



## OBAMA ADMINISTRATION EXECUTIVE ORDERS

**OVERVIEW:** On January 30, 2009, President Obama issued three executive orders (EO) that impose new requirements and restrictions on construction companies performing work under a federal contract. Although the orders specified purposes and objectives, each requires implementing regulations to be issued. Consequently, until such regulations are issued we cannot determine the full extent of the requirements and prohibitions that will ultimately be imposed on affected employers.

**COMPLIANCE:** Employers will not be required to comply with any of these orders until regulations implementing each of the orders have been issued. However, legal challenges to each of the orders are expected, so delays in the compliance deadlines related to litigation are possible.

**WHO WILL BE AFFECTED:** It is absolutely clear that all three orders will impact construction companies that work on federal contracts as a contractor or subcontractor. Until the regulations are issued, however, it is not clear what, if any, obligations or restrictions the orders will impose on companies performing work for states, localities or other parties which is funded or subsidized by the federal government.

**WHAT ABC IS DOING:** ABC, together with a coalition of other business organizations, is analyzing each of the orders in detail in order to identify the anticipated adverse impacts that they could impose and, therefore, the concerns that need to be raised on ABC members' behalf. A summary of each executive order and its anticipated adverse impact on affected employers is provided below. In addition to submitting comments in response to each rulemaking, ABC will also be active in the expected litigation to challenge the executive orders and implementing regulations.

**EXECUTIVE ORDER 13494:** Of the three orders issued, EO 13494 has generated the greatest concern within the employer community to date. The order prohibits affected contractors from charging the government for, and from being reimbursed by the government for, the employer's costs for engaging in "any activities undertaken to persuade employees or to exercise or not to exercise . . . [their] rights to organize and bargain collectively." The order does not prohibit employers from engaging in these activities, only from being reimbursed by the government for the costs incurred to engage in these activities.

The following activities and costs will be, at a minimum, the activities that will be subject to the order's prohibition:

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);
4. planning or conducting activities by managers, supervisors, or union representatives during work hours.

**ABC's CONCERNS WITH THIS ORDER:** To date, ABC has identified the following concerns about this specific executive order:

**CONCERN #1.** Until the regulations to implement this order are issued (the order requires the regulations to be issued within 150 days [July1, 2009]) the full extent of the requirements and prohibitions to be imposed cannot be determined. It is quite possible (and more than likely) that the list of activities and unallowable costs will be expanded.

**CONCERN #2.** Until the implementing regulations are issued, it cannot be determined what employers will be required to do in order to identify, segregate, and account for the costs they incur engaging in such activities. Although the order directs that the implementing regulations "shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors to engage in advocacy through activities for which they do not claim reimbursement," it is anticipated that the costs and other burdens that employers will need to incur to account for such costs and segregate them from bids and change orders could still be significant, especially for medium and smaller-sized companies.

**CONCERN #3.** The order is anticipated to have a particularly adverse impact on companies that are exclusively government contractors, or whose business comes principally from government contracting. This is because the order will either cause the profit margins to be lower because those companies will have to pay for the overhead expense of engaging in such activities out of their own pockets. Alternatively, companies that cannot afford to bear these expenses out of their own pockets will end up either no longer engaging in these activities, or significantly curtailing them.

**CONCERN #4.** The order is unclear as to whether disclosures made to the government to prove unallowable costs have been identified and segregated could be accessed by the public.

**EXECUTIVE ORDER 13495:** This order applies to contractors and subcontractors who take over a service contract (i.e., the successor contractor) covered by the Service Contract Act from the employer who was previously providing the service (i.e., the predecessor

contractor). It will require the successor contractor to give the employees of the predecessor contractor a right of first refusal to become employees of the successor contractor and continue working under the contract in positions for which they are qualified.

**ABC's CONCERNS WITH THIS ORDER:** To date, ABC has identified the following concerns about this specific executive order:

**CONCERN #1.** Until the regulations to implement this order are issued (the order requires the regulations to be issued within 180 days [July 31, 2009]) the full extent of the impact of this order cannot be determined. At the current time, it appears that this order will only affect ABC members who are performing maintenance work under a contract that is covered by the Service Contract Act.

**EXECUTIVE ORDER 13496:** This order vests the Secretary of Labor with the authority to investigate compliance and take appropriate action against employers who fail to comply, including directing the contracting department or agency to cancel, terminate or suspend the contract. In addition, the order requires contractors and subcontractors to:

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

**ABC's CONCERNS WITH THIS ORDER:** To date, ABC has identified the following concerns about this specific executive order:

**CONCERN #1.** Until the regulations to implement this order are issued (the order requires the Secretary of Labor to issue regulations within 120 days [June 1, 2009]), the full extent of the information that employers will be required to provide, or will be prevented from providing, on the notice cannot be determined.

**CONCERN #2.** Until the implementing regulations are issued, the extent of the "related rules, regulations, and orders" to which the order applies cannot be determined. However, it is likely that the Secretary of Labor will construe "related rules, regulations, and orders" includes compliance with the National Labor Relations Act, and could include other labor laws, such as the Fair Labor Standards Act, the Davis-Bacon Act, and the Occupational and Health and Safety Act, to name a few.

**CONCERN #3.** The order expressly gives the Secretary of Labor the authority to direct the contracting department or agency to cancel, terminate or suspend the contract of those who failed to post the notice or comply with its contents. The

order does not define "compliance," nor does it set any duration for contract debarment. Thus, it remains unclear if one violation would warrant debarment, or if it would take many. In addition, it is not clear how long the Secretary could impose debarment.

**CONCERN #4.** Although the order expressly gives the Secretary of Labor the authority to direct the contracting department or agency to cancel, terminate or suspend the contract of a non-compliant employer, the order also authorizes the Secretary to "develop recommendations" on additional requirements and sanctions if the Secretary find that the authority given to the Secretary under the order is insufficient to achieve the order's purpose.