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President Obama's Executive Orders Regarding Labor Relations in Government Contracting

Three Executive Orders issued today by President Barack Obama materially alter labor relations obligations for companies that conduct business with the federal government or work on federally-funded projects. These Executive Orders: (a) eliminate the requirement that federal contractors post notices advising union-represented employees of their rights not to join the union, instead requiring a notice advising employees of their right to organize; (b) render unallowable for government contract accounting purposes the costs of influencing workers deciding whether or not to form a union; and (c) require new service contractors on federal facility contracts to offer employment to nearly all the predecessor contractor's employees.[1]

Further, the first and third of these Orders expressly provide that the sanctions for non-compliance can include suspension or debarment from federal government contracting. These initial measures from the new administration reflect what could be a growing use of suspension and debarment to implement policy changes, and not merely to protect the government from contracting with unethical companies.

Executive Order re "Posting": NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Section 2 of this Order requires all Government contracting departments and agencies to include the following language in every Government contract:[2]

> 1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The notice shall include the information contained in the notice published by the Secretary of Labor in the Federal Register (Secretary's Notice).

Additional required contract language obligates the contractor to include this language in any and all subcontracts. The Order specifies that the Secretary of Labor may issue regulations penalties and remedies for non-compliance, including not only "cancellation" (which we can speculate means some form of termination) of any contracts under which the violation arose, but also suspension or debarment from eligibility for future government contracts until the Secretary is satisfied that the contractor will comply in the future. The Order certainly raises questions as to which entity will administer these actions, and whether the actions will be subject to APA and CDA review.

The Order directs the Secretary of Labor to initiate rulemaking within 120 days to "prescribe the size, form, and content of the notice to be posted by a contractor under paragraph 1 of the contract clause…." Such notice described in section 2 of this order. Such notice is to describe the rights of employees under Federal labor laws, consistent with "encouraging the practice and procedure of collective bargaining…." Finally, the Order specifically rescinds Executive Order 13201, signed by President Bush, which required only the posting of a notice explaining employees' "Beck rights."

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***Beck* rights and Executive Orders:** Despite express language in the National Labor Relations Act that gives all employees the right to refrain from union activity, labor unions have long sought to require employers to employ only dues-paying members through "union security" contract language, which requires that an employee must become a member in good standing of the union as a condition of continued employment. Except in so-called "right-to-work" states,[3] Federal law permits enforcement of a "union security" provision. Yet union-represented employees who do not wish to become full-fledged members of the union may satisfy that obligation merely by paying to the union a fee to compensate the union for its representational activities ("agency fees"). In Communication Workers of America v. Beck, 487 U.S. 735 (1988), the United States Supreme Court held that a union violates the law when, over the objection of fee paying non-member employees, expends agency fees on "non-germane activities unrelated to collective bargaining, contract administration or grievance settlement." Thus, non-member employees have certain so-called "Beck rights," including the right to refrain from joining a union; the right to object to the use of mandatory fees for political activities; and the right to seek appropriate refunds or reductions.

Requiring federal contractors to notify employees of Beck rights has been the subject of partisan controversy for many years. President George H.W. Bush first required federal contractors to post notices in the workplace informing employees of their Beck rights in Executive Order 12800, which issued on April 23, 1992. Within two (2) weeks of his Inauguration, President Bill Clinton signed Executive Order 12836, which rescinded Executive Order 12800 in its entirety. President Clinton issued a statement along with the revocation, branding President Bush's Order "one-sided" and "distinctly antiunion as it did not require contractors to notify workers of any of their other rights protected by the NLRA…." Then, within a month of his own Inauguration, George W. Bush issued Executive Order 13201 on February 17, which rescinded the Clinton Order and reinstated the posting requirement.

President Obama's Order: President Obama has taken a position similar to President Clinton's regarding the Beck requirement, but has expanded upon the former President's criticism. In addition to revoking the requirement that contractors notify employees of Beck rights, the new Order goes much further, requiring contractors to notify employees of their right to organize. The specific form of the required Notice will not be known until the completion of administrative rulemaking by the Department of Labor, likely sometime in mid-2009. Still, given the Order's express endorsement of collective-bargaining and employees' rights to organize, one can assume that the Notice will be geared toward advising employees of these rights, if not exclusively, certainly more prominently than their Beck rights.

Absent significant additional legislative action, employees of federal contractors still have their Beck rights, and employers arguably may still advise employees of those rights. As set forth below, however, the cost of such efforts by the contractor are now unallowable. Absent an employer's voluntary notice, however, it will be incumbent upon employees to discover them on their own.

Executive Order re. Cost Allowability: ECONOMY IN GOVERNMENT CONTRACTING (Preventing Reimbursement of Funds Used To Influence Workers Deciding Whether To Form A Union)

Section 2 of the Order directs that:

> [C]ontracting departments and agencies...shall treat as unallowable the costs of any activities undertaken to persuade employees... to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing.

Section 4 of the Order further makes clear that when pertaining to the employees' choice whether to unionize, non-reimbursable activities will include:

> (a) preparing and distributing materials;
>
> (b) hiring or consulting legal counsel or consultants;
>
> (c) holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and
>
> (d) planning or conducting activities by managers, supervisors, or union representatives during work hours.

Finally, the Order directs the Federal Acquisition Regulatory ("FAR") Council to adopt rules and regulations necessary to enforce the Order, but that those rules and regulations "shall not interfere with the ability of contractors to engage in advocacy through activities for which they do not claim reimbursement." Not included within the scope of the Order are costs incurred to maintain satisfactory relations between the contractor and its employees, including costs of labor-management committees, employee publications and related activities.

The Order is effective immediately and shall apply to contracts resulting from solicitations issued on or after the 150-day period for FAR council action. Thus this Order will not, as a practical matter, impact contractors until the latter half of this year. However, because the costs to which the Order is directed are predominantly, if not totally, indirect costs, contractors need to begin monitoring the incurrence of such costs immediately to assure that such costs as are unallowable are not included in final indirect cost claim submissions and do not impact future years' Forward Pricing Rate proposals.

In 2000, the State of California passed Assembly Bill 1889, which placed similar restrictions on the use of State funds by contractors to promote or deter union organizing by employees. The California bill was expressly intended to advance the state's policy of not "interfer[ing] with an employee's choice about whether to be represented by a labor union."[4] Last year, in Chamber of Commerce of United States v. Brown, 554 U.S. __, No. 06-939 (June 19, 2008), the United States Supreme Court struck down AB 1889, ruling that the provision unlawfully sought to "regulate within 'a zone protected and reserved for market freedom.'" Slip Op., at 4-5. The Court stressed that the addition of Section 8(c) of the National Labor Relations Act[5] by the 1947 Taft-Hartley Act was intended to protect non-coercive, non-threatening speech for all parties in the context of union organizing:

> From one vantage, §8(c) merely implements the First Amendment... in that it responded to particular constitutional rulings of the NLRB...But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management."... It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word…has been expressly fostered by congress and approved by the NLRB." Letter Carriers v. Austin 418 U.S. 264, 272-273 (1974)[6]

It is clear from its express text that the White House has attempted to design this Order to avoid the issues which compelled the Supreme Court's decision in Brown. The language of the Order's policy statement and title -- attempting to frame the federal government as a market participant and not a regulator -- and the explicit protection of activity for which no reimbursement is sought are directly intended to bolster arguments the Supreme Court found lacking when advanced by the State of California in Brown. The ordered rules and regulations, yet to be developed by the FAR Council, may provide additional basis for challenge of this Order. In the meantime, however, federal contractors are faced with the prospect of accounting practices and procedures which clearly separate costs for communication with their employees in any matters arguably related to rights protected by the National Labor Relations Act.

Executive Order re successor labor workforce: NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

Section 1 of the Order provides:

> It is the policy of the Federal Government that service contracts and solicitations for such contracts shall include a clause that requires the contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. There shall be no employment openings under the contract until such right of first refusal has been provided.

This Order applies by its terms to all Service Contract Act contracts,[7] with a few specified exceptions, and requires conforming language to be placed in all solicitations and contracts awarded.

This order may be the most significant of the three for government contractors and subcontractors. While there are salient exceptions, in particular, the exceptions relating to the incumbent's poor performers (which was the subject of DoL enforcement actions under the Clinton version) and the exception relating to managerial and supervisory employees, this Order could have a significant impact on how contractors solicit incumbent employees, and could raise issues in business tort suits brought by incumbent contractors.

The Order expressly states that it is intended to promote "economy and efficiency" by "reduc[ing] disruption" to services and ensuring "an experienced and trained work force." Pursuant to labor law "successorship" principles, however, the Order will also have the effect of securing the continued recognition of the predecessor's union representative and preventing the successor from unilaterally setting initial terms of employment. Under well-settled law, unless it is "perfectly clear" that a new employer intends to hire all of a predecessor's employees, the new employer is free to set the initial terms and conditions of employment. However, where it is "perfectly clear" that all prior union-represented employees will be retained, the successor must maintain the pre-existing wages and benefits for those employees while bargaining with the union over terms and conditions of employment.[8]

Like the Order of notification of employee rights, this Order also authorizes the Secretary to impose sanctions and remedies against contractors found to have violated the Order, including ineligibility from future contracts. Significantly, the Order authorizes the Secretary to issue rules providing that if a contractor is found to have willfully violated this Order or its implementing regulation, the contractor may be subject to mandatory debarment for a period of up to three year. Contractors and subcontractors (a term that is not defined in the Order) will need to immediately begin to plan on the impact of the bid in future bids and proposals. The Order may well have significant competition impacts, as it will certainly complicate the ability of new bidders for existing contracts to offer alternative solutions for providing services which may not accommodate the existing workforce. Contractors can also anticipate that employees will seek to challenge management's interpretation of "similar" positions, and positions for which the employee is "qualified."

[1]The text of these Executive Orders should soon be available on White House's newly re-designed website at http://www.whitehouse.gov/briefing_room/executive_orders/

[2] Exempted are collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and purchases under the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403.

[3] Section 14(b) of the National Labor Relations Act allows states to pass "right-to-work" laws -- provisions that prohibit "union security" clauses that would be otherwise lawful under the Act. These provisions afford employees the opportunity of employment without having to join or contribute any financial assistance to any labor organization -- even a union which has been designated the exclusive representative of those employees.

[4] 2000 Cal. Stats. c. 872, §1.

[5] 29 U.S.C. §158(c).

[6] Brown, 554 U.S. __, No. 06-939 (June 19, 2008), Slip Op. at 6-7.

[7] President Clinton's Executive Order 12933 imposed similar obligations on "maintenance service contractors." On February 17, 2001, President Bush issued Executive Order 13202, which rescinded Clinton's Order in its entirety. President Obama's January 30, 2009 Order reinstates the Clinton Order's obligations, expanding them to all service contracts.

[8] See NLRB v. Burns Int'l Sec. Serv. Inc., 406 U.S. 272 (1972).

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