

'Blacklisting' Rules for Government Contractors Proposed, Again

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Congress again is seeking to include requirements that federal government contractors and subcontractors disclose actual and alleged violations of labor and employment laws during the contract bidding phase in must-pass legislation.

This is not new. The Clinton, Obama, and, now, Biden Administrations have all tried to impose such “blacklisting” requirements. These are laws that would require federal government contractors and subcontractors to disclose violations and even *alleged* violations of various labor and employment laws during the contract bidding phase. If passed, such laws would essentially prohibit government contractors and subcontractors from keeping or winning contracts for certain labor and employment law violations.

Suspension and debarment are the federal government’s method to avoid doing business with what it determines are “non-responsible contractors.” Once suspended or proposed for debarment, a contractor immediately is published as ineligible for contracts in the government’s System for Award Management (SAM). Once listed as ineligible in SAM, the contractors will not be solicited for offers, contracts will not be awarded to them, existing contracts will not be renewed or otherwise extended to them, and subcontracts requiring government approval will not be approved by any agency.

2014 Fair Pay and Safe Workplaces Executive Order

In 2014, the Obama Administration’s Fair Pay and Safe Workplaces Executive Order (EO 13673) and its implementing regulations, also known as the blacklisting EO, posed a grave threat to government contractors. The rule required federal contractors to report violations and alleged violations of various federal labor laws and equivalent state labor laws when submitting proposals for government contracts. The federal agency would take an employer’s record of violations and alleged violations into account when making contract award determinations. A federal court blocked most of the rule in late-2016, determining that the regulation likely violated a host of federal labor laws and due process rights. By signing the Congressional Review Act resolution, the Trump Administration later invalidated the Obama regulations entirely.

Latest Attempts

In 2021, Congress has once again sought to include similar blacklisting language in must-pass legislation. For example, Congresswoman Pramila Jayapal (D-Wash.) submitted to the House Rules Committee an amendment to the National Defense Authorization Act for Fiscal Year 2022 (H.R. 4350) to blacklist certain contractors. The proposed amendment would direct all federal agencies and department heads automatically to initiate a temporary or permanent debarment proceeding against federal contractors with at least four willful or repeated violations of the Fair Labor Standards Act from the previous four years. The Rules Committee will consider the amendment the week of September 20, 2021, along with other proposed amendments to H.R. 4350.

Blacklisting legislation generally would impose significant new recordkeeping and reporting responsibilities on most government contractors and subcontractors and threaten some contractors' ability to secure federal contracts. Employment and labor problems are inevitable in large organizations. They are not necessarily indicators of the contractor's ability to fulfill the requirements of a contract with the federal government. Indeed, if any agency of the U.S. government itself were subject to such legislation, it, too, likely would be blacklisted from bidding for government contracts because of its number of labor and employment law complaints.

Blacklisting and COVID-19

President Joe Biden's [executive order](#) requiring federal contractors to "ensur[e] that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to the workers performing on or in connection with a Federal Government contract or contract-like instrument ..." does not mention vaccination. However, the Biden Administration's [COVID-19 action plan](#) suggests federal contractors will be subject to the same vaccination mandate as federal employees. Still, questions remain on the scope of the order and how it will be enforced.

Blacklisting just may be the government's method of enforcement. The order "applies to new contracts or solicitations issued on or after October 15, 2021, as well as extensions or renewals of existing contracts, or exercised of options on existing contracts, that occur on or after October 15, 2021." Having a vaccinated or frequently tested workforce under the order or face being blacklisted from future contracts may be the choice federal contractors and subcontractors must make. Further guidance is expected by September 24.

The status of potential blacklisting of federal contractors and subcontractors is quickly developing. Jackson Lewis attorneys will continue to monitor Congressional, agency, and executive actions and provide additional insights as necessary. For more information or questions, please contact a Jackson Lewis attorney.

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