AFFIRMATIVE ACTION UPDATE
** NEWS FLASH **

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THE PRESIDENCY: EXECUTIVE ORDERS AND PRESIDENTIAL MEMORANDUMS

On February 12, 2014, President Obama signed an Executive Order (EO) raising the minimum wage for new and renegotiated federal contracts to $10.10 an hour effective January 1, 2015. Then, on March 10, 2014, he issued a Presidential Memorandum (PM) instructing the Labor Department to review the eligibility requirements for overtime under the Fair Labor Standards Act (FLSA).

On April 8, 2014, he signed another Executive Order regarding the "Non-Retaliation for Disclosure of Compensation Information." Also on April 8, 2014, he issued another Presidential Memorandum instructing the Labor Department to propose a rule requiring federal contractors and subcontractors to submit summary data on compensation to the Labor Department by race and sex.

So, why were two Executive Orders and two Presidential Memorandums issued within two months, all of them dealing with compensation? Well, the answer is pretty simple. Can you say, "Mid-Term Elections?" It is no coincidence that this flurry of EOs and PMs regarding compensation has occurred at the start of the campaign season for the mid-term elections. However, while there has been a flurry of activity, the question that really needs to be asked is, "How much of a potential game-changer are these EOs and PMs for federal contractors and subcontractors?" Upon closer examination, the answer appears to be, "Overall, not much."

So, let's take a closer look at each of the EOs and PMs.

EO RAISING MINIMUM WAGE FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS

First, the EO only applies to new or renegotiated federal contracts (and tipped employees, who for the purposes of this article, we will not discuss). Second, it is not effective until January 1, 2015. Third, and most importantly, since labor costs are part of the expense that goes into quoting the contract, the contractor and subcontractor community is going to build any increased costs into the bid. As such, while it may raise the payroll costs, those costs are going to be passed along to the government who will actually end up paying for the increase in wages. In the end, it will be the taxpayer who pays for the increase in wages.

Without knowing the current average wages for employees of federal contractors and subcontractors, it is hard to predict the impact of the EO. It is more likely than not that the average wage for federal contractors and subcontractors is in excess of $10.10 an hour. As such, the impact on employees of federal contractors and subcontractors is likely to be minimal. In fact, a September 15, 2013 letter

from 15 Democratic Senators claimed that only 28% of employees of federal contractors and subcontractors earned less than $12.00 an hour. Only an across the board increase in the federal minimum wage for all employers would likely impact "hundreds of thousands" of employees claimed by the White House. So, will the EO raising the minimum wage for federal contractors and subcontractors have a large impact? It appears that the answer is, "Not likely."

EO REQUIRING NON-RETALIATION FOR DISCLOSURE OF COMPENSATION INFORMATION

On April 8, 2014, President Obama signed another EO, applicable only to federal contractors and subcontractors, requiring "Non-Retaliation for Disclosure of Compensation Information." Present at the signing was Lilly Ledbetter, the former Goodyear Tire and Rubber Supervisor after whom the Lilly Ledbetter Fair Pay Act of 2009 was named. This was the very first piece of legislation signed into law by the President.

The stated purpose of the EO is to allow employees to freely discuss their compensation without fear of retaliation for violating workplace policies or rules. The EO claims that the free discussion of compensation will ensure that employers pay their employees equitably as employees will know what each other are being paid, and can then timely take steps to remedy any unlawful disparities in pay.

Once again, how does this change the playing field? The answer is, "Not at all." The National Labor Relations Act already prohibits union and non-union employers from retaliating against employees for discussing wages, hours and/or working conditions. The EO merely prohibits behavior that is already prohibited by another Federal Regulation. In other words, it's nothing new. It creates no new rights. It prohibits no additional conduct. Will this EO requiring non-retaliation for disclosure of compensation information have a large impact? It again appears that the answer is, "Not really."

PM FOR ADVANCING PAY EQUALITY THROUGH COMPENSATION DATA COLLECTION

Also on April 8, 2014, the President issued a Presidential Memorandum directing Secretary of Labor, Tom Perez, to propose a rule requiring federal contractors and subcontractors to submit to the Department of Labor in summary form, compensation data including race and sex. So, what new obligations arise on the part of federal contractors and subcontractors? The answer is, "At the moment, none." Item 11 of the OFCCP scheduling letter already requires the submittal of data in summary form with race and sex information to the OFCCP for analysis. Contractors following the audit and evaluation provisions of the implementing regulations already look at this data.

The only substantive change is that all covered contractors and subcontractors will have to submit the data, as opposed to only those who receive a scheduling letter. Let's presume this happens. What will the OFCCP do with this data? There is history that may provide some insight. Remember when contractors had to submit summary compensation data by EEO-1 category when they completed the former EO Survey? What did the OFCCP do with that data? Nothing. They did not have the resources to look at it; when they did try to look at some of the data, they found the information provided was worthless from an analytical perspective. It was so worthless that after two short years, the Agency stopped requiring the submittal of the data.

The real question has nothing to do with the collection or submittal of the data. The real question is what will the Department of Labor do once they receive it? They still need a means to put the data into a form that can be analyzed. They still need the resources to look at the data and a way to analyze the data. They also need a way to take the results of the analysis, merge the results into the Federal Contractor Selection System (FCSS) and then decide what results should be subject to further scrutiny.

At this point, we are likely several years from the roll-out of anything substantial. If/when the roll-out occurs, given the Agency's success with large scale analysis, meaningful use of the data remains a huge question mark. So, does it appear that the collection of compensation data will have a large impact? Yet again, "Not really."

PM TO LABOR DEPARTMENT EXPANDING OVERTIME ELIGIBILITY

Up to this point, the two EOs and the PM regarding data collection have only applied to federal contractors and subcontractors. The final PM deals with directing the Labor Department to look at revising the overtime eligibility provisions of the Fair Labor Standards Act (FLSA) which applies to almost all employers. Currently, misclassification of employees as exempt from the overtime provisions of the FLSA is an ongoing focus of the Wage-Hour Division of the Department of Labor.

Under the current exemptions, individuals who meet one of the three exemptions (Executive, Administrative and Professional) and who earn more than $455 a week are exempt of earning overtime if they work over 40 hours in the work week; $455 equates to an annual salary of $23,660. The salary threshold was last changed in 2004 when it was raised from $155 a week, an amount that was established in 1975. What a new threshold will look like is anybody's guess.

At the signing ceremony, the President stated that the revisions would be done "…the right way." That means the Labor Department will use the full rulemaking procedure including publishing the rule; getting public comments; revising the rule; getting clearance from OMB and finally publishing the rule. This will likely require somewhere in the area of 12-24 months before the final rule is published.

When they do finally take effect, revisions to the overtime requirements of the FLSA will be a significant change for all employers, not just federal contractors and subcontractors.

WHY THE CHANGES?

Finally, let's address the questions of why these new EOs and PMs were issued.

On April 9, 2014, Senate Republicans blocked further action on the Paycheck Fairness Act. The proposed Act was first approved by the House in 2009 but the Senate failed to move the bill forward in 2010. The Act was reintroduced in 2011 in both houses. However, in 2012 it again failed to move forward. The bill was then reintroduced a third time on April 9th, and once again it failed to generate sufficient support in the Senate to move forward. This has been pretty much par for the course for the employment related legislation put forward by the current administration. Since the 2010 mid-term elections, either the Senate or the House have blocked efforts to pass employment legislation. It is no

secret that Congress and the President are at odds on domestic policy. Congress has specifically refused to go along with the President's domestic agenda.

So, does this mean that the President's hands are tied? Not at all. The Executive Branch has alternatives to developing and implementing its agenda, including employment related matters. As such, the President has decided to work around Congress through the Executive Order and Presidential Memorandum process. But wait, isn't this circumventing the elected officials who were put in place in large part to maintain the system of checks and balances between the Executive, Congressional and Judicial branches of government?

Well, yes. But so has every other President since Herbert Hoover. At this point, President Obama has issued 177 Executive Orders with 2.9 years left in his administration. In contrast, Ronald Regan issued 381 EOs during his administration. In other words, in order to tie Ronald Regan, the President will have to issue 204 more EOs before he leaves office. Could he do this? Certainly. Will he do this? Who knows.

The point is that other Presidents to one extent or another have used the powers of the Executive office to implement and carry out their agenda. Right now, there are contentious and important mid-term elections coming up. Once those elections are held, getting any part of the President's agenda through Congress, if the make-up of the House of Representatives does not change to his party's advantage, will be next to impossible. The use of the EOs and the PMs is merely an avenue to continue to make and implement change. More importantly, they present an avenue to show important constituent groups that the Administration and the party in charge are continuing to try to work in the interests of the constituency.

No matter your party affiliation, both parties play this game. In this instance, the President is playing these cards because he can, and because it promotes his party's agenda at this critical time. While you may not like it or agree with it, it helps to understand the "why" behind what is happening.

ARE THESE MAJOR CHANGES?

In summary, when looking at the question whether all of these are major changes, the answer is that for federal contractors and subcontractors, they are not. The changes to the FLSA will be, but they will affect almost all employers. These changes are generally form over substance and most contractors and subcontractors will not even notice a difference.