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Executive Orders

For companies frustrated with the increasingly complex and burdensome compliance obligations imposed on government contractors, the elimination of some or all of the burdensome rules, which are both expensive and distinct from generally applicable commercial obligations, would be a welcome development for both government contractors and for U.S. taxpayers who will ultimately bear the cost.

The (Hopefully) Short, Costly Life of President Obama's Executive Orders

BY RICHARD W. ARNHOLT

In January 2014, President Barack Obama, faced with a Republican-controlled Congress that was, unsurprisingly, unwilling to advance his legislative agenda, announced his ''pen-and-phone'' strategy:

> We're not just going to be waiting for legislation in order to make sure that we're providing Americans the kind of help they need. I've got a pen and I've got a phone. And I can use that pen to sign executive orders and take executive actions and administrative actions . . . .

And use it he did, issuing a host of executive orders and presidential memoranda. Those actions — some of which have been found by federal courts to be unauthorized, unconstitutional or both — piled extraordinary costs on U.S. businesses.

A significant number of the unilateral actions were targeted at government contractors, a group seemingly viewed as a testing ground for social policy prescriptions that Congress was unwilling to impose on the broader economy. As detailed below, just a handful of those executive actions — which imposed new obligations on government contractors regarding sick leave, increased minimum wages and mandatory disclosure of unproven allegations of labor violations — resulted in

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the issuance of regulations that the Obama administration estimated would cost U.S. government contractors and subcontractors almost $12 billion during the first 10 years alone. The regulations describe the majority of those costs as a ''wealth transfer'' from employers to employees, acknowledging only in passing that government contractors would certainly adjust their prices to pass on these additional costs to the government, ultimately resulting in U.S. taxpayers paying more for necessary goods and services further exacerbating the fiscal challenges facing the country.

Government contractors were also affected by executive actions that hit companies more broadly. For example, a presidential memorandum issued in 2014 resulted in a radical expansion of the number of workers eligible for overtime compensation. Had the regulations not been halted by a district court injunction, the change would have imposed another $15 billion in costs on U.S. businesses over the next 10 years.

The significant burdens President Obama placed on government contractors selling commercial goods and services is inconsistent with long-standing federal policy intended to reduce the obligations applicable to such procurements and enable the government to leverage favorable pricing and ready availability in the commercial marketplace. Indeed, since the passage of the Federal Acquisition and Streamlining Act (FASA) in 1994, federal law has mandated that the government, to the maximum extent practicable, procure commercial items to meet the needs of the agency. FASA also eliminated numerous statutory requirements for purchasing commercial items, and created streamlined procurement procedures for commercial item acquisitions.

Importantly, laws enacted after Oct. 13, 1994, that set forth policies, procedures, requirements or restrictions for the procurement of property or services by the federal government are presumptively inapplicable to commercial item procurements. 41 U.S.C. § 1906. Such laws can only apply to commercial item procurements if the Federal Acquisition Regulatory Council (FARC), which is responsible for promulgating acquisition regulations, ''makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items for the applicability of the provision.'' To the extent this provision is applicable to executive orders, it is not clear that the deference given by the FARC to President Obama's determination of the applicability of executive order requirements met this requirement in all instances.

While executive orders have the effect of law and may therefore provide temporary satisfaction to a president unable or unwilling to work with Congress, without a legislative foundation such ''pen-and-phone'' tactics can be easily unwound. Given President-elect Donald Trump's expressed commitment to reducing the regulatory burden facing U.S. businesses, one can expect that the first 100 days of the Trump administration will likely see a number of President Obama's unilateral actions reversed. For companies frustrated with the increasingly complex and burdensome compliance obligations imposed on government contractors, particularly those that sell commercial goods and services to the government, the elimination of some or all of the burdensome rules, which are both expensive and distinct from generally applicable commercial obligations, would be a welcome development for both government contractors and for U.S. taxpayers who will ultimately bear the cost of more expensive goods and services.

I. Executive Order 13673: Fair Pay and Safe Workplaces

One of the first executive orders likely to be scrutinized by President-elect Trump is Executive Order (EO) 13673, ''Fair Pay and Safe Workplaces.'' The EO was signed July 31, 2014, and directed that executive agencies contracting for supplies and services valued over $500,000 require offerors to disclose their track record for promoting safe, healthy, fair and effective workplaces for three years prior to contracting with the government. Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

The order further required that disclosures be taken into account in making award decisions. It also included a ''paycheck transparency'' provision mandating that federal contractors for supplies and services valued above $500,000 disclose to employees — each pay period — hours worked, overtime hours, pay and deductions.

Under the final rule issued by the Federal Acquisition Regulation (FAR) Council on Aug. 25, 2016, contractors are required to publicly disclose labor law violations even if they do not relate to government contracts and regardless of whether they had been adjudicated. 81 Fed. Reg. 58562 (Aug. 25, 2016). 81 Fed. Reg. 58654 (Aug. 25, 2016).

While the rule excludes contracts for commercial off-the-shelf items, it applies to commercial-item contractors and extends to subcontractors. It requires that covered contractors disclose any alleged violations of the Fair Labor Standards Act, the Service Contract Act, the Davis-Bacon Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act, among others, including equivalent state laws. It also requires that contractors update disclosures every six months. For federal contracts exceeding $1 million, the final rule adds another restriction, prohibiting contractors from requiring arbitration agreements to resolve claims under Title VII of the Civil Rights Act, or related tort claims.

The EO claimed to promote compliance with labor laws and federal procurement regulations, speculating that responsible contracting will ''increase efficiency and cost savings'' in federal procurement. The Obama administration was unable to quantify the likely benefits of this ''efficiency,'' finding that:

> In the final analysis, as in the proposed analysis, there were insufficient data to accurately quantify the benefits presented. The agencies invited respondents to provide data that would allow for more thorough benefit estimates, *however no data were received that could be used to quantify the benefits of the final rule.* 81 Fed. Reg. 58562, 58634 (Aug. 25, 2016) (emphasis added).

But it was able to estimate the costs the EO and implementing regulations would impose: A staggering $4 billion in costs on government contractors over the first 10 years, and an additional $113 million in costs on the government over that period. The ''government costs'' calculated by the Labor Department (DOL) only include costs to the federal government directly related

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to the implementation of EO 13673: new staff at DOL; new agency labor compliance advisors (ALCAs); contracting agency evaluation costs; information technology costs to support implementation; and government personnel training. *Id.* at 58633.

While the fate of President Obama's other executive orders will be determined by President-elect Trump, much of EO 13673 and its implementing regulations have already been halted by a federal district court. Two months after the final rule was published in the Federal Register, the U.S. District Court for the Eastern District of Texas granted a preliminary injunction to halt the implementation of EO 13673, its implementing regulations, and DOL guidance. The court deemed the EO, the FAR rule and the DOL guidance, separately and together, to be unconstitutional. According to the decision, the EO, regulations and guidance: exceeded executive authority; were otherwise preempted by federal labor laws; violated due process; violated the First Amendment; violated the Federal Arbitration Act; and were arbitrary and capricious. As it stands, only the paycheck transparency provision, which took effect on Jan. 1, survived.

There is seemingly no better candidate for immediate revocation among the more than 250 executive orders issued by President Obama. EO 13673, which has already been determined to be legally unsound, would impose billions of dollars in costs on government contractors and subcontractors, including those providing commercial goods and services. Those costs will almost certainly be passed on to the government and the U.S. taxpayer, and even the Obama administration was unable to quantify any benefit to the government of the rule. Notably, this is one of a number of Obama administration actions related to labor and employment to have been halted by federal courts. *See National Fed'n of Indep. Bus. v. Perez*, No. 5:16-cv-00066-C (N.D. Tex. Nov. 16, 2016) (issuing a permanent injunction halting the expansion of the information collected under the "persuader rule," finding it was inconsistent with the attorney-client privilege, undermined the attorney-client relationship, violated employers' First Amendment rights and the due process clause, and imposed a significant reporting burden on consultants); *Associated Builders and Contractors of Se. Tex., et al. v. Rung, et al.*, No. 1:16-cv-00425 (E.D. Tex. Oct. 24, 2016) (halting the revision to overtime regulations under the Fair Labor Standards Act, a revision instigated by a March 2014 presidential memorandum that DOL estimated would cost private employers $15 billion in the first 10 years).

II. Executive Order 13658: Establishing Minimum Wage for Contractors

President Obama's tinkering with the government marketplace continued with EO 13658, which establishes a $10.10 hourly minimum wage for federal contractors and all subcontractors. Signed Feb. 12, 2014, the EO states that the minimum wage requirement would "promote economy and efficiency in procurement," which the president predicted would raise morale, productivity and the quality of work. Based on the estimates in the implementing regulations, the cost to private businesses of this morale booster will be more than $4 billion in the first 10 years.

The regulations implementing EO 13658 were issued Oct. 7, 2014, and are codified in 29 CFR Part 10. 79 Fed. Reg. 60634. The higher minimum wage requirement applies to all new government contracts and solicitations issued on or after Jan. 1, 2015, for concessions contracts; contracts with the federal government relating to federal property or lands and relative to offering services for federal employees, their dependents, or the general public; and contracts where employee wages are covered by the Fair Labor Standards Act, the Services Contract Act (service contracts), or the Davis-Bacon Act (construction contracts). While the base wage rate is $10.10, the minimum rate will be annually determined by the secretary based on the rate of inflation, but will not fall below $10.10 (in 2016, the minimum wage increased to $10.15). In other words, these regulations require government contractors, many of which also have significant commercial operations, to pay a wage premium to employees working on government contracts of 40 percent above the otherwise applicable minimum wage, $7.25.

In addition to mandating a minimum wage far above that applicable to commercial businesses, the rule requires that contractors put their employees on notice — either physical or electronic — that they are covered under this regulation. If a federal contractor fails to comply with the new rule, the contracting agency may withhold its funds. The withheld funds would be used to compensate workers for the wages the contractor failed to pay under the regulation.

According to DOL, the regulations will benefit 183,814 low-wage workers. This benefit will be in the form of transfer costs from employers to employees of $100 million in the first year, 2015, based on the assumption that one-fifth of government contracts each year will be new. Assuming this is correct, the transfer costs will be $200 million in 2016, $300 million in 2017, $400 million in 2018 and $500 million in 2019 and each year thereafter. 79 Fed. Reg. 60693, 60696 (Oct. 7, 2014) (codified at 29 C.F.R. Pt. 10).

DOL speculated that this estimate, which totals a staggering $4 billion over the first 10 years, is overstated because it "does not account for changes in state and local minimum wages that will raise wages independently of this final rule," a supposition that fails to acknowledge the automatic increase built into the federal rule.

In addition to costs from raising wage rates, DOL also estimates $25.87 million in costs for government contractors to familiarize themselves with the new contract clause. This cost was calculated at a rate of one hour per government contractor at $51.74 per hour for each of the 500,000 businesses contracting with the government.

Some comments submitted in response to the proposed rule criticized the government's data collection, suggesting that — as with the paid sick leave rule discussed below — the population of affected employees and costs associated with the rule will be above DOL's conservative estimates. For example, Demos — a public policy organization focusing on social, economic and political equity — argued that DOL should have relied on data from the American Community Survey (ACS) rather than relying on the Current Population Survey — sponsored jointly by the U.S. Census Bureau and the Bureau of Labor Statistics. Further, in calculating the percentage of employees affected by the EO, DOL assumed that the ratio of workers earning below the new minimum wage is the same for federal contractors and those within the rest of the U.S. economy, an assumption that the Chamber of Commerce/National Federation of Independent Business (NFIB) believed was unwarranted and skewed DOL data. Similarly, Demos' calculations using ACS data estimated 350,721 affected workers (almost twice the value of DOL's estimate), as well as approximately 10,000 additional concession contracts improperly excluded from the calculations. DOL had data available for construction and service industries and assumed the wage distribution of federal contract workers is the same for the rest of the U.S. economy. As Chamber/NFIB pointed out, DOL could have obtained more accurate statistics, asking contractors to report the number of their affected workers, but chose not to do so.

In the final rule, DOL conceded that costs were omitted from its analysis — including the increase in payroll taxes, in workers' compensation insurance premiums, and the cost of needing to make an upward wage adjustment for employees not covered by the order. But in justifying its data, DOL argued that some employers will cut fringe benefits and overtime. While this may help balance out the employer's costs, it is also likely to decrease the same morale and productivity that the government claims to be trying to raise. This assertion also contradicts DOL's assumption that raising the minimum wage does not affect employment.

In response to concerns that the minimum wage will pressure government contractors to cut labor costs, DOL speculated that any pressure would be mitigated by ''worker productivity, reduced turnover, lessened supervisory costs, and other benefits'' — a supposition repeated a number of times throughout the final rule that relies on a study by the UPJOHN Institute for Employment Research as its justification. UPJOHN is a nonpartisan, not-for-profit research organization that regularly plans and administers federally and state-funded programs in Michigan. The DOL fails to acknowledge that the UPJOHN study is based on historical changes in minimum wage that the authors concede were moderate — comparing the effects of a 10 percent increase in minimum wage rather than the 40 percent increase from $7.25 to $10.10 that resulted from EO 13658.

Despite a study from the Congressional Budget Office projecting an employment reduction of 0.3 percent (500,000 workers), and a study by George Mason University suggesting employers would lay off less productive workers, DOL stood by its speculation that the overall effect of increasing the minimum wage would be positive for employers and employees. 79 Fed. Reg. 60697.

DOL used the same response to address commentators' concerns that the EO would place small businesses, particularly those under concessions contracts, at a competitive disadvantage. Remarkably, DOL then conceded that the data in support of the claim that improving morale and decreasing absenteeism can be beneficial to business is based on companies that have voluntarily increased wages. Commentators further highlight that DOL did not provide a cost-benefit analysis of specific wage increases for current and future beneficiaries.

DOL could find little quantitative data supporting its theory that the lowered costs resulting from productivity gains would be equal to or greater than the increased costs from raising wages.

EO 13658 is another likely candidate for reversal by President-elect Trump. There is good reason to believe the $4 billion in costs over the first 10 years underestimate the true cost of the rule and the president's and DOL's justification for the regulation is speculative. Further, the regulation serves to drive a greater wedge between commercial and federal marketplaces, increasing the cost of performance and undermining the U.S. government's ability to leverage the commercial marketplace. And, of course, contractors subject to this costly EO-based regulation will almost certainly pass on their increased costs to the government, which means U.S. taxpayers will ultimately bear the burden.

III. Executive Order 13706: Establishing Paid Sick Leave for Federal Contractors

On Sept. 7, 2015, President Obama signed EO 13706, requiring that all companies contracting with the government provide their employees at least seven days of paid sick leave per year. 80 Fed. Reg. 54697.

The president's justification for the order was that it would, in his estimation, ''improve efficiency and economy in Government procurement'' by ensuring that federal contractors remain competitive employers, while simultaneously enhancing the health and performance of their employees. There is no acknowledgment in the EO that the requirement would impose expenses on government contractors; further differentiate government contractors' employment obligations from obligations applicable to commercial contractors; that these costs would likely be passed on to the government; or the possibility that increasing the cost of labor might negatively affect the demand for labor.

The DOL regulations implementing EO 13706, now codified in 29 CFR Part 13, were issued in a final rule dated Sept. 29, 2016. 81 Fed. Reg. 67598.

The regulations affect contractors and subcontractors alike, and apply to any new contract awarded on or after Jan. 1, 2017, to which the Davis-Bacon Act or the Service Contract Act applies, and to any new contracts made in connection with federal property or lands that relate to offering services for employees, their dependents or the general public. There is no exclusion for companies providing commercial items.

The rule grants employees one hour of paid sick leave for every 30 hours worked, requiring accrued time to carry over not only from one year to the next, but also reinstating an employee's hours if he is hired by another covered contractor within 12 months of leaving his previous employer. Although DOL reiterated in the final rule that there will be ''many benefits associated with this rule,'' DOL could not monetize such benefits. 81 Fed. Reg. 67672.

Juxtaposed with President Obama's speculation about ''efficiency and economy,'' the final rule makes clear that the EO 13706 will impose significant costs on private businesses. DOL estimated that this rule would result in an additional $3.77 billion in costs paid by government contractors and subcontractors over the first 10 years alone. 81 Fed. Reg. 67701. According to the final rule, the new requirements will affect employees who were previously not entitled to any paid sick leave, as well as employees who were already receiving sick leave but below the seven-day minimum. Based on calculations from DOL, the new rule will affect more than 1 million employees, leading to an average annual cost of $27.3 million over the first 10 years for regulatory fa-

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miliarization, initial implementation, recurring implementation and administrative costs. 81 Fed. Reg. 67671. DOL estimated an additional $349.6 million in transfers from employers to employees per year over that same period. 81 Fed. Reg. 67672. In addition to the costs of implementation and transfer costs, DOL projected $734,500 in annual ''deadweight loss'' due to the market operating at less than optimal equilibrium output. 81 Fed. Reg. 67693. In concluding its cost assessment, DOL conceded other costs are likely, such as costs to consumers, reduced production and replacement costs, but again stated those costs are difficult to quantify.

The details of the final rule should give industry concern that DOL's cost estimates are too low. For example, the final rule adopts a broad definition of ''sick leave,'' encompassing not only illness, injury or medical condition, but also domestic violence and caring for ''a child, parent, spouse, or any other individual related by blood or affinity whose close association with the employee'' amounts to a family relationship. The costs of this expansive coverage could be mitigated to a degree if employers were entitled to confirmation that an employee was absent for a qualifying reason. The rule, however, prohibits an employer from seeking such confirmation unless the employee has missed three consecutive workdays. 81 Fed. Reg. 67715.

As with the new minimum wage rules, it is also questionable whether paid sick leave will actually improve employee morale — particularly for commercially focused companies that do some government work. For those companies, the sick leave rule, like other increasingly onerous and divergent rules applicable to government contractors, will likely mean maintaining two different sick leave systems — one for employees working under a covered contract and one for strictly commercial employees — or applying the more generous sick leave rules to all of their employees. DOL's speculative cost estimate does not appear to include any allowance for those costs.

Not only is EO 13706 certain to impose significant costs on the private sector, studies cited by DOL itself in the final rule make clear that the rule will likely have a negative impact on a significant number of government contractor employees. Despite pleas from commenters, DOL refused to factor the expense of paid sick leave into bids submitted to a federal contractor because DOL surmised that there was a slim chance of many contractors either shifting costs onto consumers or laying off workers to balance increased costs. DOL's analysis relied on a handful of studies from organizations such as the Institute for Women's Policy Research (IWPR), which according to its website is ''the leading think tank in the United States focusing on the quantitative and qualitative analysis of public policy through a gendered lens,'' and the Murphy Institute for Worker Education and Labor Studies to support its conjecture, but even those studies suggest there is risk of a significant negative impact on employee hours. For example, DOL cited a Murphy Institute for Work Education and Labor Studies paper about the implementation of paid sick leave in Connecticut, stating the study ''found that approximately 90 percent of employers did not reduce employee hours.'' But the Murphy study analyzed was extremely limited in scope: It surveyed only 251 Connecticut employers and had a 36 percent response rate. Further, DOL failed to mention in the final rule key points from that study that undermine its position, including:

- 10.6 percent of employers surveyed did reduce employee hours.
  - o While 10.6 percent may seem insignificant — using DOL's own estimate that more than 1 million government contract workers will be affected by the new rule, an estimate that may be low — the regulations promulgated to implement EO 13706 could decrease the earning capacity of over 120,000 workers.
- 53.2 percent of respondents said costs increased as a result of the new paid sick leave law.
- One of the primary reasons for the limited impact of the Connecticut sick leave legislation was because it had a number of carve-outs, including for businesses that employed fewer than 50 workers and for per diem and temporary works.
  - o No such carve-outs exist in the regulations promulgated to implement EO 13706.

In sum, the sick leave EO signed by President Obama will impose, by DOL's own estimates, almost $4 billion in costs over the next 10 years on private entities doing business with the government. The rule will almost certainly result in reduced hours for a significant number of employees, increase the costs for goods and services sold to the government — costs that are ultimately borne by the U.S. taxpayer — and will add complexity to the already challenging compliance landscape faced by government contractors.

Conclusion

In total, during his eight years in office, President Obama issued more than 250 executive orders and more than 225 presidential memoranda. Those unilateral actions, some of which have already been enjoined by federal courts due to a lack of authority and other constitutional infirmities, will likely be among the first costly actions to be undone after President-elect Trump takes office. While President Obama's policy decisions likely stem from a desire to improve the federal acquisition landscape, little attention appears to have been given to the practical implications of imposing these obligations on private entities. Given the significant cost those orders imposed on government contractors, other employers, and, ultimately, the U.S. taxpayer, such a development would almost certainly be welcomed by companies providing goods and services to the federal government.