

Down To The Wire: DOL's 'Blacklisting Rule' Enjoined

October 27, 2016 | [Federal Laws And Legislation, Labor And Employment](#)



**Gerald F.
Lutkus**

Of Counsel
(Retired)

A federal judge in Texas has blocked implementation of major portions of the U.S. Department of Labor's (DOL) Fair Pay and Safe Workplaces rule, the so-called "blacklisting" rule. Judge Marcia A. Crone of the U.S. District Court for the Eastern District of Texas entered a nationwide preliminary injunction order on Oct. 24 blocking the Oct. 25 implementation date of the DOL rule, along with a related Obama Executive Order, the Federal Acquisitions Regulations ("FAR") Rule and the DOL's Guidance regarding the FAR Rule. Had they gone into effect, the new rules would have imposed significant and stringent reporting and disclosure requirements on contractors bidding on federal projects. Moreover, those disclosures of non-final and non-adjudicated "violations" could have been used to bar contractors from federal projects.

Judge Crone determined that the plaintiffs in this action, the Associated Builders and Contractors of Southeast Texas, had a likelihood of success on the merits of establishing that the new regulations exceeded the authority of the president, the FAR Council and the DOL; were otherwise preempted by other federal labor laws; violated the First Amendment rights of federal contractors through compelled speech; violated contractors' due process rights; are arbitrary and capricious; and violated the Federal Arbitration Act.

The opinion focuses in large part on the disclosure requirements contained in the president's Executive Order, the DOL Guidance and the FAR Rule, which Judge Crone found to be "drastic new requirements" which are "a substantial departure from and a significant expansion of prior reporting rules."

The disclosure requirements, among other things, would require contractors to report all "violations" of 14 separate federal labor and employment statutes; disclosures could then be used to disqualify bidders on federal projects.

Judge Crone's opinion finds fault with the Executive Order, Rule and Guidance for broadly defining "violations" to include non-final decisions or administrative determinations, which have not been preceded by a hearing or made subject to judicial review. Moreover, the "violations" to be reported are not confined to performance of past government contracts. Judge Crone determined that "[i]n the present case, the Executive Order, FAR Rule, and DOL Guidance arrogate to contracting agencies the authority to require contractors to report for public disclosure mere allegations of labor law violations, and then to disqualify or require contractors to enter into premature labor compliance agreements based on their alleged violations of such laws in order to obtain or retain federal contracts. By these actions, the Executive Branch appears to have departed from Congress's explicit instructions dictating how violations of the labor law statutes are to be addressed."

Judge Crone also enjoined enforcement of the portion of the Executive Order

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and the Rule that provided that contractors and subcontractors who enter into contracts for non-commercial items of more than \$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.

Left standing by Judge Crone is the portion of the Executive Order requiring that all covered contractors inform their employees in each paycheck of the number of hours worked, overtime calculations (for non-exempt employees), rates of pay, gross pay, additions or deductions from pay, and whether they have been classified as independent contractors. That requirement in the Executive Order has an effective date of January 1, 2017. A copy of the court's Preliminary Injunction Order is [available here](#).