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Senate Passes Disapproval Resolution of "Blacklisting" Regulations

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***Seyfarth Synopsis**: By a vote of 49-48 last evening by the U.S. Senate, both Houses of Congress have now moved to rescind the regulations issued pursuant to President Obama's Executive Order 13678, entitled Fair Pay and Safe Workplaces but popularly referred to as the "Blacklisting" Order, which required government contractors to report all potential labor violations as well as disclose the basis of pay to employees working on government contracts. If President Trump signs the rescission resolution, as he is expected to do, the regulations will be rescinded. Under the Congressional Review Act, if a regulation is subject to rescission, the Executive Branch cannot reissue the same or similar regulation absent legislative authorization.*

On March 6, 2017, by a vote of 49 to 48, the U.S. Senate approved a joint resolution of disapproval, S.J. Res. 12, to rescind the Final Rule implementing President Obama's Executive Order 13673, "Fair Pay and Safe Workplaces." The U.S. House of Representatives passed House Joint Resolution 37 on February 2, 2017, rescinding the regulations issued under the Executive Order. Both the Senate disapproval action and the House disapproval action were pursuant to the Congressional Review Act (CRA), which permits Congress to pass legislation rescinding a particular regulation under certain restrictions. As both houses of Congress have passed disapproval resolutions under the CRA, the rescission resolution will now make its way to the President's desk for signature.

If President Trump signs the legislation, as he is expected to do, the regulations implementing E.O. 13673 will be nullified. The Executive Order itself will remain in effect until President Trump takes action himself to rescind it - however, without its implementing regulations in force, the "Blacklisting" Order will not have any implementation requirements. Moreover, the CRA will preclude any future attempt by Executive agencies to promulgate the regulations requiring the same or similar procurement prohibitions and disclosures, without Congressional action allowing the regulations.

The "Blacklisting" Order has already been stayed in large part. As discussed here, last October Judge Marcia Crone, a federal judge sitting in Texas, issued a nationwide preliminary injunction blocking the requirement that contractors disclose "labor law violations" and the prohibition against entering into mandatory pre-dispute agreements with employees. Judge Crone's order left in place the paycheck transparency provisions requiring contractors to provide regular statements disclosing wages and benefits to employees. President Trump's expected signature to Congress's rescission regulation will render the paycheck transparency provisions null and void as well.

Referred to as the "Blacklisting" Order, as discussed in more detail here, the Executive Order and its implementing regulations would have:

1. Required certain government contractors to disclose "labor law violations" under fourteen different statutes and Executive Orders when bidding for or modifying contracts;

2. Prohibited employers from entering into mandatory pre-dispute arbitration agreements with employees; and

3. Required certain disclosures to independent contractors and employees concerning their employment status and information about wages and hours worked.

The "Blacklisting" Order has been criticized by the employer community and employer associations because of the additional financial burdens it imposed on covered contractors, the risk to reputation and business from public disclosure of alleged violations before they are proven, and the fact that agencies already had enforcement mechanisms in place to ensure contractor compliance. Thus the Congressional action under the CRA will remove these supplementary requirements for federal contractors and the additional responsibilities given to the contracting agencies and the department of Labor.

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