previous violations have not resulted in discipline or discipline has been inconsistent, employers should carefully consider whether discipline may be imposed against the subject employee. Even with a clear violation of policy, discrimination or retaliation issues still may exist with a particular employee, especially if the circumstances vary from situations where discipline has been imposed in the past. The advice of counsel is recommended.

If discipline or termination is contemplated, the employer also must review any union collective bargaining agreement or individual employment agreement to ensure that the company follows any required process or restrictions. Finally, while employers may be tempted to "look the other way" or offer leniency for time falsifications during the unprecedented circumstances COVID-19 presents, they should carefully consider whether such a response may set a precedent that will affect their ability to discipline more strongly for the same conduct when normal operations resume.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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