PROGRAM MATERIALS
Program #29144
October 16, 2019

On the Horizon for Government Contractors: Specialized Labor and Employment Issues and Practical Advice

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 180, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

SEYFARTH SHAW

On the Horizon for Government Contractors: Specialized Labor and Employment Issues and Practical Advice

Seyfarth Shaw LLP October 16, 2019

Today's Speakers

Jason Burritt

Partner, Washington, D.C.

(202) 828-3596
jburritt@seyfarth.com

Bryan O'Keefe

Partner, Washington, D.C.

(202) 828-3543
bokeefe@seyfarth.com

Alexander Passantino

Partner, Washington, D.C.

(202) 828-3595
apassantino@seyfarth.com

Leon Rodriguez

Partner, Washington, D.C.

(202) 828-3572
lerodriguez@seyfarth.com

Agenda

01 Welcome

02 Labor and Employment Successorship Considerations for Contractors

03 National Labor Relations Update

04 I-9/E-Verify for Federal Contractors: Old Issues and New Challenges

Speaker

Alexander Passantino

Partner, Washington, D.C.

(202) 828-3595
apassantino@seyfarth.com

SEYFARTH SHAW

Labor and Employment Successorship Considerations for Contractors

SEYFARTH SHAW

Section 4(c) Wage Determinations Under SCA

Dealing with Section 4(c) Wage Determinations

Section 4(c) of the SCA provides that no contractor or subcontractor shall pay any service employee employed on the contract work less than the wages and fringe benefits provided for in a collective bargaining agreement as a result of arms-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in such CBA

Section 4(c)

- Wage determination based on Collective Bargaining Agreement
  - If previous contractor had a CBA you must pay
    - Wages and benefits at least equal to CBA
    - Includes prospective increases
  - So long as you are performing
    - Substantially the same services
    - In same locality

Section 4(c)

- SCA provides that the wages and fringe benefits contained in a predecessor contractor's CBA will supersede any and all other WD requirements for the successor contract period of performance

- The CBA must be provided on a timely basis to the contracting office and be properly executed by the signatories to the CBA (predecessor contractor and union) and be effective for wage/benefit purposes during the predecessor contract in order to control under the SCA

SEYFARTH SHAW

Executive Order on Nondisplacement

Coverage

- The nondisplacement rule is effective January 18, 2013 and applies to **service contracts** and their solicitations except those excluded, that succeed contracts for the same or similar service at the same location

- The definition of service contract is one covered by the SCA

Contracting Agency Requirements

- Must include a contract clause in covered service contracts that succeed contracts for performance of the same or similar services at the same location
- Must direct predecessor contractor to provide notice
- Must provide the incumbent contractor’s list of employees to the successor contractor and, on request, to employees or their representatives

Contractor Required to Provide Right of First Refusal

- A successor contractor or subcontractor cannot fill an employment opening under the contract prior to making good faith offers of employment, in positions for which the employees are qualified, to those employees employed under the predecessor contract whose employment will be terminated as a result of award of the contract or the expiration of the contract under which the employees were hired

Who Is Eligible?

- A person's eligibility to a job offer usually can be determined based on whether he or she is named on the certified list of all service employees working under the predecessor's contract during the last month of contract performance

- The successor contractor's obligation to offer a right of first refusal exists **even if** the successor contractor has not been provided a list of the predecessor contractor's employees or the list does not contain the names of all persons employed during the final month of contract performance

Making a Job Offer

- A contractor must make a bona fide express offer of employment to each qualified employee on the predecessor contract before offering employment on the contract to any other person

Timing of Job Offer/Acceptance

- The contractor shall state the time within which an employee must accept an employment offer, but in no case may the period in which the employee has to accept the offer be less than 10 days

Process for Making Job Offer

- The successor contractor must, in writing or orally, offer employment to each employee. In order to ensure that the offer is effectively communicated, the successor contractor should take reasonable efforts to make the offer in a language that each worker understands

Offering for a Different Position

- As a general matter, an offer of employment on the successor's contract will be presumed to be a bona fide offer of employment, even if it is not for a position similar to the one the employee previously held but one for which the employee is qualified

Termination After Contract

- Where an employee is terminated under circumstances suggesting the offer of employment may not have been bona fide, the facts and circumstances of the offer and the termination will be closely examined during any compliance action to ensure the offer was bona fide

Exceptions to Requirements

- Nondisplaced Employees
  - Successor's current employees
  - Predecessor contractor's non-service employees
  - Employee's past unsuitable performance
  - Non-Federal work
  - Reduced staffing
  - Contractor determines which employees
  - Changes to staffing pattern

Obligations at or Near End of Contract

- The contractor shall, not less than 30 days before completion of the contractor's performance of services on a contract, furnish the Contracting Officer with a list of the names of all service employees working under the contract and any subcontract at the time the list is submitted

Exclusions

- Executive, administrative, and professional employees exempt under 29 CFR 541
- Contracts or subcontracts for services under the simplified acquisition threshold
- Contracts for commodities or services produced or provided by the blind or severely handicapped, and agreements for vending facilities operated by the blind

Exclusions

- Guard, elevator operator, messenger, or custodial services provided to the federal government under contracts with sheltered workshops employing the severely handicapped
- Federal service work constituting only part of employee's job
- Contracts exempted by Federal Agency

Recordkeeping

- The contractor shall maintain copies of any written offers of employment or a contemporaneous written record of any oral offers of employment, including the date, location, and attendance roster of any employee meeting(s) at which the offers were extended, a summary of each meeting, a copy of any written notice that may have been distributed, and the names of the employees from the predecessor contract to whom an offer was made

SEYFARTH SHAW

Common Issues on SCA Contracts

Paid Sick Leave E.O.

- Requires an employee to accrue (earn) not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract
- Contractor could limit an employee's paid sick leave accrual each year to 56 hours, and the contractor could prohibit an employee from having more than 56 hours of paid sick leave available for use at any point in time
- Effectively all but eliminates ability to use PTO
- Applies to "new contracts" after January 1, 2017

How to Properly Classify SCA Workers

- Unless a specific classification is called for in the contract, selecting the proper classification is the responsibility of the contractor
- Use DOL Directory of Occupations
- DOL will not offer advice or confirm classification
- Contractor generally will not be reimbursed for increased cost incurred resulting from of a classification error
- Only if there is no classification in the WD covering a particular type of work to be performed can a conformance can be sought
- DOL disfavors conformances

Paying for Work Subject to Different Wage Rates

- Employee must be paid
  - Highest applicable rate for all SCA hours worked, unless
  - Employer's payroll records or other affirmative proof show periods spent in each class of work
- Also applies when employee works part of workweek on SCA-covered and non-SCA-covered work
  - MUST keep detailed records
  - May need to update payroll/timekeeping system

Speaker

Bryan M. O'Keefe

Partner, Washington, D.C.

(202) 828-3543
bokeefe@seyfarth.com

SEYFARTH SHAW

National Labor Relations Update

Current National Labor Relations Board – Pro-Employer

- In sharp contrast to Obama NLRB, current NLRB is pro-employer and an extremely favorable forum for employers

- Regional offices will vary but requesting review of regional office decisions can be worth the time and effort given pro-employer sentiment in Washington, D.C.

- **General Counsel:** Peter Robb (former management side attorney) (term expires November 2021)

- **NLRB Board Members**
  - Chairman John Ring (former Morgan Lewis attorney) (expires December 2022)
  - William Emmanuel (former Littler attorney) (expires August 2021)
  - Marvin Kaplan (former Republican hill staffer) (expires August 2020)
  - Lauren McFerran (former Democrat hill staffer) (expires December 2019)

NLRA Successorship

- First step: READ THE CBA!
  - If CBA contains a typical successorship clause binding third-party purchasers, seller may be liable to the Union if buyer does not assume the contract
    - If seller does not obtain an assumption, and buyer doesn't assume the CBA, Union will likely file claims against seller for breach of CBA, seek damages, and try to obtain an injunction to prevent the deal
    - The potential litigation and liability risks become factors in the purchase deal

- Second step: consider the nature of the transaction
  - Stock deal – **YES** Buyer is bound by the contracts
  - Assets deal – **MAYBE NOT**
  - Service contract – **MAYBE NOT**

CBA Obligation

- Two-part test to determine whether a company or contractor is a successor to a predecessor with an obligation to recognize and bargain with an incumbent union:

  - whether there is substantial continuity of business operations, i.e. whether the new employer conducts essentially the same business as the predecessor employer; and

  - whether there is continuity in the workforce, i.e. whether a majority of the new employer's substantial and representative complement of employees in an appropriate unit are former employees of the predecessor employer

Even When You Are a Successor…

- Under *Burns*, in an assets deal or service contract situation, an employer is not bound by the substantive terms of a collective-bargaining agreement negotiated by its predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally
- An exception however is in "instances in which it is **perfectly clear** that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." (*Burns*, 406 U.S. at 294-95)
- In *Spruce Up*, the Board restricted the "perfectly clear" exception to "circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing all would be retained without change in their wages, hours or conditions or employment or … has failed to clearly announce its intent to establish a new set of conditions." (*Spruce Up*, 209 NLRB at 195)

Ridegwood Health Care Center, 367 NLRB No, 110 (2019)

- Nursing home property owner changed contractor/management company
- Prior management company was union with CBA in place
- New management company hired 101 employees; 49 were union represented employees from the prior management company, 52 were new employees off the street.
- Of the 83 employees working for the prior management company, 65 applied for jobs at the new management company

Ridegwood Health Care Center, 367 NLRB No, 110 (2019)

- NLRB finds that the new management company violated the law and engaged in a discriminatory hiring scheme to avoid hiring a majority of the prior management company's employees

- The key question is the remedy

- The remedy starts with a case called *Love's Barbeque*, 245 NLRB 78 (1979). In that case, the NLRB found that the remedy when you fail to hire all or substantially all of the predecessor's employees because of anti-union discrimination, the NLRB assumes you would have hired all or substantially all of the predecessor's employees and that employer essentially becomes a "perfectly clear" successor and cannot set initial terms and conditions of employment; the successor is bound to the prior CBA.

Ridegwood Health Care Center, 367 NLRB No, 110 (2019)

- That remedy is then expanded in a case called *Galloway School Lines*, 321 NLRB 1422 (1996). In that case, the NLRB finds that the *Love Barbeque* remedy should apply in a case where the successor employer discriminatorily failed to hire some but not all of the predecessor's employees

- In *Galloway*, the successor employer hired 23 employees from a predecessor unit of 60-65 employees and discriminatorily failed to hire 10 others. For the other 27-32 predecessor unit employees who were not hired, there was no allegation of discrimination or the allegations were dismissed. Still, the NLRB found that the successor was a "perfectly clear" successor and lost the right to set initial terms and conditions

Ridegwood Health Care Center, 367 NLRB No, 110 (2019)

- In *Ridegwood Health Care Center*, the NLRB overruled *Galloway*

- "Any hiring scheme designed to avoid the Burns majority-based successor obligation—even one that involved discriminating against a single employee—would result in not only the imposition of that obligation but also the forfeiture of the usual Burns right to set initial terms of employment unilaterally"

- "The Galloway remedy may be a deterrent to employers contemplating unlawful hiring scheme, but it also risks job loss and consequent financial ruin for all employees in the successor's enterprise. Such a potential outcome threatens the labor relations stability that the Board is statutorily bound to protect"

Labor Unions – Local Worker Retention Statutes

- Many cities and states have passed local “worker retention statutes” requiring that employers retain employees for specific period of time (i.e. 90-days) in certain industries (usually janitorial, service, or grocery industries)

- Legal question as to whether a successorship obligation attaches when Buyer buys Company and is forced to keep on employees because of local law, or when specific period of time ends as mandated by law (i.e. 90 days)

Impact of Local Worker Retention Law

- *GVS Properties*, 362 NLRB No. 194 (Aug. 27, 2015)
  - Compared local worker retention laws to probationary periods of employment
  - Burns successorship obligations can arise **before** the expiration of a mandatory local retention period
  - Footnote 14: “We find that the Respondent made a conscious or voluntary choice to retain its predecessor’s employees when it purchased the buildings and took over the predecessor’s business with actual or constructive knowledge of the requirements of the DBSWPA. Clearly, the Respondent could have chosen either not to purchase the buildings or not to assume responsibility for managing the buildings. The Respondent could also have chosen to negotiate with the seller regarding the effects of the obligation to hire the predecessor’s employees”

Impact of Local Worker Retention Law

- *GVS Properties*, 362 NLRB No. 194 (Aug. 27, 2015)
  - "Consistent with *Spruce Up*, therefore, employers subject to worker retention statutes can avoid "perfectly clear" successor status by announcing new terms and conditions of employment **prior to or simultaneously with** the expression of intent to retain their predecessors' employees"
  - Case was on appeal to the DC Circuit and appeal was dropped, so substantive issue was never decided by a Circuit court; until further notice, assume this is still good case law (even under the Trump NLRB)

Joint Employer Status

- Previously: under Browning-Ferris Industries of California, the Board found an entity could be a joint employer if it:
  - (1) reserved a right of control;
  - (2) exerted "indirect control" on the employees; or
  - (3) exercised control in a "limited and routine" manner

- Broad scope of who could be considered a joint employer

- Board reverses Browning-Ferris in Hy-Brand; however, Board then vacates Hy-Brand in February 2018 because of ethical concerns

Joint Employer Status

- September 2018: board announces Notice of Proposed Rulemaking on Joint Employer issue. Under the Proposed Rule, an employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship. This essentially "returns back" to the pre-Browning Ferris rule

Joint Employer Status

- December 2018: labor union Christmas gift from the D.C. Circuit – D.C. Circuit decides *Browning-Ferris* itself. In a 2-1 decision, Court essentially agrees with the Board's recitation of law and found that it was consistent with the common law. However, DC Circuit remanded the case to identify which specific facts supported its joint-employer finding, especially as it relates to indirect control. Dissenting opinion disagreed with the substantive law and also the Court's timing with the rule pending

NLRB Just Released Regulatory Agenda (May 22, 2019)

- The Board's current representation-case procedures
- The Board's current standards for blocking charges, voluntary recognition, and the formation of Section 9(a) bargaining relationships in the construction industry
- The standard for determining whether students who perform services at private colleges or universities in connection with their studies are "employees" within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. Sec. 153(3))
- Standards for access to an employer's private property

Significant Substantive Changes from the Board

- In December 2017, the Board issued a series of decisions reversing several keystone Obama-era Board decisions
  - **The Boeing Company** overrules **Lutheran Heritage Village-Livonia** (employer work rules)
  - **PCC Structurals, Inc.** overrules **Specialty Healthcare**
  - **Raytheon Network Centric Systems** overrules **E.I. du Pont de Nemours**

Boeing Company and Work Rules

- Previously: Under Lutheran Heritage, work rules violated the Act if an employee would "reasonably construe" the work rule to prohibit Section 7 activities
- Lutheran Heritage test for unlawful work rule:
  - (1) would an employee reasonably construe the language of the rule to prohibit Section 7 activity;
  - (2) was the rule promulgated in response to union or other protected activity; ***or***
  - (3) has the rule been applied to restrict the exercise of employees' Section 7 rights

Boeing Company and Work Rules

- Now: The Boeing Co., 365 NLRB No. 153 (Dec. 14, 2017) ***reversed*** Lutheran Heritage
  - New test: consider two factors when analyzing work rule
    - (1) the nature and extent of the potential impact of the work rule on NLRA rights, ***and***
    - (2) the employer's legitimate justifications for implementation of the rule

Boeing Company and Work Rules

- Test should result in three categories of rules:
  - (1) rules that are lawful because they do not interfere with Section 7 rights or because they potential adverse impact on employees' rights is outweighed by justifications for the rule;
  - (2) rules that warrant individualized scrutiny and balancing of employee rights and employer justifications; and
  - (3) unlawful rules which prohibit or limit NLRA-protected conduct for which the adverse impact on employee rights is not outweighed by the justifications for the rules

PCC Structurals, Inc. and Bargaining Units

- Previously: Under Specialty Healthcare, a bargaining unit identified in the representation petition would be "appropriate" for collective bargaining *unless* the employer could demonstrate that other employees had an "overwhelming community of interest"
- Concerns from management re "micro-units"

PCC Structurals, Inc. and Bargaining Units

- Now: PCC Structurals, Inc., 365 NLRB No. 160 (Dec. 15, 2017) ***reinstates*** the community-of-interest standard from earlier Board precedent
  - Changes the burden of proof – employer does not have to demonstrate "overwhelming community of interest" in order to challenge unit scope
  - Majority: Board has a statutory duty to consider the NLRA rights of all employees, not just those in the petitioned-for unit

Raytheon Network Centric Systems and Unilateral Change

- Previously: Under E.I. du Pont de Nemours, an employer violated Section 8(a)(5) of the Act by making unilateral changes to its group medical plan without first bargaining with the union after the expiration of a CBA
  - Stricter understanding of maintaining *status quo* during period of statutory bargaining duties

Raytheon Network Centric Systems and Unilateral Change

- Now: Raytheon Network Centric Systems, 365 NLRB No. 161 (Dec. 15, 2017) ***reverses*** E.I. du Pont de Nemours
  - New rule: unilateral change is *permitted* as long as the change is "not materially different from what [the employer] has done in the past"
  - Conduct is only a "change" if it materially differs in kind and degree from past practice – must maintain a "dynamic status quo"

Speakers

Jason Burritt

Partner, Washington, D.C.

(202) 828-3596
jburritt@seyfarth.com

Leon Rodriguez

Partner, Washington, D.C.

(202) 828-3572
lerodriguez@seyfarth.com

SEYFARTH SHAW

I-9/E-Verify for Federal Contractors: Old Issues and New Challenges

SEYFARTH SHAW

Why Do Immigration Issues Affect Government Contractors Differently?

Why You Are Different

- National security/law enforcement concerns
- Heightened public scrutiny
- Compliance is a contractual requirement
- E-Verify requirements

Immigration Issues for Government Contractors

- Employment verification issues generally
- E-Verify
- Anti-discrimination requirements under 8 USC § 1324b
- Issues related to employment of foreign nationals

Worksite Enforcement Trends

Increased Compliance, Higher Stakes

- Increase in workplace enforcement in the fiscal year 2018 - which set a **10-year high record** for the number of I-9 audits conducted and criminal charges filed
- FY 2018, the Homeland Security Investigations "opened 6,848 worksite investigations compared to 1,691 in FY17; initiated 5,981 I-9 audits compared to 1,360; and made 779 criminal and 1,525 administrative worksite-related arrests compared to 139 and 172, respectively"
- Employers were ordered to pay $10.2 million in civil penalties for employing unauthorized workers and another 10.2 million in judicial fines, forfeitures, and restitutions

Key Areas of Exposure During an Inspection

- Missing I-9s
- Incomplete I-9 Section 2s
- Failure to reverify or update
- inconsistent or sloppy completion
- Remote employees completed with copies or online
- Unauthorized workers/Fraudulent Documents or other related issues leading to Criminal Liability, including lower level hanky panky
- Willful Blindness
- Electronic I-9 issues, including invalidation of I-9s

Special Issues for Federal Contractors and Sub-Contractors

- Executive Orders 13286 and 13465, FAR 52.222-54
- Flow-down provisions
  - The prime contract
  - Importance of safeguards in contracts

Who is Subject to the E-Verify Federal Contractor Rule

- The contract was awarded on or after the E-Verify Federal contractor rule effective date of September 8, 2009, and includes the FAR E-Verify clause;
- The contract has a period of performance that is for 120 days or more;
- The contract's value exceeds the simplified acquisition threshold;
- At least some portion of the work under the contract is performed in the United States
- Contract Officer determines

Sub-Contractors

- The prime contract includes the Federal Acquisition Regulation (FAR) E-Verify clause;
- The subcontract is for commercial or noncommercial services or construction;
- The subcontract has a value of more than $3,500; and
- The subcontract includes work performed in the United States

Non-FAR Federal Contractors

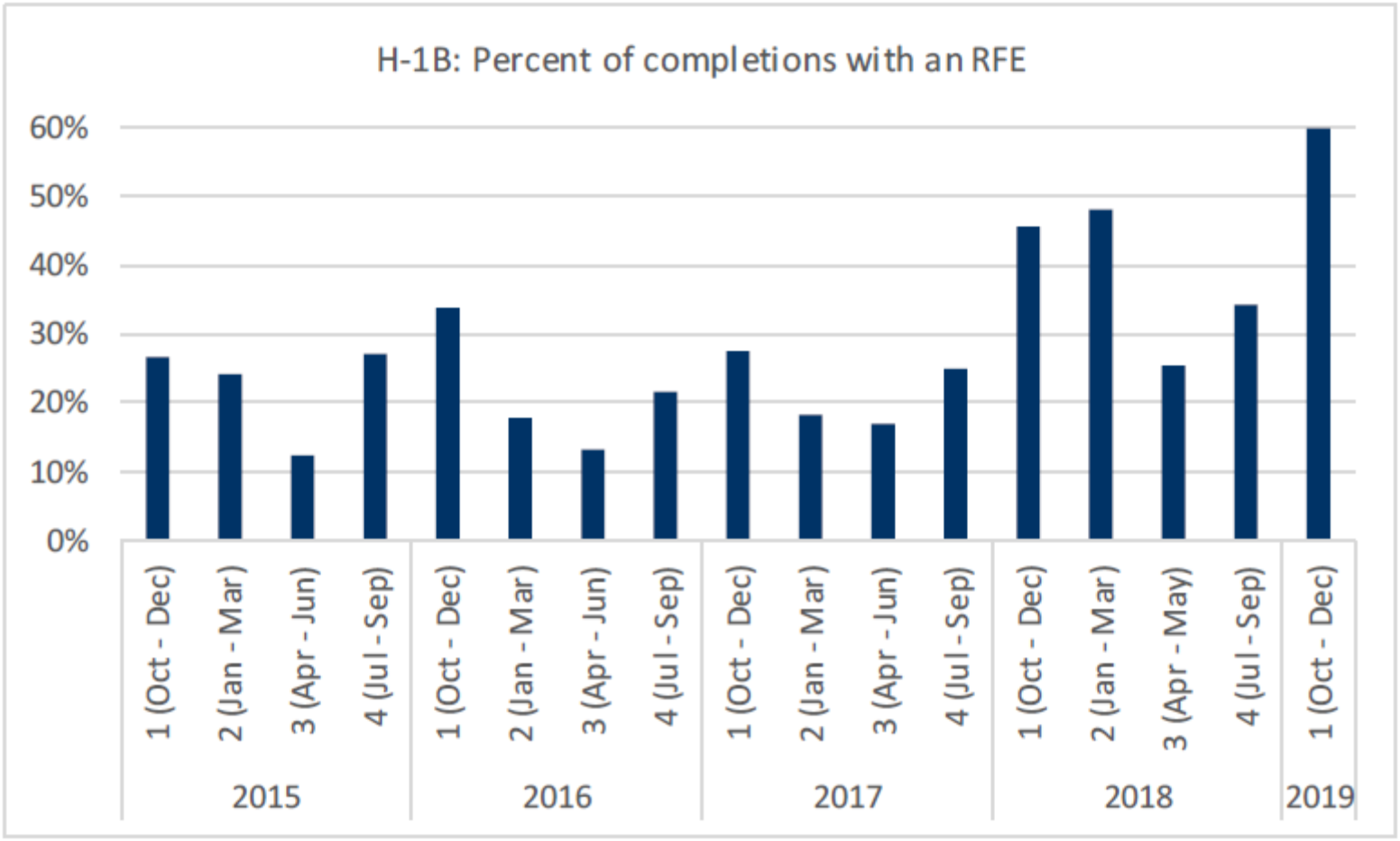
- If already enrolled in E-Verify, may not use E-Verify for current employees performing work on the contract

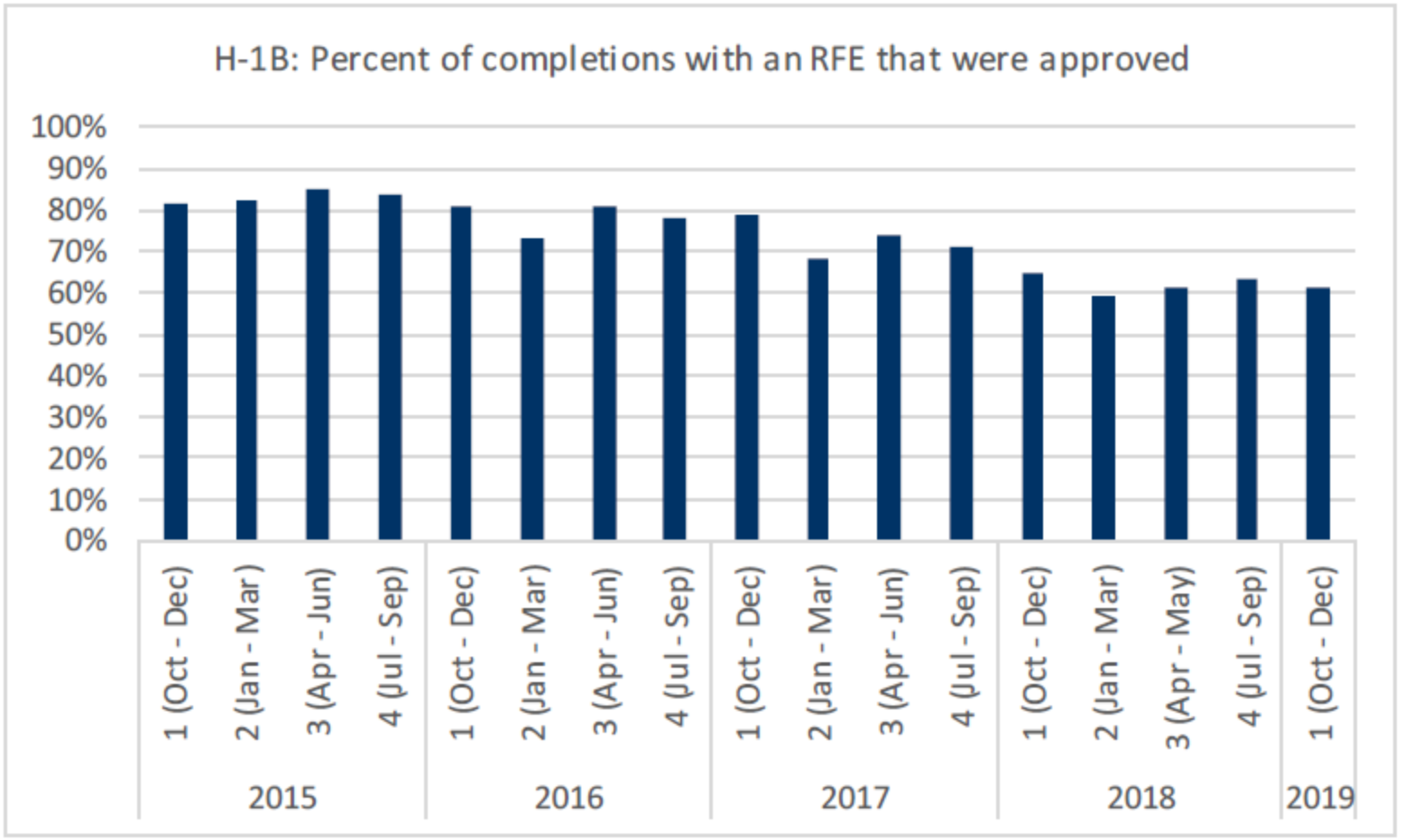
Prime Contractor and Subcontractor Obligations

- General oversight
- Subcontractor to confirm E-Verify enrollment
- Self-employed individuals do not need to complete Form I-9 or use E-Verify

Baseline H-1B Eligibility Rules Changed

- The government has narrowed the definition of “specialty occupation” such that the employer cannot accept any appreciable variety of majors/fields of study for the job
  - For example, for IT professionals, the employer can no longer require a degree in “Computer Science, Mathematics, Engineering or related field” and instead must require a narrower range
- The government is issuing RFEs if the job is entry-level or otherwise falls within the “Level 1” wage rate used by DOL
- The government is issuing RFEs if there is no clear nexus or connection between the degree held by the foreign national and the position (so that, for example, a mechanical or civil engineering degree will no longer – standing alone – support an IT position)





Baseline H-1B Eligibility Rules Changed

- Government has rescinded an employer-favorable policy memorandum that applied to applications involving off-site or third-party work sites and instead requires extensive evidence that is often difficult to obtain, including:
  - evidence of employer's "right to control" the off-site worker;
  - evidence that there is sufficient work to occupy the off-site worker for the three-year period requested in the application;
  - a detailed itinerary showing where the off-site worker will be on what dates

- The government asks for this same evidence when the off-site worker will work at multiple offices of the same employer AND/OR will work from home pursuant to an off-premises worker/telecommute program

Other Quick Updates

Topic	Significance
• OPT Third-Party Placement	• USCIS restricts and scrutinizes off-site employment for OPT recipients
• Pending H-4 EAD Regulation	• Rescission of work authorization regulations for certain spouses H-1B recipients
• Final Guidance on Signature Requirements	• Eliminates POA signatures • Guidance on authorized signators for companies
• Travel Issues	• Travel Ban • Administrative Processing • Electronic devices searches
• Site Visits	• Growing scrutiny of bona fides of H-1B petitions and other petitions, including staffing/contractor issues

SEYFARTH SHAW

Thank You! Questions?

Jason Burritt

Partner, Washington, D.C.

(202) 828-3596
jburritt@seyfarth.com

Bryan O'Keefe

Partner, Washington, D.C.

(202) 828-3543
bokeefe@seyfarth.com

Alexander Passantino

Partner, Washington, D.C.

(202) 828-3595
apassantino@seyfarth.com

Leon Rodriguez

Partner, Washington, D.C.

(202) 828-3572
lerodriguez@seyfarth.com