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President Obama Signs Executive Orders Impacting Employers with Federal Contracts

President Obama recently signed four (4) executive orders, which strongly favor the interests of organized labor and will affect private employers that enter into contracts or subcontracts to provide goods or services to the federal government. The new executive orders:

- (i). Require the posting of a notice in the workplace on employee rights;
- (ii). Require federal contractors that perform services previously performed by another contractor to offer employment to the predecessor's employees;
- (iii). Disallow certain labor-related costs as legitimate expenses under federal contracts; and
- (iv). Permit and encourage federal agencies to use project labor agreements in large scale federal construction projects.

The new executive orders will *not* affect the obligations of federal contractors under existing contracts or subcontracts, as the requirements apply to new contracts or subcontracts entered into following the promulgation of regulations by the Secretary of Labor and Federal Acquisition Regulatory ("FAR") Council interpreting the new executive orders.

The new executive orders may run contrary to current judicial authority, precluding laws or executive orders that either alter the balance of bargaining or economic power that the National Labor Relations Act ("NLRA") establishes for organized labor and management, or that provide alternate remedies and procedures for certain NLRA violations. Therefore, the executive orders may be subject to judicial challenge on grounds that they are preempted under the NLRA. However, until any such challenge is successful, employers with federal contracts need to be mindful of and comply with the new executive orders.

1. Executive Order 13496 Notification of Employee Rights Under Federal Labor Laws (Signed by President Obama on January 30, 2009 – effective immediately)

Summary: This executive order requires federal contractors to inform their employees (through posting of a notice in the workplace) of their rights to bargain collectively and to be protected in the exercise of their rights to engage in union activity under the NLRA. All governmental contractors must also contractually require their subcontractors to provide the same notice requirement to the subcontractors' employees.

At this time, the exact text of the new required notice has not been issued. The Secretary of Labor is responsible for administration and enforcement of this executive order and has 120 days to promulgate the text of the notice. The notice requirement under this executive order will apply to new federal contracts and subcontracts resulting from solicitations issued on or after the effective date of the rule/text of the notice to be promulgated by the Secretary of Labor.

Additional items of significance are as follows:

- Exception: The notice posting requirements of this executive order do not apply to federal contracts for everyday supplies, services and construction valued at \$100,000 or less under the FAR Council's Simplified Acquisition Threshold. Caveat: the existence of even one contract valued at \$100,000 or more may trigger the requirement that an employer post the notice at all of its locations.
- The required posting may encourage increased union-organizing activity and other protected concerted activities among contractors' employees. A failure to comply with the posting requirement may result in cancellation of the federal contract or subcontract and debarment from future federal contracts.
- This executive order also revokes Executive Order 13201 from the Bush Administration, which had required federal contractors to post a different notice (the so-called Beck Notice) in the workplace, informing employees of their right *not* to join a union and for employees represented by a union to object to the union's use of member dues for purposes unrelated to collective bargaining or contract administration without the member's consent. Even with the revocation of Executive Order 13201, federal contractors may still post the Beck Notice, but are not required to do so.
- The Department of Labor regulations for the prior and now revoked Bush Administration executive order required the posting of the Beck Notice at all work sites, even if no work was performed under government contracts at those sites. While the final rules and regulations for the new executive order should provide further guidance, once issued by the Secretary of Labor, it is possible that the new executive order, may likewise require the notice of employee rights under the NLRA to be posted at all facilities of a federal contractor or subcontractor who have at least one federal contract valued at \$100,000 or more.

2. **Executive Order 13495**
Nondisplacement of Qualified Workers Under Service Contracts
(Signed by President Obama on January 30, 2009 – effective immediately)

Summary: Under this new executive order, employers assuming existing federal service contracts must give the predecessor's employees (other than supervisors or managers) a right of first refusal of employment. It addresses the situation where government service contracts change hands and a new contractor or subcontractor takes over a federal service contract.

The real impact of this executive order is that any time a successor employer hires a majority of its workforce from a predecessor, then under the NLRA, the successor may have to recognize any union which represented the predecessor's workforce. Following recognition, the successor must negotiate a new bargaining agreement with that union. Thus, this executive order potentially impacts union and non-union status of employers assuming federal service contracts.

Other items of significance are as follows:

- This executive order applies to all federal contracts and subcontracts that are covered by the Service Contract Act of 1965 (41 U.S.C. § 351 et seq.) and that result from contract solicitations issued on or after the effective date of the FAR Council's regulations implementing the new executive order (to be enacted within 180 days of the executive order).
- The order requires that all new federal service contracts or subcontracts covered by the Service Contract Act must now contain a provision granting employees of a federal contractor that has lost the service contract the right of first refusal for employment with the successor contractor in positions for which they are qualified.
- The successor contractor may not hire new employees, other than managers and supervisors, until all employees of the predecessor contractor have been offered employment (employees of prior contractors must be given at least 10 days to consider accepting the express offer of employment).
- Application: The executive order *does not* apply:
 - (i). to contracts or subcontracts meeting the FAR Counsel's Simplified Acquisition Threshold, as defined by 41 U.S.C. § 403 (contracts for everyday supplies, services and construction valued at \$100,000 or less); or
 - (ii). to federal service contracts that are for the performance of a single job (as long as not designed to avoid the purposes of the order).

- Exceptions: the executive order provides for a few limited exceptions. The successor contractor:
 - (i). is allowed to employ fewer employees than the predecessor contractor;
 - (ii). is not required to offer employment to an employee for whom it has a reasonable belief that “based on the particular employee’s past performance, has failed to perform suitably on the job;” and
 - (iii). is permitted to employ any of its own employees who have worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of the new contract and who would otherwise face layoff or discharge.

**3. Executive Order 13494
Economy in Government Contracting**

(Signed by President Obama on January 30, 2009 – effective immediately)

Summary: This executive order prohibits federal contractors from using federal funds to persuade their employees to exercise or not exercise the right to organize and bargain through a representative of their own choosing (i.e., preparing or distributing materials designed to persuade, hiring or consulting legal counsel or consultants to advise on or conduct persuader activities, holding persuader-activity meetings with employees (including cost of employee wages while attending these meetings) and planning or conducting persuader activities by managers or supervisors during work hours).

Importantly, the executive order does not prohibit federal contractors from engaging in the persuader activities altogether, provided the contractor does not claim reimbursement for such expenditures from federal funds. Thus, federal contractors may engage in union avoidance activities, but they will have to ensure that they account for the funds used for such purposes separate from costs and expenses billed to the federal government.

Other items of significance for private employers are as follows:

- The executive order will apply to all contracts and subcontracts with the federal government that result from solicitations issued on or after the effective date of regulations to be issued by the FAR Council (regulations to be issued by June 29, 2009).
- This executive order could pose significant hurdles to federal contractors or subcontractors who derive all or a large portion of their business from contracts with the federal government.

- Exception: The federal government shall treat as allowable, those costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of labor-management committees and employee publications that do not seek to persuade employees with respect to the exercise of their rights to organize and bargain collectively.

4. **Executive Order 13502**

Use of Project Labor Agreements for Federal Construction Projects

(Signed by President Obama on February 6, 2009 – effective immediately)

Summary: This executive order provides that federal agencies may require the use of union-only project labor agreements (a type of pre-hire collective bargaining agreement) on “large-scale construction projects” (where total cost to the federal government is \$25 million or more). The federal agency may require that every contractor and subcontractor on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations. Thus, non-union contractors and subcontractors that wish to work on a federal construction project may be required to be a party to a collective bargaining agreement with one or more unions. The executive order is effective immediately but gives the FAR Council 120 days to take whatever action is necessary to implement the provisions of the executive order.

Items of significance for private employers are as follows:

- The executive order represents a complete change in the law, as it repeals two (2) existing executive orders from the Bush Administration, which had prevented federal agencies and other recipients of federal funding from requiring or prohibiting contractors from signing union-only project labor agreements as a condition of performing work on federal projects.
- The executive order provides that if a federal agency determines that use of a project labor agreement will advance the federal government’s interest in achieving economy and efficiency in federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, the agency may require that every contractor and subcontractor on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations.
- This executive order is likely to have significant ramifications in the wake of the recently-passed \$787 billion stimulus package, a substantial portion of which is allocated to funding construction

projects. As a result, many construction firms may be compelled to agree to project labor agreements on federally-funded construction projects for the first time. Not only will these firms face likely difficulties in navigating the uncharted waters of participating in the negotiations for a project labor agreement, but they may also be forced to pay higher, union-level wages and benefits to their workers than they are otherwise accustomed to paying on construction projects.

- Contractors will also lose the right to make unilateral changes to the terms and conditions of employment for the employees working on the project and may also face restrictions on the hiring of employees for the project, as project labor agreements may require the use of union hiring halls. Finally, the order requires that any project labor agreement shall contain guarantees against strikes, lockouts, or similar job disruptions.

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