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PRESIDENT OBAMA SIGNS EXECUTIVE ORDERS RELATED TO EMPLOYMENT BY GOVERNMENT CONTRACTORS

In an early possible indication of things to come, on January 30, 2009, President Obama issued three new Executive Orders affecting government contractors: *Nondisplacement of Qualified Workers Under Service Contracts* (in general, restoring rights granted under a 1994 Clinton EO that were revoked in 2001 by President Bush); *Notification of Employee Rights Under Federal Labor Laws* (requiring posting of rights related to organized labor), and *Economy in Government Contracting* (making unallowable costs incurred by federal contractors to influence whether their employees unionize). The EOs are effective immediately.

Nondisplacement Of Qualified Workers Under Service Contracts—This EO regulates what happens to employees when a federal contract for services changes hands. Based on a finding that “interests in economy and efficiency” are served when a successor contractor hires the predecessor contractor’s employees, this EO requires a contractor (and its subcontractors) to give non-managerial qualified employees of the previous contractor a right of first refusal on employment with the new contractor. The EO further provides that there shall be “no employment openings under the [new] contract until such right of first refusal has been provided.” Contracts can be exempted from the EO if the contracting agency finds that the EO would “impair the ability of the Federal Government to procure services on an economical and efficient basis.” Also, certain types of contracts are excluded from the EO. These include contracts for guard, elevator operator, messenger, or custodial services provided to by workshops



employing the severely handicapped, and agreements for vending facilities entered into pursuant to preference regulations. The EO also excludes those employees “hired to work under a federal service contract and one or more non-federal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of the Order.”

Notification of Employee Rights under Federal Labor Laws—This EO revokes an earlier order issued by President Bush (Executive Order 13201; issued on February 17, 2001). It requires posting a workplace notice of rights related to organized labor. To enforce the EO, the Secretary of Labor may sanction federal contractors for noncompliance, including termination, suspension, or cancellation of contracts. The EO requires specific language in every government contract (with some exceptions—e.g. collective bargaining agreements). Contracts must now provide that “[d]uring the term of this contract, the contractor agrees to post a notice . . . containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. . . .” The notice states that employees of federal contractors have a right to join or not join a union. This provision differs from President Bush’s earlier order, which called for a notice to employees that they had a right not to join a union.

Economy In Government Contracting—This EO effectively hampers efforts by federal contractors to encourage their employees not to organize unions. It forbids reimbursement for costs incurred by a contractor in an effort to influence whether, or the manner in which, its employees (or the employees of a subcontractors or another employer) exercise “the right to organize and bargain collectively through representatives of the employees’ own choosing.” Specifically not reimbursable are costs for the following activities, when they are directed at whether and how employees should exercise the right to organize: (i) preparing and distributing materials; (ii) hiring or consulting with consultants; (iii) holding meetings, including paying the “salaries” of attendees; and (iv) “planning and conducting activities by managers, supervisors, or union representatives during work hours.” The EO does not prevent reimbursement for costs



“incurred in maintaining satisfactory relations between the contractor and its employees, including the costs of labor-management committees,” employee publications (except for those that attempt to influence the right to organize, etc.) and “other related activities,” citing 48 C.F.R. 31.205-21. A contractor’s ability to engage in advocacy is not limited if the contractor does not seek reimbursement for the costs of its advocacy; the EO “does not restrict the manner in which recipients of Federal funds may expend those funds.” The EO observes that prohibiting reimbursement for a contractor’s costs related to anti-union advocacy is “consistent with the policy of the United States to remain impartial concerning any labor-management dispute involving Government contractors.”

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