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HILL, FARRER & BURRILL LLP LABOR & EMPLOYMENT E-BLAST



PRESIDENT OBAMA ISSUES THREE EXECUTIVE ORDERS IMPACTING FEDERAL CONTRACTORS; MORE CHANGES ANTICIPATED

February 5, 2009 - Last Friday, President Obama began to cement his mark on the national employment landscape by issuing three labor-friendly executive orders affecting employers under contracts with the federal government. The orders prohibit federal contractors from seeking reimbursement of costs incurred to influence their employees' choice regarding union representation, require contractors to post notices of employees' rights under the National Labor Relations Act ("NLRA"), and require successor contractors to provide jobs to qualified employees of the predecessor company. In his speech announcing the three orders, Obama tied a strong middle class to a strong labor movement, making more change likely to come.

Costs of Persuasion Activities

The first executive order prevents reimbursement of expenses incurred by federal contractors to influence employee opinions on joining a union or engaging in collective bargaining and requires that the costs of such activities be excluded from any billing, claim, proposal or disbursement applicable to any federal government contract. While praised by union leaders, the U.S. Chamber of Commerce and others have pointed out that the order limits an employer's ability to respond to union encroachments, thus interfering with free speech rights. Federal contractors that wish to advocate against collective bargaining must maintain clear records demonstrating that the funding of such activity came from a source other than the government. Regulations can be expected on this subject by June.

Posted NLRA Rights

Under the second executive order, contractors and subcontractors will be required to post workplace notices explaining employee rights under the National Labor Relations Act (NLRA) and comply with any related rules issued by the labor secretary. The order also revokes a Bush Administration requirement that federal contractors post notices informing employees of their rights not to join a union or pay agency fees for nonrepresentational union expenditures.

Failure to comply with the notice requirements, including failure of a contractor to ensure compliance by a subcontractor, may cause cancellation or suspension of the government contract and cause the contractor to become ineligible for further government contracts. However, exemptions may be granted by the Department of Labor if applying the requirements would not serve the purposes of the executive order or would impair the ability of the federal government to economically and efficiently procure goods and services. While no action is necessary to comply at this time, regulations on the notice requirements are anticipated by the summer.

Maintained Employment Under Successor Contractor

The final executive order restores a Clinton Administration policy requiring successor companies on a federal government contract to provide a right of first refusal to the predecessor contractor's employees to jobs for which they are qualified. The executive order applies to all workers with the exception of managerial and supervisory employees. In essence, this means that new employers to a contract will be treated as successors and required to recognize any incumbent unions.

The labor secretary is charged with monitoring compliance and is given the authority to issue sanctions, payment of lost wages or reinstatement of workers covered by the executive order. Willful violations could subject an employer to a three year ban on government contracting. Employers may expect a quick turnaround on regulations here, as the executive order directs that regulations be issued within 180 days.

What Lies Ahead

Labor unions project that a fourth order is in the works that would reinstate the requirement of a project labor agreement on any federally funded construction project.

Moreover, passing legislation favorable to workers seems high on President Obama's agenda. He recently signed into law the Lilly Ledbetter Fair Pay Act, which amends federal discrimination laws to provide that a new violation occurs from each paycheck made as a result of a discriminatory compensation decision. In addition, Congress is soon likely to consider the Employee Free Choice Act ("EFCA"), which would require the NLRB to certify a bargaining representative without directing an election if a majority of the bargaining unit employees have signed authorization cards endorsing that representative, eviscerating the right to a secret ballot. This spring, Hill, Farrer & Burrill, LLP will be presenting a luncheon seminar on the impact of EFCA that will be available free of charge to all clients. Please be on the lookout for our invitation in the coming weeks.

Other issues on the radar are the Independent Contractor Proper Classification Act, which eliminates the ability of employers to justify classification of workers as independent contractors based on a common practice in the industry, and possible legislation to expand the coverage of the Family Medical Leave Act to employers with only 25 employees.

If you believe your company would benefit from a presentation on any of these topics, please contact your attorney at Hill, Farrer & Burrill, LLP to schedule a personalized presentation.

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