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Labor And Employment Changes Ahead For Gov't Contractors

By **Michael Schrier** (March 24, 2021, 5:49 PM EDT)

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After more than two months in office, President Joseph Biden is settling into his role as he fills out his cabinet, particularly in light of this week's confirmation of Marty Walsh as secretary of labor.

While predicting the future from certain presidential appointments and executive orders can be problematic, they point to changes ahead for federal contractors in the area of labor and employment law. The following is an exercise in "what is possible" from publicly available information, and not a prediction based on nonpublic or insider information.

Biden campaigned on a number of pro-employee and pro-union issues, such as a $15 per hour minimum wage and increased ability of unions to organize. Given the slim Democratic majorities in both the U.S. Senate and the U.S. House of Representatives, it is reasonable to assume that fulfilling many of Biden's campaign promises in labor and employment law reform may be significantly delayed or outright stymied.

While generally applicable, legislative change may be difficult to achieve through the legislative process, and the Biden administration could use the power of the president in matters concerning federal contracting under the Federal Property and Administrative Services Act[1] to impose policy changes through executive action on federal contractors.

Federal Contractor Minimum Wage Increase

It is very likely that the Biden administration will take action to raise federal contractor minimum wages to at least $15 per hour.

Pursuant to the Obama administration's Executive Order No. 13658 on establishing a minimum wage for government contractors, there already exists a regulatory regime requiring federal service contractors, construction companies, and concessionaires, to pay no less than a federally established minimum wage, which is automatically adjusted each year for inflation.

As of Jan. 1, the federal contractor minimum wage is $10.95. It is very reasonable to assume that the Biden administration will take executive action to amend the Federal Acquisition Regulation and applicable U.S. Department of Labor regulations and increase the federal contractor minimum wage to

match the campaign rhetoric of a $15 per hour minimum wage for all employees.

This appears even more likely in light of Biden's Executive Order No. 14003 on protecting the federal workforce, directing the Office of Personnel Management to make "recommendations to promote a $15/hour minimum wage for Federal employees" and the parliamentary maneuvers that stripped provisions raising the minimum wage from the latest COVID-19 relief act.

In other words, it appears that the Biden administration intends to pull every lever of power it has to establish a minimum wage floor of $15 per hour, regardless of whether Congress is able to raise the minimum wage by statute.

Nondisplacement of Qualified Workers

Considering the economic and job-market uncertainty caused by the ongoing COVID-19 pandemic, it is also likely that regulations on the nondisplacement of qualified workers may be reinstated.

Obama-era Executive Order No. 13495 on the nondisplacement of qualified workers under service contracts — and resulting FAR 52.222-17 — required successor federal contractors to make bona fide offers of employment to predecessor contractor employees before new employees could be hired for the same positions. Trump revoked that executive order with Executive Order No. 13897, which was issued Oct. 31, 2019.

It is likely the Biden administration will reinstitute the requirements of the former Executive Order No. 13495 in some shape or form as a means of providing additional protections to union collective bargaining agreements that predecessor contractors may have had with the incumbent employees, and require successor contractors to honor such collective bargaining agreements.

This appears even more likely in light of the fact that key Labor Department appointments by the Biden administration have strong union backgrounds. For instance:

- Marty Walsh, secretary of labor. Prior to holding publicly elected office, Walsh was the president of the Laborers' Union Local 223, and later the head of the Boston Metropolitan District Building Trades Council.

- Jessica Looman, principal deputy administrator of the DOL Wage and Hour Division. A presidential appointee not requiring Senate confirmation — and currently the highest ranking presidential appointee in place within the Wage and Hour Division — Looman previously served as the executive director of the Minnesota State Building and Construction Trades Council, and before that she was the deputy commissioner and the assistant commissioner for the Minnesota Department of Labor and Industry. Earlier in her career she served as the general counsel of the Laborers District Council of Minnesota and North Dakota.

As a result, it is reasonably likely that Executive Order No. 13495 on nondisplacement of workers, and the now defunct nondisplacement regulations, will be reinstated in some form as a means of aiding unions and unionized workplaces to remain unionized when a successor contractor takes over a new contract.

Project Labor Agreements

In another nod to organized labor and the extensive experience of the top Biden appointees in the building trades, it is not unreasonable to assume that the new administration — through executive order and/or regulation — will place a new emphasis on encouraging project labor agreements in connection with new, large federal construction projects.

Obama's Executive Order No. 13502, which was never rescinded by the Trump administration, gave federal agencies the option to use project labor agreements. As part of a more pro-union agenda, it is very likely that the Biden administration may make entering into project labor agreements a preference, rather than just an option for federal agencies.

In lockstep with project labor agreements, it is also possible that the Biden administration may adjust apprenticeship requirements in the building trades.

One of the first executive orders Biden signed, Executive Order No. 14016, revoked Trump's Executive Order No. 13801 on apprenticeships, which sought:

> more affordable pathways to secure, high-paying jobs by promoting apprenticeships and effective workforce development programs, while easing the regulatory burden on such programs and reducing or eliminating taxpayer support for ineffective workforce development programs.

It is not unreasonable to assume that the current administration will weave more union friendly apprenticeship requirements into any revamped emphasis on project labor agreements.

Davis-Bacon Act and Service Contract Act Enforcement

It is unlikely that there will be any legislative changes to either the Davis-Bacon Act, or DBA, or the Service Contract Act, or SCA, during the current administration. However, it is reasonable to assume that the Biden administration will place a new emphasis on invoking and enforcing those two prevailing wage statutes.

Early indications of increased attention on federal prevailing wage statutes can be found in Executive Order No. 14008 on tackling the climate crisis at home and abroad:
Agencies shall, consistent with applicable law, apply and enforce the Davis-Bacon Act and prevailing wage and benefit requirements. The Secretary of Labor shall take steps to update prevailing wage requirements.

By expressly calling out the DBA and directing the secretary of labor to update prevailing wage requirements, the Biden administration is sending a clear message that there will be an increased focus on DBA applicability and enforcement.

What remains unclear at this time is whether, and to what extent, the DBA will be expressly required in conjunction with future infrastructure initiatives — particularly to the extent it is marketed by the Biden administration as a post-pandemic economic recovery package, and a way of putting money into the economy and the pockets of construction workers.

Such a message is entirely consistent with recent appointments. As discussed above, both Walsh and Looman have extensive building trades backgrounds, where the DBA is directly relevant.

During his confirmation hearing, Walsh reportedly stated, "I will do everything I can to make sure that Davis-Bacon's enforced."

Adding to this is Julie Su, the pending appointee for deputy secretary of labor. Su was the labor commissioner of California, heading California's Division of Labor Standards Enforcement before later serving as the secretary of the California Labor and Workforce Development Agency.

In her prior roles, Su had experience enforcing prevailing wage statutes. Hence, it is reasonable to expect a renewed emphasis on SCA and DBA enforcement, along with traditional increases in the numbers of Department of Labor Wage and Hour Division investigators that typically accompany Democratic administrations.

Expanded use of the DBA and the SCA are also back-door ways of meeting the Biden administration's stated goal of instituting a $15 per hour minimum wage. Because federal service and construction contractors typically must comply with the SCA and DBA, and the respective SCA and DBA wage determinations have an annually rising wage floor thanks to the federal contractor minimum wage discussed above, increased use and enforcement of the SCA and DBA will lead to raising wages.

And, if the federal contractor minimum wage is increased to $15 per hour, then all SCA and DBA wage determinations would be adjusted to set a new wage floor. The result could be severe wage compression as lower wage trades and classifications have their wages raised to $15 per hour without a similar increase in the hourly rates for other classifications.

Office of Federal Contract Compliance Programs

One of the first orders of business for the Biden administration was to expressly revoke the prior administration's Executive Order No. 13950 on combating race and sex stereotyping by signing Executive Order No. 13985 — Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. This, however, may only be the tip of the iceberg for changes coming to the Office of Federal Contract Compliance Programs.

While Executive Order No. 13950 was in effect, the OFCCP director explained in public discussions that he believed the OFCCP did not need the order to make the changes it did to ban certain race and sex stereotyping practices.

Jenny Yang, the newly appointed director of OFCCP served as chair, vice-chair, and commissioner of the U.S. Equal Employment Opportunity Commission in the Obama administration.

It is reasonable to assume that Yang may make policy and/or regulatory changes to make it more difficult for successive administrations to impose viewpoint-restricted limitations on workplace training. It is also reasonable to assume that the OFCCP will revise its audit and compliance procedures and practices to reflect the policy agenda of the current administration.

It is also logical to assume that the OFCCP will attempt to expand its traditional scope to focus on gender identity and sexual orientation issues. Among the first wave of executive orders Biden signed was Executive Order 13988 — Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation — reinforcing the proposition that "all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."

Biden also signed Executive Order No. 14004, on enabling all qualified Americans to serve their country in uniform, which states in relevant part, "it shall be the policy of the United States to ensure that all transgender individuals who wish to serve in the United States military and can meet the appropriate standards shall be able to do so openly and free from discrimination."

Based on the policy directions reflected in early Biden executive orders and Yang's former role in the Obama administration, it is reasonable to assume that significant changes may be coming to the OFCCP coverage and enforcement.

OSHA COVID-19 Enforcement

Aside from traditional labor and employment issues, it is likely that the Biden administration may expand Occupational Safety and Health administration enforcement for federal contractors as a result of the administration's overall focus on COVID-19.

Biden issued Executive Order No. 13999, on protecting worker health and safety, with the express focus of protecting workers from COVID-19 under the OSHA. Around the same time, Executive Order No. 14003, on protecting the federal workforce, was issued.

Reading these two executive orders together, it is reasonable to assume that where federal service contractors are co-located or otherwise have frequent contact with federal employees and the agencies they serve, such contractors may see increased OSHA inspections and/or scrutiny.

As a result, federal contractors are advised to stay particularly up to date on any COVID-19 related regulations or guidance OSHA may issue, and take appropriate steps to ensure compliance.

A Return of Fair Pay and Safe Workplaces

Perhaps the most unwelcomed, yet anticipated, policy move of the new administration may be a reinstatement of some or all of the provisions of the Fair Pay and Safe Workplaces regulations. The Clinton administration had a version of this that was rescinded by the subsequent administration, as did the Obama administration.

Obama's Executive Order No.13673 — Fair Pay and Safe Workplaces— and the resulting regulations, had three separate components: (1) disclosure requirements and responsibility determinations; (2) paycheck transparency; and (3) arbitration of Title VII claims and tort claims related to sexual assault or harassment.

One of the first orders of business of the Trump administration was to rescind Executive Order No. 13673. And, more importantly, the Republican controlled Congress exercised its power under the Congressional Review Act and issued a joint resolution rescinding the Fair Pay and Safe Workplaces regulations.

The CRA states at Title 5 of the U.S. Code, Section 801(b)(2), that a rule rescinded pursuant to the CRA "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[2]

It is unlikely that the current Democratic controlled Congress will attempt, or be able to, undo what Congress did in 2017 and reinstate the Fair Pay and Safe Workplaces regulations in their entirety under the CRA. The more likely scenario will be either a piecemeal legislative approach or executive action.

Because there already exist prohibitions against mandatory arbitration of Title VII claims in military contracts, and those prohibitions were extended in Section 8092 of the Consolidated Budget Bill passed Dec. 20, 2019, it is not unreasonable to expect a Democratic controlled Congress to attempt to expand the existing prohibitions on arbitration of employment discrimination/retaliation claims to cover all federal contracts.

Defense Federal Acquisition Regulation Supplement 252.222-7006 already lays out the contract clauses and related prohibitions, so it would not be too much of a stretch — notwithstanding the 2017 CRA action by Congress — for the Biden administration to attempt to extend such coverage to all federal contracts by executive order.

Because legislative action on reinstating the blacklisting rule is unlikely, one should expect to see some attempt by the Biden administration to find ways around the 2017 CRA action by Congress. It is not clear how strictly the federal courts may interpret Section 801(b)(2) and to what degree any new rule must be "in substantially the same form."

So, it is possible the administration may try to promulgate regulations concerning responsibility determinations based on labor law compliance, and argue that they are not in substantially the same form as the rescinded Fair Pay and Safe Workplaces regulations. Alternatively, the Biden administration may come up with some new formulation of the blacklisting rule that looks and operates differently from the Obama era version.

Under the Fair Pay and Safe Workplaces regulations, the public disclosure requirement was a clear nod to unions to enable them to gather information for use in organizing campaigns against federal contractors. There was no need for public disclosure of alleged labor law violations if the stated purpose of the Fair Pay and Safe Workplaces regulations — making responsibility determinations — was the real purpose behind the regulations.

FAR Part 9 responsibility determinations could have been made from existing federal databases or the Fair Pay and Safe Workplaces regulations could have simply required federal contractors to make disclosures to a federal database to which only contracting officers had access.

Given the strong union background of the labor department nominees discussed above and the overt emphasis on unions by the current administration and Congress — with the House recently passing its version of the Protecting the Right to Organize Act — it is reasonable to assume that any new blacklisting rule will continue to have some sort of requirement of publicly disclosing alleged labor law violations in a way that is intended to benefit union organizers and the plaintiffs' bar.

Conclusion

It is clear that there will be changes to federal contractor employment and labor compliance in the months and years ahead, particularly now that Marty Walsh has been confirmed as the new secretary of labor. The only questions that remain are how radical will the changes be and how fast will they be implemented.

It is still early in the Biden administration, but one may assume that if the Democratic agenda on unions and employment law gets bogged down in Congress, the Biden administration may seek to impose a similar agenda on federal contractors through the president's significant powers to regulate federal contracting.

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[1] 40 U.S.C. 101 et seq.

[2] 5 U.S.C. § 801(b)(2).