

One Minute Memo®



Texas Judge Grants Preliminary Injunction to Government Contractors Challenging “Blacklisting” Executive Orders

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Seyfarth Synopsis: *The first of several anticipated challenges to Executive Order 13673, “Fair Pay and Safe Workplaces,” has resulted in a preliminary injunction staying the implementation of some - but not all - aspects of the Executive Order and its implementing regulations. In a significant victory for the government contracting community, the Associated Builders and Contractors of Southeast Texas won an injunction staying the application of the reporting and disclosure requirements, as well as the prohibition on entering into mandatory pre-dispute arbitration agreements. The Judge left the paycheck transparency provisions in effect, however, and as a result, government contractors must still plan for compliance with those requirements.*

In a significant victory for the government contracting community, a federal judge sitting in the U.S. District Court for the Eastern District of Texas partially stayed the implementation of Executive Order 13673, “Fair Pay and Safe Workplaces,” referred to in the government contracting community as the “Blacklisting Order.” As discussed in more detail [here](#), the Blacklisting Order would:

1. Require government contractors to disclose “labor law violations” under fourteen different statutes and Executive Orders when bidding for or modifying contracts;
2. Prohibit employers from entering into mandatory pre-dispute arbitration agreements with employees; and
3. Require certain disclosures to independent contractors and employees concerning their employment status and information related to wages and hours worked.

When the White House issued the Executive Order, the government contracting community expressed concerns about the substantial burdens it would impose on businesses and noted that the Order seemed to exceed the limits of Executive power. Judge Marcia Crone, a federal judge in Texas, agreed. Late on October 24, 2016, Judge Crone issued a preliminary injunction blocking: (1) the labor law violations disclosure requirements and (2) the prohibition against entering into mandatory pre-dispute arbitration agreements. The preliminary injunction applies to all federal contractors subject to the Executive Order

and it blocks all aspects of the requirements and the implementing regulations, except the paycheck transparency provision.

The Plaintiffs, an association of government contractors in Texas, argued that the Executive Order and its implementing regulations and guidance exceeded Executive power and would impose irreparable harm on their businesses. Judge Crone found the Plaintiffs' arguments compelling with regard to the reporting and disclosure requirements and arbitration clause prohibitions, and stayed the implementation of those requirements.

In her decision, the Judge addressed several of the arguments raised by the contracting community Plaintiffs and the government Defendants.

- The Judge found that the Executive Order and its implementing regulations and guidance likely exceeded the limits of Executive power.
- She noted that fourteen statutes and Executive Orders of which the Blacklisting Order requires contractors to publicly disclose "violations" all have their own detailed enforcement mechanisms and penalties.
- The Judge noted that under the Blacklisting Order, a contractor could face debarment or disqualification even if it was contesting a violation or over nothing more than the issuance of a citation by an individual government agency official.
- Judge Crone also found persuasive the Plaintiffs' arguments that the provisions of the Executive Order and Final Rule which restrict or prohibit certain mandatory pre-dispute arbitration agreements are in violation of the Federal Arbitration Act and the government's general policy in favor of arbitration.
- The Judge found the reporting and disclosure requirements to be "compelled speech" that likely violates the contractors' First Amendment rights and also agreed that the Executive Order likely violates contractors' Due Process rights 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."
- Judge Crone found that the Executive Order is likely arbitrary and capricious "in view of the complex, cumbersome, and costly requirements . . . which hamper efficiency without quantifiable benefits."

Although the contracting community's victory is substantial, it was not complete, as Judge Crone left the paycheck transparency provisions to take effect on their regular schedule (starting on January 1, 2017). The paycheck transparency provisions require that contractors with procurement contracts of \$500,000 provide their employees with a document disclosing "the individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay." For exempt employees, the document may omit information concerning overtime hours worked so long as the individual has been informed of his or her exempt status. Covered contractors in states with equivalent paycheck transparency laws, such as New York and California, are deemed to be in compliance with the Executive Order's requirements so long as they comply with their state's paycheck transparency law. Contractors should also be aware that there is always a possibility that the preliminary injunction may be lifted - whether by the Fifth Circuit or another federal court - and in that event, the reporting and disclosure requirements could be reinstated. For that reason, covered contractors may wish to continue to collect data in case they find themselves once again subject to the reporting and disclosure obligations.

The request for - and subsequent partial granting of - a preliminary injunction staying the implementation of certain provisions of the Blacklisting Order is only the opening salvo in what is likely to be a long fight between the contracting community and the federal government. As we discussed in our [previous alert](#) on the topic, multiple court challenges are possible, and the Blacklisting Order's provisions may appear before Congress at some point.

Meanwhile, thanks to Judge Crone's preliminary injunction, the reporting and disclosure requirements and the prohibition on mandatory pre-dispute arbitration agreements are enjoined until further notice, while we continue to closely monitor developments. Preliminary injunctions typically remain in effect at least until the conclusion of the underlying litigation. The Plaintiffs may petition the court for the preliminary injunction to become permanent, blocking the government from enforcing the reporting and disclosure requirements and the prohibition on mandatory pre-dispute arbitration agreements (unless the injunction is overturned). Or the government Defendants may appeal to the U.S. Court of Appeals for the Fifth Circuit, perhaps paving the way for an ultimate ruling by the U.S. Supreme Court. The ultimate resolution of the contracting community's concerns about the Blacklisting Order remains to be seen. One thing is clear, however: while government contractors should be pleased with their victory in Texas, they must still plan to comply with the paycheck transparency provisions. The contracting community has won the first battle, but the war over blacklisting continues.

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