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### FEATURE COMMENT: Executive Orders Change Labor Rules For Federal Contractors

Making good on his campaign promises to help organized labor, on January 30 President Obama signed three union-friendly executive orders pertaining to federal contractors.

Each order expresses a purpose of promoting economy and efficiency in Government procurement and achieving labor-management peace. Demonstrating a paradigm shift from Bush administration policies, the orders' intent is to "level the playing field for workers and the unions that represent their interests."

**Notification of Employee Rights under Federal Labor Laws (E.O. 13496)**—Government contractors must post "a notice of such size in such form, and containing such content as the Secretary of Labor shall prescribe," that describes "the rights of employees under Federal Labor Laws," including the National Labor Relations Act. The notice must be posted "in conspicuous places ... where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract."

Under Bush administration policies, federal contractors were required to post notices to employees informing them of their rights to limit financial support of unions that represent them.

The exact wording of the notices will be determined by the secretary of labor, who must "initiate a rulemaking to prescribe the size, form, and content" of the notices within 120 days of January 30. The executive order is effective immediately and applies to contracts resulting from solicitations issued on or after the effective date of the rule promulgated

by the secretary of labor. The Federal Acquisition Regulatory Council (FAR Council) must amend its regulations to comply with the executive order.

Given Obama's statements that the Government has an interest in ensuring that the performance of federal contracts "will not be interrupted by labor unrest" and that "industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights," the notices may be very similar to notices that the National Labor Relations Board (NLRB) requires employers to post as part of the remedial scheme for committing unfair labor practices. Such notices advise employees of their rights to organize or not organize, bargain collectively, and be free from unlawful coercion. The notices also likely will state where to file claims if employees believe their rights under the labor laws have been violated.

The posting requirements must be made part of every subcontract under a federal contract.

Violations of the executive order may result in contract termination and contractor suspension, as determined in enforcement proceedings conducted by the Secretary of Labor. The Secretary can exempt particular contracts and contractors from the requirements if compliance would impair the Government's ability to procure goods and services economically and efficiently, or would not serve the purpose of the executive order, and the secretary finds that "special circumstances require an exemption in order to serve the national interest." These vague exceptions are not explained.

**Economy in Government Contracting (E.O. 13494)**—In pursuit of "government impartiality in labor management disputes," Obama reversed Bush administration policy, ordering that Government contractors may not pass on any "costs not directly related to the contractor's provision of goods and services" under federal cost-reimbursement-type contracts. Contractors must absorb the costs of any activities undertaken to persuade employees to exercise or not exercise their rights to organize and bargain collectively.

Thus, the costs typically incurred by an employer in opposing unionization of its employees may not be passed on to the Government. The executive order specifies as unallowable any costs associated with preparing and distributing materials, legal counsel or consultants, wages paid for attending meetings, and “planning or conducting activities by managers, supervisors, or union representatives during work hours.” The order identifies costs that may be reimbursable, such as maintaining satisfactory relations between a contractor and employees, labor-management committees, employee publications and “related activity.” The categories of allowable and unallowable expenses have nuanced differences; for example, will the Government pay for maintaining satisfactory relations between a contractor and its *non*-union employees? It should be noted that the NLRB has determined that some activities of labor-management committees are tantamount to recognizing a union, and care must be taken in implementing such committees.

To clarify these broad guidelines, the FAR Council has 150 days to promulgate regulations and issue orders to implement the executive order. The order’s requirements apply to all contracts resulting from solicitations issued on or after the effective date of the action taken by the FAR Council.

**Non-Displacement of Qualified Workers under Service Contracts (E.O. 13495)**—In another departure from previous policy, federal service contractors now must offer a predecessor’s employees a right of first refusal of continued employment if a follow-on contract will continue the same work at the same location. Service contractors who displace an incumbent often seek to hire some or all of the incumbent’s employees because they likely have valuable knowledge and experience, and the Government customer may value continuity. However, the executive order may remove some flexibility and discretion from this practice.

Under this policy, contracts will include a provision that a contractor must make a “good faith” offer to non-managerial and non-supervisory employees whose employment would be terminated as a result of an award of a successor contract, giving them the right of first refusal for “positions for which they are qualified.” The contractor may determine the number of employees needed for efficient performance and may use fewer employees than the predecessor. The “good faith” offer must be express and provide a 10-day period for acceptance.

Contractors may not post openings for employment until after the 10-day period has expired. Also after the

10-day period, contractors must provide to the successor employer a written list of all service employees working under the contract during the last month of performance and their anniversary dates of employment.

The executive order includes some exceptions to the hiring requirement. A contractor may employ any employee who worked for the contractor or a subcontractor for at least three months immediately preceding the commencement of the successor contract and who would otherwise be laid off or discharged. This policy does not apply to anyone who is not a service employee under the Service Contract Act of 1965, 41 USCA § 357(b), or any employee who, based on past work performance, did not perform “satisfactory” work. The latter exception underscores contractors’ need to evaluate and maintain accurate records of employee work performance.

The executive order lists some contract types that are not covered. These include contracts (1) under the simplified acquisition threshold, currently \$100,000; (2) awarded to disabled persons under the Javits-Wagner-O’Day Act; (3) for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act; (4) involving certain employees, i.e., guards, elevator operators, messengers and custodians, hired through sheltered workshops that employ handicapped individuals; and (5) using employees also working under a federal service contract and one or more non-federal service contracts as part of a single job. As for the last exception, a contract could be structured to avoid coverage under this executive order.

The Secretary of Labor is responsible for settling all disputes. No rights under the Contract Disputes Act will be available to contractors in disputes under this executive order. Remedies include back pay and, for willful violations, a three-year debarment from new federal contract awards. The secretary must consult with the FAR Council and issue regulations within 180 days.

Executive orders 13494, 13495 and 13496 are available at [www.access.gpo.gov/su\\_docs/fedreg/a090204c.html#Presidential%20Documents](http://www.access.gpo.gov/su_docs/fedreg/a090204c.html#Presidential%20Documents) under “Presidential Documents.”



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