

# CLIENT ALERT

## Obama Administration Issues Pro-Union Executive Orders

Feb.02.2009

One day after signing the Lilly Ledbetter Fair Pay Act, on Friday January 30, 2009 President Obama issued three Executive Orders that signal a significant shift in federal labor policy. The Executive Orders, issued in connection with the President's announcement of the formation of the White House Task Force on Middle Class Working Families, expressly noted the need for "strong labor unions" to support a strong middle class, and the "need to level the playing field for workers and the unions that represent their interests."

### **Nondisplacement of Qualified Workers under Service Contracts**

The first Executive Order, "Nondisplacement of Qualified Workers under Service Contracts," revokes Executive Order 13204, which was issued at the beginning of the administration of President George W. Bush. The Order broadly requires the successful bidder on a successor service contract to offer the employees (other than managerial and supervisory employees) of the predecessor contractor a right of first refusal of employment under the new contract. While the new contractor need not employ all employees under the predecessor contract, it may not make offers of employment to other individuals until it has extended offers of employment to the predecessor's employees. The Order's few exceptions includes employees of the predecessor contractor "whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job." The Order also permits the new contractor to "employ an employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of the contract and who would otherwise face lay-off or discharge."

The Order contains traditionally broad flow-down provisions making its obligations binding on subcontractors. It will be enforced through the Department of Labor ("DOL") and includes the sanction of debarment for a period of up to 3 years.

### **Notification of Employee Rights under Federal Labor Laws**

The second Executive Order, "Notification of Employee Rights Under Federal Labor Laws," rescinds Executive Order 12301, issued by President George W. Bush. Executive Order 12301 had stated that government contracts and subcontracts must include an employee notice clause requiring contractors and subcontractors to post notices informing their employees that they have certain rights (known as *Beck* rights), such as the ability to refuse to join a union and the ability to object to the use of non-union member dues for certain purposes. In addition to repealing this requirement, this Order requires government contractors to post notices informing employees of their affirmative right to organize under the National Labor Relations Act.

### **Economy in Government Contracting**

The final Order, "Economy in Government Contracting," prevents federal contractors from being reimbursed for expenses incurred in efforts to influence employees' decision to form unions or engage in collective bargaining. Examples of costs which contractors may no longer include in allowable costs include the following, when undertaken to dissuade employees from forming unions or undertaking collective bargaining:

1. preparing and distributing materials;

2. hiring or consulting legal counsel or consultants;
3. holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and
4. planning or conducting activities by managers, supervisors, or union representatives during work hours.

The Order does provide, however, that costs incurred for "maintaining satisfactory relations between the contractor and its employees, including costs of labor-management committees, employee publications (other than those undertaken to persuade employees to exercise or not to exercise, or concerning the manner of exercising, right to organize and bargain collectively), and other related activities" are allowable.

This Order will mean that government contractors seeking to exercise their rights under federal labor law to communicate to their employees during a union organizing campaign will not be able to recover those costs from the government. To the extent that some (particularly small) contractors may not be willing to absorb such costs, the effect of the Order (and its obvious intent) would be to make it easier for a union to organize the contractor's employees.

These Orders suggest that the Obama administration will continue to look for ways to advance the cause of organized labor through incremental changes in regulatory policy. There is no indication that the administration intends to move quickly to reintroduce some version of "card check" legislation, which passed the House of Representatives in 2007 but did not survive a cloture vote in the Senate.

Employers should review their policies and procedures to ensure that they are in a position to comply with these Orders. If you have any questions regarding the implementation of these policies, please contact any of the individuals listed to the right or your usual Crowell & Moring contact person.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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