

Executive Orders Signify Beginning of Obama Administration's Labor-Friendly Policies

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On January 30, 2009, President Obama issued three Executive Orders concerning the requirements applicable to companies that hold contracts with the federal government to provide goods or services. Among other effects, the three Executive Orders essentially undo policies of the Bush Administration that were considered by many to be against organized labor, and otherwise signify the beginning of the Obama Administration's strong stance in favor of labor unions.

All three Executive Orders became effective immediately upon publication and are to be followed within 120 to 180 days with a rulemaking process for implementation of rules and regulations applicable to the enforcement of each Executive Order. The first two Orders described below will be enforced by the U.S. Department of Labor, while the third Order has little mention of any enforcement mechanisms. Each Executive Order is summarized below.

Executive Order: Nondisplacement of Qualified Workers Under Service Contracts

This Order applies to all federal service contracts and solicitations for service contracts that succeed a prior service contract ("successor service contracts"). The Order requires all such successor service contracts to include a provision that requires the contractor and its subcontractors to offer all employees employed under the prior service contract a right of first refusal of employment in positions for which they are qualified. The Order specifically excludes managerial and supervisory employees from this requirement. However, the new contractor cannot make any other offers of employment openings available under the service contract unless and until the right of first refusal has been offered and the employees of the prior contractor have had at least 10 days to consider accepting the offer. The Order provides for a few limited exceptions to the rule. For instance, the successor contractor is allowed to employ fewer employees than the prior contractor and 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."

This Order defines contract as any contract or subcontract for services entered into between the federal government and its contractors that is covered by the Service Contract Act of 1965, as amended, 41 U.S.C. § 351. This Order specifically excludes from its requirements contracts issued under certain government contracting provisions, including those contracts issued: (a) under the simplified acquisition threshold ("SAT"), 41 U.S.C. § 403, which generally applies to contracts for "everyday" supplies, services and construction generally valued at \$100,000 or less, depending on the subject of the contract; (b) for services or purchases from blind or disabled persons under the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 46-48c; (c) for certain guard, custodial or other related services provided or contracted to sheltered workshops employing the severely handicapped; (d) for vending facilities contracts issued under the Randolph-Sheppard Act, 20 U.S.C. § 107; (e) for federal service contracts that are for the performance of a single job (as long as not designed to avoid the purposes of the Order); or (f) otherwise exempted by the contracting agency.

This Order specifically revokes Executive Order 13204, signed by President Bush in 2001, which had rescinded Executive Order 12933 by President Clinton. President Clinton's order had implemented displaced worker policies, and President Obama's Order effectively reinstates those policies. The Order will be enforced by the U.S. Secretary of Labor. Sanctions for non-compliance may include debarment for up to three years, payment of lost wages and orders requiring employment of the prior contractors' employees.

Executive Order: Notification of Employee Rights Under Federal Labor Laws

This Order applies to all federal government contracting departments and agencies as well as to every contract entered into, except collective bargaining agreements and those for purchases under SAT (generally less than \$100,000). The Order requires that a provision be included in every covered contract pursuant to which the contractor agrees to post a notice to employees informing them of their rights under the National Labor Relations Act ("NLRA"), including their right to organize. Penalties for non-compliance include cancellation of the current contract as well as future debarment.

This Order also specifically revokes Executive Order 13201, signed by President Bush in 2001, which had required federal contractors to publish a notice to employees informing them of their right to refuse to join a union and their right to object to having their union dues used for political or lobbying-related reasons.

Executive Order: Economy in Government Contracting

This Order precludes federal government contractors from being reimbursed by contracting agencies or departments for expenses incurred to influence employees' decisions to join or form a union or otherwise engage in protected collective bargaining. Examples of non-reimbursable expenses include: preparing or distributing printed materials; hiring legal counsel or other labor consultants; holding meetings (including paying wages for meeting attendance); or planning

activities conducted during working hours. The Order allows for the reimbursement of expenses related to the contractor's maintaining satisfactory relations between the contractor and its employees, such as costs related to labor-management committee meetings and certain employee publications.

What This Means for Employers

Because these Executive Orders are effective retroactively to January 30, 2009, all employers doing business under contracts, whether new or existing, with any federal government department or agency should review the contracts, as well as their billing practices and procedures, to ensure compliance with the Orders. Employers also should consult legal counsel regarding the terms of any contracts currently being negotiated with the federal government.

For Further Information

If you have any questions regarding this Alert or would like more information regarding the issues presented above, please contact any [member](#) of the [Employment & Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.