Court Puts Blacklisting Rules On Hold

FEDERAL CONTRACTORS CAN PROCEED AS NORMAL FOR THE TIME BEING

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In a somewhat surprising development, a federal court in Texas blocked the government from implementing most of the federal contractor "blacklisting" rules that were slated to go into effect on October 25, 2016. The final rules and guidance implementing the Fair Pay and Safe Workplaces Executive Order, signed by President Obama in July 2014 and published in August 2016, would have required contractors to disclose violations of numerous workplace laws, such as Title VII and the FLSA, when bidding for work with the government. But by virtue of Judge Marcia Crone's October 24 order, contractors can carry on and proceed without present concern about most of the blacklisting rules.

Lawsuit Leads To Employer Victory

The trade group Associated Builders and Contractors of Southeast Texas filed a lawsuit earlier this month in a last-ditch effort to prevent the rules from going into effect. The group argued that the rules violated the law by adding an undue burden to employers, and that the Obama administration exceeded its authority when it pushed them forward.

After several whirlwind weeks of competing arguments and legal briefs filed by both sides, the judge sided with employers in a 32-page order issued earlier this week that blocked most of the blacklisting rules. Judge Crone said the federal government appeared to exceed its authority when it issued the rules. More importantly, she said that the blacklisting rules ran afoul of current labor and employment laws by creating additional punishments for violations that already carried their own consequences. At the same time, as the judge said, they do not permit contractor disqualification "based solely upon 'administrative merits determinations' that are nothing more than allegations of fault asserted by agency employees and do not constitute final agency findings of any violation at all."

Judge Crone further ruled that the mandatory disclosures violate employers' constitutional free speech rights, saying "the First Amendment protects not only the right to speak but also the right not to speak." Finally, she said the rules improperly limited employers' rights by barring arbitration agreements – even existing agreements – in certain circumstances. "Such overstepping of authority [by the Executive Branch] in the guise of enhancing federal procurement practices," she concluded, "is unwarranted."

Paycheck Transparency Notice Provisions Survived The Challenge

However, the victory for employers was not complete. The paycheck transparency provisions of the rules will go into effect as proposed. Beginning with all contracts in effect on January 1, 2017, contractors must provide notice to all workers each pay period of hours worked, overtime hours, rate of pay, gross pay, and deductions, broken down on a weekly basis even if the workers are paid on a bi-weekly or semi-monthly basis. This applies to all workers, not just employees.

Also, under the terms of the rules, exempt employees must be given notice of their exempt status prior to beginning work on the contract, and independent contractors must be given notice at the time the relationship is established prior to their beginning work on the contract. The independent contractor announcement must be provided in a separate notice.

The new rules also state that contractors must provide their workforce with these wage statements in languages other than English if a significant portion of their workers speak a language other than English. Finally, contractors must require their subcontractors to provide the same information for subcontracts over $500,000.

If a contractor is already complying with a substantially similar state rule, that is deemed sufficient under the new rules.

What Does This Decision Mean For Contractors?

Simply put, as a result of this ruling, for now, federal contractors can continue to compete for federal contracts without disclosing workplace law violations and opening themselves up to additional scrutiny and punishment. Employers can feel comfortable entering into contracts on or after October 25, 2016 – even large contracts of $50 million or more which were to be included in the initial level for the phased-in requirements of the rules – without having to report prior violations of the 14 federal laws covered by the blacklisting rules.

Of course, the government is likely to appeal this decision with the hopes of reinstating all of the rules and getting them back on track at some point in the future. We will continue to monitor the litigation and will update contractors if the status of the rules change.

In the meantime, some contractors may wonder at this point whether they should report adjudicated violations of the law to federal agencies with whom they are contracting. At this point, the answer is "not necessarily." Some alleged violations of federal workplace law do not require any reporting by the employer. Typically, the reporting has been made by the government agency rather than requiring the employer to self-report, as had been intended by the blacklisting rules. Unless the blacklisting rules are reinstated by an upper court, there is no need for a contractor to go the extra mile and self-report if not already required.

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This Legal Alert provides an overview of a specific federal court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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