Proskauer

Texas Federal Judge Enjoins Part of DOL Prevailing Wage Rule

Labor Relations Update on **June 27, 2024**

On June 24, 2024, Judge Sam R. Cummings of the U.S. District Court for the Northern District of Texas enjoined part of a U.S. Department of Labor ("DOL") Rule altering the Davis-Bacon Act. In his opinion, Judge Cummings held that the DOL had engaged in "egregious violations" of the U.S. Constitution by expanding the application of the statute without congressional approval.

Background

The Davis-Bacon Act ("DBA") has governed federally-funded construction projects since its passage in 1931. Among other things, the statute requires contractors to pay their workers the same prevailing wages as those provided to similarly-situated workers in the relevant geographic area.

Of relevance to the injunction, the statute defines "workers" as "mechanics and laborers" performing their job "directly on the site of the work." As a result, workers who performed their job primarily off-site, albeit in relation to the project, would not be covered under the statute.

Further, when a contract is covered by the DBA, the statute explicitly requires that the contracting federal agency include prevailing wage requirements within the relevant contract. This prevents a contractor from being penalized after the fact if a contract that possibly should have been covered under the statute did not follow the requirements of the statute.

As reported here, on August 8, 2023, the DOL proposed changes to the DBA concerning the calculation of prevailing wages, recordkeeping requirements, survey processes, and enforcement mechanisms. In its final rule, issued on August 23, 2023, the DOL made additional changes, including the application of prevailing wage rates to additional laborers and contracts.

Challenged Sections of Final Rule

Section 5.2 of the DOL Rule expanded the application of the statute to material suppliers and transportation workers. This would require contractors to provide prevailing wage rates to an additional subset of workers whose jobs are more attenuated to the on-site work.

Section 5.5(e) of the DOL Rule also provided that prevailing wage requirements are effective "by operation of law," and considered to be incorporated in a federally-funded construction project, even when they have been omitted from the contract. This would create substantial uncertainty regarding potential application of the statute to any construction contract that is silent on Davis-Bacon requirements.

District Court Granted Preliminary Injunction

In granting a preliminary injunction, Judge Cummings put a hold on the DOL Rule's expanded application of the DBA. The Court determined that the DOL had exercised authority "inconsistent with the administrative structure that Congress enacted into law."

Concerning the enjoined sections, the "plain language" of the DBA indicates that truck drivers and material suppliers are **not** covered workers, and their inclusion is a "fundamental amendment to the DBA." According to the Court, this proposed alteration was outside the purview of the agency constitutional authority.

The Court also held that the DOL lacked authority to contradict the express text of the DBA by including in the Rule that "DBA requirements are applicable by operation of law" even if omitted from a contract. As a result, in enacting its Rule, the DOL failed to "faithfully execute the DBA" and was instead "making substantive amendments to the DBA" and "usurp[ing] Congress' law-making power."

Judge Cummings, therefore, granted a preliminary injunction with respect to Sections 5.2 and 5.5(e) of the DOL Rule as they relate to the expanded application of the DBA. The other aspects of the DOL Rule remain in effect.

Takeaways

The Fifth Circuit and district courts within the Circuit have been particularly active in addressing alleged agency overstep, especially in the realm of labor relations. While the prevailing wage calculations set forth in the DOL Rule remain in effect, the DOL Rule has been limited in scope to more accurately reflect the text of the DBA. Now, the DOL cannot enforce the provisions of its Rule that expanded application of prevailing wage requirements to truck drivers and material suppliers, and the requirement that prevailing wage requirements are interposed on federal contracts where the contracts themselves with the respective federal agencies are silent as to the application of the DBA.

This preliminary injunction will continue pending a final resolution of the merits of the underlying case. The DOL may also appeal the ruling to the Fifth Circuit Court of Appeals.

We will continue to monitor this case and the status of the DOL Rule.

View original.

Related Professionals

- **Joshua S. Fox**
  Partner
- **Michael S. Kratochvil**
  Associate
- **Paul Salvatore**
  Partner