

## Labor and Employment Alert

October 26, 2016

### Key Points

- A federal district court in Texas issued a preliminary injunction blocking implementation of the labor law disclosure requirements and restrictions on certain predispute arbitration agreements under the Fair Pay and Safe Workplaces Executive Order, but it did not enjoin the new pay notification requirements under the Order.
- Contractors should prepare for the pay notification requirements that go into effect on January 1, 2017, and determine whether to place on hold their compliance efforts for the other parts of the Order pending the outcome of further court proceedings on the preliminary injunction.



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### Federal Court Temporarily Enjoins Parts of the Fair Pay and Safe Workplaces Executive Order

On October 24, 2016, a federal judge in the U.S. District Court for the Eastern District of Texas blocked certain parts of the Fair Pay and Safe Workplaces Executive Order, as well as the Final Rule and Guidance implementing the Order (collectively, the “Order”) from taking effect. As we [previously reported](#), the Order, which was slated to take effect on October 25, 2016, requires federal contractors and subcontractors to disclose various labor law violations to the government for contracting officers and the newly created agency labor compliance advisors to assess before awarding contracts. The Order also prohibits certain contractors from utilizing predispute arbitration agreements covering Title VII claims and tort claims for sexual harassment/assault, and it mandates new pay notice requirements.

In response to a lawsuit by industry groups, the court granted a preliminary injunction blocking implementation of the labor law disclosure requirements and arbitration restrictions under the Order, holding that those provisions likely exceeded executive authority and directly conflicted with other federal laws. The court, however, left untouched the new pay notification requirements, holding that there was no showing of irreparable harm from those obligations.

The preliminary injunction order is not a final decision. The government can (and likely will) take an interlocutory appeal of that order to the U.S. Court of Appeals for the Fifth Circuit. If that occurs, the district court has discretion to stay the underlying lawsuit pending appellate review. In either case, the preliminary injunction will remain in place until it is modified or vacated. In the meantime, contractors will have to prepare for the pay notification requirements and determine whether to continue their efforts to plan for compliance with the other parts of the Order.

## Background

On October 7, 2016, the Associated Builders and Contractors and the National Association of Security Companies filed a lawsuit challenging the Order in the U.S. District Court for the Eastern District of Texas. The groups sought a preliminary injunction preventing implementation of the Order, a declaratory judgment declaring the Order invalid and a decision vacating the Order. The groups argued, among other claims, that (1) the Order exceeded the executive branch's authority and was pre-empted by federal labor law; (2) the Order unconstitutionally infringed on contractors' First Amendment rights by compelling them to publicly disclose labor violations, including administrative merits determinations, without a due process hearing or final adjudication; (3) the Order violated contractors' due process rights by requiring them to report and defend alleged labor violations without a hearing or being able to contest them; and (4) the arbitration restrictions violated the Federal Arbitration Act. On October 21, 2016, District Judge Marcia Crone held a hearing on the plaintiffs' motion for preliminary injunction.

## Decision

The court found that the contractor industry groups had shown that they were entitled to a preliminary injunction temporarily blocking implementation of the labor law disclosure requirements and arbitration restrictions. First, the court found that the executive branch exceeded its authority because Congress had not authorized it to "disqualify government contractors from bidding or performing contracts except under statutorily specified conditions" that were not present here. The court reasoned that by requiring contractors to publicly disclose "mere allegations of labor law violations" and then use that information to disqualify them or require them to enter "premature labor compliance agreements," the executive branch had "departed from Congress's explicit instructions dictating how violations of labor law statutes are to be addressed." The court also found that the Order conflicted with labor law protections already in place, including those under the National Labor Relations Act and "labor laws that already specify debarment procedures" (e.g., the Service Contract Act and Executive Order 11246).

Second, noting the Order's mandate to publicly disclose details of non-final decisions that are subject to appeal, the court found the plaintiffs had a substantial likelihood of success for showing that the Order compelled contractors to "engage in public speech on matters of considerable controversy adversely affecting their public reputations and thereby infringing on the contractors' rights under the First Amendment." In support of its conclusion, the court found that there was no evidence that "disclosure of non-final determinations demonstrate[d] any likelihood of poor performance on government contracts."

Third, the court stated that the Order violated contractors' due process rights by requiring them to report "non-final agency allegations of labor law violations without being entitled to a hearing at which to contest such allegations." This lack of due process, according to the court, could damage a contractor's "business and reputation" based on a decision that may later be rejected. Finally, the court found that the prohibition on predispute arbitration agreements of Title VII and sexual assault/harassment claims violated the Federal Arbitration Act because, unlike similar prohibitions for defense contractors under the Franken Amendment, there was an "absence of any congressional command that would override the requirement that arbitration agreements be enforced in accordance with their terms."

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