

February 5, 2009

President Obama Signs Three Executive Orders Concerning Unions

On Friday, January 30, 2009, in a move targeting Bush-era policies that some viewed as unfriendly to organized labor, President Barack Obama signed three executive orders: [Notification of Employee Rights Under Federal Labor Laws](#); [Nondisplacement of Qualified Workers Under Service Contracts](#); and [Economy in Government Contracting](#). Regarding these orders, President Obama commented, "We need to level the playing field for workers and the unions that represent their interests. . ."

Notification of Employee Rights Under Federal Labor Laws

By signing this order, President Obama, via the Secretary of Labor, guaranteed that employees working under government contracts will be informed of their federal labor law rights. A government contractor will now be required to post a notice approved by the Secretary of Labor. At this time, the exact language of the notice is unknown; however, the order contemplates that it will involve a notification to employees of their union-related rights under the National Labor Relations Act ("NLRA"). As recited in the order, the NLRA "encourage[s] the practice and procedure of collective bargaining" and "protect[s] the exercise by workers of full freedom of association, self-organization, and the designation of representatives of their own choosing. . ." The order also requires a contractor to comply with all aspects of the Secretary's Notice and the related rules, regulations, and orders of the Secretary of Labor. If a contractor does not comply with any of the stated requirements, it faces possible cancellation of the contract and being declared ineligible for future government contracts. Moreover, a contractor is required to include these provisions in every subcontract entered into in connection with its federal contracts.

Finally, the order revokes former President George W. Bush's Executive Order 13201, which required federal contractors to post a *Beck* notice informing employees of their right to refrain from joining a union or paying dues unrelated to collective bargaining, contract administration, or grievance adjustment.

Nondisplacement of Qualified Workers Under Service Contracts

This order applies to successor federal contractors, or federal contractors who are awarded a contract for the same services and location as an expiring service contract. It begins by explaining that, "The Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees." Accordingly, successor federal contractors are now required to offer employees of the predecessor employer (other than managerial and supervisory employees) a right of first refusal for open positions they are qualified to perform. No employment openings under the contract exist until the successor provides the right of first refusal. Additionally, subcontractors are contractually obligated to these hiring requirements when the subcontractors enter into contracts with covered contractors. The order also enumerates procedures for identifying predecessor employees and making the appropriate offers of employment. In turn, the order provides that offers need not be made to predecessor employees whom the contractor or subcontractor reasonably believes failed to perform suitably on the job. If a contractor violates this order, the contractor may be ineligible to receive federal contract awards for a period of up to three years.

Economy in Government Contracting

The third order states that the Government will not pay for costs associated with persuading employees to exercise or not exercise their rights to organize and bargain collectively. It is unclear at this time how costs for this prohibited purpose will be segregated from other allowable costs; however, the order instructs the Federal Acquisition Regulatory Council to promulgate regulations within 150 days to give federal contractors further guidance. Despite the impartial tone of the order, it targets anti-union campaigns by government contractors. The order specifically disallows costs associated with the following activities (when they are undertaken to persuade employees to exercise or not exercise their rights to organize and bargain collectively): 1) preparing and distributing materials; 2) hiring or consulting legal counsel or consultants; 3) holding meetings (including paying the salaries of the attendees); and 4) planning or conducting activities by managers, supervisors or union representatives during work hours. Nevertheless, the order allows costs associated with "maintaining satisfactory relations between the contractor and its employees," such as the costs of labor/management committees.

The order's wording attempts to avoid the fate of a similar California state law recently struck down by the United States Supreme Court in *Chamber of Commerce of U.S. v. Brown*, 128 S. Ct. 2408 (2008). The *Brown* Court held that the statute, which prohibited entities that received state funds from using those funds for anti-union campaigns, restricted employer speech in an area that Congress intended to be unrestricted. The Supreme Court reasoned that two of the statute's goals were constitutionally infirm. First, the statute's specific goal was to promote California labor policy (as opposed to ensuring that state funds were used for the purposes for which they were obtained); thus, the statute conclusively presumed that funds used from a commingled account for anti-union campaigns violated the statute. Second, the statute allowed for the use of state funds to negotiate pro-union neutrality agreements and access rights.

In contrast, President Obama's executive order provides that (a) it promotes economy and efficiency in government contracting (while simultaneously acknowledging that it is consistent with U.S. labor policy); (b) disallows payment of certain costs instead of restricting the use of federal funds; and (c) does not allow for the payment of costs associated with pro-union speech.

Practical Effects

Under these orders, federal contractors and subcontractors must take special care to ensure that they are complying with all new contract provisions or face a potential loss of business. Federal contractors, now forced to affirmatively notify employees of their federal labor law rights, should expect increased litigation and organizing efforts. The requirement that successor federal contractors offer employment to predecessor employees makes it almost a given that if the predecessor workforce is represented by a union, the bargaining obligation - based generally on the composition of the workforce and the nature of the work - will attach to the successor. Further, contractors and subcontractors will no longer be allowed to include certain costs in bids or contracts that pertain to anti-union campaigns, making it more difficult and expensive to voice their concerns regarding organization and collective bargaining. It also appears inevitable that there will be more regulation and scrutiny of contracts based on complaints from unions that funds are being used for proscribed purposes.

If you have any questions concerning these executive orders or the associated federal labor laws, please contact:

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