Former OSHA Head Says Contractor Should be Blacklisted For Safety Violations: Can the Government Do That?

Insights
8.30.19

Harkening back to the "Blacklists" imposed by the Obama administration, Dr. David Michaels, former Assistant Secretary of Labor for the Occupational Safety and Health Administration, urged the government to ban a construction contractor from work on public lands in a tweet this week after the company pleaded guilty on charges related to the death of a worker. But can the government even do that?

Yes, at least to some extent. In July 2014, then-president Barack Obama issued Executive Order 13673 entitled the "Fair Pay and Safe Workplaces," which many referred to as the "Blacklisting" Executive Order. The Blacklisting Order required companies bidding or submitting offers for federal contract work over a certain amount to disclose any administrative merits determinations, arbitral awards or decisions, and civil judgments against them in the preceding three years related to potential violations of the Fair Labor Standards Act, Occupational Safety and Health Act, National Labor Relations Act, and Family Medical Leave Act, among others. The federal contracting officer would then, before making an award, consider safety violations when awarding government contracts, putting companies with records of numerous serious, repeated, or willful OSHA violations at risk of being denied work.

Shortly after issuing the Order, the Department of Labor and the Federal Acquisition Regulatory Council proposed regulations and guidance to administer the law, which the Obama administration finalized in August 2016. After that, industry trade associations challenged the rule's validity in federal court, securing a preliminary injunction to bar the enforcement of the so-called "Blacklisting" provisions of the rule. In March 2017, President Trump used the 1996 Congressional Review Act to effectively invalidate the "Blacklisting" rule.

Yes, the government could "blacklist" a company from public contracts due to habitual OSHA volations. However, despite former Assistant Secretary Michaels' continued public endorsement of the practice, the federal "Blacklisting" of companies remains, at least for now, prohibited. In order for his wish to come true, the federal government would need to once again set up a formal apparatus for levying and enforcing a blacklisting order, and it would need to withstand the inevitable court challenges that would follow. There seems to be no appetite under the current administration for something like that to be enacted in the near future, but employers should at least be aware of the fact that blacklisting remains a possible legal maneuver a future administration could choose to unleash.

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