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President Obama Signs Three New 'Labor Friendly' Executive Orders

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February 2009

On January 30, 2009, President Obama issued three Executive Orders, each of which has the potential to significantly affect employers that do business with the federal government. All are reflective of the Obama administration's support for organized labor and are consistent with the president's support for the Employee Free Choice Act, legislation that he co-sponsored in the Senate during the last session of Congress.

The new Executive Orders will, respectively, require all federal contractors to post notices informing employees of their rights under the National Labor Relations Act ("NLRA"); potentially limit the ability of employers that are federal contractors from actively exercising their rights under the NLRA's employer free-speech provisions by barring the use of funds that they receive under government contracts to influence employees' decisions as to whether or not they will opt for union representation; and require companies that enter into certain service contracts with the federal government to offer continued employment to the employees of contractors they are replacing, in many instances becoming obligated to recognize and bargain with such employees' union representatives under the National Labor Relations Board's successorship doctrine.

The first of these Executive Orders, entitled "Notification of Employee Rights Under Federal Labor Laws," requires employers that contract with the federal government to formally notify employees of their rights under the NLRA. The NLRA is the federal statute providing private-sector employees with the right to engage in or refrain from engaging in "collective activity," including forming and joining unions, to deal with their employers with respect to wages, benefits, working conditions, and other terms and conditions of employment. The stated purpose of this Executive Order is to facilitate the efficient and economical completion of government contracts without labor unrest. All covered government contractors and subcontractors (unless otherwise exempted by the Secretary of Labor) will be required (a) to post notices which are to be specified by the Secretary of Labor and (b) to comply with such notices under threat

of the imposition of sanctions, including cancellation, suspension and being declared ineligible for further federal contracts. The required notices will need to be posted in conspicuous places about an employer's premises, including all places where notices to employees are typically posted. Both physical and electronic posting may be required. Until now, employers have generally not been required to affirmatively post notices advising employees of their rights under the NLRA. Prime contractors will bear responsibility for ensuring their subcontractors' compliance with this Order.

This Executive Order also revokes Executive Order 13201, issued by former President George W. Bush, which required employers of employees represented by unions to notify their employees of their so-called "Beck" rights—the right not to pay that portion of "union dues" used by a union for political contributions or other activities unrelated to the administration of the collective bargaining agreement.

The second new Order, entitled "Nondisplacement of Qualified Workers Under Service Contractors," applies to federal government service contractors and subcontractors. It requires such contractors, when they replace another contractor, to offer employment to the previous contractor's employees on that job (other than managerial and supervisory personnel)—giving the workers a so-called "right of first refusal." These obligations will arise whenever a federal government service contract changes hands and the new contractor is retained to perform the same or similar service at the same location as the predecessor.

The stated rationale for this Order is to reduce the "disruption to the delivery of services during the period of transition between contractors and provide the Federal Government the benefits of an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities and requirements." The Executive Order allows the heads of the contracting department or agency to authorize exemptions to this Order.

This Executive Order is likely to result in the increased presence of unionized workers on work under government service contracts, because "successor" contractors and subcontractors whose workforces may not be unionized will be required to offer employment to their predecessors' unionized workers. Under well-established NLRA precedents, such contractors will likely become obligated, at minimum, to recognize and bargain with the union representing prior contractor's work force as a "successor employer." While the successor may have the right to establish the initial terms and conditions of its offers to the prior contractor's workforce, under certain circumstances the new contractor may, under applicable case law, be deemed obligated to observe the terms of the prior contractor's collective bargaining agreement with its employees' union representative.

In some respects this Executive Order is similar to such local laws as the New York City Displaced Building Service Workers Protection Act, passed in 2002, and the District of Columbia's Displaced Worker Protection Act of 1994. Like their new federal counterpart, these union "job security" laws serve but one purpose—to provide

continued employment with continued union representation.

The third new Executive Order, designated "Economy in Government Contracting," prohibits government agencies from considering as "allowable costs" those costs and expenses incurred by federal contractors to influence workers in deciding whether to form unions and/or engage in collective bargaining. This Order, which "does not restrict the manner in which recipients of Federal funds may expend those funds," purports to be "consistent with the policy of the United States to remain impartial concerning any labor-management dispute involving government contractors." The Order disallows contract costs and expenses that are incurred in connection with efforts intended to persuade employees to exercise or not exercise the rights to form and join unions and to organize and bargain collectively. The costs that are disallowed include those for preparing and distributing communications materials; hiring or consulting legal counsel and consultants; holding meetings (including paying the salaries of those attending the meetings); and planning and conducting activities by managers, supervisors or union representatives during working hours. Government agencies may treat as allowable costs expenses such as those for labor-management committees and for employee publications other than those meant to persuade employees to exercise or refrain from exercising the right to organize and bargain collectively. Interestingly, this Executive Order closely follows a recent United States Supreme Court decision striking down a California state statute which sought to restrict the use of state funds to oppose union organizing, as pre-empted by federal labor law, specifically the NLRA.

The issuance of these three labor-friendly Executive Orders in the first weeks of the new administration likely foreshadows the Obama administration's continued support and advocacy for the Employee Free Choice Act ("EFCA"), and its support for other portions of organized labor's legislative agenda. Like the EFCA, these Executive Orders can be seen being intended to support labor's goal of expanding its presence in the private-sector workforce.

It is worth noting, however, that there is certainly precedent for the use of federal procurement laws as the basis for issuance of Executive Orders to support such policies. In 1995, for example, president Clinton issued an Executive Order barring the federal government from contracting with employers that exercise their legal right to permanently replace employees engaged in lawful economic strikes. The right of the executive branch of government to act through the use of such Executive Orders is not, however, an unlimited one, and courts have in some cases found the issuance of Executive Orders for similar purposes to be an overstepping of the authority of the legislative branch. Where the president, by issuance of an Executive Order, acts as regulator in the field of labor relations and seeks to establish broad policy rather than acting as a mere purchaser of goods, such actions may be subject to challenge as being pre-empted by the NLRA*. See Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir 1996).*

While some or all of these three new Executive Orders may face such challenges, it is

clear that in the meantime, employers that contract and do business with the federal government will need to be mindful of them and act in accordance with their dictates. Accordingly, those employers that are doing business with the federal government within the scope of these new Executive Orders and are subject to their coverage should confer with their counsel to review their particular obligations and ensure that they are in compliance.

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