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OFCCP Enforcement Action Against Federal Contractor Enjoined by U.S. District Court

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Last week, the United States District Court for the Southern District of Texas entered a preliminary injunction barring the U.S. Department of Labor (DOL) from pursuing an enforcement action against a federal contractor, ABM Industry Groups LLC (ABM), before an Administrative Law Judge (ALJ). This is the first federal court decision to address the constitutionality of the DOL's use of administrative law judges to adjudicate discrimination claims against federal contractors. In its decision, the court held that the DOL's administrative enforcement process likely violates the "Take Care" clause of Article II of the U.S. Constitution, and that ABM would suffer irreparable harm if the DOL enforcement proceeding was not enjoined.

I. The DOL Enforcement Proceeding and ABM's Response

The Office of Federal Contract Compliance Programs (OFCCP) is the DOL agency responsible for overseeing federal contractors' compliance with Executive Order 11246, the Rehabilitation Act, and the Vietnam Era Veterans Readjustment Assistance Act. OFCCP conducted a compliance review of ABM, a janitorial services company. During the review, OFCCP determined that ABM preferred Hispanic applicants over Black and White applicants, failed to keep required employment records, and failed to conduct required analyses and audits.

Pursuant to DOL regulations, OFCCP commenced an enforcement proceeding against ABM before the DOL Office of Administrative Law Judges, seeking back pay and other forms of relief. OFCCP can refer such a matter to DOL administrative enforcement proceedings as it did here, or to the Department of Justice for enforcement in federal court. DOL ALJs are appointed by the DOL with the approval of the Office of Personnel Management, and they may not be removed from office except "for good cause." Good cause must be established and determined by the Merit Systems Protection Board (MSPB), the members of which are appointed by the President and may be removed by the President "only for inefficiency, neglect of duty, or malfeasance in office."

ABM filed a separate action against DOL in the U.S. District Court for the Southern District of Texas challenging OFCCP's authority to pursue the enforcement proceeding and seeking a preliminary injunction. ABM's challenge to OFCCP's enforcement proceeding mirrors those brought against the Securities and Exchange Commission's (SEC) administrative tribunal in recent years. ABM argued that OFCCP's ability to choose to bring the matter to an ALJ was unconstitutional on two grounds: (1) the proceeding before an ALJ violates the Seventh Amendment right to a jury trial, and (2) the two layers of for-cause removal protections between the President and DOL ALJs violate Article II.

II. The District Court's Decision

On October 30, 2024, the District Court entered a preliminary injunction against the DOL enforcement proceeding, holding that ABM's Article II constitutional challenge was likely to succeed and ABM would otherwise suffer irreparable harm in the absence of the injunction. Judge Lake found that the SEC ALJ's authority to conduct hearings is "essentially the same" as the DOL ALJs, and therefore pursuant to *Jarkesy v. Securities and Exchange Commission*, 34 F.4th 446, 463 (5th Cir. 2022), enforcement proceedings before a DOL ALJ violated the "take care" clause of Article II of the Constitution.¹ In *Jarkesy*, the Fifth Circuit held that having two or more layers of good-cause removal restrictions between the President and SEC ALJs was unconstitutional because this additional layer of for-cause removal protection interferes with the President's ability to "take care" that the laws be faithfully executed. *Id.* At 464-5.² The court relied on this Fifth Circuit precedent and related Supreme Court decisions to find that the DOL ALJs are unconstitutionally protected by two layers of good-cause removal restrictions: they can only be removed for cause, a decision which must be made by the MSPB, who the President can only remove for cause.

In granting the preliminary injunction, the Court found that being subject to a proceeding before an improperly insulated ALJ is a cognizable legal injury that qualifies as irreparable harm. *ABM v. Indus. Grps.*, No. 24-3353, slip op. at 15-16 (S.D. Tex. Oct. 30, 2024). The balance of equities and public interest, the Court held, weighs in favor of granting the requested injunction because the government suffers no harm from stopping an unlawful agency action, and, nevertheless, any harm is mitigated by the DOL's ability to refer violations to the DOJ for enforcement in federal court. *Id.* 16-17.

III. What This Means for Federal Contractors

The court's ruling applies only to the *ABM Industry Groups LLC* proceeding; "the specifics of any other proceedings or ALJs," the Judge wrote, "are not before this court." *Id.* at 18 FN 20. The decision, however, is persuasive precedent for challenges to OFCCP enforcement proceedings elsewhere and is another example of a successful challenge to the authority of federal administrative agencies.³

We at Paul Hastings are continuing to follow these issues and will provide updates as the law develops. In the interim, please contact us to continue the discussion.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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- ¹ Article II states that the President “shall take Care that the Laws be faithfully executed” and grants the President the power to “nominate, and by and with the Advice and Consent of the Senate, shall appoint ‘Officers of the United States,’” except “inferior Officers,” for which Congress can choose to vest appointment power in the President alone, the courts, or department heads. U.S. Const. Art. II, § 1, cl. 1; § 2, cl. 2; § 3.
 - ² The U.S. Supreme Court reviewed the Fifth Circuit’s decision in *Jarkesy*, but only decided the separate Seventh Amendment challenge to the SEC’s ALJ scheme. For more information on the Supreme Court’s decision, see [The Consequential Impact of the Supreme Court’s Monumental Ruling in SEC v. Jarkesy](#).
 - ³ For more information on the Post-*Chevron* Supreme Court decisions, see [The Post-Chevron Future: Litigation Against Administrative Agencies Following Loper and Corner Post](#)

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