A Timely Analysis of Legal Developments

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The Department of Labor has published final regulations effective June 21, 2010, implementing Executive Order 13496 regarding the obligation of federal contractors and subcontractors to post notices to employees informing them of their rights under the National Labor Relations Act. The surprisingly complicated regulations raise many questions as to who must comply, require a broader dissemination of the notice than what is usually required in connection with workplace posters, and raise several issues from a labor relations perspective.

# DOL Issues Final Rule on Notification by Federal Contractors of Employee Labor Law Rights

**By David Goldstein and Jay Sumner**

The Department of Labor's Office of Labor Management Standards (OLMS) published a final rule on May 20, 2010, implementing Executive Order (EO) 13496: *Notification of Employee Rights Under Federal Labor Laws*. This EO mandates that all government contracting departments and agencies include a provision in most government contracts stipulating that the contractor post a notice "in all places where notices to employees are customarily posted both physically and electronically," informing them of their rights under the National Labor Relations Act (NLRA). In turn, covered contractors are required to include a similar provision in subcontracts that are necessary to the performance of the government contract and in an amount in excess of $10,000.

This new obligation applies to employers entering into covered government contracts or subcontracts that result from solicitations issued after June 21, 2010, and that include the above notice requirement.

EO 13496 also revoked an earlier EO issued by former President Bush – *Notification of Employee Rights Concerning Payment of Union Dues or Fees* – which had required federal contractors to post a notice (commonly known as a "Beck" notice) to their employees informing them that they were not required to join or maintain membership in a labor union, and that those who were not union members – but were nonetheless required to pay dues or fees pursuant to a union security agreement – could object to paying a portion of those dues or fees to support activities that are not related to collective bargaining, contract administration or grievance adjustment. The final rule revoking the *Beck* notice requirement was issued in March 2009. The final rule for EO 13496 prescribes requirements for the size, form, and content of the notice, outlines the exceptions for certain types of contracts, and discusses the standards and procedures related to complaints, penalties, compliance evaluations and enforcement of the notice requirement, among other things.

## Content of the Required Notice

The notice required under the final rule includes a preamble stating that

> The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

The notice then includes a section informing employees that under the NLRA they have rights to:

- Organize a union to negotiate with their employer concerning terms and conditions of employment;
- Form, join or assist a union;
- Bargain collectively through representatives of their own choosing;
- Discuss terms and conditions of employment or union organizing with coworkers or a union;
- Take action with one or more coworkers to improve working conditions by, among other means, raising work-related complaints directly with their employer or with a government agency, and seeking help from a union;
- Strike and picket, depending on the purpose or means of the strike or the picketing; and
- Choose not to do any of these activities, including joining or remaining a member of a union.

The notice sets forth seven examples of unlawful employer conduct under the NLRA including:

- Prohibiting employees from soliciting for a union during non-work time or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms;
- Questioning employees about union support or activities in a manner that discourages them from engaging in that activity;
- Taking adverse action against employees for joining or supporting a union or engaging in concerted activity for mutual aid and protection, or choosing not to engage in any such activity;
- Threatening to close a workplace if workers choose a union to represent them;
- Promising or granting promotions, pay raises, or other benefits to discourage or encourage union support;
- Prohibiting employees from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances; and
- Spying on or videotaping peaceful union activities.

The notice also includes five examples of unlawful union conduct under the NLRA including:

- Threatening that employees will lose their jobs unless they support the union.
- Refusing to process a grievance because an employee criticized union officials or is not a member of the union.
- Using or maintaining discriminatory standards or procedures in making job referrals from a hiring hall.
- Causing or attempting to cause an employer to discriminate against an employee because of his or her union-related activity.



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- Taking other adverse action against employees based on whether they have joined or support the union.

The final section of the notice advises employees to contact the National Labor Relations Board (NLRB) if they believe that their rights or the rights of others have been violated and provides information on how to contact the NLRB.

## Who is Required to Post the New Notice?

Unless exempted by one of the four exceptions described below, the obligations of the final rule apply to both government contractors and their subcontractors at any tier. The notice requirements do not apply to employers with the following type of contracts:

- Prime contracts below the simplified acquisition threshold ($100,000).
- Subcontracts that are *de minimis* in value, which the OLMS has defined as those subcontracts that do not exceed $10,000.
- Contracts resulting from solicitations issued before the effective date of the final rule.
- Contracts and subcontracts for work performed exclusively outside the territorial United States.

In addition, federal contractors that are not "employers" for purposes of the NLRA (*e.g.*, employers covered by the Railway Labor Act (RLA)) or who only employ workers excluded from the definition of "employee" under the NLRA (*e.g.*, an entity employing only agricultural laborers) are also exempt from the requirements.

Please note that unionized, partially unionized, and non-union contractors not otherwise exempt are obligated to comply with the posting requirements.

## When Must the Notice be Posted?

The final rule is effective June 21, and the notice requirement applies to contracts resulting from solicitations issued after that date. The rule does not provide any guidance as to how quickly an employer must comply with the new requirements upon first entering into a covered contract. However, the contract provision provides that the contractor will post the notice "[d]uring the term" of the contract. Therefore, we recommend that employers obtain and display the poster as soon as they reasonably can after entering into a covered contract. Contractors should also be including the notice requirement in all purchase orders and subcontracts entered into in connection with the covered contract (unless the subcontract is otherwise exempted).

Because not all federal contractors will be subject to the notice requirement, contractors will want to carefully review the rule and their specific circumstances to determine whether compliance is required. In this regard, it should be noted that, unlike some other federal contracting obligations, this notice requirement does not appear to apply by operation of law but rather arises only after applicable language has actually been included in a contract. In other words, under a reasonable interpretation of the language of the EO and its implementing rule the obligation to post does not arise until after a contractor actually enters into a government contract or subcontract that includes the applicable notice provision. Employers should be forewarned, however, that the Department of Labor may interpret the rule differently. Accordingly, as discussed below, some employers may want to consider posting in situations where they would be subject to the notice requirement but for the failure of a contracting agency or higher tier contractor to include the relevant language in a particular contract.

## Satisfying the Notice Requirement

Contractors should note that simply displaying a single copy of the poster in a break room or other centralized location may not satisfy the notice requirement. Under the rule, contractors are required to place the poster in conspicuous places so that the notice is prominent and can readily be seen by employees. In addition, contractors are further required to also place the poster wherever



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employees covered by the NLRA engage in activities relating to the performance of the contract. The Office of Federal Contract Compliance Programs (OFCCP) takes the position that such contract-related work includes indirect or auxiliary work without which the contract could not be effectuated. Such indirect or auxiliary work could include maintenance, repair, personnel, and payroll work.

Contractors that customarily post notices to employees electronically must also post the required notice electronically. Such contractors or subcontractors satisfy the electronic posting requirement by displaying prominently on any website that is maintained by the contractor or subcontractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment, a link to the DOL's website that contains the full text of the poster. The link to the Department's website must read, "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers."

Note that electronic posting must always be in addition to displaying the physical poster. Displaying the physical poster is always a requirement.

Where a significant portion of the contractor's workforce is not proficient in English, the information in the Notice must be provided in their primary language. This requirement must be satisfied with regard to both the physical poster and the electronic notice.

Posters with the required employee notice in English and in other languages will be printed by the Department of Labor, and made available through federal contracting agencies, the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5609, Washington, DC 20210, or from any field office of the OLMS or the OFCCP. A copy of the poster in English and in languages other than English also may be downloaded from the Office of Labor-Management Standards website at www.dol.gov/olms.

## Incorporation of the Notice Requirement into Purchase Orders and Subcontracts

The final rule requires covered contractors to include in every subcontract or purchase order entered into in connection with their covered contracts, specified language requiring subcontractors to also comply with the notice requirement. The final rule provides that the required language may be incorporated by reference through citation to Title 29 of the Code of Federal Regulations Part 471, Appendix A to Subpart A.

In order to facilitate compliance with this requirement, government contractors may wish to include the relevant language in all purchase orders and subcontracts subject to a statement that the language is incorporated "where applicable."

On the other hand, when presented with a purchase order or contract that purports to incorporate the notice requirement, subcontractors will want to carefully consider the relevant facts to determine whether the provision really applies to the transaction at issue.

## Labor Relations Implications and Strategies

The impact of this new notice requirement will vary from employer to employer depending upon individual circumstances. In some workplaces, adding one more poster to the multiple posters already required under federal, state, and local laws is going to be of little consequence. In other workplaces, posting this notice may have a significant impact on the workforce. Accordingly, specific advice as to how to address issues resulting from compliance with the new notice requirement depends on each contractor's individual circumstances. However, all employers should consider the following when determining what steps to take to deal with the impact of the posting, if any:

## 1. How should I address employee questions?

There is a good chance that at least some employees will read the posting and have questions. The most common question is



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probably going to be in the nature of "why did the company post this?" Therefore, in connection with the posting, the company should provide training to leaders and supervisors as to how to respond to employee questions about the notice. The best response is that the posting was made pursuant to a federal government requirement. Some employers may even want to consider pro-active communications with and/or training of employees directly regarding the concept of unionization in anticipation of questions regarding the subject.

## 2. Can we post our own "notice"?

An employer retains its right to speak to its employees with regard to unions and unionization within the confines of the NLRA. If a company has an obligation to post the requisite notice, it must of course comply. But, nothing in the EO takes away from any rights the employer or any employee has under the NLRA, including an employer's right under Section 8(c) to free speech. Given that the posting may cause employees to talk among themselves about the virtues of unionization, an employer may want to consider a pro-active response as discussed previously.

## 3. What should I do in ambiguous posting situations?

In some cases, it may not be clear if the notice requirement applies. For example, a company may enter into a contract that it believes should have been covered, but which does not include the required clause; or the company many have multiple locations, only some of which may require the posting due to the nature of the work performed. In such a situation, there may be reasons why a company might still want to post the notice (for example, where the employer believes that posting the notice is unlikely to have any negative impact in the workplace or that posting everywhere will assure full compliance). By posting the notice even when it may not be required, the employer is able to control the timing and avoid the possibility of non-compliance.

As another example, even though an employer may have an excellent basis for believing that the notice requirement does not apply, it may fear that employees, or a union either seeking to represent or currently representing those employees, will complain to the Department of Labor if the poster is not properly displayed in the workplace. The costs of dealing with an OFCCP investigation into alleged non-compliance with the notice requirement may justify proactively posting the notice. It is also possible that the employer's failure to post the notice in situations where a notice is required may be taken into account by the NLRB in considering unfair labor practice charges filed by a union during an organizing drive or other contentious labor situation.

## 4. Should I Take Down My Old Beck Poster?

Under the Bush administration's now revoked EO 13201, government contractors had been required to post notices informing employees of their rights under the National Labor Relations Act to elect not to join a union and the right of non-union members to pay only dues and fees used for union costs related to collective bargaining, contract administration, and grievance adjustment. Although no longer required to display this notice, employers are certainly free to leave them up as a still-accurate description of the law.

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