A Timely Analysis of Legal Developments

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On January 30, 2009, President Obama issued three labor-related executive orders that will have a significant effect on federal contractors and send a strong signal of the new administration's pro-labor positions.

# President Obama Issues Three Executive Orders That Dramatically Affect Labor Relations for Federal Contractors

**By Gavin S. Appleby and C. Scott Williams**

President Barack H. Obama signed three executive orders during a ceremony at the White House on January 30, 2009: *Economy in Government Contracting, Nondisplacement of Qualified Workers under Service Contracts, and Notification of Employee Rights under Federal Law.* The three executive orders focus on federal contractors, but the pro-labor slant of the President's action signals a dramatic shift in labor policy at the highest levels of the federal government. In announcing the executive orders, Mr. Obama said, "I ... believe that we have to reverse many of the policies towards organized labor that we've seen these last eight years, policies with which I've sharply disagreed. I do not view the labor movement as part of the problem, to me it's part of the solution. We need to level the playing field for workers and the unions that represent their interests, because we know that you cannot have a strong middle class without a strong labor movement." In the view of employers, however, the President did not "level" the playing field as much as tilted it decidedly in favor of unionization.

## Economy in Government Contracting

This executive order is by far the most controversial of the group. In the President's words, this order "is going to prevent taxpayer dollars from going to reimburse federal contractors who spend money trying to influence the formation of unions." Specifically, the order prohibits federal contractors from expending federal funds to persuade their employees to exercise or to not exercise the right to organize and bargain through a representative of their own choosing. Several examples of "persuader" expenditures prohibited by the executive order include preparing or distributing persuader materials, hiring or consulting legal counsel or consultants, holding meetings, or planning or conducting activities by managers or supervisors during work hours. Such expenditures are declared "unallowable" under any federal government contract by the order. Although federal contractors cannot use federal funds for these purposes, they may use federal dollars to "maintain satisfactory relations" between the contractor and its employees. As stated in the order, such expenditures could include the cost of labor-management committees, employee publications (provided they do not attempt to persuade employees regarding unionization), and other related activities.

Importantly, the order does not prohibit federal contractors from engaging in the above prohibited activities provided they do not claim reimbursement for those expenditures from federal funds. How difficult that will be may depend on each contractor - some only work with the federal government while others have a broader customer base. Further, the limitation is on the payment or repayment of permitted costs by the federal government. Carrying out union avoidance activities is not completely forbidden, but contractors will have to ensure that they account for the funds used for such purposes separate from costs billed to the government.

The order directs the Federal Acquisition Regulatory Council (FAR Council) to adopt rules and regulations necessary to carry out the order within 150 days. Although this executive order takes effect immediately, the order applies only to contracts resulting from solicitations issued on or after the date the FAR Council issues its rules and regulations, which will likely include a protocol for monitoring compliance with the order.

Significantly, the President's authority to issue this executive order constraining a federal contractor's free speech rights will likely face legal and constitutional challenge upon implementation of the FAR Council's rules. Such a challenge could have merit. In June 2008, the U.S. Supreme Court addressed a similar state law prohibition in *Chamber of Commerce v. Brown*. There, the Court considered the legitimacy of California's "union neutrality" law, Assembly Bill (AB) 1889, which prohibited state contractors from using state funds to "assist, promote, or deter union organizing." Ultimately, the Court held that the National Labor Relations Act (NLRA) preempted California's law, by finding that Congress had manifested a clear intent to encourage free debate on labor relations issues and that Congress explicitly intended, in Section 8(c) of the NLRA, that noncoercive employer speech was to remain unregulated. In the words of the Court, AB 1889 established a "formidable enforcement scheme" to deter otherwise protected employer speech. For more detail on the Supreme Court's decision in *Chamber of Commerce v. Brown*, see Littler's June 2008 ASAP, *U.S. Supreme Court Overturns California's Limitation on Employer Free Speech Rights to Resist Union Organizing*.

*Chamber of Commerce v. Brown* may not be directly applicable as most preemption issues deal with the priorities between state and federal law. However, Section 8(c) to the NLRA prohibits any regulation of employer speech unless the speech contains threats of reprisal or force or promise of benefit. According to the Supreme Court, Section 8(c) "implements the First Amendment" with regard to employer speech on unionization. Thus, the President's order arguably violates a federal contractor's First Amendment right to engage in noncoercive speech regarding unionization, and the order seems expressly inconsistent with the NLRA. A similar employer argument regarding inconsistency and preemption was raised in *Chamber v. Reich*, 74 F.3d 1322 (D.C. Cir. 1995), and was upheld by the D.C. Circuit Court of Appeals in a case challenging an executive order issued by President Clinton prohibiting federal contractors from using federal funds to hire permanent replacements during a strike. In short, a legal fight will undoubtedly arise as soon as the FAR Council issues implementing rules on President Obama's new executive order.

## Nondisplacement of Qualified Workers under Service Contracts

President Obama's second executive order creates rights for employees of federal contractors when a contract changes hands. As President Obama explained, "I'm issuing an order so that qualified employees will be able to keep their jobs even when a contract changes hands. We shouldn't deprive the government of these workers who have so much experience in making government work." Thus all new federal service contracts covered by the Service Contract Act must now contain a specific provision granting employees of a federal contractor that has lost the service contract the right of first refusal for employment with the successor contractor. The successor contractor may not hire new employees, other than management and supervisors, until all employees of the predecessor contractor have been offered employment. Willful violations of the order result in complete disbarment from federal contracts for a period of up to three years. This new requirement essentially ensures "representational security" for unions in collective bargaining relationships with federal contractors.

The law of successorship liability is set forth in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), in which the Supreme Court upheld NLRB rulings that a mere change in ownership in the employing entity is not such an "unusual circumstance" as to relieve



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the new employer of an obligation to bargain with the union that represented its predecessor's employees. The criteria upon which the Court upheld the bargaining obligation were that the bargaining unit remained unchanged and a majority of the employees hired by the new employer had been represented by a previously certified bargaining agent. The Court found that the successor employer was obligated to bargain with the incumbent union, but it had no obligation to adopt the predecessor's contract, unless it had agreed to do so as a matter of contract. The Court noted that a new employer is ordinarily free to set initial terms and conditions of employment. In contrast, if it were "perfectly clear" that the employer planned to retain enough former employees to constitute a majority of the new workforce, a successor would have an obligation to consult with the union as to the initial terms and conditions of employment, as well as, at least initially, honor the terms of the predecessor contractor's collective bargaining agreement.

By essentially requiring the continuity of the workforce in a context where the business being done under the federal contract has not changed, the new executive order in essence mandates "perfectly clear" successorship liability for the successor employer. Thus, if a union is present at the time of the change in contractor, the new contractor will usually have to recognize and consult/bargain with the incumbent union over initial terms and conditions of employment. The penalties for failing to comply are severe - disqualification for federal contracts for up to three years. At least some employers therefore may forgo seeking some federal service contracts in order to avoid the added costs of employing a unionized workforce.

## Notification of Employee Rights under Federal Law

As expected, President Obama also revoked Executive Order 13201, signed by President George W. Bush on February 21, 2001, requiring federal contractors to post a notice in the workplace informing employees of their rights under *Communication Workers of America v. Beck*, 487 U.S. 735 (1988). In *Beck*, the Supreme Court held that unions could not use member dues for purposes unrelated to collective bargaining or contract administration without the members' consent. Accordingly, these "*Beck*" rights guarantee all non-union members (in agency shops in right to work states) and financial core members (in union shops in non-right to work states) that they will not have to pay fees to unions other than for the purposes of collective bargaining, contract administration, and grievance adjustment. While the executive order does not and cannot reverse the decision in Beck, it goes further than simply reversing the notice requirement of the Bush administration. President Obama went on to declare: "We will also require that federal contractors inform their employees of their rights [to unionize or refrain from unionizing] under the National Labor Relations Act. Federal labor laws encourage collective bargaining, and employees should know their rights to avoid disruption of federal contracts."

At this point in time, the text of the new notice is unknown. The Department of Labor is responsible for the administration and enforcement of this executive order, and the Secretary of Labor has 120 days to promulgate the text of the notice. In addition, the Secretary of Labor is given broad investigation and quasi-judicial powers to determine whether an employer is in violation of this order. The Secretary may hold hearings, public or private, regarding compliance with the order, and has the power to impose sanctions against an employer, including not only the cancellation of the contract at issue, but also debarment from future government contracts. Regardless of the content of the notice, requiring employers to post such a notice in the absence of a violation of the NLRA is unprecedented. In the meantime, federal contractors are no longer required to post their current *Beck* notices.

## Executive Order 13202

According to the AFL-CIO's Building and Construction Trades Department, the President is preparing to issue a fourth executive order that would overturn former President George W. Bush's Executive Order 13202 issued in February 2001. That order prohibited the federal government from requiring or prohibiting a federal contractor to enter into project labor agreement with a labor organization on a federal construction project, and prohibits discrimination by the federal government against a federal contractor that refuses to enter into a project labor agreement. Although the text of the potential executive order is unknown at this time, the President's actions on January 30 suggest a pro-labor policy of requiring project labor agreements on federal construction contracts.



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## Implications and Suggestions

Federal contractors, unless and until the executive order is successfully challenged, will no longer be able to seek reimbursement for expenditures related to "persuader" activities. Stated differently, when a federal contractor experiences a union organizing campaign, it will no longer be able to share its views on the negatives of unionization with its employees unless it pays for such activities on its own. The Supreme Court's decision in *Chamber of Commerce v. Brown* and the D.C. Circuit's decision in Reich certainly cast some doubt on the constitutionality of this new executive order, but the results of upcoming litigation are difficult to predict.

Federal contractors must also post a notice informing employees of their Section 7 rights under the NLRA, and they must offer employment to their predecessor contractor's non-managerial employees.

With the President dealing these cards, the deck is certainly stacked in favor of greater unionization of federal service contractors. However, here are some guidelines for federal contractors to consider to minimize the effect of these executive orders:

- The executive order does not prohibit federal contractors from engaging in "persuader" activities, just from seeking reimbursement from federal funds for such purposes. Federal contractors, therefore, should segregate expenditures for "persuader" activities from expenditures for reimbursable purposes.
- Although there is no longer a requirement to post Beck notices, the executive order does not prohibit the posting of Beck information.
- Carefully consider the impact of successorship liability by requesting copies of predecessor contractors' collective bargaining agreements prior to responding to a solicitation for bids. Under the new executive order, the successor contractor will likely be required to recognize the existing union as soon as it takes over the federal contract and, at least initially, to honor the terms of the predecessor contractor's collective bargaining agreement. Employers therefore must decide, prior to submitting a bid, whether that eventuality will make winning the contract a profitable endeavor.

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