Blacklisting Rules Blocked By Trump's Signature

OBAMA ADMINISTRATION'S FAIR PAY AND SAFE WORKPLACES RULE FALLS VICTIM TO CONGRESSIONAL DISAPPROVAL RESOLUTION

Insights
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Today, President Trump signed his approval to a joint resolution passed by Congress disapproving of Executive Order 13673, better known as the "Fair Pay and Safe Workplaces" executive order, and more commonly referred to as the "blacklisting" rules (a term which includes regulations and guidance issued in conjunction therewith). President Trump's signature sets ablaze yet another piece of the Obama administration's legacy, permanently blocking rules which would have required federal contractors to disclose violations of numerous workplace laws when bidding for work with the government.

What Did The Rules Require?
The blacklisting rules required companies bidding or submitting offers for federal contract work over the threshold amount to disclose administrative determinations, arbitral awards and decisions, and civil judgments issued against them in the preceding three-year period. A number of potential violations were subject to the rules, including those related to the Fair Labor Standards Act (FLSA), Occupational Safety and Health Act (OSHA), National Labor Relations Act (NLRA), the Family and Medical Leave Act (FMLA), Title VII of the Civil Rights Act of 1964 (Title VII), Americans with Disabilities Act of 1990 (ADA), and many more. Companies determined to have serious, repeated, willful, or pervasive violations were put at risk of being denied federal contract work (hence the term "blacklisted").

With the federal government being the single largest consumer of goods and services in the United States, the rule was set to impact a massive number of employers. A regulatory impact analysis calculated the costs on federal contractors to exceed $458 million in the first year alone.

Proponents argued that taxpayer dollars should not be used to hire companies that violate the law. They contended that responsible contractors meeting their legal obligations should not be required to compete with contractors submitting "low-ball" bids based on cost savings achieved from "skirting" the law.

Opponents argued that the rules empowered agencies to deny federal contracts based on *preliminary* and *purported* violations because they required disclosure of decisions without respect to when the underlying conduct occurred – and regardless of whether the decision had been

finalized or was still subject to appeal. Federal contractors were also required to make disclosures without regard to whether an actual federal contract was involved, whether a hearing had been held, or an enforceable decision issued. Employers believed the rules would have forced them to enter into unfair settlements in order to avoid the risk of a violation determination, emboldening plaintiffs' attorneys to bring weak claims but seek high damages.

When Did The Rules Go Into Effect?
They never did. The blacklisting rules were initially set to take effect on October 25, 2016. However, at the eleventh hour, the most controversial portions of the rules were halted by Judge Marcia Crone of the United States District Court for the Eastern District of Texas.

Judge Crone noted the National Labor Relations Board (NLRB) issues more than 1,200 unfair labor practice complaints each year, a number of which are ultimately dismissed for lack of merit. Similarly, the Equal Employment Opportunity Commission (EEOC) issues more than 3,000 reasonable cause notices each year, but litigates only 150 such cases, a significant percentage of which are ultimately found to lack merit. Both categories would have been included in the mandatory disclosures.

Before President Obama left office, the Department of Justice filed an appeal seeking to resurrect the blacklisting rules. However, once President Trump took control of the White House, many expected his administration to back off the rules and shelve them. Today's action accomplishes just that.

President's Signature Puts Final Nail In Coffin
Today's signature of the congressional disapproval is a strategic move by the president and Congress to reduce employer burdens left behind by the Obama administration. President Trump could have rescinded the executive order or instructed the Department of Justice to withdraw its appeal. However, congressional disapproval pursuant to the Congressional Review Act (CRA) allows Congress to not only permanently block its implementation, but also prevents advancement of similar regulation in the future.

President Trump's signature marks a bittersweet victory for employers, many of whom had already begun preparing for compliance through preliminary assessments and new information collection procedures. However, all things being equal, federal contractors can breathe a sigh of relief knowing that they will not have to reveal skeletons in the closet when bidding for new government contracts.

What's Next?
More Obama administration legacies are expected to be dismantled in the upcoming months. In fact, the president recently signed an executive order requiring every federal agency to establish a "Regulatory Reform Task Force" to eliminate what he considers to be unnecessary and burdensome regulations hampering the American economy. Coming on the heels of a meeting with the Business Roundtable, a conservative collection of management executives formed to promote pro-business

Roundtable, a conservative collection of management executives formed to promote pro-business public policy, it appears a number of workplace regulations could be on the chopping block. Reconsideration may include federal contractor minimum wage, paid sick leave, and pay equity initiatives, to name just a few. We will keep you apprised of new updates as they arise and help you keep your fires under control.

For more information, contact any member of our Affirmative Action and Federal Contract Compliance Practice Group or your regular Fisher Phillips attorney.

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