LABOR, IMMIGRATION & EMPLOYEE BENEFITS DIVISION
U.S. CHAMBER OF COMMERCE

Using the Procurement Process to Drive Policy: A Review of Labor and Employment Executive Orders in the Obama Administration

In January 2014, while expressing his frustrations with the legislative process, President Obama famously quipped, "I've got a pen and I've got a phone. And I can use that pen to sign executive orders and take executive and administrative actions." Since then, President Obama's unilateral actions relating to healthcare, immigration and environmental issues have often garnered the most public attention. However, as set forth in more detail below, the President has also exercised his executive authority at least 11 times in order to establish new policies in the labor and employment law areas. Of course, these executive actions result in more regulations, the burdens of which fall squarely and uniquely on the shoulders of federal contractors.

Most often, these actions are little more than repackaged versions of bills that could not get passed in Congress, such an increase in the minimum wage, the Healthy Families Act or the Employment Non-Discrimination Act. As such, these Executive Orders often have little to do with encouraging economy and efficiency in the federal procurement process – as required by the Federal Property and Administrative Services Act – and everything to do with the President usurping Congress' role to make labor and employment policy. Indeed, while the Procurement Act provides the President with significant discretion with regard to federal procurement, it does not provide a "blank check for the President to fill in at his will." [1]

Below is an overview of President Obama's significant Executive Orders which have or will result in increased regulatory burdens for federal contractors. We hope you find it useful.

[1] *Chamber of Commerce of U.S. v. Reich,* 74 F.3d 1322, 1330-31 (D.C. Cir. 1996) *quoting AFL-CIO v. Kahn,* 618 F.2d 784, 793 (D.C. Cir.).

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I. Notice of Employee Rights Under Labor Laws for Federal Contractors

On January 30, 2009, President Obama issued Executive Order 13496, "Notice of Employee Rights Under Federal Labor Laws." The EO requires federal contractors to post a notice of employee rights to unionize and participate in concerted protected activity under federal labor law. The Department of Labor's Office of Labor Management Standards published proposed implementing regulations on August 3, 2009.[2] Interestingly, the EO did not prescribe the content of the notice, nor any of the posting rules. A final rule was published on May 20, 2010, and it became effective on June 21, 2010.

- The final rule applies to all contracts with any agency of the United States government with a value of $100,000 or more, as well as all subcontracts necessary to the performance of the covered contracts with a value of $10,000 or more.

- As proposed, the notice was heavily biased. While the final poster did include several additional examples of union unfair labor practices, it still has a very "pro union" slant. For example, the notice does not explain to employees their right to decertify an unwanted union.

- The notice must be posted in "conspicuous" places "in and about [the contractor's] plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted."

- The rule is enforced by the Office of Federal Contract Compliance Programs (OFCCP), which may conduct compliance evaluations. The final rule requires the OFCCP "to make reasonable efforts to secure compliance through conciliation."

- The National Labor Relations Board (NLRB) retains jurisdiction over alleged violations of the situations described in the notice.

[2] The Chamber submitted comments on September 2, 2009, which are here: https://www.uschamber.com/comment/comments-employee-rights-under-federal-labor-laws

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II. Economy in Government Contracting (Non-Reimbursement of Labor Relations Costs)

On January 30, 2009, President Obama signed Executive Order 13494, "Economy in Government Contracting," which prohibits federal contractors from seeking reimbursement for certain labor relations costs, for example, communicating with employees during a union organizing campaign. Un-reimbursable activities include any that are undertaken to persuade employees to exercise or not exercise their right to join a union or engage in collective bargaining, such as preparing and distributing materials, hiring or consulting legal counsel or consultants, and holding meetings. The FAR Council proposed regulations on April 14, 2010, to implement the EO.[3]

On November 2, 2011, the FAR Council published a final regulation to implement the EO. The regulation took effect on December 2, 2011. The final regulation is very brief and is as follows:

> *31.205-21 Labor relations costs.*
>
> *(a) Costs incurred in maintaining satisfactory relations between the contractor and its employees (other than those made unallowable in paragraph (b) of this section), including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.*
>
> *(b) As required by Executive Order 13494, Economy in Government Contracting, costs of any activities undertaken to persuade employees, of any entity, to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing are unallowable. Examples of unallowable costs under this paragraph include, but are not limited to, the costs of—*
>
> *(1) Preparing and distributing materials;*
>
> *(2) Hiring or consulting legal counsel or consultants;*

[3] The Chamber filed comments opposing the EO and proposed regulation on June 14, 2010, focusing on the lack of legal authority for this policy that would have a chilling effect on employers exercising federally-protected free speech rights. Chamber comments are here: https://www.uschamber.com/comment/comments-labor-relations-costs-proposed-rule

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(3) 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.

III. Non-displacement of Qualified Workers Under Service Contracts

On January 30, 2009, President Obama signed Executive Order 13495, "Non-displacement of Qualified Workers Under Service Contracts." Essentially, the EO requires federal contractors under the Service Contract Act to offer the employees of a contractor that they displace the right of first refusal for employment.[4] Both the Department of Labor' Wage and Hour Division and the FAR Council issued regulations which became effective on January 18, 2013. The final regulations contain the following significant provisions:

- The rule applies to contracts and subcontracts above the simplified acquisition threshold (currently $150,000) and contains a few other narrowly-defined exemptions.

- Upon receiving the employee roster from the contracting agency, new contractors are required to offer jobs to the predecessor's employees who worked on the contract during its final month.

- Based upon "credible information provided by a knowledgeable source," contractors are not required to offer employment to employees of the predecessor contractor who did not perform "suitable work."

- The regulations allow new contractors to reduce staffing, and new contractors are not required to offer employment to workers who are retained by the previous contractor.

- New contractors must maintain records of their compliance with the new requirements, including records of employment offers.

[4] The Chamber submitted comments on May 17, 2010, which are here: https://www.uschamber.com/comment/comments-us-department-labor-nondisplacement-qualified-workers

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- Penalties include payment of back wages, mandatory offers of employment, and even debarment.

IV. Use of Project Labor Agreements for Federal Construction Projects

On February 6, 2009, President Obama signed Executive Order 13502, "Use of Project Labor Agreements for Federal Construction Projects." The EO encourages agencies to "to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement." This really means that jobs are only available to bidders who are unionized. As the Wall Street Journal noted, the EO and implementing regulations "put an end to open, competitive federal bidding, which means higher project costs. They also mean taxpayers must finance the benefits and work rules of union members."[5]

The FAR Council issued final regulations – which do not differ much at all from the EO – on April 13, 2010. The regulations define "large scale" construction projects as those with a total cost exceeding $25 million (though agencies are not prohibited from requiring PLAs on smaller projects). The final regulations do not require PLAs, but provide contracting agencies with great discretion to use them upon the consideration of the following non-binding factors:

(1) The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades.

(2) There is a shortage of skilled labor in the region in which the construction project will be sited.

(3) Completion of the project will require an extended period of time.

(4) Project labor agreements have been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project.

[5] WALL STREET JOURNAL. "Crony Contracts: Want federal business? Better be a union shop." April 14, 2010, available at http://www.wsj.com/articles/SB10001424052702303695604575182333308913608?alg=y

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(5) A project labor agreement will promote the agency's long term program interests, such as facilitating the training of a skilled workforce to meet the agency's future construction needs.

(6) Any other factors that the agency decides are appropriate.

The regulations also give contracting agencies broad discretion to determine at what stage in the process PLAs must be negotiated and what must be covered in the PLA.

V. Raising the Minimum Wage

On February 12, 2014, President Obama signed Executive Order 13658, entitled "Establishing a Minimum Wage for Contractors," to raise the wages of workers employed by certain federal contractors to $10.10 per hour ($4.90 for tipped employees). The minimum wage will be increased each year by an inflation based adjustment.[6] The EO also applies to subcontractors of federal contractors and companies with concession agreements on federal properties or leasing space in federal buildings.

On October 7, 2014, the Department of Labor issued final regulations, and the new minimum wage requirements became effective January 1, 2015, for new and renewed contracts. Among other things, the final regulations create a new notice posting requirement and impose two additional recordkeeping requirements for contractors (the requirement to maintain records reflecting each worker's occupation(s) or classification(s) and the requirement to maintain records reflecting total wages paid). Additionally, the final rule provides an exemption for workers performing in connection with covered contracts for less than 20% of their work hours in a given workweek as long as the contractor segregates the hours worked in connection with the covered contract from other work not subject to the EO for that worker.

The regulations apply to the following contracts:

- Procurement contracts for construction covered by the Davis-Bacon Act;

[6] Beginning January 1, 2016, these rates will increase to $10.15, generally, and for tipped employees, $5.85.

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- Service contracts covered by the Service Contract Act (SCA);

- Concessions contracts, (e.g., contracts to provide food and refreshments, lodging, souvenirs, etc., on federal property); and

- Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public (e.g., day care facilities located within government buildings).

VI. Compensation Data Collection ("Presidential Memorandum")

On April 8, 2014, President Obama issued a "Presidential Memorandum" to instruct the Secretary of Labor to develop regulations to require federal contractors and subcontractors to submit to the Department of Labor summary data on the compensation paid their employees, including data broken down by race and sex.[7] On August 8, 2014, the Office of Federal Contract Compliance Programs promulgated a proposed rule.[8]

Under the proposal, companies that file EEO-1 reports with the federal government, and that have more than 100 employees and hold federal contracts or subcontracts worth $50,000 or more, would have to submit summary pay data on their workforces broken out by race, sex, ethnicity, specified job categories, and other relevant data points such as hours worked, and the number of employees to the OFCCP in an "Equal Pay Report."

The Equal Pay Report would not collect any individual pay information or any data on factors such as education or experience that may affect pay. According to the proposal, "OFCCP will collect and analyze the contractor summary compensation data to establish objective industry standards for identifying potential discrimination in employee compensation."

As of the date of this document, the OFCCP has not issued a final rule.

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[7] This was not an Executive Order but a Presidential Memorandum as OFCCP had initiated the process in 2011.

[8] The Chamber submitted comments on January 5, 2015, which are here: https://www.uschamber.com/sites/default/files/chamber_comments_on_ofccp_comp_data_nprm.pdf

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VII. Anti-Retaliation Regarding Compensation

In addition to the "Presidential Memorandum" relating to compensation data collection which the President signed on April 8, 2014, the President also signed Executive Order 13665 on that day, entitled "Non-Retaliation for Disclosure of Compensation Information." This EO amends Executive Order 11246 to provide that federal contractors shall not discriminate against employees or applicants that share, inquire about, or disclose compensation data.

On September 11, 2015, the DOL promulgated final regulations. In essence, the new rule adds employees and applicants who inquire about, discuss, or disclose their "compensation" as a protected category under Executive Order 11246. Characterizing this protection as "anti-discrimination" rather than "anti-retaliation," allows aggrieved employees to only have to demonstrate that their discussions relating to compensation disclosure were a "motivating factor" of the adverse action taken against them. This runs counter to a recent Supreme Court ruling which states that the "motivating factor" analysis does not apply to retaliation claims.

While the National Labor Relations Act (NLRA) already protects disclosure and discussion of compensation-related information, the law generally does not cover managers and supervisors. OFCCP's rule now extends these protections to managers and supervisors.

The rule provides employers with two defenses. First, employers have a general defense to try to demonstrate that any alleged adverse action was taken pursuant to a "consistently and uniformly applied company policy." Second, the employer may take adverse action under certain circumstances if the employee making the disclosure has access to this information as part of his or her "essential job functions."

The new rule goes into effect January 11, 2016.

VIII. LGBT Non-Discrimination

On July 21, 2014, President Obama signed Executive Order 13672, entitled "Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government and Executive Order 11246, Equal Employment Opportunity," which amends Executive Order 11246 to provide that federal contractors cannot discriminate on the basis of "sex, sexual orientation, gender

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identity, or national origin." The EO provides that the Secretary of Labor shall issue regulations within 90 days to implement the requirements of the Order. Rather controversially, the OFCCP did not put a proposed rule out for public comment, but instead proceeded directly to a final rule.[9]

On December 9, 2014, the OFCCP published the final rule. The regulations modify Executive Order 11246 by substituting the phrase "sex, sexual orientation, gender identity, or national origin" for "sex or national origin" wherever the latter phrase appears in the regulations implementing Executive Order 11246. Importantly, unlike some other OFCCP regulations, the LGBT final regulations do not require federal contractors to set hiring or utilization benchmarks or goals, nor do they require contractors to collect data on the sexual preferences and/or gender identity of their employees and applicants.

The rule requires contractors to update the equal opportunity clause included in new or modified subcontracts or purchase orders, to ensure that applicants and employees "are treated without regard to their sexual orientation and gender identity," and to update the "equal opportunity language used in job solicitations" and workplace notices. The rule became effective on April 8, 2015, and will apply to federal contracts entered into or modified on or after this date.

IX. Anti-Human Trafficking

On January 29, 2015, the U.S. Government finalized a rule which amends the Federal Acquisition Regulation ("FAR") to combat human trafficking by placing new reporting and compliance burdens on federal contractors. The final rule implements Executive Order 13627 ("Strengthening Protections Against Trafficking in Persons in Federal Contracts")(September 25, 2012) and Title XVII of the National Defense Authorization Act for Fiscal Year 2013 ("Ending Trafficking in Government Contracting"). The new rule became effective on March 2, 2015**.**

The new regulation adds certain prohibitions for *all* federal contracts *and* subcontracts (including those that are performed in the United States), making it

[9] On November 12, 2014, the Chamber sent a letter to the Administrator of the Office of Information and Regulatory Affairs, urging him to require OFCCP to make the proposal available for public comment due to the complexity of the issue. The Chamber's letter is available here: https://www.uschamber.com/letter/letter-omb-ofccp-final-rule-implementation-executive-order-13672

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unlawful to, for example, confiscate employees' identity or immigration documents, use misleading or fraudulent practices during the recruitment of employees, or charge employees recruitment fees.

Two additional requirements apply to any contract or subcontract, any portion of which is for supplies acquired or services performed outside of the U.S. and is greater than $500,000.[10] First, the contractor must certify that it has an anti-trafficking Compliance Plan in place and, after the contract award, this certification is required annually during performance of the contract. The second requirement is the Compliance Plan itself, which must at a minimum contain: an anti-trafficking awareness program to educate contractor employees; a process for employees to report trafficking-related activities; a recruitment/wage plan; a housing plan (if applicable); and procedures to monitor and detect trafficking-related activities at any subcontracting tier.

The rule also requires contractors to inform the relevant agency contracting officer immediately of any "credible information" it receives that alleges conduct on behalf of a contractor employee, subcontractor, subcontractor employee or their agent that violates the trafficking provisions. Penalties include requiring the contractor to remove a contractor employee or employees from the performance of the contract, the suspension of payments, and debarment.

X. Blacklisting

On July 31, 2014, President Obama signed Executive Order 13673, "Fair Pay and Safe Workplaces," to restrict the ability of companies with violations under a wide variety of labor and employment laws (including state "equivalents") to obtain federal contracts or subcontracts worth $500,000 or more. On May 27, 2015, the administration released proposed guidance from the Department of Labor and proposed regulations from the Federal Acquisition Regulatory Council (FAR Council) as the first steps in implementing the EO.

Among the laws for which contractors and subcontractors will have to report violations are: Fair Labor Standards Act, Family and Medical Leave Act, Occupational Safety and Health Act, Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, National Labor Relations Act, Davis-Bacon Act, Service Contract Act,

[10] These requirements do not apply to contracts or subcontracts for commercially available off-the-shelf items (COTS).

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and the Executive Order on raising the minimum wage for federal contractors. In addition, contractors and subcontractors will also have to report violations of "state equivalent" laws.[11] Under the proposed regulations, contractors also must require prospective covered subcontractors to "represent to the best of the subcontractor's knowledge and belief" whether they have any labor law violations (both federal and "equivalent" state laws) within the preceding three years.

Under the proposed FAR Council regulation, companies bidding on federal contracts would have to indicate at the initial submission whether they have any violations of the listed laws and Executive Orders within the last three years.[12] Once disclosed, the contracting officer, with assistance from the newly-created Labor Compliance Advisor, would determine whether these violations qualified as "serious," "repeated," "willful," or "pervasive," and if so, how much weight they should carry in making the determination of responsibility and whether the company has a satisfactory record of integrity and business ethics. As part of this disclosure, the contractor is also permitted to provide any mitigating information that demonstrates they are now in compliance, such as any Labor Compliance Agreements, or settlements into which they may have entered. The same disclosure process will recur every six months for the life of the contract.

The EO and proposed regulations would also bar employers seeking contracts of $1 million or more from requiring their employees to enter into mandatory arbitration agreements to resolve disputes "arising out of Title VII of the Civil Rights Act or any tort related to or arising out of sexual assault or harassment." Additionally, the EO also mandates that federal contractors provide their employees information concerning their hours worked, overtime hours, pay, and any additions to, or deductions made, from their pay, as well as requiring employers to notify any worker

[11] This term has created significant confusion and was expected to be clarified in the guidance that was proposed. However, the DOL has indicated it will issue a second set of guidance detailing which state laws will be deemed "equivalent" (but the Occupational Safety and Health Administration (OSHA) approved state plans are already considered "equivalent").

[12] Contractors and subcontractors are required to report any violations defined as administrative merits determinations, civil judgments and arbitral awards or decisions. DOL's guidance defines "administrative merits determinations" down to the lowest level of procedure, on the logic that these actions are the products of extensive investigation. The guidance even acknowledges that these may not be final, or still under review. Examples include NLRB complaints, EEOC reasonable cause letters and OSHA citations.

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in writing whether they are being treated as an independent contractor rather than an employee.

Because of the low contract thresholds specified for compliance (broadly, any solicitation estimated to exceed $500,000), the implementation of EO 13673 would significantly disrupt the procurement system across every federal agency *without* improving the existing suspension and debarment process which has ensured due process and effective enforcement of federal procurement standards of conduct. Overall, the proposed regulations will slow down the bid and proposal process, potentially jeopardize existing supply chains, and stifle innovation and possibly require prime contractors to certify alternate critical subsystem and component vendors. Just as significantly, implementation of the EO through these regulations may force many small and mid-tier subcontractors out of business, or at least out of federal contracting, as prime contractors use the presence of even minor violations to disqualify these firms, or contracting officers force prime contractors to choose different subcontractors because of reported violations.

As of the date of this document, neither the FAR rules nor DOL guidance have been finalized.

XI. Paid Leave

On September 7, 2015, President Obama signed an Executive Order requiring federal contractors and subcontractors to provide employees with one hour of paid sick leave for every 30 hours worked, for at least 56 hours per year. Pursuant to the EO, employees must be permitted to use the paid sick leave to care for themselves, family members, domestic partners or other individuals "whose close association with the employee is the equivalent of a family relationship." Leave is also permitted to address issues resulting from "domestic violence, sexual assault, or stalking."

Additional requirements are as follows:

- Paid sick leave accrued under the EO shall carry over from one year to the next and shall be reinstated for employees rehired by a covered contractor within 12 months after a job separation.

- Employees must provide notice of leave at least seven calendar days in advance where the leave is foreseeable, and "in other cases as soon as practicable."

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- Contractors covered by the Service Contract Act (SCA) or Davis-Bacon Act (DBA) will not receive credit toward their prevailing wage or fringe benefit obligations under these acts by providing the paid sick leave required by the EO.

The President directed the Secretary of Labor to issue the implementing regulations by September 30, 2016, and the requirements will take effect for covered contracts entered into after January 1, 2017. Much like the EO relating to minimum wage, the paid leave EO has broad coverage, and applies to contracts and "contract-like instrument[s]." Additionally, contractors will be required to "flow-down" the sick leave standards to subcontractors on the federal projects.

As of the date of this publication, DOL has not issued proposed regulations.

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