Insights: Alerts

Reign It In: Federal Court Enjoins DOL's Expansion of Davis-Bacon Coverage

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This past year, the Department of Labor ("DOL") implemented significant amendments to the Davis-Bacon Act ("DBA") regulations in a final rule that became effective in October 2023. The amendments significantly expanded the DBA's coverage. As expected, construction trade groups swiftly challenged the DOL's rule in federal court. Yesterday, a federal judge in Texas issued a nationwide injunction blocking several of the final rule's provisions.

Expansion of "Site of Work" and Covered Workers

First, the court enjoined the DOL's revised definition of "construction, prosecution, completion, or repair." The final rule revised the definition to include "covered transportation," and thus truck drivers, in five different circumstances, including "onsite activities essential or incidental to offsite transportation." The latter was defined to include activities conducted by truck drivers or their assistants at covered construction sites, such as "loading, unloading, or waiting for materials to be loaded or unloaded" where the time spent at the covered site "is not *de minimis*." Previously, truck drivers were rarely, if ever, covered by the DBA.

Second, the court also enjoined the final rule's revised criteria for the "material supplier" exemption. Under the final rule, the material supplier exemption was limited to entities whose sole contractual obligation on a particular project is the delivery of supplies/materials. The final rule also expanded the definition of a DBA-covered "site of the work" such that material suppliers operated by contractors or subcontractors would be covered by the DBA's requirements merely where the material supplier was operated by a covered contractor or subcontractor, regardless of where the underlying work was performed.

With respect to both updates, the court determined that the DOL unlawfully sought to expand the DBA to apply to workers who are simply not covered by the DBA as promulgated by Congress.

Expansion of Coverage by Operation of Law

Third, the court enjoined the final rule's amendment that would impose DBA requirements by "operation of law." Prior to the amendment, the DBA was implicated only where the contracting agency included the relevant FAR clauses and applicable wage determinations into the solicitation documents. The DOL's effort to incorporate the prevailing wage requirements by operation of law was especially significant because contractor bids are, in large part, based on projected labor costs, which tend to be significantly greater on DBA-covered projects.

Key Takeaways for Employers

While the court's ruling is a welcomed one for government contractors, the bulk of the DOL's final rule expanding the DBA remains intact. This includes the final rule's increased flow-down responsibilities for upper-tier contractors, the DOL's enhanced debarment and withholding powers, increased recordkeeping responsibilities, and expansion of

covered “construction” to include installation of “green” equipment.

If you have any questions about this Alert, the effects of the final rule, or avenues for the recovery of additional costs caused by the implementation of the final rule or defenses to its applicability, please contact one of the authors or the attorney(s) in our firm with whom you are regularly in contact.

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