



## **Obama Executive Orders Target Nonunion Contractors**

On January 30, President Obama issued three executive orders establishing new labor requirements for government contractors. While the orders have not yet been numbered, publicly posted, or published in the federal register, the White House did release advanced copies. Below are details on each.

### ***NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS***

#### ***Debarment, Posting & Revoking Beck***

This order repeals Executive Order 13201 (known as the “Beck order”) and appears to vest the Secretary of Labor with sweeping new powers over federal government contracts.

The Beck order, which was signed by President George W. Bush, required contractors to inform employees of their rights set forth in U.S. Supreme Court decision *Communication Workers v. Beck* — specifically, that employees are not compelled to pay union dues earmarked for non-collective bargaining activities, including politics and lobbying.

The new Obama order also appears to vest the Secretary of Labor with broad authority over federal contractors, including the power to potentially blacklist contractors for violations of labor laws. Specifically, the order mandates most federal contracts contain provisions that require contractors and subcontractors to agree to:

1. post a Notice informing employees of their rights under federal labor laws; and
2. comply with all provisions of the Notice and related rules, regulations and orders.

If a contractor fails to post or comply with provisions in the Notice, the “contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts.” In other words, federal contractors and their subcontractors could lose their contract and/or face debarment (blacklisting) for failing to post the Notice or comply with its provisions.

While the executive order is effective immediately, the Secretary of Labor, who is charged with administration and enforcement of the order, has 120 days to initiate a rulemaking process to “prescribe the size, form, and content of the Notice.” The order applies to any contracts resulting from solicitation issued after the Secretary promulgates a final rule. It remains unclear whether the Secretary will issue a proposed rule initially, which would require an additional comment period before becoming effective, or an interim final rule, which would be effective immediately.

The Secretary may initiate an investigation on its own of potential violations, but is required to investigate any complaints or violations filed by employees of the contractor or the subcontractor. The Secretary must afford contractors or subcontractors the opportunity for a hearing, however, before ordering contractor termination or debarment (blacklisting).

The executive order leaves many important questions for the Department of Labor to answer in the rulemaking process, including:

- Whether the Notice will be limited to rights provided under the National Labor Relations Act, or extend to other laws governing the employment relationship;

- What constitutes a failure to comply with provisions of the Notice – is it multiple violations of the laws, regulations or orders referenced in the Notice or a single violation or something else entirely; and
- The length of debarment – the order states that Secretary may impose debarment (blacklisting) until he or she is “satisfied that contractor has complied with and will carry out the provision of this order,” without any further specificity.

ABC will be tracking this issue closely and working via the rulemaking process to get answers to these questions.

## ***ECONOMY IN GOVERNMENT CONTRACTING***

### ***Neutrality on Union Organizing***

The President also issued an executive order encouraging neutrality in union organizing campaigns by prohibiting reimbursement to federal contractors for costs associated with educating employees about unionization. Specifically, the order prohibits the government from reimbursing the cost of “any activities undertaken to persuade employees . . . to exercise or not exercise, or concerning the manner of exercising, the right to organize and bargain collectively. . . .” The order lists the following examples of activities for which reimbursement is prohibited:

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 Federal Acquisition Regulatory Council (FAR Council) is tasked with promulgating rules within 150 days to carry out the order. Until the rules are finalized, the full impact of the order, including recordkeeping and reporting burdens for contractors, remains unclear.

It is likely this order will face a legal challenge almost immediately. The U.S. Supreme Court issued a ruling last year in the case of *Chamber v. Brown* that appears to undermine the legality of this Order.

## ***NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS***

### ***Rehiring Requirement for Service Contracts***

In a third executive order, the President mandates that service contracts covered by the Service Contract Act include a clause requiring contractors to offer workers employed under a predecessor contract the right of first refusal of employment in positions for which they are qualified. Managerial and supervisory employees are excluded as are some types of contracts. The Secretary of Labor is tasked with enforcing the order and, in conjunction with the FAR Council, must issue regulations within 180 days. Penalties include back wages and the possibility of a three year debarment from federal contracts.

ABC is tracking this issue closely to determine the impact it will have on ABC members. Based upon an initial analysis, this Order may only impact those members who engage in maintenance work.