

OCTOBER 27, 2016 | REGULATORY & GOVERNMENT OVERSIGHT

Fair Pay and Safe Workplaces Rule Temporarily Put on Hold

Following [President Obama's 2014 "Fair Pay and Safe Workplaces" Executive Order \(EO 13673\)](#) — in August the Federal Acquisition Regulatory (FAR) Council in conjunction with the Department of Labor (DOL) issued its controversial [Fair Pay and Safe Workplaces rule](#), which was scheduled to take effect on October 25, 2016. Among other things, this rule, commonly referred to by opponents as the "blacklisting" rule, requires potential federal contractors and subcontractors bidding on any deal worth more than \$500,000 (with several exceptions) to disclose violations of labor law, going back three years. Contracting officers would be required to take those disclosures into account in their decisions as to whether to award or extend contracts, based on whether they showed "serious, repeated, willful or pervasive" labor law violations. Our OSHA group previously blogged about this rule when it was in its proposed stages. Although the final rule does contain some important changes from the proposed rule, such as a phased-in reporting requirement and unique subcontractor reporting obligations, you can check out that [blog post](#) for insight on the potential impact of this Rule from an OSHA perspective.



On October 7, 2016, several trade groups (including Associated Builders and Contractors Inc. and the National Association of Security Companies) filed a lawsuit requesting a Temporary Restraining Order and Preliminary Injunction in which they sought to enjoin the implementation of EO 13673, the FAR regulations, and corresponding guidance from the DOL. In the lawsuit, the plaintiffs argued that the rule would violate contractors' First Amendment and due process rights and harm fair and open competition for federal contracts in the marketplace by forcing bidders to disclose allegations of labor law violations that were not yet fully adjudicated. The suit also argued that the rule constituted an unprecedented overreach of executive authority into matters previously controlled by Congress.

On October 24, U.S. District Judge Marcia Crone of the United States District Court for the Eastern District of Texas accepted the arguments set forth by the plaintiffs and granted a nationwide [preliminary injunction](#). In so doing, she blocked the "blacklisting" portion of the rule from taking effect. Specifically, Judge Crone agreed with the trade groups' argument that the disclosure requirement was unconstitutional, holding that that the executive branch exceeded its authority and violated the free speech and due process rights of federal contractors by compelling them to report and defend against non-final agency allegations of labor law violations without being

entitled to a hearing at which to contest such allegations. In her decision, Judge Crone noted the groups that initiated the lawsuit had “properly demonstrated immediate and ongoing injury to their members” if the rule was allowed to take effect. Judge Crone also found that contractors would face significant burdens in implementing the compliance scheme necessary to comply with the rule as proposed.

Although this is a significant victory for government contractors, this victory may prove to be only temporary. Thus, employers need to proceed with caution. First, the injunction does not affect the rule’s pay transparency provision, which requires federal contractors to provide wage statements and information to workers regarding their hours worked, overtime hours, pay, and any additions or deductions to their pay starting on January 1, 2017.

Second, although the granting of a preliminary injunction means that the court deems a plaintiff’s case to have a “substantial likelihood of success on the merits,” there is certainly no guarantee this “blacklisting” rule will be permanently struck down. Indeed, the U.S. Department of Justice is on record stating it is “confident that the rule and guidance are legally sound” and is currently considering its options for its next steps, which in all likelihood will consist of an appeal. If Judge Crone’s ruling is narrowed or reversed on appeal, or if an amended rule is issued, contractors would likely be required to implement the rule’s requirements immediately. In fact, it is even possible that, if the rule is reinstated, the government could look at a contractor’s conduct *during* the injunction period. Thus, contractors should not discard the preparations they have made for implementation of the rule. Rather, they should continue to prepare for compliance with the expectation that the blacklisting rule will continue to exist in some form or another. If it turns out that a permanent injunction is issued or otherwise upheld on appeal, then at that point federal contractors could actually celebrate. For now, however, it is more of a slight sigh of relief, and a waiting game.