

Management Alert



Congress in Process of Passing Disapproval Resolution of Blacklisting Regulations

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Seyfarth Synopsis: Pursuant to President Obama's "Fair Pay and Safe Workplaces" Executive Order, popularly referred to as "the blacklisting order" the federal procurement agencies issued regulations requiring government contractors to report all potential labor violations as well as disclose the basis of pay to employees working on government contracts. While most of these controversial regulations were enjoined by a federal judge, the Congress nevertheless has moved to formally rescind all of the regulations under the Congressional Review Act. The House of Representatives has voted to rescind the regulation. The House resolution is the first step toward rescinding the regulations issued under the Executive Order; the Senate will vote next week and the rescission resolution then goes to the President for his signature.

On February 2, 2017, by a vote of 236 to 187, the U.S. House of Representatives approved a joint resolution of disapproval to block the Final Rule implementing President Obama's Executive Order 13673, "Fair Pay and Safe Workplaces." House Joint Resolution 37, an act authorized by the Congressional Review Act ("CRA"), is the first step toward rescinding the regulations issued under the Executive Order. The CRA permits Congress to pass legislation rescinding a particular regulation. The CRA has various time limits but the adoption of the final regulations under E.O. 13673 fell within the CRA time limits.

Rep. Virginia Foxx, Chair of the House Education and Workforce Committee, who sponsored the resolution, called the Executive Order "an unnecessary layer of red tape" in a government contracting landscape in which federal agencies already have tools at their disposal with which they can ensure contractors' compliance with legal obligations. The House vote tally nearly tracked party lines, with three Democrats joining the Republican legislators in voting "aye" on the disapproval resolution, and only one Republican voting "no."

E.O. 13673 has been criticized by the employer community and employer associations because of the additional financial burdens it imposed on covered contractors, the risk to reputation and business from public disclosure of alleged violations before they are proven, and the fact that the procurement statutes and regulations already had enforcement mechanisms in place to ensure contractor compliance. Referred to as the "blacklisting" order, as discussed in more detail [here](#), the Executive Order and its implementing regulations would:

1. Require certain government contractors to disclose "labor law violations" under fourteen different statutes and Executive Orders when bidding for or modifying contracts;
2. Prohibit employers from entering into mandatory pre-dispute arbitration agreements with employees; and
3. Require certain disclosures to independent contractors and employees concerning their employment status and information about wages and hours worked.

The blacklisting order has already been stayed in large part. As discussed [here](#), last October Judge Marcia Crone, a federal judge sitting in Texas, issued a nationwide preliminary injunction blocking the requirement that contractors disclose “labor law violations” and the prohibition against entering into mandatory pre-dispute agreements with employees. Judge Crone’s order left in place the paycheck transparency provisions requiring contractors to provide regular statements disclosing wages and benefits to employees.

An identical joint resolution is currently pending in the Senate. If the Senate passes its resolution, and the President signs it, the Executive Order regulations will no longer have any force and effect and will be nullified in its entirety, a legislative act that will cover not only the provisions of the Order that have already been stayed, but the paycheck transparency provisions as well. In addition, the CRA will preclude any future attempt to promulgate regulations requiring the same or similar procurement prohibitions and disclosures. We will continue to monitor the resolutions’ progress through both houses of Congress and the Executive Branch.

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