Blacklisting Amendments to Funding Measures Threaten the Jobs of Employees of Federal Contractors

Amendment Attached to Several Funding Bills in the House Would Deny Federal Contracts to Companies Based on Violations of a Law That Even the U.S. Department of Labor Has Violated

An amendment sponsored by Rep. Keith Ellison (D-MN) and other House Democrats has been added to a series of House appropriation bills that would prohibit agencies funded by the bills from entering into, or renewing, contracts with any company that has had a “finding of fault in a civil or administrative proceeding related to the Fair Labor Standards Act (FLSA)” regardless of whether or not the company has remedied those findings. Applicable violations would also include any conciliation and consent decrees with an acknowledgment of fault. The amendment effectively blacklists numerous large federal contractors from bidding or working on contracts across the federal government. Moreover, the debarment would apply based on violations of an outdated and often inscrutable 1938 workplace law that even the Department of Labor, which is charged with enforcing the law, has violated. Thus far, the amendment has been included in the appropriation bills for Transportation, Housing and Urban Development, Energy and Water, Department of Defense, Financial Services and General Government, State and Foreign Operations, and Interior and Environment.

The Amendment Would Jeopardize a Significant Number of American Jobs

While the amendment is billed as strengthening employment protections, automatic debarment is a blunt instrument that would accomplish just the opposite by jeopardizing millions of jobs tied to employers who would become barred from entering into or renewing contracts with the federal government next year. In fact, the amendment could bar a contractor’s entire workforce for a single violation that resulted in no more than $5,000 in damages that were later remedied by the contractor. The impact on jobs could be widely felt in cases where government contracts constitute a large portion of an employer’s businesses, as debarment could force those companies to shut down facilities and a significant number of jobs along with them. Rep. Ellison’s amendment would thereby cruelly victimize the stated beneficiaries of the amendment.

Strict Compliance with Outdated FLSA Poses Difficulties for Well-Intentioned Employers

The Fair Labor Standards Act of 1938, which is largely based on the scheduling and pay practices of the era in which it was passed, is one of the most problematic laws for today’s employers and their employees to comply with. The FLSA and its regulations simply have not kept pace with changes in the workplace. Its vague and inscrutable provisions often result in findings of fault and liability for even the most well-intentioned actors. As the digital workplace continues to evolve, this disconnect and problem grows even larger. In fact, the Department of Labor itself, which enforces the law, has had difficulty complying with the FLSA. The Department recently settled a complaint involving 1,900 employees who brought a grievance against the agency for alleged violations based on the Department’s inability to distinguish between who is and who is not exempt from the FLSA’s overtime requirements, a particularly difficult area for all employers. Efforts to determine how to apply outdated regulations, particularly for employees who prefer the flexibility and status of being a salaried professional, have repeatedly resulted in good faith actors finding themselves in violation of the FLSA – under the present amendment it could also result in their debarment.
Flexible Workplace Practices Often Penalized by FLSA  Many well-intentioned employers who seek to provide flexible workplaces for their employees often find themselves in unknowing violation of the FLSA. The law requires employers to track all "hours worked" (or portions of varying lengths thereof) by nonexempt employees, which poses a challenge for employers if the employees wish to perform some or all of their duties away from the workplace. This can involve telecommuting, where some or all of the workday is spent by the employee at home or elsewhere. It may also involve the employee doing some work at home outside of normal working hours, which modern communications technology makes possible in today’s digital workplace. Finally, even when nonexempt employees confine their work activities within normal working hours, they may occasionally check their smartphones for work-related emails, text messages, meeting invitations, outside those hours, potentially triggering an FLSA violation.

Automatic Debarment Is an Extreme Measure That Circumvents the Existing Contracting Process  The federal government has in place a comprehensive process that is designed to protect the public interest by ensuring the government does not contract with entities lacking integrity, fairness, and openness under the Federal Acquisition Regulations (FAR). Within that process, debarment represents the absolute last, most dramatic measure that an agency may take to protect the public interest in part because of the disruptions that can occur to critical federal contracts and the impact it would have on employees working on those contracts. For this reason, FAR provides that agencies reserve the debarment for contractors that engage in particularly egregious conduct, including criminal offenses, fraud, and willful violations of the law. It also requires that agencies consider remedial measures or mitigating factors prior to debarring a contractor. Separate from and in addition to FAR, the FLSA itself provides for penalties and remedies, including double back-pay awards for employees affected by violations. Rep. Ellison’s amendment circumvents these well-defined processes and jumps straight to a mandatory automatic debarment starting in FY 2015, regardless of the nature of the violation, the penalties the contractor already bore, or the remedial and corrective measures the employer may have taken to address a violation.

Congress Should Instead Seek to Bring the FLSA In Line with the Modern Workplace  All workers should have assurance that their employer will treat them fairly and in accordance with the highest standards prescribed by law. Workers who depend on federal contractors for their employment will not be served by provisions such as the present amendment that paints all FLSA violators with one brush and leads to automatic debarment. Instead, Congress should remove the subjectivity of complying with the FLSA by updating it to better reflect the reality of the 21st century workplace.