

Executive Order 13496 Requires Federal Contractors and Subcontractors to Notify Employees of Their Rights Under the National Labor Relations Act

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June 2010

On May 20, 2010, the U.S. Department of Labor's Office of Labor-Management Standards published its final rules implementing Executive Order 13496. See 29 CFR Part 471 (Notification of Employee Rights Under Federal Labor Laws) <http://edocket.access.gpo.gov/2009/pdf/E9-2485.pdf>. As a result, beginning on June 19, 2010, federal contractors and subcontractors that enter into new federal contracts, subcontracts, or modifications to existing contracts on or after that date will be required to post a detailed government notice ("Notice") informing employees of their rights under the National Labor Relations Act ("NLRA" or "the Act"). These rights include not only the right to obtain union representation and to engage in collective bargaining but also, for example, the right to share wage and benefit information with co-workers and others. As the regulations make clear, Executive Order 13496 and the Notice are intended to promote collective bargaining, and along with it, union organizing activity. The regulations also provide direction on how and where the Notice is to be posted and communicated to employees, and explain how the Department of Labor ("DOL") will enforce the posting requirements.

The Required Notice

The DOL-created Notice that must be used by all employers who hold federal contracts or subcontracts at any tier advises employees of their right under the NLRA to form, join, and assist labor unions; to bargain collectively through a representative of their choosing; to discuss terms and conditions of employment with co-workers as well as unions; to strike, picket and engage in other forms of concerted activity along with their co-workers; and to refrain from engaging in any of these activities.

The Notice also lists examples of the types of actions by employers and by unions, *i.e.*, unfair labor practices, which are prohibited by the NLRA. The Notice directs employees

to contact the National Labor Relations Board (“NLRB”) if they believe any of their rights under the NLRA have been violated.

Although the NLRA has been in effect for more than 70 years, the requirement that a broad class of employers, *i.e.*, virtually all contractors and subcontractors holding contracts with the federal government, post such a notice, is the first in the Act’s history.

Which Employers Are Affected

Executive Order 13496’s posting requirement will apply to all federal government contracts and subcontracts for the purchase, sale, or use of personal property or non-personal services, with only limited exceptions. Excluded are government contracts under \$100,000, subcontracts of \$10,000 or less, and contracts and subcontracts for work performed exclusively outside the territorial United States. Contractors and subcontractors excluded from the definition of “employer” in the NLRA are also not subject to the new requirements.

The commentary to the Notice issued by the Office of Labor Management Standards makes clear that the DOL takes an expansive view of which facilities of covered employers must post the Notice.

How and Where to Post

Covered contractors and subcontractors must post the Notice in “conspicuous places” throughout their workplaces, including all areas where notices concerning terms and conditions of employment are posted and where they will be readily seen by all employees. Notices must be prominently posted where employees covered by the NLRA perform work related to the federal government contract or subcontract, including where the contractor’s employees who “support” the work under the contract are located. The DOL has made clear that this requirement means that a Notice must be posted everywhere notices to employees about employment conditions are posted and not just where “legal” notices are placed.

Physical posting of the Notice will not be sufficient for an employer that regularly uses an intranet, the Internet or other electronic forms of communication to communicate with employees concerning terms and conditions of employment. The regulations provide that if an employer customarily posts notices to employees electronically, the Notice must be posted both electronically and physically in the workplace. The regulations specify that any electronic Notice must be “prominently” displayed on all websites the employer maintains and customarily uses for displaying notices or providing information to employees about terms and conditions of employment, whether on the Internet or an intranet. The electronic notice may include a link to the DOL’s website that contains the full text of the poster. Such a link must read, “Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers.”

Where a significant portion of an employer's workforce at a given location is not proficient in English, the employer must also provide the Notice in the languages the employees there speak. The language mandate applies both to the physical posting and the electronic posting requirements. The DOL has made the Notice available in a number of languages.

What Are the Consequences of Noncompliance?

Covered employers that fail to comply with the Executive Order will be subject to a broad range of sanctions and penalties. These can include cancellation, termination, or suspension of the company's government contract or a portion of a contract; the continuance of the contract conditioned upon compliance; and/or the issuance of an order of debarment preventing the contractor or subcontractor from entering into any further government contracts, extensions or modifications.

The Office of Federal Contract Compliance Programs ("OFCCP") is responsible for investigating employee and other complaints alleging noncompliance with the Order's requirements. The OFCCP also will monitor compliance with the regulations when conducting compliance audits of contractors' and subcontractors' affirmative action programs.

Contractors and subcontractors may request posters from an Office of Labor-Management Standards or OFCCP field office. Notices are available for download from www.dol.gov/olms/regs/compliance/posterpg.htm.

What Should Employers Do?

The Executive Order clearly is intended to increase employee interest in collective bargaining and union representation, and to educate employees about their rights under the NLRA. These rights protect employees in non-union as well as unionized environments. The Order reiterates the declaration of "national labor policy" contained in the NLRA, *i.e.*, "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection"

There are a number of concrete steps that employers will need to take at this time. The first is a thorough review of any federal contracts or subcontracts that may be in effect or taking effect at any of their operations. This review will be necessary to determine which facilities and employees are engaged in work that is under the contracts or is in support of the contracts, so that the employer can determine where and when it will need to post Notices, both physically and on its websites and other electronic media.

Further, given that employees will be receiving access to much new information about their rights under the NLRA, both in unionized and non-union environments, and how to pursue those claims under the Act with the NLRB, it is advisable to ensure that

workplace policies and practices are in compliance with the Act's requirements. For the same reasons, employers will want to ensure that supervisors and managers are aware of the Act's provisions and what types of employer actions are permitted and prohibited under the NLRA.

For those organizations and facilities where employees are not represented by unions, employers may wish to assess their employment practices and procedures in recognition of the enhanced organizing that many predict will result from the Order. This assessment would include not only reviewing the company's personnel and HR policies to ensure that they comply with the requirements of the NLRA, but also assessing communications and dispute resolution practices, as well as their own particular risks and vulnerabilities.

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