The Potential Impact of President Obama's Three Executive Orders And A New Task Force

Insights
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On January 30, 2009 President Barack Obama fired three very clear shots across the bow of non-union employers. They were in the form of Executive Orders titled *Nondisplacement of Qualified Workers Under Service Contracts*, *Economy in Government Contracting*, and *Notification of Employee Rights Under Federal Labor Laws*.

At the signing ceremony for these three Executive Orders the President also established a mechanism designed to tee up further employment law modifications. The Working Families Task Force which will "focus on policies that will really benefit the middle class, policies to create jobs that pay well and provide a chance to save, to create jobs in growing fields and train workers to fill them, to ensure that workplaces are safe and fair as well as flexible for employees juggling the demands of work and family."

While no one can properly claim that the articulated goals are not worth pursuing, we anticipate that many of the improvements identified and pursued will have a decidedly pro-union and anti-employer bent.

Each of the Executive Orders in some way uses the power of federal spending, in President Obama's words, to "reverse many of the policies towards organized labor that we've seen these last eight years, policies with which I've sharply disagreed." It's important that all employers who have or who are contemplating undertaking federal contracts understand the reach of these Orders. It is also important for employers who do not have federal contracts to understand the radically changed and changing environment that these Orders presage.

Nondisplacement Of Qualified Workers Under Service Contracts
This Order requires that when a service contract with the government expires and a new contractor is awarded the contract, that new contractor or subcontractor must make an offer of employment to employees covered by the Service Contract Act of the predecessor contractor. Additionally the Order requires that the new contractor give the predecessor's employees a minimum ten-day right of first refusal of employment in positions for which they are qualified before the new contractor can make any offers of employment to anyone else.

The Order does not require the new employer to offer a right of first refusal to any former employee

whom the contractor "reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job." That means that the new contractor must have a particularized belief about a given employee's prior job performance in order to justify not making an offer of employment to that individual.

One other exception to the requirement to offer employment, subject to the ten-day right of refusal for the predecessor's employees, is a provision permitting the new contractor to employ any individual who has worked for the incoming contractor for three months immediately before the commencement of the covered contract *and* who would otherwise face lay-off or discharge.

Fortunately, the Order permits the new contractor or subcontractor to hire fewer employees than were hired by the predecessor in connection with performance of the work, and it contains no requirement concerning wages and benefits offered by the incoming contractor.

Enforcement to have real teeth

The Order sets up an enforcement mechanism through the Secretary of Labor who has the authority to issue final Orders prescribing appropriate sanctions and remedies which can range from Orders requiring employment and payment for lost wages, up to a three-year debarment from federal contracts.

The Secretary of Labor is directed to issue regulations by July 29, 2009 and the requirements of this Order will apply to contracts solicited after the Secretary of Labor and the Federal Acquisition Regulatory Council have issued the necessary regulations.

Economy In Government Contracting

This Order disallows all costs of activities undertaken by the employer to persuade employees to exercise or not exercise their rights to organize and bargain collectively. (We are unaware of excessive or frequent employer expenditures to persuade employees to join a union.) Examples of costs which will not be allowable are those associated with:

- preparing and distributing materials;
- hiring or consulting legal counsel or consultants;
- holding meetings, including paying the salaries of participants at the meetings held for the purpose of persuading employees to exercise or not exercise their rights to organize and bargain collectively;
- managerial or supervisory time spent planning or conducting activities relating to efforts to persuade employees.

The Order does not prohibit all employer efforts to address and persuade employees with respect to union affiliation and support, but rather dictates that such activities must be conducted solely at the employer's cost which is not reimbursable by the government.

Certain other costs remain allowable under this Order such as costs incurred to maintain satisfactory relations between the contractor and its employees, which includes costs of labor-management committees, employee publications (not related to persuasive matters) and other related activities.

This Order will apply to solicitation for contracts issued after June 29, 2009.

Is it lawful?

We anticipate that there is likely to be a challenge to this Order based on the U.S. Supreme Court's decision in a 2008 case – *Chamber of Commerce v. Brown*. That decision by a 7 to 2 majority invalidated a California statute that prohibited employers that received state grants of more than $10,000 in state program funds from using the funds "to assist, promote, or deter union organizing." While the comparison between the California statute and the Executive Order is not exact, the Court's rationale for overturning the California statute, we believe, is equally applicable to the Economy in Government Contracting Order.

The Court in *Chamber of Commerce* concluded that California's action was preempted by the National Labor Relations Act because it was contrary to a "congressional intent to encourage free debate on issues dividing labor and management." The Court held that "California's policy judgment that partisan employer speech necessarily 'interferes with an employee's choice about whether to join or to be represented by a labor union' . . . is the same policy judgment that . . . Congress renounced in the Taft Hartley Act."

The *Chamber of Commerce* decision held that a state could not ignore or override a clear mandate determined by Congress. We believe it very possible that the Court would conclude that the Executive Branch of government has no greater rights to ignore congressional mandates than did the State of California.

While it would not be surprising to see this issue finally addressed by the U.S. Supreme Court, in the meantime it's important for federal contractors covered by the Order to understand its reach and scope and to set up appropriate accounting measures to document compliance and to preserve records of all such expenditures for possible submission for payment in the event the Order is found to be preempted by the National Labor Relations Act.

Notification of Employee Rights Under Federal Labor Laws

This Order cancels President Bush's previous Executive Order of February 17, 2001 which directed federal contractors to notify employees of their rights concerning payment of union dues or fees. The Bush poster informed employees, among other issues, of their rights not to make certain contributions to unions.

The Obama poster has a decidedly different bent – as President Obama said concerning this Order: "We will require that federal contractors inform their employees of their rights under the National Labor Relations Act (NLRA). Federal labor laws encourage collective bargaining and employees

Labor Relations Act (NLRA). Federal labor laws encourage collective bargaining and employees should know their rights to avoid disruption of federal contracts." The Order itself concludes that the encouragement of collective bargaining will eliminate the causes of certain substantial obstructions to the free flow of commerce and mitigate and eliminate these obstructions when they have occurred.

While the wording of the required poster is presently unknown and will not be finalized until at least June 1, the enforcement provisions of this Order contain draconian penalties for federal contractors who do not comply. Failure to comply with the contractual provisions required by Section 2 of the Order can result in contract cancellation, termination, or suspension. Noncompliant contractors may also be prevented from entering into further contracts until the contractor has satisfied the Secretary of Labor that the contractor has complied with and will carry out the provisions of the Order.

Trouble waiting in the wings?

We have a significant concern with the potential breadth of this Order. On the one hand it could amount to nothing more than a requirement to post the notice that will be prepared in the next 120 days. But there is language in the Order which could require much more. Section 2, Paragraph 2 states: "The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations and Orders of the Secretary of Labor." If the intent of the Executive Order is merely for federal employers to post the required notice, it is difficult to imagine what other "provisions" a federal contractor could violate. And yet the Executive Order has frequent references to these as yet undetermined "provisions."

For example, Section 5 of the Order gives the Secretary of Labor the authority to "investigate any Government contractor, subcontractor, or vendor to determine whether the contractual provisions required by section 2 of this Order have been violated." If the concern is whether or not the contractor has posted and uses the required notices, such an investigation is rather quickly concluded.

But the frequent use of the term "provisions" throughout the Order could be an effort to give the Secretary of Labor new and sweeping powers to impact federal contractors' labor law obligations, at least as they have existed since 1935. This question cannot be answered with assurance until the Secretary's notice and related rules and regulations have been issued, which should happen by June 1. If the "provisions" do mandate sweeping changes, we anticipate any significant expansion may well impinge on NLRB or other federal agency established jurisdictions.

The Order will apply to contracts resulting from solicitations issued on the effective date of the promulgation of the Secretary of Labor's implementing rules and notice.

Looking Ahead

We expect that these Executive Orders are only the first salvo in a situation which will become increasingly more challenging for American employers, particularly for employers whose employees have not fully understood and embraced the supposed "benefits" of unionization

employees have not fully understood and embraced the supposed "benefits" of unionization. For more information contact any Fisher Phillips attorney.

This Legal Alert provides an overview of three new Executive Orders. It is not intended to be and should not be construed as legal advice for any particular fact situation.