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## President Obama Issues Three Labor-Friendly Executive Orders

In what some commentators have referred to as the President "paying his union dues" following significant support from organized labor during the recent election, on January 30, 2009 President Barack Obama signed three Executive Orders relating to labor policy and government contracting. The Orders follow the President's signing of the recent [Lily Ledbetter legislation](#).

Described by the President as strengthening the rights of employees of federal contractors, the Executive Orders may be briefly summarized as follows:

- The Non Displacement of Qualified Workers Under Service Contracts Executive Order requires government contractors to offer jobs to the qualified employees of the predecessor contractor when a government contract changes hands.
- The Notification of Employee Rights Under Federal Labor Laws Executive Order reverses an Executive Order signed by President Bush requiring employers to post signs informing workers of their rights to limit financial support of unions serving as their collective bargaining representatives.
- The Economy in Government Contracting Executive Order prohibits government contractors from being reimbursed for expenses incurred when seeking to inform or influence workers regarding whether to form unions or engage in collective bargaining.

### A. Non Displacement of Qualified Workers Under Service Contracts

Under the Non Displacement of Qualified Workers Under Service Contracts Executive Order, service contracts and solicitations for such contracts will be required to include a clause requiring a successor contractor to offer "line" employees (other than managerial and supervisory employees) employed under the predecessor contract a right of first refusal of employment in positions for which they are qualified. The Executive Order maintains that "a carryover workforce reduces disruption to the delivery of services... and provides the federal government the benefits of an experienced and trained workforce that is familiar with the federal government's personnel, facilities, and requirements."

The enforcement provisions of the Executive Order indicate that the Secretary of Labor has the authority to issue final orders prescribing sanctions and remedies, including orders requiring employment and payment of loss wages. In addition, if a contractor has failed to comply with any order of the Secretary or has committed willful violations of the Executive Order or its regulations, "the contractor or subcontractor, and its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest, shall be ineligible to be awarded any contract of the United States for a period of up to three years."

This Executive Order is, in essence, a renewed and expanded version of an Executive Order issued under President Clinton that was limited to building service workers and was revoked by President Bush in 2001. On October 20, 1994, President Clinton issued Executive Order No. 12933 directing federal agencies to include in public building maintenance contracts a clause requiring successor contractors to give their predecessor's employees a right of first refusal to employment openings under the new contract. President Bush's Executive Order No. 13204 effectively rescinded that earlier order.

It is difficult to forecast the practical effect of President Obama's Executive Order. At least one commentator has noted that contracts may in fact be lost due to the poor performance of the prior workforce, which will now be given preferential hiring rights on any successor contract. See Mickey Kaus, "Labor Payoff of the Day," *Slate.com*, January 30, 2009. While the Executive Order does not provide any additional rights to employees in regard to maintaining their employment with successor contractors, such contractors will need to actively manage the performance of their workforce given that they now may not be able to employ line employees with whom they have worked in the past.

### B. Economy in Government Contracting

The Economy in Government Contracting Executive Order requires contracting departments and agencies to treat as unallowable "the costs of any activities undertaken to persuade employees – whether employees of the recipient of the federal disbursements or of any other entity – 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." The Executive Order provides examples of unallowable costs, including: 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.

This Executive Order is a renewed attempt to impose a change in the established law regarding "allowable costs" for government contractors that the Clinton administration attempted to impose as a "midnight regulation" in the final days of its tenure. Upon its issuance, the Clinton rule, which was attached to "black listing regulations," was challenged as unfair and unworkable by the business community and was immediately stayed and later revoked by the Bush administration in 2001.

In a press release issued the same day as President Obama's Executive Order, the United States Chamber of Commerce stated that "the new Executive Order runs counter to the fundamental values of free speech, hindering the right of employees to hear from their employers about the vital decision whether or not to join a union." The Chamber press release contrasted the intent of the Executive Order with a recent opinion from the Supreme Court, in which it was noted that the National Labor Relations Act favors "uninhibited, robust, and wide open debate and labor disputes" and provides employees the "right to receive information opposing unionization." Chamber of Commerce v. Brown, 184 LRRM 2385, 2389 (U.S. 2008).

Here again, the practical import of this Executive Order is difficult to forecast. On its face, the Order would disallow disbursements to federal contractors for activities related to conveying the company's perspective during a labor organizing drive. Arguably, the modifications to the Federal Acquisition Regulation ("FAR") Council's provisions would convert those regulations into "neutrality agreements," which would effectively prohibit employers from responding to union campaigns. At a minimum, it would provide the opportunity to challenge contractors' receipt of funds and raise the specter of significant administrative issues in attempting to distinguish whether and how federal funds may have been used in an employers' response to an organizing campaign.

#### **C. Notification of Employee Rights Under Federal Laws**

The Notification of Employee Rights Under Federal Labor Laws Executive Order reverses a Bush Order that required federal contractors to notify workers that they can limit their financial support of unions that are serving as their bargaining representatives under government contracts. This order is considerably less provocative than the other simultaneously issued orders. However, one commentator did note that the metadata associated with the PDF version of the Executive Order first publicly circulated suggests that the document itself was created by Craig Becker, Associate General Counsel of the Service Employees International Union ("SEIU"). See <http://www.shopfloor.org/tag/craig-becker/>.

#### **D. Contractor Response**

Each of the three Executive Orders discussed above are effective as of the President's signing. While it is not possible to forecast the contracting community's response, it is likely that the Orders regarding the forced hire of predecessor employees and restrictions regarding the disbursement of funds relating to employer campaigns will give rise to preemptive litigation or lobbying efforts.

Venable LLP will continue to monitor the forthcoming modifications to the FAR provisions. The firm was previously involved in efforts to respond to the Clinton administration's midnight regulation, and it stands ready to represent its clients in litigation and lobbying efforts to mitigate the effect of the recent executive orders and any future measures enacted at the behest of organized labor.

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