



Recent Trends in Contractor Prosecutions and Compliance Programs for Construction Industry Companies

Recent Trends in Contractor Prosecutions

- Insurance Fraud
- Environmental Violations
- OSHA Investigations
- Whistleblower Claims
- Immigration Compliance
- DBE Fraud

Insurance Fraud Investigations

- Increased scrutiny by investigators regarding payroll and contract values reported to insurance carriers
- Fla. Stat. Section 440.105(4)(b) (5) – illegal to "knowingly make any false, fraudulent, or misleading oral or written statement, or to knowingly omit or conceal material information...for the purpose of obtaining workers' compensation coverage or for the purpose of avoiding, delaying, or diminishing the amount of payment of any workers' compensation premiums."

Insurance Fraud Investigations

- The most common forms of workers' compensation fraud by employers are:
 - Underreporting payroll. An employer reports that workers are paid less than they actually are in order to lower their premiums.
 - Inflating experience. An employer claims workers are more experienced than they actually are in order to make them seem less risky and therefore less expensive to cover.
 - Evasion. An employer fails to obtain workers' compensation for their employees when it is required by law. Workers are often deceived into thinking they are covered when they are not.

Current EPA Prosecutions

- Commercial property owners, at time of purchase, received quote for \$117K asbestos remediation
- Decided to DIY. No containment, no negative air machines, no wetting, directed workers to reuse protective masks and suits over multiple days. 150 contractor bags of material
- 2019 Sentence: \$9,500 and 1 year probation

Current EPA Prosecutions

- Excavation contractor in Colorado removed pollution monitoring devices on equipment and installed kits to alter emissions performance. Dramatically increased pollutants
- When caught, falsely claimed only four vehicles modified. Investigation revealed at least six had been modified, with two being sold
- 2018 sentence: \$15k fine, three years probation

Current Prosecutions

- “Dirt broker” convicted by federal jury of illegally dumping contaminated soils adjacent to Wildlife Refuge in Cal.
- Illegally dumped 1800 truckloads of construction debris in wetlands areas without federal permit or property owner’s permission
- Sentenced in 30 months in prison

OSHA Criminal Enforcement

- OSHA makes referral to DOJ
- DOJ express concern over:
 - High rates of workplace fatalities
 - Few criminal prosecutions under OSH Act
 - Penalties not deterring criminal violations
- DOJ and DOL initiative to increase use of enforcement in cases involving workplace safety

OSHA & Environmental Violations

- Prosecutors often couple OSHA with violation of related environmental violations.
- In 2012, a federal grand jury in Texas indicted an environmental services company and its former president on conspiracy charges for illegally transporting hazardous materials that resulted in the death of two employees. The 13 count indictment alleged the company and its President willfully failed to provide protective measures to limit employee's exposure to hydrogen sulfide.
- Two months later, four former managers from Atlantic States Cast Iron Pipe Company lost their appeal of prison sentences and fines in connection with several safety and environmental violations and the resulting cover-up. Atlantic was placed on four years' probation and required to pay an \$8 million fine. Jail sentences ranging from six to 70 months (almost six years) were upheld.

Prosecutors Creatively Avoid OSHA Misdemeanor Limit

- Willful violations of OSHA causing loss of human life are punishable by fines up to \$250,000 and up to six months in prison for individuals and \$500,000 for organizations
- Since penalties are larger for EPA violations than those involving OSHA, prosecutors often use the environmental infractions or Mail and Wire Fraud (18 U.S.C. §1341) to increase
- Companies and individuals can also be prosecuted under state criminal laws. OSHA doesn't preempt prosecution under state manslaughter or negligent homicide statutes.

OSHA Rollback

- In April 2017, President Trump killed the “Volks” rule, which allowed OSHA to cite employers for recordkeeping violations going back 5 ½ years from date of incident. Now six months.
- Only misdemeanor prosecutions allowed under OSHA; efforts to add felony prosecutions for knowingly committing violation resulting in death or serious injury has failed past 15 years

Whistleblower Claims

- Employees who report legal violations by employers are protected by state and federal laws.
- Florida's Whistle Blower Act (Fla. Stat. §§112.3187 – 112.31895) protects employees who report a wide variety of violations by their employers, including gross neglect, health and safety violations, and environmental infractions.
- Texas whistleblower law applies only to state or local public employees (with some private exceptions) (Texas Code Title 5, Chapter 554)
- Many states have Fed False Claim Act analogs which provide whistleblower protection (Texas –healthcare only; not contracting generally)
- Cannot harass, retaliate, dismiss, discipline, or take other adverse personnel action against an employee for disclosing information of any violation or suspected violation of law.

Immigration Compliance

- Under the Immigration and Nationality Act ("INA" – Title 8 USC. §1324), employers may hire only persons who may legally work in the United States (i.e., citizens and nationals of the U.S.) and aliens authorized to work in the U.S.
- The employer must verify the identity and employment eligibility of anyone to be hired, which includes completing the Employment Eligibility Verification Form (I-9), within three days of starting work.
- Employers must keep each I-9 on file for at least three years, or one year after employment ends, whichever is longer.
- It is a felony to assist an alien to obtain employment without legal authorization.

Immigration Compliance – cont'd

- Anyone employing or contracting with an unauthorized alien without verifying his or her work authorization status is guilty of a misdemeanor.
- Aliens and employers violating immigration laws are subject to arrest, detention, and seizure of their vehicles or property.
- Criminal penalties can include imprisonment up to 10 years.
- In addition, individuals or entities who engage in racketeering enterprises that commit (or conspire to commit) immigration-related felonies are subject to private civil suits for treble damages and injunctive relief.

Immigration Compliance

- An employer has constructive knowledge that an employee is an illegal unauthorized worker if a reasonable person would infer it from the facts.
- Constructive knowledge constituting a violation of federal law has been found where: (1) the I-9 employment eligibility form has not been properly completed, including supporting documentation; (2) the employer has learned from other individuals, media reports, or any source of information available to the employer that the alien is unauthorized to work; or (3) the employer acts with reckless disregard for the legal consequences of permitting a third party to provide or introduce an illegal alien into the employer's work force.

Rise in Worksite Enforcement: I-9 Audits

- Trump Administration quadrupled I-9 and worksite audits (5,981 I-9 audits in FY2018 vs. 1,360 in FY2017).
 - 779 criminal charges filed, including 72 employer managers)
- Audit of Form I-9 and E-Verify compliance
- Need for standard, rigorous onboarding and retention procedures across all offices

Rise in Worksite Enforcement – “No Match” Letters

- SSA has issued “No Match” letters since 1990s, identifying discrepancy between name, SS# and information in SSA records (often based on employers wage and tax statement)
- Under Bush administration, enforcement procedures issued to investigate mismatches – but then suspended
- Trump administration has resumed procedures, and HSI perform worksite investigations, requests all “No Match” letters and responses thereto

Rise in Worksite Enforcement – “No Match” Letters

- Number of reasons “No Match” may occur
 - Clerical errors (transposed letters)
 - Unreported name change
 - Inconsistent use of multiple last names, hyphenation
- What to Do? DOJ publishes “Do and Don’ts”
- Give employee notice of mismatch, and reasonable time to resolve
 - Reasonable time undefined
 - Don’t just terminate
- Failure to notify employee and document follow up can constitute constructive knowledge of unauthorized employment

Immigration Enforcement

- 2018: Waste Management of Texas paid \$5.5M and agreed to enhanced immigration oversight
 - between 2003-2012, did not inquire into work status of employees as required.
 - in 2012, fired ten undocumented employees, then immediately rehired them using IDs belonging to others.
 - Company cooperated with criminal investigators and conducted own internal investigation
- Because company cooperated and agreed to enhanced future oversight, DOJ entered into non-prosecution agreement. \$5.5M represented estimated proceeds from hiring undocumented workers at facility from 2003-2012

Compliance Challenges

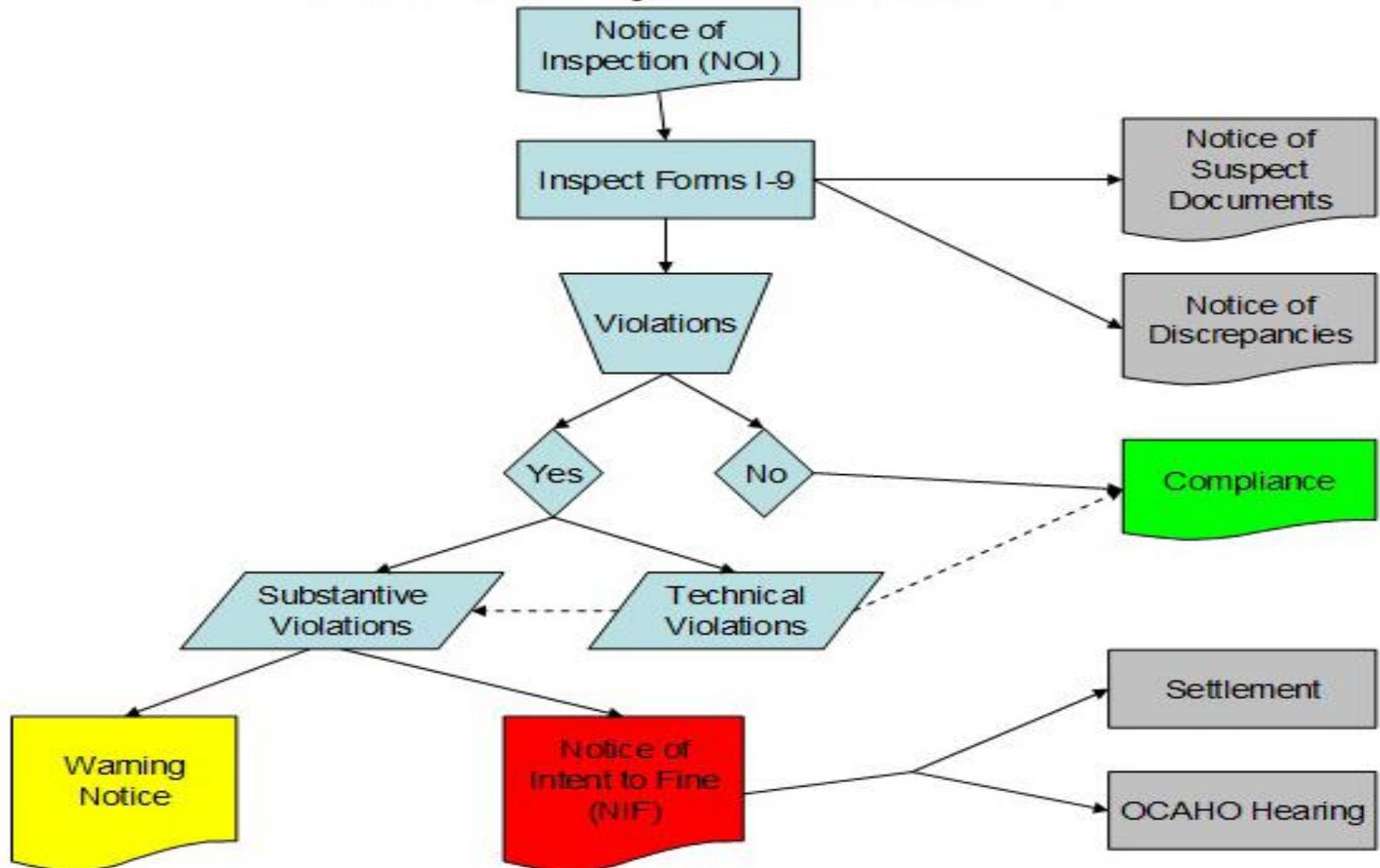
- Must collect necessary I-9 information to verify identity, but:
 - Cannot request more or different documents than required
 - Cannot reject documents that appear genuine
 - Cannot request specific documents based on citizenship, immigration status or national origin
- Due diligence standard – “culture of compliance” - best demonstrated through training and uniform practice

Getting ICED

- Employer receives Notice of Inspection
 - Three business days to allow for ICE to physically inspect the I-9s.
- ICE can “raid” if they obtain a judicial search warrant
- If H-1B or L-1 workers, unannounced compliance visits may occur
- Have a single point of contact ready
- Self-audit to identify errors and deficiencies before you receive a Notice
- Know how to fix errors and deficiencies before you receive a notice.

Inspection Process

Form I-9 Inspection Process



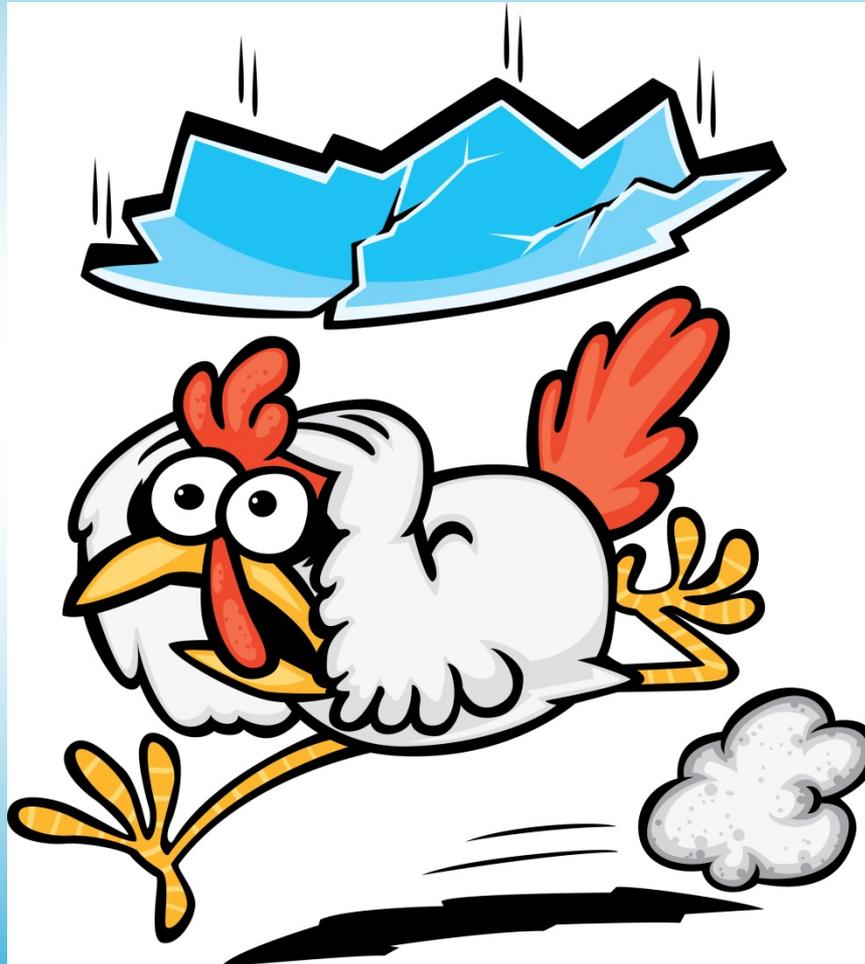
DBE Fraud

- Active pursuit of DBE fraud in federal contracting
- Virgil Contracting was a SBA 8(a) contractor who graduated from program in 2011 (owned by John Virgil) That same year, VMJ Construction, (started by brother Michael Virgil) obtained 8(a) certification.
- VMJ used offices, resources, personnel, bonding capacity, computers, vehicles, of Virgil Contracting.
- Michael held no position of control in VMJ
- US Army, Navy and Dept. of Agriculture all awarded 8(a) contracts to VMJ
- 2019 Settlement: \$3.5M fine paid.

Other DBE Prosecutions

- Local GC (Chicago) \$12 million
- Two Michigan companies \$4 million
- Local GC (CT) \$2.4 million
- Paving Contractor (Iowa) \$4.3 million + prison time

Compliance Programs – Why Bother? Is This a Case of “Chicken Little”?



NO. THE SKY IS NOT FALLING BUT THIS IS ALSO NOT A DRILL!

Most contractors are good, law abiding people who work hard every day to overcome the many risks and challenges they face – and we respect that.

Prosecutors do not respect that. These days they see "mistakes" through a lens of criminality.

The Reality...

- Some of the largest contractors in the nation have paid **huge fines in the many millions of dollars**, had **monitors** installed in their businesses, and signed deferred prosecution agreements containing damaging admissions that they overbilled clients and engaged in M/W/DBE fraud among other things— **and most thought they had done nothing wrong!**
- **All because they did not have genuine and *robust* compliance programs in place.**

Why Do You Need a Compliance Program?

- Minimize legal risk
- The optics, which can save your bacon if one of your employees ever goes “rogue”
 - More about that later
- The construction industry is a highly charged regulatory environment
 - Regulators looking for more work
 - Some of them even think they are cops!
 - E.g. inspectors general who love working with prosecutors

Why Do You Need a Compliance Program?

- It is the smart thing to do in the construction business where a lot of companies are doing publicly funded work
- Helps you avoid trouble with your public clients, your regulators, and prosecutors, which can be expensive and bad for your reputation
- Required by the FAR if you are doing federal work

FAR Compliance Requirements



- For many contractors, the US Government is the most significant potential customer.
- If you are a federal contractor, a robust compliance program is mandatory.

FAR Requirements

- Compliance program are required for federal government contracts
- FAR 52.203-13 requires all prime contractors and subcontractors with a contract in excess of \$5M and with a performance period of more than 120 days to have comprehensive compliance program
- Contractors with contracts less than \$5M still expected to have a compliance program commensurate with the amount of their federal work

FAR Compliance Requirements

- Communicate your compliance standards and procedures
- Maintain a culture of compliance to your principals and employees.
- Provide ethics and compliance training.
- Provide an internal controls that:
 - Establishes standards and procedures to facilitate timely discovery of improper conduct in connection with a government contract.
 - Ensures that corrective measures are promptly initiated and carried out.
 - Disciplinary action.

Key Elements of a Compliance Program

- Learning to discern what conduct comports with the law against a backdrop of long-standing industry practices, historical company practices and misunderstandings of what the law requires and then implementing policies, training and oversight to assure conduct by the company and its employees that does meet the requirements of the law is what a COMPLIANCE PROGRAM is all about.

The Baseline

- Robust compliance programs establish a baseline of corporate integrity that avoids most potential violations, educates employees at all levels about that policy and demonstrates that the company takes compliance seriously.

More...

- If a violation of law occurs or your company becomes the target of an investigation, a **genuine program can sometimes enable the company to avoid or mitigate consequences with its regulators and prosecutors**
 - both civil and criminal.

A Good Corporate Compliance Program Results in a Better Working Environment

- US DOJ has stated that companies that do not have clear anti-corruption policies and practices create an environment in which those companies are more likely to become the victim of employee misjudgment and, worse, employee crime – including crime against the company!

And...

- Failure to have a robust compliance program will be held against your company by prosecutors and regulators if there is a violation.
 - Your conversation with the prosecutor will be a lot easier if you have a robust compliance program and one of your employees violates the law to "benefit the company."

Uniform Sentencing Guidelines

- **In the event a company is prosecuted and convicted, prosecutors give a company credit for having had in place an effective compliance and ethics program at the time of the offense by a “rogue” employee.**
 - Could help you avoid prosecution completely whether federal or state.
 - Could help even if your company is charged and convicted in a federal criminal prosecution.
 - Compliance Program must be genuine and promote a culture of compliance and ethics to be of use.

And...

- It takes years to establish a reputation.
- It takes just a few minutes to destroy it.
- A robust compliance program can protect your company's hard-earned reputation for integrity and good business practices.



“We Already Have a Policy and Program, Everyone Knows We Have Integrity, Why Should We Be Concerned?”

Too many company executives think that if there has been no previous prosecution of the company AND they have a genuine statement of ethics that somehow that equals a strong compliance program.

This Belief is Not Protection

- A truly robust program requires:
 - Training
 - Policy that gives guidance
 - Monitoring of the policy as it is applied
 - Prompt and documented consequences to violators of the compliance policy.

Why Have a Robust Compliance Program?

- Being a good corporate citizen and responsible member of the community is reason enough.
- The “Defensive” need for a robust compliance program is real and reason in and of itself to have one.
- It is good for business!

What Is Not Robust?

- Good intentions, statements of integrity principles, and lack of a bad track record **is not good enough** and does not a robust compliance program make.
 - At least as far as the federal government is concerned.
 - The trend is for local and state governments to follow the federal government's lead.

When It Goes Wrong Or You Think It May Have Gone Wrong

- Despite all of your best efforts, there may come a time when it appears that someone may have violated company policy or violated the law.
- You need to know the facts, whether there was a violation of law or regulations, and whether your company is at legal risk.
- Evaluating legal risk is no simple task, make sure rely on seasoned expertise to perform that evaluation and provide practical advice.

Internal Investigations

- A genuine and robust compliance policy will make it less likely that you will need an internal investigation!
- But if you do need one conducted....

Internal Investigations

- Must be conducted by counsel so that the results of the investigation are privileged.
- Employees must understand that the investigation is confidential and they will probably not be told of the outcome.
- Compliance policy should require employee cooperation.
 - Saves you money and grief!



Why Use Outside Counsel for Internal Investigations?

- Courts are far more inclined to find the work of outside counsel **privileged and confidential** thereby enabling ***management*** to decide whether and when to disclose an internal investigation's findings of fact.

What Kind Of Compliance Program Do You Need?

- Written for your company specifically
 - There is no one size fits all!
 - Must be written for your employees in plain English and not lawyer speak.
 - Your employees build things –they should not have to parse phrases.



Execute the Program

- Perform a compliance-risk analysis of your business.
- Draft a customized compliance policy for your company appropriate to your culture, size and project type.
- Develop a compliance training program for your employees.
- Seek legal guidance, including performing internal investigations, when necessary.

Questions?

