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President Obama Signs Three Executive Orders as the First Step in Implementing a Pro-Union Labor Policy

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On Friday, January 30, 2009, President Obama signed three Executive Orders signaling an official reversal of the government's policy towards union organizing. In signing the three Executive Orders, the President reaffirmed one of the central themes of his election campaign, advancing the cause of organized labor.

Specifically, these Executive Orders direct that: (1) federal contractors post a notice advising employees of their rights to organize under the National Labor Relations Act ("NLRA"); (2) federal service contractors offer employment to a predecessor service contractor's employees before hiring a new workforce; and (3) costs related to activities that are intended to persuade employees regarding the exercise of their rights to organize or bargaining collectively are not reimbursable under federal contracts.

Notification of Employee Rights Under Federal Labor Laws

The first Executive Order repeals one signed by President George W. Bush (the "Beck Order") which required federal contractors to post a notice informing employees of, among other rights, their rights *not* to join a union. Union supporters objected to that requirement, arguing that non-union workplaces were not obligated to post similar notices informing employees that they were allowed to organize and join unions. This order responds to the unions' complaint.

The order starts with a policy statement that "the attainment of industrial peace is most easily achieved and workers' productivity enhanced when workers are well informed of their rights under federal labor laws, including the National Labor Relations Act." The order then quotes the following selective rights provided by the NLRA:

> "Encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

The order goes on to state that except where the Secretary of Labor finds that the application of the requirements of the order would impair the ability of government to procure goods and services on an economical and efficient basis, all government contracts must include the following provisions:

> 1. The contractor must agree to post a notice, of such size and form and containing such content as the Secretary of Labor shall provide, in conspicuous places, including all physical and electronic locations where notices to employees are customarily posted, in and about plants and offices where

employees covered by the NLRA engage in activities related to the performance of the contract;

2. A statement that the contractor will comply with all provisions of the notice;

3. An acknowledgment that the contract may be cancelled, terminated or suspended in whole or in part if the contractor does not comply, and that the contractor may be declared ineligible for further government contracts; and

4. A requirement that the contractor include these provisions in every subcontract that is entered into in connection with the contract.

Currently, employers are not required to post notices advising employees of their rights to organize and engage in collective bargaining under the National Labor Relations Act unless and until a union files a petition for a representation election with the National Labor Relations Board (NLRB) or an employer is found to have committed an unfair labor practice. This order, which was promoted by organized labor, is meant prominently to remind employees of federal contractors of their rights to organize and to notify them of their protections from any retaliation for engaging in such activity.

The Secretary of Labor is ordered to issue regulations as to the "size, form, and content of the notices" within 120 days.

For now, all contractors must remove any "Beck Order" notices from their premises, then, look for the form of notice to prescribed by the Secretary of Labor in the coming months and be sure to post the notices promptly.

Non-Displacement of Qualified Workers Under Service Contracts

This second Executive Order revives a Clinton administration order rescinded by President Bush that applies to federal contractors covered by the 1965 Service Contract Act. It provides that when a service contract with the federal government expires and a follow-on contract is awarded for the same service at the same location, the successor contractor or its subcontractors are required to offer the predecessor's employees (other than managerial and supervisory employees) a right of first refusal for employment in positions for which they are qualified. The order goes on to state that: "There shall be no employment openings under the contract until such right of first refusal has been provided."

Contractors must make express offers of employment to each employee, stating the time within which the employee must accept the offer, which in no case can be less than 10 days.

There is a limited exception for service contractors' employees who have worked for the contractor for at least three months immediately preceding the commencement of the contract who would otherwise face layoff or discharge if a first right of refusal is given to a predecessor employee.

Contractors must provide the government contracting officer a certified list of the names of all the service employees working under their contract during the last month of contract performance. This list will be provided by the government to the successor contractor and, upon request, to the employees or their representatives.

The effect of this Executive Order will be that once a union becomes the representative of employees performing work under a government service contract, the union will continue to represent the employees performing the work, regardless of contractor changes. Under NLRA successorship principles, as articulated by the Supreme Court in the seminal case of *NLRB v. Burns International Securities Services*, 406 U.S. 272 (1972), a successor employer must recognize and bargain with the union as the representative of its employees if the successor hires a majority of the predecessor's employees

to perform the same or similar work previously performed under the old contract. The Executive Order is intended to ensure just this workforce continuity.

Over the past few years, organized labor has been successful in getting "displaced worker" protection laws with similar hiring requirements passed in a few states (*e.g*. California Labor Code §§ 1060-1065) and by several local governments (*e.g*. New York, San Francisco, Pittsburgh, St. Louis, *inter alia*). Now, organized labor has been successful in convincing the federal government to revive the concept.

As with the other two Executive Orders, this is effective immediately. The Secretary of Labor is directed to issue implementing regulations within 180 days. And the obligations under the Order will apply "to contracts resulting from solicitations issued on or after the effective date" of the implementing regulations.

Economy in Government Contracting

The third Executive Order prohibits reimbursement under federal contracts for costs related to "activities undertaken to persuade employees to exercise or not to exercise the right to organize and bargain collectively through representatives of the employees' own choosing." In a short, but very broad and non-exhaustive list, this Executive Order identifies the following "persuader" activities that will no longer be reimbursable:

1. Preparing and distributing materials;

2. Hiring or consulting legal counsel or consultants;

3. Holding meetings (including paying the salaries of attendees at meetings held for this purpose);

4. Planning or conducting activities by managers, supervisors or union representatives during work hours.

Notwithstanding this prohibition on reimbursement, the Executive Order states that "the policy of the United States [is] to remain impartial concerning any labor-management dispute involving government contractors." And it explicitly "does not restrict the manner in which recipients of Federal funds may expend those funds."

The Executive Order directs the Federal Acquisition Regulatory Council ("FAR Council") to adopt implementing regulations within 150 days. It also states that the FAR Council may not "interfere with the ability of contractors to engage in advocacy through activities for which they do not claim reimbursement." Moreover, the Executive Order does *not* preclude contractors from obtaining reimbursement for "costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of labor-management committees . . .." The prohibition on reimbursement and any obligations under the implementing regulations will apply to contracts resulting from solicitations issued on or after the effective date of those regulations.

This Executive Order will likely be challenged despite the policy statement of neutrality in labor-management disputes and the explicit statement that recipients of federal funds may use such funds without restriction. Last year, in *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008), the U.S. Supreme Court invalidated a similar California statute that precluded employers that receive state funds — "whether by reimbursement, grant, contract, use of state property, or pursuant to a state program" — from assisting, promoting, or deterring union organizing. The Court found that this statute was preempted because it attempted to regulate an area reserved exclusively to the National Labor Relations Act.

This Executive Order attempts to avoid a similar fate by stating that it is issued "to promote economy and efficiency in government contracting" thereby attempting to fit within the

"market participant" exception to the preemption doctrine. Under the "market participant" exception, when government acts as a purchaser of goods and services rather than a "regulator," protecting its own economic interest rather than its policy interests, it does not offend the pre-emption principles of the NLRA.

This "market participant" rationale was the argument used by the Clinton administration when it signed an Executive Order in 1995 barring companies that hired permanent replacements for strikers from federal contracts. The Clinton administration argued that this was not "regulation" of labor but rather a legitimate exercise of the government's role as a purchaser of services in the marketplace.

Because this Executive Order conflicted with the NLRA's self-help scheme it was struck down by the Court of Appeals for the District of Columbia in *Chamber of Commerce of Commerce v. Reich*, 74 F.3d 1322 (DC Cir. 1995). Interestingly, the Clinton administration did not seek review of that decision to the Supreme Court.

Conclusion

By signing these Executive Orders, the Obama Administration has sent a message to the employer community that it has embraced a multi-faceted strategy designed to make it easier for unions to organize. While the Employee Free Choice Act (EFCA) is garnering most the limelight, it is only one arrow in organized labor's quiver to help them reestablish their presence.

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