

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

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## Texas Court Blocks Key “Blacklisting” Rule Provisions

A Texas district court temporarily blocked key provisions of the Fair Pay and Safe Workplaces final rule, which were scheduled to take effect on October 25. The rule would have implemented a 2014 executive order — the so-called “blacklisting” order — that requires federal contractors to disclose past labor law violations during the federal procurement process, imposes paycheck transparency requirements, and restricts the use of pre-dispute arbitration agreements. Unless overturned by a higher court, the nationwide preliminary injunction will stay in place pending a final resolution of the case or further court order.

### Background

Executive Order 13673 (EO), signed by President Obama in July 2014, requires federal contractors and subcontractors to disclose past labor law violations during the federal procurement process. The so-called “blacklisting” order requires bidders on certain federal contracts valued in excess of \$500,000 to disclose violations of 14 federal labor and employment laws (including violations that have not been fully adjudicated) when submitting a bid, and allows federal agencies to disqualify them from contract awards based on the disclosures. The EO also imposes new paycheck transparency obligations requiring covered contractors to provide workers with wage statements and other information, and limits the use of pre-dispute arbitration agreements for Title VII and sexual assault claims.

On August 25, the Federal Acquisition Regulatory (FAR) Council issued the [final rule](#) implementing the EO and the DOL issued corresponding guidance to assist federal agencies with that implementation. Slated to take effect on October 25, the rule phased in the new requirements for government solicitations and contracts issued after that date. (See our [September 28, 2016 For Your Information](#).)



### Legal Challenge Filed

Soon after the FAR Council released its final blacklisting rule, several trade associations that represent construction and security industry groups filed a [lawsuit](#) to prevent its implementation. In *Associated Builders and Contractors of*

*Southeast Texas et al. v. Rung et al.*, the trade associations challenged the EO, FAR final rule, and DOL guidance on both statutory and constitutional grounds. The six-count complaint alleges that the EO, final rule and guidance are unlawful because they: exceed the president's, FAR Council's and DOL's authority; are preempted by federal labor and employment laws; and are arbitrary and capricious. It also contends that they infringe on contractors' right of free speech under the First Amendment and violate the due process clause of the Fifth Amendment, and the EO and final rule violate the Federal Arbitration Act (FAA). On October 13, the business groups filed an [emergency motion](#) for a temporary restraining order and preliminary injunction to prevent the implementation or enforcement of EO 13673 on October 25.

## Federal Judge Enjoins Key Provisions

Hours before the final rule was to go into effect, District Court Judge Marcia A. Crone of the Eastern District of Texas [ruled](#) that the plaintiff trade associations had shown a substantial likelihood that they will succeed on the merits, and "properly demonstrated immediate and ongoing injury to their members if the rule is allowed to take effect." Judge Crone found no statutory provision or authorization for the rule's public disclosure and disqualification requirements.

As the court noted, once the final rule took effect, contractors would have to disclose alleged violations of various labor laws even if they have not been fully adjudicated and resolved. Thus, both the EO and the final rule "appear to conflict directly with every one of the labor laws they purport to invoke by permitting disqualification based solely upon 'administrative merits determinations' that are nothing more than allegations of fault asserted by agency employees and do not constitute final agency findings of any violation at all."

Judge Crone also found that compelling contractors to publicly report non-final determinations of alleged labor law violations would infringe on First Amendment guarantees and violate their due process rights. Concluding that the government was "unable to quantify any benefits derived from the sweeping changes imposed by the Executive Order, FAR Rule and DOL Guidance," the court found the new rule and guidance to be arbitrary and capricious and not entitled to deference. Finally, the court found that neither the EO nor the final rule could override the FAA and "a liberal federal policy favoring arbitration agreements."

While Judge Crone enjoined enforcement of both the public disclosure and pre-dispute arbitration agreement provisions, she concluded that the plaintiff trade associations had not established they were likely to prevail on their claims regarding the paycheck transparency requirement and that their members would be irreparably harmed if it took effect. Noting that the paycheck provisions do not take effect until January 1, 2017, she declined to block their enforcement at this time.

**Comment.** This is the second significant labor rule that a Texas federal court has blocked in the last few months, and another DOL rule is currently under challenge. On June 28, Senior District Court Judge Sam R. Cummings of the Northern District of Texas issued a nationwide preliminary injunction blocking enforcement of the DOL's persuader rule. (See our [June 29, 2016 FYI Alert](#).) Earlier this month, the attorneys general from 21 states and a more than 55-member business coalition asked a Texas federal court to issue a nationwide preliminary injunction blocking the DOL's final overtime rule from taking effect on December 1. A hearing has been set for November 16. (See our [October 20, 2016 For Your Information](#).)

## In Closing

With the exception of the paycheck transparency provisions, the “blacklisting” rule, which would have gone into effect on October 25, is now on hold. Even if, as expected, the government appeals the Texas ruling, the nationwide injunction will stay in effect and the *status quo* will be maintained until further notice.

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