Big Brother Is Watching

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Nearly every business owner or manager has been told that it is inappropriate to pry into the private lives of employees. If a single, unattached, employee on his weekend off were to drive down to Nevada, no employer would consider it any of their business. And, certainly, if the employee during his weekend escape were to visit a legal brothel and secure the pleasures of one of the adult entertainment workers within, no employer would dream of inquiring…well, not unless they are a government contractor.

On January 15, 2009, the FAR Councils issued a final rule implementing the provisions of the Trafficking Victims Protection Reauthorization Act of 2005 (TVPA). The Rule can be found at FAR 52.222-50 and is the implementation of 22 USC 7104(g). The Rule, which applies to all Government contractors, makes an employee's off-the-clock, off the job site, personal activities a possible cause for the revocation of a government contract.

The TVPA is meant to address a serious international crisis: the trafficking of persons whether it be for purposes of slavery, sexual exploitation, or other reasons. Under the TVPA, Congress ensured that government contractors would be held accountable for the conduct of their employees at any time during the period of contract performance. This accountability extends beyond the jobsite and beyond the hours of employment. It is not tied to security issues or the scope of one's employment. The purpose of the TVPA is meant to shut down human trafficking and its reach goes directly to the "consumer" in those trades, in particular the adult entertainment industry, that are perceived rife with violations of the law.

The Rule provides that neither contractors nor their employees, during the period of contractual performance, are to engage in human trafficking or use forced labor. The controversial aspect of the Rule is that, "Contractors and contractor employees shall not procure commercial sex acts during the period of performance of the contract." A commercial sex act is any sex act that is performed in exchange for anything of value. No distinction is made for commercial sex acts that are obtained lawfully.

During the comment period, several organizations raised the concern that the regulation is more broad than the statutory authority -- it fell on deaf ears. It was also felt that this was an "Orwellian" intrusion into the lives of employees. Arguably, an adult, Nevada brothel visiting, employee risks, by this act which is entirely lawful and legal in Nevada, that his employer will lose the contract he is working on during the week.

Many may argue that the FAR Councils could not possibly have meant to be so invasive into the private lives of the employees of government contractors. Various groups commented and argued during the comment

period that the rule should be limited to conduct occurring during the performance of the contract and not to employee behavior outside work. The Council was not persuaded:

> As written, the rule reflects the statutory language …The Councils believe that limiting the rule in the manner requested…would inadequately implement the statute since employee violations are more likely to occur after working hours. …(Emphasis added.)

Under the Rule, employers will find themselves in the uncomfortable position of having to "police" the private conduct of their employees, in order to preserve their contracts. One can speculate as to the liability this creates for employers -- invasion of privacy, etc. The provision must also be included in contracts that are to be performed outside the United States. In Europe, the clause will raise further issues as both the Human Rights Committee and the European Court have treated one's sexual life as an integral part of one's right to privacy. Arguably, the enforcement of this clause, as between the employee and contractor, within the EU could be seen as violating the 2005 Declaration of Rights as to Sex Workers -- it can be said to adversely impact the ability of sex workers to engage in their chosen profession.

No doubt, FAR 52.222-50 will lead to bizarre outcomes. Unfortunately, it is the law and government contractors will need to position themselves to deal with it. This is especially important since the Rule contains a self-reporting requirement.

At a minimum, government contractors should establish and distribute to their employees written policies and procedures. This should be done as part of a TVPA awareness program. The Department of State has a website with suggestions for such programs at http://www.state.gov/g/tip/c26189.htm . Employers will need to incorporate TVPA violations into their business' code of conduct and determine appropriate disciplinary measures. Of course, employers will need a set of auditable internal controls as well, due to the Rule's self reporting requirements.

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seek the advice of your legal counsel.