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One Minute Memo®

President Obama Signs Three Pro-Union Executive Orders: New Rules on Hiring, Use of Government Funds, and Workplace Notices

"It's a quick start to what union leaders hope will be an aggressive labor agenda."

That is how *The Wall Street Journal* described the three pro-union executive orders signed by President Obama on January 30, 2009. It was indeed a productive day for unions, who have lobbied for significant pro-union legal reform from the new administration and the new Congress. Most concerning for employers, these executive orders are likely just a harbinger of things to come.

The first executive order requires employers with federal contracts above $100,000 in value to post a notice in the workplace informing their employees of their rights under the National Labor Relations Act (NLRA), including the right to join a union. This order also repeals Executive Order 13201, issued by President Bush in 2001, that required federal contractors and subcontractors to post so-called "Beck notices." Such notices, named after the Supreme Court's decision in *Communication Workers v. Beck*, 487 U.S. 735 (1988) informed employees covered under the NLRA that they could not be required to join a union or maintain union membership in order to retain their jobs and that employees who are subject to a union security clause and choose not to be union members may object to the purposes for which mandatory union dues are used.

The second order applies to federal contractors who provide services to government buildings. While there are several exemptions, under this new executive order, when a federal agency changes contractors, the new contractor will be required to offer jobs to the non-supervisory employees of its predecessor. This order is designed to try to ensure that when a unionized contractor is replaced, its successor will be obliged under existing labor laws to bargain with the original contractor's labor union.

Finally, the third order prevents federal contractors from being reimbursed in federal funds for money spent to oppose (or support) union organizing efforts among their employees. The First Amendment prevents government from interfering with an employer's right to voice its opinion on the merits of unionization. Similar measures have been enacted in some states, with respect to their state contractors, but the Supreme Court ruled in 2008 that California's law to this effect was invalid because it was preempted by the National Labor Relations Act. Although a federal executive order is different than state legislation, there may be legal challenges to this executive order's constitutionality, including a possible violation of the First Amendment. Unless and until the order is successfully challenged, however, federal contractors who still wish to oppose

union organizing campaigns will need to consider the effects of this order on their ability to continue doing so without jeopardizing their federal contracts.

While these three new executive orders apply only to federal contractors, President Obama and many members of the Democratic majority in Congress promised during their election campaigns to do even more to change the labor law landscape for all employers—to help unions in their attempts to organize employees. This first step by the President is further evidence that significant change is coming to the labor laws in the very near future. At this point, employers should consider what steps they can lawfully take to prepare themselves for those changes and the increase in union organizing that is certain to accompany them.

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