

AFFIRMATIVE ACTION E-BULLETIN

February 3, 2009

PRESIDENT OBAMA SIGNS THREE NEW EXECUTIVE ORDERS

On January 30, 2009, President Obama signed three executive orders that will reverse several of former President George W. Bush's labor policies. These Orders are scheduled to be published in the Federal Register on February 4, 2009.

Under the new executive order "Notification of Employee Rights Under Federal Labor Laws," federal contractors will be required to post a new notice of workers' rights with content determined by the Secretary of Labor (Hilda Solis) under rulemaking to be initiated within 120 days of the effective date of the order. This order covers government contractors for goods or services – in essence, most federal contractors. In addition, the new order repeals the executive order signed by former President George W. Bush (E.O. 13201 dated February 17, 2001), which required government contracts and subcontracts to include an employee notice clause (the "Beck Poster") requiring non-exempt federal contractors and subcontractors to post notices informing their employees that they have certain rights related to union membership and use of union dues and fees under federal law. Section 13 of the new order states that the "heads of executive departments and agencies shall, to the extent permitted by law, revoke expeditiously any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 13201.

As you likely know, the Secretary of Labor is a strong union supporter and supports the Employee Free Choice Act. This executive order is intended to make employees aware of their right to unionize. **How should employers prepare for this?** Employers have the right to express to employees both the reasons why the employer believes a union is unnecessary as well as the business case for remaining union free. This communication may include a discussion of labor's initiative to take away an employee's right to a secret ballot vote.

President Obama also signed an executive order, "Nondisplacement of Qualified Workers Under Service Contracts," that requires covered successor federal contractors, and their subcontractors, to offer jobs to current workers when contractors change; it provides that there can be no employment openings until this "right of first refusal" has been provided to the predecessor's employees. This order reaches a smaller universe of government contractors – only those under the Service Contracts Act. Under this order, the new contractor isn't required to hire employees where "based on the particular employee's past performance, [the employee] has failed to perform suitably on the job;" the order also doesn't apply to managers/supervisors and it allows government department and agency heads to exempt some contracts from this requirement in circumstances where it's determined that the requirements of the order would impair the ability of the government to "procure services on an economical and efficient basis." Currently, if a new contractor does not hire a majority of the predecessor's union-represented employees, the new

contractor could become union-free. If, however, an employee believes he/she was not hired because of union affiliation, the individual could file an unfair labor practice charge. This order takes a more direct approach to preventing a successor employer from eliminating the union by eliminating the predecessor's employees.

Finally, President Obama signed an executive order, "Economy in Government Contracting," that makes unallowable certain costs associated with activities undertaken to influence workers deciding whether to unionize and engage in collective bargaining. Essentially, this order means that an employer may not charge to the contract expenses that are intended to persuade employees to support or not support unions, including legal fees, preparing and distributing materials, and time spent by managers or supervisors on activities to persuade employees about unionization. **Note:** Time spent in 'captive' meetings with employees who are paid to attend will not be chargeable to the contract. These meetings generally involve the employer discussing unionization and are considered working time, so employees are paid for attending. Under this order, the employees' pay may **not** be charged to the contract. The employer may still have such meetings, but it cannot charge the pay for that time to the contract. Importantly, remember that this order relates only to union organizing. For example, fees, time, and expenses related to administration of the labor contract (for example: offering the right of first refusal to a predecessor's employees pursuant to the order discussed above) are not excludable by this executive order. This order does not limit in any way an employer's rights to persuade employees to remain or become union-free, it just means those costs related to that will not be paid for by the federal government.

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