

Webinar Summary¹

Assessing Contractor Labor Law Violations Responsibility and Debarment (Parts 1 and 2)

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Abstract

These webinars discuss issues surrounding debarment relative to U.S. labor law violations and their implications for contractors. The webinar recordings are available at <https://acqirc.org/events/assessing-contractor-labor-law-violations/>. The webinars were hosted by David Drabkin and Christopher Yukins, who were the principal investigators on a congressionally mandated study on this topic, which is available at <https://acqirc.org/publications/research/congressionally-mandated-study-on-contractor-debarments-for-violations-of-u-s-labor-laws/>. Key points and discussion from the webinars included:

¹ These webinars and this summary are in fulfillment of requests from Congress in the *Joint Explanatory Statement* accompanying the *James M. Inhofe National Defense Authorization Act for Fiscal Year 2023*, section on “Prohibition on contracting with employers that violated the National Labor Relations Act,” CPRT-118JPRT50665, Book 2, pp. 1988-1989, [CPRT-118JPRT50665.pdf \(congress.gov\)](https://www.congress.gov/118/jprts/2023/118JPRT50665/pdf), last accessed 4/5/24. The writing of this summary document was supported in part by the Microsoft Word transcription tool and the Microsoft Copilot generative AI tool.

- The risk-management **nature of suspension and debarment**, which in the U.S. federal system are *not* intended to serve as punishment. Suspension is the temporary exclusion of a contractor, typically pending consideration for debarment, which is generally an exclusion from federal contracting for a term of years. Suspension and debarment are addressed under the Federal Acquisition Regulation (FAR) Subpart 9.4, which is part of Contractor Qualifications, FAR Part 9. Suspension and debarment are part of the supplier risk assessment that is an inherent function of contractor qualification under the FAR. Contracting officials, including both contracting officers and the suspending and debarring officials (SDOs), need to assess vendors for (among other things) performance and reputational risks, per FAR Part 9.
- The importance of **accessibility and understandability** of data, so that contracting officials and other stakeholders can make a meaningful assessment of the risks that might be posed if prospective contractors have engaged in labor violations.
- The **impact of suspension and debarment on the industrial base and mission**.
- The **use of existing databases for contracting officer assessments of vendors**, and how they might require follow-ups with the Department of Labor (DOL) for additional information.
- The **impact of statutory debarments on the defense industrial base across the government** – and the potentially unforeseen impacts on the supplier base if statutory impacts *require* automatic debarment for statutory violations.
- A primary focus for debarment or suspension (and of a responsibility determination) for the DoD is whether the contractor is going to be able to **deliver the product** that DoD wanted, at a quality DoD expected, and in time for the warfighters to employ it in the defense of the nation.
- Ultimately **Congress will need to decide** whether debarments should be mandatory, but that decision should be informed based on these discussions of debarment's nature and purpose and the potential impact of statutory debarment on the defense industrial base.

The Importance of Labor Law Compliance

The webinars discussed the importance of compliance with labor laws in several contexts:

1. The underlying report and the webinars address the **Fair Labor Standards Act (FLSA), the Service Contract Act (SCA), and the Davis Bacon Act**, highlighting the importance of adhering to these labor laws.
2. The webinar discussions pointed out that if a company knows that a resolution of labor law violations will be counted against them as repeated violations of the FLSA, they might be **less cooperative in trying to reach a resolution**. This illustrates one of the potential dangers of making debarment automatic for violations of labor laws.
3. The webinar discussions noted that a company's propensity to engage in legal violations could impact their ability to perform on a contract. The webinars suggested that companies should respect their obligations and have the processes and procedures in place to comply with those laws and obligations. Labor law

violations, in other words, are an appropriate part of assessing a contractor's responsibility for award, and even of assessing a contractor's present responsibility for purposes of suspension or debarment.

4. The document also discusses the **impact of debarment** on a company's ability to rectify prior labor law violations, such as providing back pay. If a company is automatically debarred, it will not be able to make its workers "whole" by rectifying the violations. The study that launched these webinars said that this explains why there are remarkably few debarments under existing "mandatory debarment" labor laws – the companies are typically allowed to take remedial measures instead (as is common in discretionary procurement-based debarments under FAR Subpart 9.4), because ultimately the Labor Department is reluctant to force companies to close if that will hurt their workers.

The Role of Debarment

Debarment plays a significant role in ensuring sound suppliers for the Department of Defense (DoD). Here are some key points:

1. **Protection of Government's Interest:** Debarment under FAR 9.4 is a discretionary action taken to protect the Government's interest. It serves as a tool to avoid doing business with non-responsible contractors. The primary goal is to prevent irresponsible contractors – vendors that pose unacceptable risks, whether reputational or performance-based – from receiving new contracts.
2. **Contractor Present Responsibility:** The webinar emphasizes that each case referred to the SDO for consideration of debarment is unique; in each case, the SDO must pose the relative risks (including remedial measures, prospective business, and competitive market) presented by the contractor that might be debarred.
3. **Information Access:** In the report to Congress on contractor debarments for violations of U.S. labor laws, the Acquisition Innovation Research Center (AIRC) noted that often contracting officers and SDOs do not have the necessary information to make these determinations. This highlights the need for better information flow and transparency in the process.
4. **Suspension and Debarment** is not a form of punishment for past acts but rather a tool to ensure that companies become compliant with laws, regulations, and policies for doing business with the federal government.
5. **Suspension and Debarment Officials at Contracting Agencies** are the only officials who suspend or debar a company following an assessment of a particular company's actions and remediation, if any, by the company.
6. **Contracting Officers** do not suspend or debar contractors. Instead, they make a *responsibility determination* at time of award based upon information available to them. If they find a company is not responsible, for a variety of reasons, they do not make an award to the that company and instead move on to the next in line for award.

Thus, responsibility determinations and debarment help DoD maintain high standards, protect taxpayer funds, and ensure that contractors meet their obligations. It's a vital mechanism for acquiring capabilities while safeguarding the Government's interests.

The Effects of Debarment on a Contractor's Ability to Rectify Prior Labor Law Violations

The webinar discusses the potential implications of debarment on a company's ability to rectify prior labor law violations, such as providing back pay. Here are some key points:

1. The **contracting officer or the SDO** is likely to face situations where a competitor or some other stakeholder raises concerns about a particular vendor. In such cases, the contracting officer or the SDO needs to assess whether the final determination of a labor law violation affects their confidence in the company's ability to perform. This may entail assessing remedial measures (such as enhanced compliance) that the vendor has taken to address labor law violations (or other sources of concern).
2. The webinars highlighted that the **DOL** has more expertise to understand what the violations mean and how they impact a company's ability to rectify violations (e.g., provide back pay to employees) and perform on a particular contract than other government agencies. The webinars explained how to access the extensive data on labor law violations posted on the DOL website by the Wage & Hour Division.

What Are the Key Grounds for Debarment?

The webinar outlines several key points regarding the grounds for debarment:

1. **Labor Law Violations:** The webinars note that labor law violations can be a starting point for an inquiry into debarment. However, the violation in and of itself typically should not result in debarment or a finding of non-responsibility. The real question is whether a labor law violation is a red flag that a vendor poses unacceptable risk.
2. **Lack of Remedial Actions:** Debarment should result if, after having been found to have violated the law, no steps were taken to fix that violation going forward. This suggests that the contractor's response to the violation – the contractor's remedial compliance efforts – are a significant factor in the debarment decision.
3. **Administrative Agreements:** The webinar discusses the ability of suspension and debarment officials to put in place administrative agreements, which allow the government to periodically check to make sure that a company has not only fixed the problem but continues in a positive direction going forward.
4. **Statutory Debarment Provisions:** The webinar also mentions that there are already statutory debarment provisions for the Service Contract Act and other violations of U.S. labor laws. However, it notes that these statutory debarments are relatively rare.
5. **Fair Labor Standards Act (FLSA) Violations:** The webinar discusses FLSA violations as grounds for exclusion or non-responsibility. However, it suggests that automatic exclusion based on FLSA violations might not be appropriate as these

violations might not point to the risk that the government considers sufficiently significant or material, and because automatic debarments could have unforeseen impacts on the defense industrial base.

Thus, the grounds for debarment can include labor law violations, lack of remedial actions, and violations of specific statutes like the Service Contract Act and the Fair Labor Standards Act. However, these grounds should be considered in the context of the specific risks they present to the government.

How Often Do DoD Contractors Violate the Fair Labor Standards Act?

The webinar provides some statistics on the number and fraction of DoD contractors that have violated the FLSA. Here are the key points:

1. **Number of Contractors:** The Government Accountability Office (GAO) found that for fiscal years 2015 through 2019, about 114,000 companies had contracts with the DoD totaling approximately \$1.7 trillion in obligations. Of those companies, at least 727, about 1%, had been cited for violations under the Occupational Safety and Health Act (OSHA) or the FLSA over this time frame.
2. **FLSA Violations:** The webinar mentions that 2/3 of the cases reported by the Department of Labor have FLSA violations. That's approximately 212,000 cases.
3. **Repeated and Willful Violations:** The webinar also discusses that if we just focus on contractors that have repeated violations or have willful violations, that's 9% of the firms that have these FLSA violations.
4. **Potential Impacts of Automatic Debarment:** The AIRC study found that four of the top 10 DoD contractors had *repeat*, *willful*, or *repeat and willful* violations of the FLSA in the DOL database. The study also found that repeat, willful, or repeat and willful violators comprise one quarter of the total dollars obligated to the top 100 DoD contractors. Making debarment automatic for FLSA violations thus could have serious impacts on the DoD supplier base.

The available data generally do not indicate whether the violations occurred while the employees were performing work related to a DoD contract. Whether violations occur while performing on a federal contract is not dispositive. Debarment can occur, for example, for *any* serious violations of law, but the fact that a violation occurs while performing a federal contract raises responsibility-related risks for the government.

(Please note that the statistics discussed above are based on the data available at the time the webinars were launched and may have changed since then.)

The Importance of Discretion

The webinars also discussed the importance of **discretion** in the context of **responsibility** and **debarment**. That discretion simply reflects the fact that qualification is a risk-based assessment, made by procurement professionals. Here are some key points:

1. **Individual Case Consideration:** The webinars emphasized that each case referred to the SDO for consideration of debarment is unique. The fact that a company may have committed a violation does not automatically mean that the SDO must debar them. This allows for individual circumstances and the severity of the violation to be taken into account.
2. **Remedial Actions and Compliance Systems:** The webinars mentioned that if contractors can demonstrate that they have put remedial measures in place and have a compliance system, they are allowed to continue to operate. Under the rules and normal federal practice, the SDO has the discretion to consider the contractor's efforts to rectify their violations and prevent future ones.
3. **Supply Chain Management:** The webinars also discussed the role of contracting officials in addressing contractor responsibility as a matter of supply chain management. This implies that discretion is needed to assess the potential impact on the supply chain if a contractor is debarred.
4. **Non-Responsibility Determination:** The webinars explained that a non-responsibility determination is a one-time decision made by the contracting officer before awarding a contract. This suggests that discretion is used to assess the contractor's responsibility at a specific point in time, rather than applying a blanket rule.

The Role of Contracting Officers

The webinars outlined several key points about the role of contracting officers in making responsibility determinations, and the role of SDOs in making debarment decisions (under standards, per FAR Part 9, that are essentially parallel):

1. **Non-Responsibility Determination:** The webinars explained that a non-responsibility determination is an exclusion decision made by the contracting officer before awarding a contract. The contracting officer can and should take additional information into account in making that risk-based responsibility assessment.
2. **Supply Chain Management:** In making a risk-based assessment, the contracting officer is making a determination very similar to that of a private-sector supply-chain manager—a determination of risks and benefits of dealing with a particular vendor. This implies that discretion is needed to assess the potential impact on the supply chain if a contractor is excluded or debarred.
3. **Information Access:** In a report to Congress on contractor debarments for violations of U.S. labor laws, the AIRC noted that often contracting officers (and suspending and debarring officials) do not have the necessary information to make these determinations. This highlights the need for better information flow and transparency in the process.

Thus, contracting officers play a crucial role in the risk assessment process for a responsibility determination. They are tasked with assessing the responsibility of

contractors, and making informed decisions based on the available information at the time of award.

The Importance of Data

The webinar discusses the importance of data in informing responsibility and debarment decisions. Here are some key points:

1. **Increasing Data Availability:** The webinars mentioned that more and more data is being pulled into the responsibility determination. This suggests that there is a growing emphasis on using data to inform these decisions.
2. **Data-Driven Decision Making:** The webinars discussed a future scenario where contracting officers are helped in their decision-making process by having access to multiple streams of data, including data regarding potential labor violations. This indicates a move towards more data-driven decision making.
3. **Lack of Information:** The webinars noted that contracting officers often do not have the necessary information to make these responsibility determinations. This highlights the need for better information flow and transparency in the process.
4. **Publicly Available Data:** The webinars also mentioned that as different jurisdictions begin to develop a broader approach to contractor qualification and to make that data publicly available, the risk posture from a contractor perspective increases. This suggests that publicly available data can play a significant role in informing debarment decisions.

In summary, the webinars emphasized the importance of data in informing responsibility and debarment decisions, the need for better information flow and transparency, and the potential impact of publicly available data.

What Constitutes Contractor *Responsibility*?

The webinar outlines several key elements of responsibility in the context of contractor debarment and the contracting officer's determination:

1. **Risk Assessment:** In making a responsibility determination, the contracting officer is tasked with assessing the risk presented by every prospective contractor. This includes both performance risk and reputational risk. Performance risk refers to whether the contractor can deliver the required product or service, while reputational risk refers to the potential damage to the United States' reputation if it continues to do business with a contractor that has violated labor laws (or otherwise acts improperly).
2. **Compliance and Operations:** The webinar suggests that the contracting officer should consider whether the vendor has a satisfactory performance record. These factors help determine whether the vendor presents significant risk from a compliance, operations, and organizational standpoint.
3. **Risk-Based Approach:** The webinar discusses the U.S. risk-based approach to responsibility determination and debarment. This approach considers the specific

risks presented by a contractor, rather than applying a blanket rule and rather than making contractor exclusion a type of punishment, as some other systems do.

Thus, the webinar emphasizes the importance of risk assessment, compliance, operations, and a risk-based approach in determining a contractor's responsibility.

The Availability of Data to Inform Debarment Decisions

The webinars discussed the importance of data availability in making debarment decisions. Here are the key points:

1. The AIRC report emphasizes that automatic exclusions of contractors for **violations of labor law** could be very disruptive to the industrial base, but the data regarding these violations could be useful for contracting officers and debarment officials when assessing the responsibility (and present responsibility) of contractors.
2. The AIRC report mentions that the **accessibility and understandability** of the data are crucial, especially if contractors are asked to put that information into the government's System for Award Management (SAM.gov). Heavy investments in compiling qualification information do not make sense if that information is not accessible and useful.
3. The webinars also discussed the need to consider whether the presentation of the information needs to be revised to make it more accessible to other governments, both across the United States and among our allies abroad.
4. The webinars mentioned that the **determining organization**, addressing a vendor that appears to have engaged in violations, might require follow-ups with the DOL to get additional information, both on the violations and on how to interpret those data.
5. The webinars highlighted that suspension and debarment have a significant effect not only on the federal government but also on state and local governments. These governments often require bidders to disclose debarments by other entities, particularly the federal government, and consider that a responsibility factor or even a basis for an automatic debarment from a state's procurements.

Approaches to Dealing with Labor Law Violators

The webinar discusses four possible approaches to dealing with labor law violations:

1. The first approach involves the **DOL**, which already has mandatory debarment requirements for certain labor laws, such as the Service Contract Act and the Davis Bacon Act. The DOL has the expertise to understand what the violations mean and how they impact a company's ability to perform, and how those violations may reflect on the company's lack of effective internal controls.
2. The second approach involves discretionary debarments by contracting agency **SDOs**, to address those contractors without effective controls and to encourage contractors to follow labor laws. Unlike the DOL, however, SDOs may not have a

- deep understanding of the applicable U.S. labor laws—thus the benefit of having DOL available as a resource to agency SDOs.
3. The third approach could involve the **contractors** themselves being asked to **report their labor law violations** and put that information into the System for Award Management (SAM.gov). This approach assumes, again, that the contracting officials and SDOs who review those SAM.gov entries will understand the relevance of the violations.
 4. The fourth approach relies on **contractor responsibility determinations made by Contracting Officer (CO)**, but this would involve getting sufficient information and training for the CO to make those determinations and would add significant new workloads and time to contracting actions. As a practical matter, contracting officers would likely focus on labor violations in special cases in making their responsibility determinations—for example, where a series of violations signaled that the contractor’s internal controls had broken down entirely.

These approaches aim to address contractors that do not comply with labor laws. For the foreseeable future, practically speaking, the federal government is likely to rely on any and all of these four approaches, depending on the circumstances of a given procurement (or contractor). The goal of the training in these webinars was to have an open discussion and exposé to increase awareness of the issues and avenues available to government contracting professionals to address these violations.

What Are the Possible Next Steps Related to Debarment for Labor Law Violations?

Finally, the webinars outlined several possible next steps related to debarment and labor law violations:

1. **Administrative Agreements:** The webinars discussed the ability of suspending and debarring officials to put in place administrative agreements with contractors that have engaged in violations. Those agreements can allow the government to check periodically to make sure that a company has not only fixed the problem but continues in a positive direction going forward.
2. **Increased Scrutiny of FLSA Violations:** The genesis of this study was Congress’ concern whether firms that engage in FLSA violations should be automatically debarred. The webinars noted that there is a very concerning subset of vendors with repeated and/or willful violations of the FLSA, which suggests a need for increased scrutiny of these violations.
3. **Legislative Changes:** The webinars mentioned a provision in the House bill for the 2023 National Defense Authorization Act (NDAA) that would have prohibited contracting officers from entering into a contract with an employer found to have violated Section 8A of the National Labor Relations Act during the three-year period preceding the proposed date of contract award. Although this provision was not included in the final NDAA, it indicates a potential legislative direction towards more legislative scrutiny of contractors that have engaged in labor violations.

4. **Training and Education:** The webinars discussed the need for training on labor law violations, particularly for contracting officers if they are asked to take a larger role in scrutinizing labor law compliance. This training could involve educating officers on how to use publicly available data on labor law violations to inform their decisions.
5. **Improved Information Access:** The webinar notes that the **data regarding labor law violations** is out there and robust, but it might not be well publicized or easily accessible. Efforts could be made to make this information more readily available and understandable. If contracting officers were asked to make more responsibility determinations based on U.S. labor law violations, then they would need to be provided the necessary information to make these determinations. This bolsters a need for improved information access and transparency in the process.

In summary, the next steps could involve legislative changes, increased training and education, improved information access, the use of administrative agreements, and increased scrutiny of FLSA violations.