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Federal Contracts

View From Wiley Rein: Revisiting President Obama's Executive Orders—Has Congressional Gridlock Made Government Contractors the New Laboratories of Democracy?

BY JOHN R. PRAIRIE

The president's authority to issue executive orders is a particularly hot topic these days in light of President Obama's recent executive action on immigration. There has also been much discussion in recent months about a series of new executive orders affecting government contractors, many of which address labor policy and workers' rights.

Putting aside for a moment the wisdom of the policy choices underlying these actions, a look back at some of President Obama's executive orders affecting government contractors reveals an interesting development. Just as with the immigration action, President Obama has used his executive order authority on several occasions in the government contracts arena to weigh in on issues for which Congress was unable (or unwilling) to reach a legislative solution. The executive order establishing a new minimum wage for government contract workers is the most recent example. President Obama could not persuade Congress to pass legislation adopting a higher minimum wage for all U.S. workers so he implemented that policy for the workers under his control—government contractors.

It remains to be seen whether we are witnessing a new trend in which presidents will use their executive order authority to impose their policy initiatives on government contractors if they are unable to convince Congress to implement those policies more broadly. But assuming the current Congressional gridlock persists, the use of executive orders will be an increasingly attractive option for presidents who want to show at least some progress in advancing their policy goals. Unfortunately for contractors, they will be the guinea pigs in the executive branch's policy laboratory, and will be left to

bear the administrative and implementation burdens created by the shifting priorities of each new administration.

Brief Review of Key Obama Executive Orders. Much has been written already about the Obama administration's executive orders affecting government contractors. This article is not intended to rehash that discussion. It is interesting, however, to briefly review some of these key government contracts-related executive orders to see the array of issues they have addressed:

- *Government Transparency/Open Records* (Jan. 2009). On his first full day in office, President Obama issued two executive orders aimed at expanding public access to government records under the Freedom of Information Act (FOIA) and promoting government transparency generally. The first order creates a "presumption in favor of disclosure" under FOIA. The second directs agencies to publish information about their operations and decisions online and make records more readily available to the public.

- *Government Contract Workers' Rights* (Jan. 2009). Just over a week later, President Obama issued three labor-friendly executive orders concerning the rights of workers employed by federal contractors. The first (EO 13496) requires contractors and their subcontractors to post workplace notices of employee rights under federal labor laws. The second (EO 13495), titled "Nondisplacement of Qualified Workers Under Service Contracts," requires successor contractors to provide a right of first refusal to the predecessor contractor's employees for jobs for which they are qualified. The third (EO 13494) makes unallowable federal contractor costs for activities to persuade employees to exercise or not exercise the right to organize and bargain collectively through representatives of the employees' own choosing.

- *Project Labor Agreements* (Feb. 2009). Executive Order 13502 encourages federal agencies to consider requiring the use of project labor agreements on a

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project-by-project basis for large-scale, federally-funded construction projects of at least \$25 million.

- *Controlled Unclassified Information* (Nov. 2010). Executive Order 13556 establishes a program to manage controlled unclassified information (CUI) uniformly and openly across the Executive Branch.

- *Human Trafficking* (Sept. 2012). Executive Order 13627 prohibits federal contractors from engaging in any activities related to human trafficking and requires certain contractors to establish a compliance program to ensure employee awareness of the anti-trafficking policy.

- *Improving Critical Infrastructure Cybersecurity* (Feb. 2013). Executive Order 13636 directs federal agencies to develop voluntary cybersecurity best practices for critical parts of the private sector, including government contractors. The order also requires federal agencies to produce unclassified reports of threats to U.S. companies and to share them in a timely manner.

- *Minimum Wage for Contractors* (Feb. 2014). Executive Order 13658 raises the minimum wage to \$10.10 per hour for workers under federal government contracts and subcontracts.

- *Non-Retaliation for Disclosure of Compensation Information* (Apr. 2014). Executive Order 13665, aimed at promoting equal pay for women by improving transparency of wages and making gender pay disparities easier to identify, prohibits federal contractors from retaliating against employees who discuss their pay with each other.

- *Equal Employment Opportunity* (July 2014). Executive Order 13672 bans sexual orientation and gender identity discrimination by federal contractors.

- *Fair Play and Safe Workplaces* (July 2014). Executive Order 13673 requires covered contractors to report violations of more than a dozen federal wage and hour, discrimination, safety and health, labor and other laws, as well as equivalent state laws, during the preceding three-year period. It also requires agencies to consider labor law compliance in the award of new contracts.

Sizing Up President Obama's Executive Action Priorities.

The first thing one notices about the executive orders listed above is that President Obama has made federal contractor workers' rights a priority. This focus is not particularly remarkable for a Democratic administration. But if one looks a little more closely and considers the broader context and political climate in which each of the orders was issued, one could separate them into three general "buckets" of executive action—policy, politics and prodding.

The "policy" executive orders are just that—at least on their face, the orders appear to have been issued because the administration believes they reflect the right policy choice. Because of the Executive Branch's unique power to regulate contractors and issue guidance to executive agencies, these orders often involve issues for which action can only be taken, or is most appropriately taken, by the president.

At the heart of the FOIA and Open Records executive orders, for example, is the policy choice that executive

branch agencies should be more open and transparent with the public about their operations. The president obviously is in the best position to set that policy and implement it throughout the Executive Branch. In the same vein, the human trafficking executive order reflects the Obama administration's view that federal contractors and subcontractors should be required to take more affirmative steps to combat human trafficking and forced labor.

It can be difficult to distinguish between the "policy" and "political" executive orders, but the latter actions often appear to be aimed less at advancing a particular policy and more at scoring political points. Many of these "political" executive orders revoked executive actions taken by the Bush administration or reinstated Clinton administration executive orders that had been reversed by Bush.

Several of the labor-related executive orders fall into this category. The workplace notices executive order revoked a Bush order requiring federal contractors to post workplace notices informing them of their rights not to join a union. The nondisplacement of qualified workers order revoked Executive Order 13204 issued by President Bush in 2001, which had revoked Executive Order 12933 issued by President Clinton in 1994, which required that successor contractors for services in federal buildings offer a right of first refusal of employment to employees of the prior contractor.

The "prodding" executive orders are the most interesting category. These orders involve situations in which the Obama administration decided (or was forced) to take action on a particular issue because Congress would not (or could not) reach a legislative solution. In several cases, President Obama appeared to be attempting to break Congressional gridlock and "prod" Capitol Hill into action.

The cybersecurity executive order is a prime example. Congress has known for years about increased cyber risks to the nation's critical infrastructure and that action is needed to encourage federal agencies and private industry to work more cooperatively to share information about cyber attacks. Despite repeated attempts, however, Congress has been unable to agree on legislation to address the issue. President Obama stepped in to fill the void with Executive Order 13636, in part in an effort to prompt Congress to take more comprehensive action.

The human trafficking executive order falls into this category as well. In that case, President Obama's executive order actually may have had the desired effect of prodding Congress into action. Following issuance of the order, Congress passed the Fiscal Year 2013 National Defense Authorization Act, which included provisions augmenting and amplifying the anti-human trafficking provisions in the executive order.

The minimum wage executive order is another example. In that case, President Obama could not convince Congress to pass legislation raising the minimum wage for all U.S. workers, so he took executive action to raise the minimum wage for those workers whose wages he could control—the employees of federal contractors. It remains to be seen whether that action will prompt Congress to pass legislation applying the higher minimum wage to all U.S. workers.

What Does the Future Hold for Government Contractors?

The “prodding” executive orders will be an interesting trend for government contractors to watch during the last two years of Obama’s presidency and in future administrations. With continuing congressional gridlock a virtual certainty for the next two years after the Republicans seized control of both the House and Senate, there are likely to be more instances in which Congress is unable (or unwilling) to take action to address President Obama’s policy goals. Faced with such stalemate and given President Obama’s track record, it is logical to assume that in those scenarios that he will continue to issue executive orders implementing as much of that policy as he can.

The current political climate thus places government contractors in a precarious position. The president’s executive order authority generally is limited (some would argue those limits have been tested recently), but the president’s authority to take executive action to impose requirements on government contractors is quite broad. This presents an easy temptation for a frustrated politician to do *something*. As a result, future presidents similarly unable to press their policy agendas through legislation may also resort to taking more narrow executive action by imposing new requirements on government contractors. And executive orders such as President’s Obama’s minimum wage increase provide precedents for these policy “experiments” using companies that do business with the federal government.

Unfortunately for government contractors, serving as the new “laboratories for democracy” may force them to make drastic changes to their business practices to comply with novel requirements imposed through executive action. Consider this: Key aspects of the Affordable Care Act (ACA) are up for review again this year at the Supreme Court. If portions of the ACA are invalidated, would anyone be shocked if President Obama issued an executive order mandating that government contractors offer “qualified health plans” to their employees?

And these policies need not be consistent from administration to administration, and in fact may even be completely at odds with previous policy agendas. Thus, even after expending time and money to meet new re-

quirements, contractors may well be faced with subsequent administrations requiring shelving of the solutions developed to meet a prior administration’s policy goals. For example, what would stop a future Republican president from rolling back or revising ACA requirements that President Obama imposed on government contractors through executive order?

These considerations apply for potential future Republican presidents as well. Although Republicans generally are not in the business of imposing new requirements on government contractors, they certainly are passionate about protecting U.S. companies and U.S. jobs. In light of President Obama’s recent executive action on immigration, it is not difficult to imagine a future Republican president issuing an executive order to impose heightened requirements on contractors to ensure they hire only legal U.S. workers, or mandating that a certain percentage of government contractors’ workforce be comprised of U.S. citizens or be located in the United States.

The imposition of these and other potential new requirements on government contractors obviously would only further increase the administrative burden and costs associated with doing business with the federal government. It could also dissuade some commercial companies from participating in the market altogether. Indeed, if each new administration feels compelled to impose its failed legislative policy priorities on government contractors through executive action, contractors would be left reacting to an ever-shifting morass of new government-unique requirements and contractual obligations, some of which may have little or nothing to do with what is being procured.

It remains to be seen whether we are witnessing a new trend in the use of executive orders or whether these recent executive actions are unique to the Obama administration and its dealings with the current Congress. The results of the 2016 elections will go a long way towards clarifying the extent of that possibility. In either case, the use of executive orders—and by extension government contractors—as a means of prodding Congress into action is an interesting development for government contractors to keep an eye on over the next two years and beyond.