



Decision

Matter of: Office of Management and Budget and U.S. Department of Labor—
Applicability of the Congressional Review Act to a Joint Memorandum
Titled, *Strengthening Support for Federal Contract Labor Practices*

File: B-335142

Date: May 1, 2024

DIGEST

The Office of Management and Budget (OMB) and the Department of Labor (DOL) issued a joint memorandum titled, *Strengthening Support for Federal Contract Labor Practices* (Memorandum). The Memorandum requires federal agencies to designate labor advisors to advise agency officials on federal contract labor matters. Neither OMB nor DOL submitted a report pursuant to the Congressional Review Act (CRA) to Congress or the Comptroller General on the Memorandum.

CRA adopts the definition of rule under the Administrative Procedure Act but excludes certain categories of rules from coverage. CRA requires that before a rule can take effect, an agency must submit a report on the rule to each House of Congress as well as the Comptroller General and it provides procedures for congressional review where Congress may disapprove of rules. We conclude that the Memorandum meets the definition of a rule under CRA but that it falls under CRA's exception for rules related to agency management or personnel. Therefore, the Memorandum is not subject to CRA's submission requirements.

DECISION

On January 10, 2023, the Office of Management and Budget (OMB) and the Department of Labor (DOL) issued a joint memorandum titled, *Strengthening Support for Federal Contract Labor Practices* (Memorandum). We received a request for a decision as to whether the Memorandum is a rule for purposes of the Congressional Review Act (CRA), and if so, whether it constitutes a rule that is substantially the same as one previously disapproved by Congress. Letter from Bill Cassidy, Ranking Member, Senate Committee on Health, Education, Labor, and Pensions and Virginia Foxx, Chairwoman, House Committee on Education and the Workforce to Comptroller General, GAO (Mar. 16, 2023). For the reasons discussed

below, we conclude that the Memorandum falls within the exception for rules related to agency management or personnel and thus is not subject to CRA's submission requirements. Because the Memorandum is not a rule for CRA purposes, we do not consider whether it is substantially similar to a rule for which a resolution of disapproval has been enacted.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), available at <https://www.gao.gov/products/gao-24-107329>. Accordingly, we reached out to OMB and DOL to obtain their legal views on the matter. Letter from Assistant General Counsel, GAO, to General Counsel, OMB, and Solicitor, DOL (Apr. 3, 2023). OMB and DOL submitted a joint response to our request. Letter from General Counsel, OMB, and Solicitor, DOL to Assistant General Counsel, GAO (May 9, 2023) (OMB and DOL Response).

BACKGROUND

OMB and DOL Memorandum

The President established the White House Task Force on Worker Organizing and Empowerment (Task Force) under Executive Order No. 14025, Apr. 26, 2021. The Task Force released a report that included recommendations for executive action to strengthen federal contract labor and employment practices. See Task Force, *Report to the President*, at 36, available at <https://www.whitehouse.gov/wp-content/uploads/2022/02/White-House-Task-Force-on-Worker-Organizing-and-Empowerment-Report.pdf> (last visited 4/9/2024) (*Task Force Report*). One recommendation was for OMB and DOL to direct "all contracting agencies to designate an agency labor advisor responsible for policies and practices to improve implementation and compliance with labor requirements for federal contractors." See *id.*

As a result, OMB and DOL issued a joint memorandum titled, *Strengthening Support for Federal Contract Labor Practices* (Memorandum). See DOL and OMB, Memorandum for the Heads of Executive Departments and Agencies, *Strengthening Support for Federal Contract Labor Practices*, M-23-08 (Jan. 10, 2023), available at <https://www.whitehouse.gov/wp-content/uploads/2023/01/M-23-08-Labor-Advisor.pdf> (last visited 4/9/2024). The Memorandum sets forth four key actions. First, it states that "[e]ach Chief Financial Officer (CFO) Act¹ agency shall, and other Federal

¹ See generally Chief Financial Officers Act of 1990 (CFO Act), Pub. L. No. 101-576, 104 Stat. 2838, (Nov. 15, 1990). The CFO Act charges OMB with overseeing many of the federal government's general management functions including procurement policy. See 31 U.S.C. §§ 503, 506. Currently there are 24 CFO Act agencies. 31

(continued...)

agencies should, ensure that one or more labor advisors who are career employees are designated to advise agency officials on Federal contract labor matters.” Memorandum, at 2. Second, the Memorandum requires agencies to submit the names of their designated labor advisors to DOL for publication on its website and on the General Services Administration’s System for Award Management (SAM.gov) website. *Id.* Third, the Memorandum provides recommendations on the types of matters for which labor advisors should advise. *Id.* at 3. Lastly, the Memorandum informs agencies that OMB in conjunction with DOL will establish and maintain an interagency working group of labor advisors and acquisition personnel. *Id.* at 4–5.

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both Houses of Congress and to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date. *Id.* CRA allows Congress to review and disapprove rules issued by agencies for a period of 60 days using special procedures. See 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1). Where a resolution of disapproval is enacted, an agency may not reissue the disapproved rule nor a new rule that is substantially the same as the disapproved rule, unless specifically authorized by a law enacted after the resolution of disapproval. *Id.* § 801(b)(2).

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 804(3). CRA, however, excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

Neither OMB nor DOL submitted a report to Congress or the Comptroller General on the Memorandum. In its response to us, OMB and DOL stated that the Memorandum is exempt from CRA’s requirements because it falls within two exceptions for rules. OMB and DOL Response, at 1, 3–7. For the reasons explained below, we conclude that the Memorandum meets CRA’s exception for rules relating to agency management or personnel, and, therefore, is not subject to

U.S.C. § 901(b); See *also* Chief Financial Officers Council, *CFO Council Members*, <https://www.cfo.gov/members/> (last visited 4/9/2024).

CRA's submission requirements.² Because the memorandum is not a rule for CRA purposes, the prohibition in section 801(b)(2) does not apply and we do not consider whether it is substantially similar to a rule for which a resolution of disapproval has been enacted.

DISCUSSION

To determine whether the Memorandum is a rule subject to review under CRA, we first address whether the Memorandum meets the APA definition of a rule. As explained below, we conclude that it does. The next step is to determine whether any CRA exceptions apply. We conclude that the exception for rules relating to agency management or personnel applies to the Memorandum.

The Memorandum is a Rule as Defined by APA

The Memorandum meets APA's definition of a rule, which is adopted by CRA. First, the Memorandum is an agency statement of general applicability because it is an announcement from the Director of OMB and the Secretary of DOL to the heads of Executive Branch departments and agencies. Memorandum, at 1. Second, the Memorandum is of future effect as it requires CFO Act agencies to designate one or more labor advisors to advise agency officials on federal contract labor matters no later than February 15, 2023. *See id.* at 2, 5. Finally, the Memorandum prescribes policy and describes agency procedures as it imposes a new requirement for CFO Act agencies to designate labor advisors within their agencies, establishes an interagency working group, requires Executive Branch agencies to advise DOL of the name and contact information of their labor advisor, and notes that DOL will publicize the name of each agency's labor advisor(s) on its website and on the SAM.gov website. *See id.* at 2–4.

Next, we consider whether the Memorandum falls within one of the three categories of rules not subject to CRA. In their response to us, OMB and DOL asserted the Memorandum falls within both the exception for rules relating to agency management or personnel and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. OMB and DOL Response, at 4–5. We agree that the Memorandum falls within the first of those exceptions.

² Because we find the Memorandum falls within CRA's exception for rules relating to agency management or personnel, we do not address OMB and DOL's assertions regarding the exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

The Memorandum is Covered by the Exception for Rules Relating to Agency Management or Personnel

A rule falls within CRA's exception for rules relating to agency management or personnel if it relates to purely internal agency matters, with no effect on non-agency parties. See e.g., B-334237, Apr. 6, 2023; B-334221, Feb. 9, 2023; 142 Cong. Rec. E571, E579 (Apr. 19, 1996) (the CRA exception "exclude[s] matters of purely internal agency management and organization"). For example, we concluded that guidance issued by the Office of Personnel Management to assist agencies in implementing a vaccination requirement fell within the exception because its mandates solely applied to federal agency employees, and it did not impose any obligations on non-agency parties. B-334237, Apr. 6, 2023. Further, we have explained this exception extends to rules relating to the management or personnel of agencies outside of the agency issuing the rule. B-334221, Feb. 9, 2023 (stating that the exception is not limited to intra-agency rules but covers rules that apply government-wide).

Here, the Memorandum involves matters that clearly and directly implicate agency management and personnel matters. The Memorandum imposes certain requirements, each of which we consider to be management decisions. Memorandum, at 2–5. First, the Memorandum implements a managerial decision to require agencies to designate a labor advisor from the ranks of its career staff to ensure the consistent use of labor advisors. *Id.* at 2. Additionally, the Memorandum suggests job duties for labor advisors, and it establishes an interagency working group of labor advisors and acquisition personnel.³

Further, the Memorandum does not affect non-agency parties. The recommendations in the Memorandum primarily relate to the labor advisor's role through other agency officials, not contractors or other third parties. Memorandum, at 3–5. Although the Memorandum envisions that contracting officers will engage with agency contractors in some areas, it does not provide any guidance, impose requirements on, or directions to, agency contractors. See *id.* at 5.

Here, the Memorandum addresses matters that implicate agency personnel matters and do not affect non-agency parties. Therefore, it falls within the exception for rules relating to agency management or personnel.

³ *Memorandum*, at 3–4. Although some agencies have not designated labor advisors, the Federal Acquisition Regulation (FAR) already provides a role for labor advisors within the realm of federal contracting. FAR § 22.001 (defining the term agency labor advisor); FAR § 22.1003-7 (requiring contracting officers to consult the agency labor advisor about the applicability of the Service Contract Labor Standards statute); FAR § 22.1013 (providing a role for the agency labor advisor to act as a liaison between DOL's Wage and Hour Division for certain contracting matters).

Section 801(b)(2) Applies to Rules as Defined by CRA

We next turn to section 801(b)(2) of CRA, which provides that where a rule is disapproved through enactment of a joint resolution, it may not be reissued and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule. 5 U.S.C. § 801(b)(2).

Section 801(b)(2) applies specifically to rules as defined by section 804 of CRA. As explained above, CRA adopts the definition of rule from APA, but specifically excludes three categories of rules from such definition. 5 U.S.C. § 804(3). The Memorandum at issue here does not meet the definition of a rule for purposes of CRA because it falls within the exception for rules relating to agency management or personnel. Because the Memorandum is not a rule for purposes of CRA, the prohibition in section 801(b)(2) does not apply to it and we do not consider whether it is substantially similar to a rule for which a resolution of disapproval has been enacted.⁴

CONCLUSION

The Memorandum meets the APA definition of rule but falls within CRA's exception for rules relating to agency management or personnel. Therefore, the Memorandum is not subject to CRA's requirement that a rule be submitted to Congress before it can take effect.



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⁴ Congress passed a resolution of disapproval, which was signed into law, for a 2016 rule that amended the Federal Acquisition Regulation titled, *Fair Pay and Safe Workplaces*, 81 Fed. Reg. 58562 (Aug. 25, 2016) (the FAR Rule). Request Letter, at 1 (citing H.R.J. Res. 37, 117th Cong. (2017)). The FAR Rule was issued to implement a 2014 Executive Order that imposed new substantive requirements on federal contractors and subcontractors, such as requiring contractors to disclose findings of labor law violations under 14 statutes. See 81 Fed. Reg. 58562 (Aug. 25, 2016); OMB and DOL Response, at 8.