

# “Blacklisting” Fair Pay and Safe Workplaces

## OVERVIEW

President Obama’s Executive Order (EO) 13673, known as the “Blacklisting” EO because it could prevent some federal contractors from winning future federal contracts, will discourage qualified large and small businesses from pursuing federal contracts, threaten the livelihood of millions of Americans and increase costs to taxpayers.

## ABC SUPPORTS

- Congress, the administration, federal procurement officers and stakeholders working together to develop a balanced approach to creating and implementing any reforms to the federal contracting procurement process.
- Safeguards for fair and transparent competition and protections against subjectivity and corruption in federal contracting.
- Federal agencies awarding contracts based on merit to firms that can deliver the highest quality product at the best price.

## ABC OPPOSES

- Federal contractors who repeatedly and intentionally break federal labor and contracting laws and regulations.
- Executive Order 13673 and any executive order, legislation or regulation that would deny federal contractors due process and permit or encourage discrimination in federal contracting based on arbitrary criteria, pre-adjudicated and/or false accusations, or a contractor’s labor affiliation.
- Any executive order, legislation or regulation that could discourage competition and delay federal construction projects by adding new levels of costly and time-consuming bureaucratic red tape to the federal contracting process.

## BACKGROUND

On July 31, 2014, President Obama issued The Fair Pay and Safe Workplaces EO 13673, which creates a sweeping regulatory scheme on federal contractors that will disrupt the federal procurement process, significantly increase red tape and costs for both government and industry, and serve as a barrier to federal contracting for many businesses.

The EO instructs federal agencies to determine whether businesses seeking federal contracts are “responsible” enough to be awarded a contract based on a subjective review of its three-year compliance history with 14 federal and equivalent state labor, employment and safety laws. The EO could result in some of the best federal contractors being arbitrarily blacklisted

from winning future federal contracts for committing even minor violations of a rapidly growing and constantly changing labyrinth of workplace laws and regulations. Even the federal government has a difficult time complying with the laws consistently.

Flouting Congressional authority, the EO disregards existing statutory enforcement powers found in the Federal Acquisition Regulation (FAR) and various labor laws. In addition, the EO imposes new and redundant data collection, review, inter-agency consultation and enforcement procedures. The EO also unfairly restricts the ability of employers to use arbitration to resolve employee disputes in certain circumstances (Federal law and subsequent Supreme Court decisions have made clear these arbitration agreements are acceptable).

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While the full effect of the blacklisting EO won’t be known until more detailed regulations are finalized, there is great concern that the livelihoods of federal contractors and their employees could be jeopardized based on the subjective decisions of a team of new unelected bureaucrats (Agency Labor Compliance Advisors) who will be charged with judging federal contractors’ compliance records and advising federal agency contracting officers.

Many have expressed concern that this EO could be used to reward political allies with contracts while blacklisting political foes. Such high stakes open the door to corruption and favoritism in the procurement process, allow trial lawyers to extort larger settlements from firms, enable bureaucratic agencies to extract costly settlements for conduct that may have been legal, and give labor unions leverage to get businesses to capitulate to their demands.

Taxpayers, contractors and their employees deserve a fair and transparent process that will award contracts based on merit to firms that can deliver the highest quality product at the best price. Instead, the EO 13673 adds uncertainty and subjectivity to the government contracting process and likely will increase the frequency and cost of labor and employment disputes.