"Blacklisting" Executive Order Stayed by District Court Judge

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On October 24th, 2016, United States District Judge Marcia A. Crone issued a preliminary injunction that suspends the implementation of certain portions of President Obama's Executive Order 13673, called the Fair Pay and Safe Workplaces Executive Order, that otherwise would have gone into effect on October 25, 2016. Specifically, the court enjoined two key provisions in the new regulations that would require government contractors and subcontractors to report adverse labor law determinations and that would prohibit pre-dispute arbitration agreements regarding matters under Title VII of the Civil Rights Act and torts based on sexual assault or harassment. The new regulations, commonly called the "blacklisting" rule by opponents, could be used to preclude otherwise qualified government contractors from receiving awards of federal procurement contracts, as more fully described in Pillsbury's August 30, 2016 Client Alert.

The case, *Associated Builders and Contractors of Southeast Texas v. Rung*, was brought in the U.S. District Court for the Eastern District of Texas. In granting the preliminary injunction, the court looked favorably on the challengers' likelihood of success on the merits of the case. The court reasoned that federal agencies had "departed from Congress's explicit instructions" when requiring contractors to disclose even non-final adverse labor law determinations to obtain or retain federal contracts. The court also opined that the disqualification of government contractors and subcontractors based on "administrative merits determinations" seems to conflict with other labor laws that require debarment procedures only after full hearings and final adjudications. In addition, the court stated that requiring disclosure of labor law "violations," "without regard to whether such violations have been finally adjudicated after a hearing or settled without a hearing, or even occurred at all," appears to violate the First Amendment by compelling speech. Observing that "the First Amendment protects not only the right to speak but also the right not to speak," the court ruled that the Executive Order's "unprecedented requirement" infringes on contractors' First Amendment rights and "must be preliminarily enjoined to prevent irreparable harm to Plaintiffs' members from compelled speech that is not narrowly tailored to

achieve any compelling government interest." The court also cited due process concerns and circumstances that "evince arbitrary and capricious rulemaking" as reasons to issue the preliminary injunction.

The court rejected the plaintiffs' request for a preliminary injunction against the "paycheck transparency" requirements in the regulations, finding that the plaintiffs had not demonstrated either a likelihood of success in their challenge or irreparable harm from those provisions taking effect on January 1, 2017. Thus, the enforcement of paycheck provisions will go forward while the issue is litigated in District Court. These provisions require covered contractors, including subcontractors, to provide "all individuals performing work" under the contract with a "document" each pay period containing "information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay." According to the Department of Labor guidance, "this means that a wage statement must be provided to every worker subject to the FLSA, all laborers and mechanics subject to the DBA, and all service employees covered by the SCA—regardless of the contractor's classification of the worker as an employee or independent contractor."

The preliminary injunction staying enforcement of the disclosure requirements and arbitration agreement ban delays implementation of these significant changes and maintains the status quo, effective immediately, but it is by no means permanent. The same District Court that decided the preliminary injunction is set to hear the case to make a final ruling, and the District Court could decide differently at the close of the case. In addition, the Obama Administration has the right to appeal the preliminary injunction immediately to the Fifth Circuit Court of Appeals even before the District Court hears the case, under 28 U.S. Code § 1292. Thus, the final fate of the blacklisting regulations is uncertain. Nonetheless, for now, contractors have received a reprieve from implementation of the most controversial and burdensome aspects of the new regulations.

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