



CLIENT MEMORANDUM

President Obama Signs Three Pro-Union Executive Orders

March 6, 2009

INTRODUCTION

In keeping with President Obama's promise to "level the playing field" for workers and unions, the President issued three Executive Orders on January 30, 2009 that will have a significant impact and impose new constraints on employers that contract with the federal government. Specifically, the new Orders (i) require federal contractors to post notices informing employees of their rights under the National Labor Relations Act ("NLRA"), (ii) require successor contractors to offer jobs to qualified employees of the predecessor company, and (iii) prohibit federal contractors from seeking reimbursement for expenses related to persuading employees to exercise, or not to exercise, their right to form a union.

NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Advancing the Administration's goal to have workers be well informed of their rights under federal law to collective representation, this Order requires that, in every government contract for goods and services exceeding \$100,000, federal contractors and their subcontractors agree

to post workplace notices of employees' rights under the NLRA to bargain collectively. Contractors who fail to comply with this notice requirement face cancellation, termination or suspension of their government contracts and may be deemed ineligible for future government contracts. This Order expressly revokes Executive Order 13201 signed by President Bush in 2001, which required federal contractors to post a notice advising employees of certain rights, including their right not to join a union and to refrain from paying dues to unions beyond those relating to the administration of the collective bargaining agreement (so-called *Beck* rights).

The specific form and content of the notices required under this Order will be prescribed by rulemaking to be initiated by the Secretary of Labor within 120 days of the Order and the Order shall apply to contracts resulting from solicitations issued on or after the effective date of those rules. The Secretary of Labor is permitted to grant exemptions to this Order if the requirements would impair the ability of the government to procure goods or services on an economical and efficient basis.

NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

The President next addressed situations in which a successor contractor for an expired government contract elects to hire an entirely new work force, thus displacing all of the predecessor's employees. He dealt with that scenario by issuing an Executive Order requiring, with certain limited exceptions, that successor contractors must offer their predecessor's employees (excluding managers and supervisors) a right of first employment for positions for which they are qualified and must hold the position open for at least 10 days. This Order also revokes a Bush administration Order under which successor federal contractors were not required to offer employment to employees of a predecessor contractor. The practical import of this Order is significant: by requiring that employees of a predecessor have the opportunity to work for the successor employer, the new employer, under NLRA's successorship doctrine, may well be required to recognize and bargain with the union(s) that represented the predecessor's employees. Although the successor employer may set initial terms and conditions of employment with respect to these employees, the successor will likely be bound to bargain collectively with the unions involved for an initial contract.

Remedies for failure to comply with this Order may include sanctions, orders to employ the displaced workers and payment of lost wages. Moreover, willful violations may result in the contractor or subcontractor being ineligible to contract with the government for up to three years. The Order directs the Secretary of Labor to issue regulations to implement the Order and the Order will apply to solicitations issued on or after the regulations are issued. As above, the Labor Secretary is permitted to grant exemptions to this Order if the requirements would impair the ability of the government to procure goods or services on an economical and efficient basis.

ECONOMY IN GOVERNMENT CONTRACTING

Under this Order, which is effective immediately, costs incurred by a federal contractor to advise or persuade employees to exercise — or not to exercise — their rights to organize and bargain collectively are disallowed expenses for purposes of reimbursement. The disallowance of these expenses, which include money spent on preparation and distribution of materials, hiring/consulting with legal counsel, holding meetings and planning or conducting activities by managers, supervisors or union representatives during work hours, can have a significant impact on contractors whose profit margin is determined in part by the reimbursement of allowable costs.

Notably, the Order does not prohibit federal contractors from seeking reimbursement for costs incurred in maintaining satisfactory relations between the contractor and its employees that are not undertaken in connection with employees' right to organize and bargain collectively, such as costs of labor-management committees, employee publications and other related activities.

These Orders are not unexpected in what is expected to be a union-friendly Obama administration. Federal contractors should review their contracts and policies to ensure compliance.

For further information about this Order and further development, please feel free to contact any member of the Firm's Labor and Employment Group, including

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