

Labor Law Bulletin

New Executive Orders Will Help Unions Organize Federal Contractors

President Obama recently issued four Executive Orders, making it easier for unions to organize workers at federal contractors. When signing the Orders, President Obama stated that they were designed to “level the playing field for workers and the unions that represent their interests” in dealing with management.

- ◆ The Executive Order entitled “Economy in Government Contracting” prohibits federal contractors soliciting contracts after June 29, 2009 from seeking reimbursement for costs under those contracts related to the persuasion of employees “to exercise or not to exercise ... the right to organize and bargain collectively.” Costs that specifically may not be recouped include those related to: the preparation and distribution of materials; hiring or consulting legal counsel or consultants; holding employee meetings (including the wages of attendees); and planning or conducting activities by managers, supervisors or union representatives during working hours. The prohibitions under this Executive Order are broad, prohibiting employers from holding “captive audience” meetings during working hours and, essentially, barring reimbursement for expenditures commonly incurred by management in organizing campaigns. The Executive Order does not specify penalties for noncompliance, but liquidated damages may be sought against some contractors who obtain reimbursement for excluded expenses.
- ◆ An additional Executive Order entitled “Notification of Employee Rights Under Federal Labor Laws” requires federal contractors to post a notice in the workplace informing employees of rights under the National Labor Relations Act, including the right to bargain collectively and to designate representatives for the purpose of negotiating terms and conditions of employment. This Order revokes a 2001 Executive Order issued by President Bush that required federal contractors to post a notice explaining employees’ rights to refrain from unionization and to pay dues only for core representational activities, as the U.S. Supreme Court held in *Communications Workers v. Beck*, a 1988 decision. Noncompliance with this new Executive Order could lead to cancellation of federal contracts.
- ◆ A third Executive Order, “Nondisplacement of Qualified Workers Under Service Contractors,” revokes another Executive Order signed by President Bush in 2001. Under this new Executive Order, a successor contractor must offer the right of first refusal to each of the predecessor’s employees to positions for which they are qualified. Any offers of employment must remain open for at least ten days. This could have a significant impact on the labor relations of government contractors. Under labor law successorship rules, an employer who steps into the shoes of a predecessor generally has an obligation to bargain with the union if a majority of the successor employees were represented by the predecessor’s union. The Executive Order thus makes it much easier for unions to continue representing a group of employees, even if the employer’s identity changes. Penalties for violations of this Order include payment of lost wages and possible three-year disqualification from further government contracts. Enforcement applies to contracts solicited after the Secretary of Labor issues implementing regulations.

- ◆ The fourth Executive Order was signed by President Obama on February 6, 2009, and is effective immediately. Under this Order, every federal contractor or subcontractor on a large-scale construction project will be required to negotiate or become party to a project labor agreement (“PLA”) with one or more unions. Specifically, the Order applies to government-funded projects providing for “construction, rehabilitation, alteration, conversion, extension, repair or improvement of buildings, highways or other real property” where the total cost to the federal government is \$25 million or more. A PLA is an umbrella agreement between contractors and unions, typically on larger construction projects, that sets some uniform terms and conditions of employment that otherwise vary from union to union. Typically, a PLA will require all contractors to be bound to one of the trade union labor agreements.

These new Executive Orders pose serious challenges to any federal contractor who wishes to remain union-free. The full impact of those challenges will become better known once implementing regulations are issued in June 2009. In the meantime, contractors should seek legal advice before participating in any new solicitation for bids on federal contracts. All employers, including federal contractors, can expect additional executive orders and legislation favoring organized labor in the weeks and months ahead.

If you have any questions regarding these new Executive Orders, please contact Kevin Hennessey (312-609-7868), Kenneth F. Sparks (312-609-7877), Mark L. Stolzenburg (312-609-7512) in Chicago, Lyle S. Zuckerman (212-407-6964) in New York, or any other Vedder Price attorney with whom you have worked.

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May 7, 2009

Hotel Sofitel, Rosemont, Illinois

June 24, 2009

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