Labor and Employment Law Information Memo

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BACK TO THE FUTURE FOR FEDERAL CONTRACTORS

On January 30, 2009, President Obama reaffirmed his commitment to organized labor. Stating that the labor movement is "part of the solution," he signed three Executive Orders designed to, in his words, "level the playing field" between labor unions and government contractors. Vice President Biden echoed the President's sentiments, telling union leaders assembled for the signing ceremony that: "It's good to see so many of our good friends in organized labor – welcome back to the White House!" On February 6, 2009, the President added a fourth Order. These reversals of Bush administration policies presage a future that looks backward to the Clinton administration. All four Executive Orders and their likely consequences are discussed below.

Notification of Employee Rights under Federal Labor Laws

This Executive Order revokes President Bush's 2001 Executive Order 13201 on "Beck Notice Requirements" (Beck refers to the Supreme Court's decision in *Communications Workers v. Beck*). The Beck Order had required federal contractors to post a notice advising employees of their right not to join a union and the right to opt out of paying that portion of union dues used by unions for political contributions and other activities not related to grievance processing and contract administration. Government contractors are not prohibited from continuing to post the Beck notice, but are no longer required to do so. An agreement to post a Beck notice will likewise no longer be a required provision in federal contracts.

The new Executive Order also imposes a new posting requirement. Government contractors are required to post a notice to employees informing them of their right to organize and join a union. President Obama stated that encouraging collective bargaining and ensuring that employees have knowledge of their rights is necessary to "avoid disruption of federal contracts." The details of the new poster are not yet known because specific language must be developed by the Secretary of Labor, who has 120 days from January 30 to do so. The Executive Order requires implementation of four new contract provisions related to the notice in all new contracts, even though the posting language has not yet been determined. Significantly, prime contractors are required to include the new provisions in contracts with subcontractors and to enforce those provisions of the subcontracts. This Executive Order was effective as of January 30, 2009.

Economy in Government Contracting

This Executive Order prohibits government contractors from seeking cost-based reimbursement for costs incurred to persuade employees regarding a decision to join a union, including the cost of materials, hiring counsel or consultants, and holding meetings (including the salaries of individuals attending such meetings). An increasing number of government contracts are awarded on a cost reimbursement basis, where the contracting agency pays the contractor for costs it incurs in performing the contract. To the extent any cost is deemed not allowable, it has a direct impact on the profitability of the contract. As a result of the Executive Order, a non-union contractor that faces an organizing drive due to work it is performing on a government contract will have to either yield to the organizing effort by not opposing it, or incur significant non-reimbursable costs that may make the contract unprofitable. Viewed in this light, the underlying goal of the Executive Order appears to be something other than "economy in government contracting." It will provide a significant cost advantage and greater cost predictability for union contractors, who will not be affected by the costs of a potential organizing drive.

It is possible that this Executive Order will be subject to legal challenge on the theory that it is preempted by the National Labor Relations Act. In *Chamber of Commerce v. Brown*, the United States Supreme Court overturned a somewhat similar California statute which prohibited recipients of state funds from using any of those funds to conduct an anti-union campaign. The Court found that the statute was in conflict with Congressional intent to permit free debate on labor-management issues. The federal Executive Order, while similar to the California statute, is not identical and we cannot assume it will be overturned on the same grounds.

Authority to develop rules and regulations implementing this Executive Order has been given to the Federal Acquisition Regulatory Council, which has 150 days from January 30 to do so. The Executive Order applies to solicitations for contracts issued after June 29, 2009.

Non-Displacement of Qualified Workers under Federal Service Contracts

The third Executive Order strikes at contractors whose contracts are governed by the Service Contracts Act. With increasing frequency, contractors performing services for the federal government are replaced by lower bidding successors. Under the National Labor Relations Act, there is an extensive body of law governing successorship in a unionized setting. As a general principle, one condition for a successor to a unionized employer to have an obligation to recognize and bargain with the union representing the predecessor's employees is for a majority of the new employer's work force to consist of the predecessor's employees. The Executive Order virtually guarantees that a successor contractor will be required to recognize and bargain with the predecessor union, because it requires a successor contractor to offer employment to all non-supervisory employees of the predecessor and to give them 10 days to respond to the offer. This requirement increases the likelihood that a majority of the workers hired by the successor will be the predecessor's represented employees, and that it will therefore be required to recognize and bargain with the union.

President Obama justified the Order and the revocation of Bush Administration Executive Order 13204 (which removed the requirement that a successor offer employment to a predecessor's employees) as an effort to enable "qualified employees" to "keep their jobs even when a contract changes hands." He added: "We shouldn't deprive the government of these workers who have so much experience in making government work." The Secretary of Labor and the Federal Acquisition Regulatory Council have 180 days from January 30 to issue rules and regulations implementing this Executive Order.

Penalties

The penalties for violation of the first three Executive Orders are significant. Violation of the notice and successorship orders can result in contract cancellation and debarment from future contracts. The non-reimbursement order has no separate penalties, only the inability to obtain reimbursement for costs incurred in performing the contract. However, some contracts, notably Defense Department contracts, can contain liquidated damages penalties for contractors who seek reimbursement for non-allowable costs.

Project Labor Agreements for Federal Construction Projects

One week after signing the first three Executive Orders, the President added a fourth, which revokes Bush Executive Orders 13202 and 13208. Those Executive Orders barred agencies from including project labor agreements ("PLA") in the bid specifications for most federal construction projects. A PLA is a pre-hire collective bargaining agreement with one or more unions that sets the terms and conditions of employment for employees working on the project. If a PLA is required by the bid specifications issued by the contracting agency, any contractor bidding on the project must agree to sign the PLA. A non-union contractor must, as a result, either forgo its non-union status for the project, or refrain from bidding.

President Obama's Executive Order does not mandate the use of PLAs on federal projects, but encourages federal agencies to consider using them for large projects of $25 million or more. The new Executive Order is thus very similar to a memorandum President Clinton sent to agency heads in 1997. Although the Order encourages the use of PLAs on large projects, by revoking the Bush administration executive orders, it permits the use of a PLA on any federal project, including federally-assisted projects. The President justified his Order as a measure designed to promote efficiency and economy on federal construction projects.

No regulations are required to implement the Order. However, the Office of Management and Budget, with advice from the Department of Labor, has been directed to provide recommendations within 180 days on whether the Order should be expanded.

Actions that Government Contractors Should Take Now

Although the implementing regulations for all of the Executive Orders will not be finalized for several months, there are several steps that federal contractors can take now to ensure compliance with the Executive Orders. First, determine whether the Executive Orders apply to a particular federal contract or subcontract. This task may not be as easy as it appears. Obligations of federal contractors vary depending on the size of the contractor and the revenue derived from the contract. Second, those employers who are being subjected to union organizing activity with respect to a government contract should take steps to separately account for any costs associated with responding to that activity (including employee salaries), so that those costs can be submitted for reimbursement (if at all) consistent with the Executive Order, subsequent regulations and court rulings on the validity of the Order.

Contractors that are considering bidding on a federal contract subject to the Service Contract Act should carefully evaluate the impact of the successorship order. In particular, such contractors should obtain a copy of the existing collective bargaining agreement prior to bidding on the contract. While the contractor will likely have the right as a successor to negotiate a new agreement, the terms of the existing agreement may continue in effect during labor negotiations, and will impact the cost of performing the contract.

What Does the Future Hold?

The biggest potential change looms on the horizon: the Employee Free Choice Act ("EFCA"). Although the President and Congress are currently focused on addressing the country's economic ills, labor unions have already been aggressively lobbying Congress and promoting EFCA through advertising in a variety of media. There is a strong possibility that, in the very near future, the President will not only seek to return to the past with his Executive Orders, but break from it entirely by fulfilling a major campaign promise to organized labor – passage of the EFCA.

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Upcoming BS&K Events

March 2009 – Statewide Breakfast Briefing

Changes to the ADA and FMLA: What HR and In-House Counsel Need to Know …

Remaining Dates and Locations

Buffalo, March 11, 2009, Hyatt Regency
Corning, March 19, 2009, Radisson Hotel
Melville, March 24, 2009, Melville Marriott
New York City, March 18, 2009, Harvard Club
Rochester, March 17, 2009, Woodcliff Hotel

Both the Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA) have undergone significant changes recently as a result of new legislative and regulatory developments. These changes will have a major impact on employers and how they address and document requests for accommodation under the ADA and leave under the FMLA. This breakfast briefing will provide you with practical information on how these changes will affect your organization and what you need to do to ensure that you are in compliance.

The presentation will focus on:

- New guidance on military and non-military leaves under the FMLA
- The ADA: What was the law and what is it now?
- ADA training and other preventive measures that employers need to take
- How litigation under the ADA Amendment Act will be different, and the interplay between litigation and training
- How do the changes affect New York employers covered by the New York Human Rights Law?

March 2009 – Statewide Briefing with Astron Solutions

"Can Your Compensation System Weather the (Hurricane) Winds of Change From the Obama Administration?"

Lilly Ledbetter Fair Pay Restoration Act

President Obama has made pay equity a cornerstone of his political agenda. On January 29, 2009, he signed his first legislation into the law: the Lilly Ledbetter Fair Pay Restoration Act of 2009. This statute amends several non-discrimination statutes (Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act) and overrules a recent Supreme Court ruling. No longer does the statute of limitations for compensation cases run from when the underlying pay decision was made, it runs from when the last discriminatory paycheck was issued. ***Learn what you can do to minimize risks of state claims from active and retired employees.***

OFCCP Salary Analysis

On June 16, 2006, OFCCP issued Interpretative Standards concerning Systematic Compensation Discrimination. These are the standards OFCCP will use when conducting a compliance audit. Federal Contractors are required to "perform in-depth analysis" with respect to their compensation systems. There are voluntary guidelines from OFCCP for conducting this analysis. Pending legislation would require OFCCP to do more. ***Learn the OFCCP voluntary standard and other tests to determine pay disparity.***

Wage & Hour Claims

There are numerous pitfalls under State and Federal Wage and Hour laws. This is especially true as employers make modifications to compensation systems during difficult economic times. ***Learn how to avoid some of the pitfalls associated with reducing pay, hours of work, furloughs, changing bonuses and commission, etc. Pitfalls which can lead to class action exposure.***

The presentation will focus on:

- Overview of Discrimination Issues Associated with Compensation and Pay Equity
- Keeping Your Audits Confidential and Evaluating Document Retention Policies
- Proposed Legislative Effects: Conducting the Comprehensive Compensation Audit

May and June, 2009 – BS&K's 10th Annual Workplace Seminar

You do not want to miss New York's best Statewide Labor, Employment and Employee Benefits Seminar being held in Albany, Buffalo, Corning, Melville, New York City, Rochester and Syracuse.

Visit www.bsk.com for more information.

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