

U.S. DOL Proposes Rule Requiring Federal Contractors and Sub-Contractors To Notify Employees of Their Rights Under the National Labor Relations Act

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The United States Department of Labor (“DOL”) has issued a proposed rule requiring certain federal contractors and subcontractors to advise their employees of their rights under the National Labor Relations Act (“NLRA”). Issued on August 3, 2009, comments on the proposed rule are due by September 2, 2009, just in time for Labor Day. (EBG notes that the comment period encompasses the prime summer vacation season.) The proposed rule follows President Barack Obama’s January 30, 2009 Executive Order requiring federal contractors to notify employees of their rights under federal law. (Steven M. Swirsky and Donald S. Krueger, *President Obama Signs Three New ‘Labor Friendly’ Executive Orders*, EpsteinBeckerGreen Client Alert, Feb. 6, 2009).

The proposed rules would (i) require federal contractors and subcontractors to notify their employees of their rights under the NLRA using specific text for physical and electronic postings, and (ii) assign the Office of Federal Contract Compliance (“OFCCP”) to evaluate prime contractors’ and subcontractors’ compliance with the posting requirements, to investigate complaints and to enforce penalties for non-compliance. Once the text of the posting is finalized, the contracting federal agency and the DOL’s Office of Labor-Management Standards will make available to the public copies of the required posters and text for electronic postings.

Significantly, the text of the proposed posting does not track the statutory text of the NLRA, but rather provides a laundry list of purported employee rights and prohibitions that the DOL divined from reviewing National Labor Relations Board (“Board”) or court precedent. By doing so, however, the proposed rule fails to reflect the nuances of Board precedent. For example, the proposed posting suggests that employees may lawfully engage in countless forms of activity with fellow employees to protest the terms and conditions of their work, but never warns employees that their actions

might not be protected under certain circumstances (*i.e.*, picket line violence, secondary boycotts, and so on). Curiously, the proposed posting also does not contain any prohibitions against labor unions other than stating that a union may not discriminate or take other adverse action against an employee based on whether he or she has joined or supported the union. The proposed rule may face legal challenge because the proposed posting arguably creates new substantive rights under the NLRA, usurping the Board as the primary agency to interpret and enforce the NLRA.

The proposed rule also requires that the notice of employee rights contain contact information for the Board, a statement about filing charges with the Board and the statute of limitations for filing such a charge.

Subcontractors on Federal Contracts Beware

The DOL recognized that “a narrow reading of the Executive Order might suggest that the obligation to include the contract clause is limited to contracts between the government agency and the prime contractor” and that “under this reading, subcontractors would be required only to post the notice of employee rights, and their subcontractors (sometimes called second tier contractors) would have no responsibilities under the Executive Order.” The proposed rule, however, holds subcontractors to the posting requirement if they are performing subcontracts that are necessary to the performance of the prime contract.

Some Federal Contracts are Exempted

The proposed rules expressly exempts two types of government contracts: collective bargaining agreements and contracts involving purchases below the simplified acquisition threshold, which currently is set at \$100,000. In addition, contracts resulting from solicitations issued before the effective date of the final rule promulgated under this rulemaking would be exempt. The proposed rule would require all nonexempt prime contractors and subcontractors to include an employee notice contract clause in each of their nonexempt subcontracts so that subcontractors also are obliged to notify employees of their rights.

The full text of the proposed rule is set forth in subchapter D, Part 471 of Volume 29 of the Code of Federal Regulations and is available at <http://www.regulations.gov/search/Regs/home.html#docketDetail?R=LMSO-2009-0002>.

Comments on the proposed rule must be received by September 2, 2009, and identified by 1215-AB70, and may be submitted electronically through <http://www.regulations.gov> or by mail to Denise M. Boucher, Director of the Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, Labor Department, 200 Constitution Ave., N.W., Room N-5609, Washington, DC 20210.

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EpsteinBeckerGreen is investigating appropriate comments to this proposed rulemaking.

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