

Management Alert

Department of Labor Issues Proposed Regulations Regarding Mandatory Union Postings For Federal Contractors

On August 3, 2009, the Department of Labor issued a Notice of Proposed Rulemaking regarding proposed regulations to implement Executive Order 13496. Executive Order 13496 requires federal contractors to post notices informing employees of their rights under the National Labor Relations Act ("Act"). Two other labor-related Executive Orders signed by President Obama have not yet been the subject of proposed regulations.

As proposed, the regulations would provide contractors with direction on the content, size, and form of the required notices. Furthermore, the regulations would make it clear that the notice requirements of Executive Order 13496 apply to contractors and subcontractors alike. In addition, the proposed regulations include exceptions and exemptions for certain types of federal contracts. Finally, the proposed regulations would set forth the standards and procedures to be used for complaints, compliance evaluations, and enforcement purposes.

Posting of Notices

The Department of Labor proposes that the notices indicate, among other things, that: (1) "the policy of the United States is to encourage collective bargaining;" (2) under federal law, employees have the right to organize a union and take collective action, "including attending rallies on non-work time, and leafleting on non-work time in non-work areas;" (3) employees have the right to "strike and picket, unless [their] union has agreed to a no-strike clause;" (4) employees may "choose not to do any of these activities, including joining or remaining a member of a union;" (5) it is illegal for an employer to question employees about union activities, discriminate against employees because of their union activities, or promise employees benefits to discourage union support; (6) it is illegal for an employer to "prohibit employees from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances;" and (7) it is illegal for a union to "discriminate or take other adverse action against [employees] based on whether [they] have joined or support the union." The proposed notice also would provide information about the National Labor Relations Board and how to file an unfair labor practice charge.

Under the proposed regulations, the Department of Labor will supply the poster to federal contractors through the federal contracting agency. Contractors could also obtain the posters from the Office of Labor-Management Standards (OLMS), or could copy an exact duplicate of the poster. Posters would have to be posted at the contractor's place of operation where employees are likely to see it, including all places where notices to employees are customarily posted. The proposed regulations also indicate that contractors who customarily post notices to employees electronically would have to post this notice of rights electronically.

Exceptions and Exemptions

The notice provisions would only apply to subcontracts that are "necessary to the performance" of the government contract, although that term is not defined further. The definition of "subcontract" does not contain any exception for subcontracts that

fall below a minimum dollar value. Thus, subcontracts of de minimis value that are nonetheless necessary for the performance of the contract must include language that would impose the posting requirements on the subcontractors.

In addition, the proposed regulations preserve the right of the Secretary of the Department of Labor to exempt a contracting department or agency from the requirements of the Executive Order if the application of the order would not serve the Order's purposes, if it would impair the ability of the government to produce goods or services on an economical and efficient basis, or if there are special circumstances that require an exemption. Written requests for exemptions could be filed with the Deputy Assistant Secretary for Labor-Management Programs.

Finally, the proposed regulations also exempt employers who are not included in the definition of an "employer" under the Act. Thus, public-sector employers, agricultural employers, and employers subject to the Railway Labor Act would be exempt from the Executive Order.

Enforcement

The Executive Order would be enforced by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The OFCCP would have authority to conduct evaluations to ensure compliance with the Executive Order. The OFCCP and OLMS would also accept written complaints of noncompliance. The OFCCP would investigate any written complaints, make compliance findings, and include in its investigation a record of any efforts made toward conciliation, corrective action, and a recommended enforcement action. A noncompliant contractor will be allowed an opportunity to correct the violation and commit in writing to maintain compliance in the future.

If a contractor does not come into compliance, the OFCCP will take further enforcement action. Following a hearing in front of an Administrative Law Judge, the Assistant Secretary for Employment Standards will issue a final administrative order, which may include a cease-and-desist order. Potential sanctions for violating the Executive Order include terminating, suspending, or cancelling any contract or portion of a contract for noncompliance. The OFCCP might also issue an order debarbing noncompliant contractors. Debarred contractors would be allowed to seek reinstatement by submitting a written letter. Reinstatement will be allowed if the contractor has come into compliance with the rule and has shown it will fully comply in the future.

Next Steps

The proposed regulations are open to public comments. If you wish to submit a comment regarding the proposed regulations, you may do so in one of two ways: (1) electronic comments may be submitted through <http://www.regulations.gov>; or (2) written comments may be sent to Denise M. Boucher, Director of the Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5609, Washington, DC 20210. Comments must be received no later than September 2, 2009. Once the final regulations are issued, contractors must be prepared to post the mandated notices.

For more information, please contact the Seyfarth attorney with whom you work, or any [labor and employment attorney](#) on our website.



Breadth. Depth. Results.

www.seyfarth.com