

## Judge Temporarily Blocks "Blacklisting" Rules

Large government contractors on Monday received a reprieve, at least preliminarily, from the implementation of the U.S. Department of Labor's so-called "blacklisting" rules, under which covered contractors (including subcontractors) would be required to report to the government a panoply of labor violations. On October 24, a federal judge in the Eastern District of Texas granted a preliminary injunction blocking the portions of the rules addressing labor law violation disclosure requirements and restriction on the use of arbitration agreements. The DOL issued the rules under President Obama's Executive Order on "Fair Pay and Safe Workplaces," and they were scheduled to go into effect October 25. The case is *Associated Builders and Contractors of Southeast Texas, et al., v. Rung*, case no. 16-cv-00425-MAC (E.D. Tex.).

The injunction bars the DOL from requiring large government contractors to report past and current labor violations under a variety of federal laws, including "administrative merits determinations" reached by federal agencies without a full hearing, whenever they seek to bid for government work. Such reports would be reviewed by contracting agencies and could be used to declare a contractor "non-responsible" and ineligible to bid on contracts, even if some or all of the labor "violations" had not been finally adjudicated. And while the government has argued that the regulations only apply to "serious, repeated, willful or pervasive" violations, those assurances have done little to allay contractors' and subcontractors' concerns that they will be unjustly punished based on allegations that have not been fully scrutinized and adjudicated in an adversarial proceeding.

### Overview of the Reporting Requirements at Issue

The Fair Pay, or "blacklisting," rules would require government contractors and subcontractors to disclose to the DOL all labor law violations that occurred within the last three years, although there is a phase-in period with a shorter reporting period. Significantly, settled cases, civil judgments, arbitration awards, and administrative merits determinations that a violation of a federal labor law occurred all fall under the umbrella of "labor law violations" under the rules. As a practical matter, this means that EEOC reasonable cause determinations, NLRB complaints, Wage-Hour WH-56 unpaid wages forms, OSHA citations, and OFCCP show cause notices, all defined as administrative merits determinations, must be reported even if the case is settled. Many employers worry about future government access to such reports, and whether, once created, they may be discoverable in private litigation.

The reporting requirement is limited to contracts and subcontracts of \$500,000 or more, except for contracts for commercial-off-the-shelf (COTS) items. If these regulations are enforced, then essentially the only time reporting will not be required is when the employer opts to litigate the matter and is victorious at trial. Therefore, determining whether to settle an EEOC or DOL wage-hour complaint would become increasingly important, as it is unclear what impact a settled violation report will have on contracting officers' decision-making in awarding contracts.

The rules also require contractors to notify employees about their hours, indicate whether the workers are exempt from overtime payment, and provide workers classified as independent contractors with notice of that status. The Texas Court did not enjoin these so-called "paycheck transparency" requirements, which are slated to go into effect on January 1, 2017. The paycheck transparency requirements will be included in solicitations for contracts over \$500,000 and will apply to individuals performing work under the contract or subcontract.

### The Government's Stumbling Block

In granting the preliminary injunction, the court reasoned that many of the laws subject to the new



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reporting requirement prohibit adverse action against an alleged violator, such as debarment or denial of a government contract, without a full, contested hearing before an impartial tribunal. To the extent the new rules ignore the legislative requirements for pre-debarment hearings, the court reasoned, they are impermissibly inconsistent with Congressional intent and, therefore, cannot be enforced. The court also held that requiring contractors to report violations constituted “compelled speech” in violation of the First Amendment.

Whether a permanent injunction against the rules will be issued remains to be seen. The DOL could immediately appeal the preliminary injunction order, but no appeal had been filed at the time of this writing.

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**Cozen O'Connor's Labor & Employment attorneys are available to provide counsel and guidance on the issues discussed in this Alert.**