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LABOR & EMPLOYMENT DEPARTMENT

# ALERT

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## PRESIDENT OBAMA SIGNS THREE PRO-LABOR EXECUTIVE ORDERS GOVERNING FEDERAL CONTRACTORS

By Theodore M. Eisenberg and Ian W. Siminoff

President Obama has moved rapidly to make good on his commitment to provide governmental support for labor unions in an effort to reverse the steep decline in union membership and power that has taken place over the last thirty years. The initial measures, which he signed into law on January 30, 2009, are in the form of Executive Orders that are limited to federal contractors.

More fundamental legislative changes, which are expected to be enacted, or the subject of highly contentious Congressional battles, include easing the burden of proof under various federal anti-discrimination statutes to increase employees' chances of prevailing, and a dramatic overhaul of the National Labor Relations Act that would eliminate the employer's right to insist upon a secret ballot election when unions present authorization cards seeking representation, and guarantee employees a first collective bargaining agreement within a matter of months through compulsory arbitration of collective bargaining disputes.

Employers face a rocky four years under the new Administration, responding to more employee lawsuits and government-invigorated union organizing, which will only add to the severe economic pressures faced by the business and nonprofit community. Fox Rothschild has the resources and experience to assist employers – through planning, management training, policy development and defense – to minimize risk in these perilous times.

The newly-enacted Executive Orders are as follows:

### **1. Economy in Government Contracting/Prohibition Against Federal Reimbursement of Activities Undertaken to Oppose Unionization**

This Executive Order prohibits governmental reimbursement for contractor expenses designed to influence workers' decisions to form unions or engage in collective bargaining, such as expenses associated with preparing and distributing educational materials, paying employees who attend meetings held during working hours to explain why the employer opposes unionization, and paying counsel when faced with union organizing. This prohibition very well may prohibit reimbursement of expenditures necessitated by union picketing and other measures, which may disrupt the performance of a government contract. Fortunately, the Executive Order appears to be drafted such that it does **not** preclude a contractor from opposing union organizational efforts on the theory that it is impossible to discern whether monies a contractor receives from the federal government have been utilized for a purpose prohibited by the Executive Order. While it is possible that overzealous government officials may attempt such an interpretation down the road, the Order attempts to limit itself solely to prohibiting contractors from seeking reimbursement for expenses related to union organizing activity.

Significantly, this Order is not limited to conduct that violates the National Labor Relations Act; it includes lawful conduct that would appear to warrant First Amendment protection. The Order excepts costs incurred in maintaining positive relationships with the contractor's employees, including costs of labor-management

committees and employee publications (other than those undertaken to persuade employees to exercise or not exercise the right to organize and bargain collectively).

## 2. Notification of Employee Rights Under Federal Labor Laws

This Executive Order requires federal contractors (with certain exceptions) to post notices of the rights workers have under the National Labor Relations Act to join unions and engage in collective bargaining.

This Order specifically revokes an Executive Order signed by former President George W. Bush that required federal contractors to post workplace notices informing workers of their right *not* to join a union. Pursuant to the new Order, if an affected contractor or subcontractor fails to comply with the posting requirements, the federal contract may be terminated or suspended, and the contractor may be declared ineligible for further government contracts.

If the Employee Free Choice Act is enacted amending the National Labor Relations Act, this Executive Order will take on increased importance since that proposed law would require recognition of unions based on the private and uncontested signing of authorization cards and this Executive Order implicitly encourages organizational activity.

## 3. Non-Displacement of Qualified Workers Under Service Contracts

This Executive Order requires (with minor exemptions) that a successor service contractor must offer jobs to qualified employees (other than managerial and supervisory employees) of the former contractor when it assumes the contract. If contractors violate this Order, they can be ordered to employ the affected individuals and pay them lost wages. In the case of willful violations, they may be debarred from contracting with the federal government for up to three years. By creating a right of first refusal for qualified employees at the job site, this Order eliminates the right of contractors to select their own initial workforce, and deprives the government (and taxpayers) of any savings a new contractor can bring based on a new workforce complement. The manifest purpose of this Order, although unstated, is to preclude a new contractor from displacing a unionized workforce, and in many instances the result will be higher costs and a less efficient operation.

The new Executive Orders direct the Federal Government to promulgate regulations that will further detail the Orders' terms. We will continue to monitor all developments and provide updates as necessary.

As set forth above, these Orders place additional burdens on an already "put upon" business community, and increase contractor exposure to enforcement actions and debarment for matters which have nothing to do with performance under government contracts. These Orders also restrict employers' free speech and their right to employ individuals of their own choosing. Federal Government contractors are already subject to onerous audits by the OFCCP in connection with their federal affirmative action obligations. These Executive Orders will increase contractors' compliance burdens and costs.

If you have further questions regarding the Executive Orders or other federal contractor compliance issues, please contact the article's authors, Theodore Eisenberg at 973.994.7533 or [teisenberg@foxrothschild.com](mailto:teisenberg@foxrothschild.com), Ian Siminoff at 973.994.7507 or [isiminoff@foxrothschild.com](mailto:isiminoff@foxrothschild.com), or any member of Fox's Labor & Employment Department. Visit us on the web at [www.foxrothschild.com](http://www.foxrothschild.com).



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