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4 ANSWERS FOR FEDERAL CONSTRUCTION CONTRACTORS FACING NEW COLLECTIVE BARGAINING RULES

Insights
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Certain federal construction contractors and subcontractors should take the time now to review new labor requirements impacting most large-scale federal construction projects. A final rule, which the Biden administration announced on December 18, will require you to negotiate collective bargaining agreements with unions before covered projects begin. The White House claims the rule will support high quality jobs and help ensure projects are completed on time – but federal construction contractors and subcontractors may face more hurdles and higher costs if they are forced to hire workers through project labor agreements with unions. Who is covered by the new rule and what steps should you consider taking to prepare? Here are the answers to your top four questions.

1. Who is Impacted?

The final rule implements an executive order President Biden signed in February 2022 establishing a policy for federal agencies to utilize project labor agreements (PLAs) on large-scale construction projects. Biden noted that construction projects often involve multiple employers, which can create confusion and friction among groups of workers about the terms and conditions of employment.

Thus, the new rule will apply to most federal construction projects that are expected to cost the government $35 million or more. Importantly, the value of the subcontracts on these projects will be immaterial for purposes of applicability. In addition, the rule gives federal agencies the power to also require PLAs on projects with a value of less

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than $35 million where an agency believes a PLA would be appropriate.

Federal construction contractors and subcontractors will be required to negotiate project terms in advance with unions, which opponents contend will make it difficult for them to compete for federal construction projects and hire workers.

The Biden administration expects the rule to impact about 200,000 workers.

2. What is a Project Labor Agreement?

As you may know, a PLA is a specific type of contract used in the construction industry. According to the U.S. Department of Labor, a PLA is a pre-hire collective bargaining agreement that is negotiated between one or more unions and employers on a specific construction project. A PLA establishes the terms and conditions of employment for the project and generally includes:

- Binding provisions for all contractors and subcontractors;
- No-strike, no-lockout clauses;
- Grievance/arbitration procedures; and
- Wage rates and benefits for project workers.

PLAs may also require contractors to hire project workers through a union hiring hall and establish other hiring goals. Moreover, under a PLA, the wage and benefit rates to be paid can exceed the Davis Bacon Act prevailing wage rates.

While proponents of these agreements say they promote efficiency on construction projects, in practice the rule may make it much harder for many contractors to bid on large-scale opportunities. Opponents of the rule disagree. Congressman James Comer (R-KY) has stated, "This rule discriminates against contractors based on labor affiliation, favors labor unions, raises taxpayer costs, and freezes local workers out of job opportunities. Moreover, a concern has been raised that the final rule will negatively impact the 88% of workers in the U.S. construction industry that **do not** belong to a union.

3. What Happens Next?

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The rule was published in the Federal Register on December 22, 2023, and will take effect on January 22, 2024. But business groups that oppose the requirement, such as the Associated Builders and Contractors (ABC), are planning to challenge the rule in court.

"Absent a successful legal challenge, this executive overreach will reward powerful special interests with government construction contracts at the expense of taxpayers and the principles of free enterprise and fair and open competition in government procurement," said Ben Brubeck, ABC vice president of regulatory, labor and state affairs.

What Should You Do Now?

Federal construction contractors and subcontractors that will be affected by the new rule should not wait for the outcome of legal challenges to prepare for changes. Indeed, there are several steps you can take now, including the following:

- Take immediate steps to ascertain whether your organization is engaged as a covered contractor or subcontractor on any large-scale federal construction projects triggering application of the Executive Order;
- Evaluate and preserve any potential arguments against coverage in your particular case;
- Assuming that coverage is triggered, consider the potential implications of mandated hiring halls and union apprenticeship programs;
- Review the potential implications of proposed union security provisions – particularly in right-to-work states;
- Carefully evaluate all proposed PLAs for other potential third-party funding obligations, including any withdrawal liability implications associated with any underfunded multi-employer pension plans; and
- Otherwise consider the potential implications on your non-union operations.

You may also want to reach out to experienced legal counsel to develop an action plan ahead of the effective date.

Conclusion

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Fisher Phillips will continue to monitor any further developments in this area as they occur, so you should ensure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information. If you have any questions about how this development impacts your organization, please consult your Fisher Phillips attorney, the authors of this Insight, or a member of Fisher Phillips' Affirmative Action and Federal Contract Compliance Practice Group, the Labor Relations Group, or our Construction Industry Team.

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