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## **Federal Judge Issues Nationwide Preliminary Injunction Against the Fair Pay and Safe Workplaces Rule and DOL Guidance**

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Preliminary Analysis: Not Legal Advice  
By: Christine V. Williams

### **Executive Summary**

On Monday, October 24, 2016, a federal judge out of the Eastern District of Texas, issued a *nationwide* preliminary injunction against part of the Fair Pay and Safe Workplaces Rule (Rule). The Rule, stemming from an Executive Order in 2014 was enacted into the Federal Acquisition Regulations (FAR) with accompanying Department of Labor (DOL) guidance (Guidance). ***(Please note the Rule's paycheck transparency requirements are still in place.)*** Specifically, Judge Marcia Crone enjoined the implementation of the Rule and the DOL Guidance "that impose[s] new reporting requirements regarding labor law violations . . . on government contractors and subcontractors." Decision at 2.

The Rule was slated to take effect on October 25, 2016. For the first 6 months following the implementation of the Rule, prime contractors would be compelled to make [potential or alleged] labor law violation disclosures on solicitations (and resulting contracts) with an estimated value of \$50 million or more. Then, starting on April 25, 2017, the prime contractor disclosure requirements would apply to all solicitations (and resulting contracts) with an estimated value of \$500,000 or more. Starting on October 25, 2017, subcontractor disclosures would be required for any solicitation (or resulting contracts) valued at \$500,000 or more. On January 1, 2017, the paycheck transparency clause will be included in solicitations for contracts over \$500,000. Only the paycheck transparency requirement now remains.

The Court, in issuing the injunction, found that the criteria for issuing a preliminary injunction was met, in that: (1) there exists substantial threat of irreparable harm to plaintiffs; (2) there exists lack of harm to the defendants if an injunction is put into place; and (3) the public interest will be served by the issuance of a preliminary injunction. The Government is considering its next steps, which may include appeal or pulling back the Rule and Guidance to resolve the faults that the Court found with them. In the meantime, contractors may be well advised to keep any compliance systems in place as the case continues towards a final resolution.

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Each major provision of the Executive Order, Rule, and Guidance was addressed by the Court and is summarized below. For the full decision, [click here](#).

## **Background**

As mandated by the Executive Order, the Rule and Guidance, the Fair Pay and Safe Workplaces would require federal contractors and subcontractors for the first time to report for public disclosure on a Government run database- Federal Awardee Performance and Integrity Information System (FAPIS)- any “violations” of the “federal labor laws set forth in the Executive Order prior to any procurement for Federal Government contracts/subcontracts exceeding \$500,000, in addition to requiring updated disclosures of labor law violations every 6 months while performing covered Government contracts.” Decision at 5. The Rule and Guidance make clear that the required disclosures for the National Labor Relations Act, and other labor laws, unlike previous reporting requirements, “include non-final administrative merits determinations, regardless of the severity of the alleged violation, or whether a Government contract was involved, and without regard to whether a hearing has been held or an enforceable decision issued.” Decision at 5 (citing 81 Fed. Reg. at 58668).

For other alleged violations of labor laws, covered contractors must report, among other things, nonfinal determinations by DOL’s wage and hour division letter, notice, or other documents assessing civil monetary penalties, even if such forms or documents have not yet been administratively ruled upon or heard by the courts. Decision at 6.

The Rule required each contracting agency to designate an agency labor compliance advisor to assist contracting officers in determining whether company’s actions rise to the level of lack of integrity or business ethics and to make written reports the contracting officers within 3 business days. Neither the Rule nor the Guidance sets forth any qualifications for the newly created position. Decision at 8.

## **The Court’s Conclusions and Holdings of Law**

The Court found multiple independent grounds on which to grant injunctive relief, which means the Rule and Guidance cannot take effect, until the decision is appealed and reversed or narrowed, or the Rule and Guidance are rewritten by the Government to address the Court’s concerns.

### **1. Claims that the Executive Order, the Rule, and Guidance, separately and together, Exceed the President’s FAR Council’s, and DOL’s Authority, and are Otherwise Preempted by other Federal Labor Laws**

The Court found that for the majority of labor laws cited in the Executive Order, Congress spelled out in precise detail: what agency or court would be empowered to find a violation, how such a finding would be determined, and what the penalty or remedy would be. Decision at 13.

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The Court went on to find that none of those laws provided for debarment or disqualification of contractors for violations of their provisions, none of them provided for such determinations to be made by unqualified, agency contracting officers, and certainly none of these laws provides for any such action to occur based on nonfinal, unadjudicated, “administrative merits determinations.” Decision at 13.

In contrast, the Court held that where Congress has decided to permit the suspension or debarment of Government contractors, it is done so expressly in a category of labor laws that apply directly to Government contracts, and even then, only after final adjudication of alleged violations subject to judicial review, with full protection of contractors’ due process rights. Decision at 13. By denying the contractors’ due process rights, the court found that the Executive Branch “appears to have departed from Congress’s explicit instructions dictating how violations of the labor law statutes are to be addressed.” Decision at 14. The Court further held that the departing from Congress’s dictates puts the Rule and Guidance in conflict with long-standing labor laws, including, but not limited to, the National Labor Relations Act. Decision at 14-15.

Along those same lines, the court found that the Executive Order, the Rule, and the DOL Guidance explicitly conflict with those labor laws that already specified debarment procedures, after full hearings and final adjudications, for contractors who violate the requirements specifically directed at Government contracting.

## **2. Claims that the Executive Order, FAR Rule, and DOL Guidance Violate the First Amendment**

The Court found that it “is well settled that the First Amendment [which includes government contractors], protects the right to speak but also the right not to speak. For this reason, government compulsion of speech has repeatedly been found to violate the Constitution.” Decision at 18. The Court went on to hold that the Rule and Guidance were far from narrowly tailored and that the disclosure requirement forces contractors to disclose a list of court actions, arbitrations, and “administrative merits determinations, even where there has been no final adjudication of any violation at all, and regardless of the severity of the alleged violation.” Decision at 18.

The Court cited previous case law that requires that the government bear a heavy burden of proof when forcing businesses to speak publicly about some activities in the form of public reports. The Executive Order, Rule, and Guidance compel Government contractors to “publicly condemn” themselves by stating that they violated one or more labor or employment laws. The reports must be filed with regard to merely alleged violations, which the contractor may be vigorously contesting or has instead chosen to settle without an admission of guilt and, therefore, without a hearing or final adjudication. These types of disclosures, the Court held, are not “narrowly tailored” but instead are much broader than required to achieve the Executive Order’s

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stated intent of disclosing matters demonstrating lack of integrity and business ethics. Decision at 18-19.

The Court also found that the FAR Council and DOL have failed to support the basic premise of the Executive Order and Rule, namely that the public disclosure of non-adjudicated determinations of labor law violations on private projects correlates in any way to poor performance on government contracts. Decision at 20-21.

### **3. Claims that the Executive Order, Rule and Guidance Violate the Due Process Rights of Government Contractors and Offerors**

This Court reiterated that courts have long held that contractors and offerors are entitled to due process before being disqualified from performing government contracts. The Rule likely violates the due process rights of Government contractors by compelling them to report and defend against nonfinal agency's allegations of labor law violations without being entitled to a hearing at which to contest such allegations. The due process rights may be violated him by the Rule, which directs contracting officers to consider potentially disqualifying any violations that have been found by administrative agency (or court), including those determinations that have not yet been contested in a hearing or judicially reviewed. This type of consideration, which may be based on investigatory findings without judicial or quasi-judicial safeguards, would be considered a due process violation which could occur in several labor law arenas. Decision at 22-24.

### **4. Claims that the Rule and Guidance are Arbitrary and Capricious**

The FAR Council and DOL have failed to give an adequate explanation for imposing the drastic new requirement set forth in the Rule and Guidance. Decision at 24. Citing to the U.S. Supreme Court, the decision held that agencies act arbitrarily and capriciously when they change course without considering the "reliance interests" of the regulated community and where the policy reversal results in "unexplained inconsistencies." Decision at 24.

The Court gave examples of unexplained inconsistencies as well as the "cumbersome" new process that only adds to "bogging down the already overloaded procurement process." Decision at 25. The Court went on to find the Rule and DOL Guidance also impose "significant additional costs and expenses on government contractors who will incur substantial costs in looking back at their 'violations' for a period of 3 years before contract is offered, which then must be updated every 6 months." Decision at 25. The Court went on to find that 91 percent of commenters said the Rule will impose a significant or extreme burden on their firm as "expenditures will rise for in-house and outside legal counsel, expense of information technology systems, and expanded human resources personnel, and negatively affecting the cost, availability, quality, and delivery of these vital protective services." Decision at 26.

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The Government estimates seem to agree that the new disclosure requirements will result in a total cost to contractor/subcontractor's and the government of nearly \$475 million in the first year and \$425 million in the second year without the Government being able to "quantify any benefits derived from the sweeping changes imposed by the Executive Order, Rule, and Guidance." Decision at 26.

## **5. Claims that the Executive Order and the FAR Council Rule violate the Federal Arbitration Act**

The Court found that the Executive Order and Rule violated the Federal Arbitration Act by mandating that contractors and subcontractors who enter into contracts for noncommercial items over \$1 million must agree not to enter into any mandatory, pre-dispute arbitration agreements with their employees or independent contractors on any matter arising under Title VII, as well as any tort related to or arising out of sexual assault or harassment. The Court found it curious that the provision did not apply to employees alleging age or disability discrimination and did not apply to contractors and subcontractors whose employees are covered by collective bargaining agreements.

The decision stated that oral argument clarified that this new provision will be "enforced not only on government contracts but also with regard to employees performing private work, with no apparent nexus to the government's economy and efficiency." Decision at 27.

While the government attempted to distinguish a rule prohibiting new arbitration agreement from a rule prohibiting enforcement of existing agreements, which would violate the Federal Arbitration Act, the court found that neither type of rule is authorized by the Federal Arbitration Act in the absence of any congressional command that would override the requirement that arbitration agreements be enforced in accordance with their terms. Decision at 28.

## **Conclusion**

While many government contractors rejoiced over the preliminary injunction, this matter is far from settled. The decision of the Court may be appealed and overturned or narrowed. Additionally, the Government may choose to pull back the Rule and Guidance to remedy the faults that the Court found with them. In the meantime, a government contractor would be wise not to dissemble any compliance systems it had put in place in the event that this decision is overturned or narrowed in some fashion.