

CLIENT ALERT

District Court Judge Blocks Fair Pay and Safe Workplaces Final Rule

OCTOBER 28, 2016

On October 24, 2016, the United States District Court for the Eastern District of Texas dealt a (preliminary) blow to President Obama's Fair Pay and Safe Workplaces Executive Order, the Federal Acquisition Regulations (FAR Rule), and the Department of Labor's Guidance (DOL's Guidance). Judge Marcia Crone issued a nationwide preliminary injunction, enjoining enforcement of those portions of the FAR Rule that require new reporting and disclosure requirements and prohibit pre-dispute arbitration clauses in employment agreements. Judge Crone concluded that a contractors' First Amendment and Fifth Amendment rights, along with their freedom to arbitrate, would be irreparably harmed if certain provisions of the FAR Rule were to go into effect. Judge Crone, however, declined to enjoin the enforcement of the "paycheck transparency requirement," which requires contractors to provide their employees with detailed wage statements. The FAR Rule was scheduled to take effect on October 25, 2016.

On July 31, 2014, President Obama signed the Fair Pay and Safe Workplaces Executive Order, which requires certain federal contractors and subcontractors to publicly disclose labor law violations, and any accompanying efforts to correct such violations, in order to ensure that only responsible and compliant contractors are awarded federal contracts. See [President Obama Issues Fair Pay and Safe Workplaces Executive Order](#). According to the Order, companies who apply for a federal contract where the estimated value of the goods and services exceeds \$500,000 must disclose "any administrative merits determination, arbitral award or decision, or civil judgment" rendered against the company within the preceding three year period pursuant to any of the fourteen federal labor statutes covered in the Order. The Order directed the FAR Council to propose and enact any regulations deemed necessary to carry out the Executive Order and required the DOL to provide guidance to agencies in their efforts to determine whether labor law violations were issued for "serious, repeated, willful, or pervasive" violations.

On August 25, 2016, the DOL and the Federal Acquisition Regulatory Council (FAR Council) implemented President Obama's Fair Pay and Safe Workplaces Executive Order by publishing both the FAR Rule and the DOL's Guidance. See [Final Rule and Guidance Issued on Fair Pay and Safe Workplaces Order](#). The FAR Rule requires contractors to publicly disclose information concerning "labor law decisions" regardless of whether these decisions are final. The FAR Rule also prohibits pre-dispute arbitration clauses in employment agreements that concern Title VII disputes or torts arising out of or related to sexual harassment or sexual assault. In addition, the FAR Rule requires contractors to provide their employees with "a document with information concerning that individual's hours worked, overtime hours pay, and any additions made to or deductions made from pay."

Soon after the FAR Rule and the DOL's Guidance were published, Plaintiffs Associated Builders and Contractors Inc. and the National Association of Security Companies filed suit in an effort to invalidate the Executive Order, the FAR Rule and the DOL's Guidance. The Plaintiffs argued that the Executive Order, the FAR Rule and the DOL's Guidance unconstitutionally exercised executive authority over matters controlled by Congress. In addition, the Plaintiffs alleged that these provisions compelled speech in violation of the First Amendment, deprived contractors of their due process rights under the Fifth Amendment, violated the Federal Arbitration Act (FAA), and imposed arbitrary paycheck transparency requirements.

In the court's order granting injunctive relief, Judge Crone expressed substantial doubt concerning the validity of the Executive Order, the FAR Rule, and the DOL's Guidance. The court first held that the executive branch likely exceeded its authority by granting contracting agencies the power to require contractors to publicly disclose allegations of labor law violations. The court found that this authority conflicts with current labor laws enacted by Congress, which provide debarment for contractors who violate labor laws only after full hearings and final adjudications are completed.

Next, Judge Crone held that the Executive Order, the FAR Rule, and the DOL's Guidance violate the First Amendment by compelling federal contractors to publicly disclose violations of any of the applicable 14 federal labor laws. The FAR Rule requires the reporting of such violations regardless of whether these violations have been fully adjudicated. Therefore, Judge Crone concluded that contractors would have to disclose court actions, arbitrations, and administrative merits determinations—which adversely affect their public reputation—regardless of the severity of the alleged violation and irrespective of whether such allegations were later settled or dismissed. While the Executive Order's stated aim was to ensure that only responsible and compliant contractors were awarded contracts, Judge Crone held that these public disclosures were not “narrowly tailored” to achieve such an aim. In fact, Judge Crone noted that the government failed to show that the public disclosure of non-adjudicated labor law violations related to poor performance on government contracts.

Judge Crone also held that the FAR Rule violated the due process rights of contractors by requiring them to report and to defend labor law violations without the opportunity to refute such allegations at a hearing. The court reiterated that all of the labor laws at issue give employers the right to a hearing before an administrative law judge, the ability to appeal such determinations to the head of the applicable agency, and the possibility of judicial review before the enforcement of the judgment occurs.

In addition, Judge Crone took issue with the process by which a contracting officer—along with the newly created agency labor compliance advisors (ALCAs)—determine whether a contractor has demonstrated a lack of integrity and business ethics. In particular, the FAR Rule and the DOL's Guidance puts the determination in the hands of “inexpert” contracting officers and “questionably qualified” ALCAs, who within three days must complete a thorough examination of all relevant documents and rulings relating to the labor violation. According to Judge Crone, the complexity of such analyses could lead to an arbitrary and inconsistent assessment of contractor responsibility. Moreover, Judge Crone highlighted the substantial costs that contractors would incur by disclosing such violations. Finally, Judge Crone held that the Executive Order and the FAR Rule's prohibition on mandatory, pre-dispute arbitration agreements entered into between employees and contractors violated the FAA. Because the FAA requires arbitration agreements to be enforced in accordance with their terms, the Executive branch—absent Congressional authority—may not abrogate this requirement.

The preliminary injunction is a significant victory for covered contractors as it temporarily stays the enforcement of both the reporting disclosure requirements and the prohibition on pre-dispute arbitration clauses. We expect the government to immediately appeal the preliminary injunction to the Fifth Circuit Court of Appeals. Given the conservative nature of the Fifth Circuit, there is a reasonable likelihood that the will uphold the preliminary injunction if it is appealed. However, in the event that either the preliminary injunction is successfully appealed or the government ends up prevailing in the overall case, it is possible the government will take the position that covered contractors are responsible for violations of the FAR Rule dating back to October 25, 2016. Therefore, covered contractors should continue to plan for the potential enforcement of the rule.

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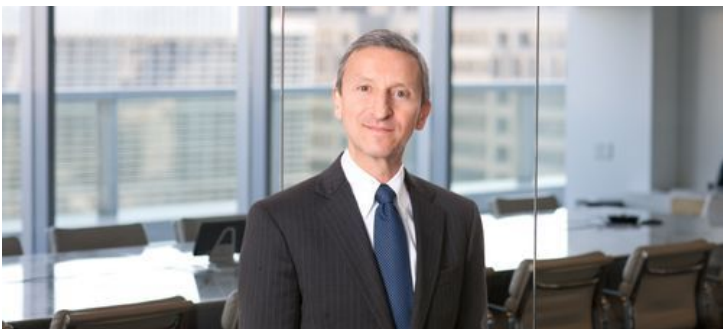
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