



LMV LEGAL ADVISOR :
ADVISORY FOR FEDERAL CONTRACTORS

More than six months after President Obama signed Executive Order 13496, the U.S. Department of Labor has published a proposed regulation describing the content of the notice required by the Order's contract clause. You'll recall that we sent out an e-bulletin in early February explaining three new Executive Orders. One of them was entitled "Notification of Employee Rights Under Federal Labor Laws," and required that federal contractors post a new notice of workers' rights with content determined by the DOL; that's what we've received now: the proposed notice content. The DOL has requested that comments regarding the proposed rule be received no later than September 2, 2009.

First, a little background: this Executive Order covers government contractors for goods or services – in essence, most federal contractors. It repealed the executive order signed by former President George W. Bush which required government contracts and subcontracts to include an employee notice clause requiring non-exempt federal contractors and subcontractors to post notices (the "Beck Poster") informing their employees that they have certain rights related to union membership and use of union dues and fees under federal law. (So, as an aside, if you diligently posted your Beck Posters, make sure you've diligently removed them now.)

Under the proposed rule, the required notice will have to be included in all Federal contracts, except collective bargaining agreements, those contracts involving purchases below the simplified acquisition threshold (currently \$100,000), and contracts resulting from solicitations issued prior to the effective date of the final rule. If you are a subcontractor, don't get too focused on that dollar threshold; subcontracts *necessary to the performance of the prime contract* are covered, even if they fall below the simplified acquisition threshold.

The notice, which we have included below in its entirety, includes details about the rights of employees under the NLRA, including:

- The right to form a union and participate in various union-related activities, such as discussing the terms and conditions of employment with co-workers;
- The right to choose not to join a union or participate in such activities;
- Protection from illegal actions by an employer as a result of union activities;
- Protection from illegal actions by a union based on their support or nonsupport of the union.
- Detailed instructions for contacting the NLRB if employees feel that their rights have been violated.

Importantly, the entire provision must be set forth verbatim in every covered contract, and cannot be incorporated by reference.

The required poster will ultimately be available for download when finalized from the Office of Labor-Management Standards (“OLMS”) at <http://www.olms.dol.gov>. If an employer customarily posts notices to employees electronically, they must display a link to the DOL’s web page that contains the full text of the notice. Also, the link itself must include the following text on the contractor’s website:

**RIGHTS OF EMPLOYEES UNDER THE
NATIONAL LABOR RELATIONS ACT**

“It is the policy of the United States to encourage collective bargaining and protect 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 and protection.”

OFCCP may enforce the Order through either a review specifically targeting E.O. 13496 compliance, or during the course of a regular compliance evaluation, or in response to a complaint. Employees of covered contractors can file written complaints

that the contractor has failed to comply with the Order to either OLMS or OFCCP. Complaints will be investigated by OFCCP. The ultimate penalties for non-compliance can include cancellation or suspension of current contracts, or debarment from future contracts or extensions of existing contracts.

TEXT OF THE CONTRACT CLAUSE AND NOTICE:

1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The "Secretary's Notice" shall include the following information:

**NOTICE TO EMPLOYEES
RIGHTS OF EMPLOYEES
UNDER THE NATIONAL LABOR RELATIONS ACT**

It is the policy of the United States to encourage collective bargaining and protect 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 and protection.

Under federal law, you have the right to:

Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

Form, join or assist a union.

Bargain collectively through a duly selected union for a contract with your employer setting your wages, benefits, hours, and other working conditions.

Discuss your terms and conditions of employment with your co-workers or a union; join other workers in raising work-related complaints with your employer, government agencies, or members of the public; and seek and receive help from a union subject to certain limitations.

Take action with one or more co-workers to improve your working conditions, including attending rallies on non-work time, and leafleting on non-work time in non-work areas.

Strike and picket, unless your union has agreed to a no-strike clause and subject to certain other limitations. In some circumstances, your employer may permanently replace strikers.

Choose not to do any of these activities, including joining or remaining a member of a union.

It is illegal for your employer to:

Prohibit you from soliciting for the union during non-work time or distributing union literature during non-work time, in non-work areas.

Question you about your union support or activities.

Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in other activity for mutual aid and protection, or because you choose not to engage in any such activity.

Threaten to close your workplace if workers choose a union to represent them.

Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances, for example, as where doing so might interfere with patient care.

Spy on or videotape peaceful union activities and gatherings or pretend to do so.

It is illegal for a union or for the union that represents you in bargaining with your employer to: discriminate or take other adverse action against you based on whether you have joined or support the union.

If your rights are violated:

Illegal conduct will not be permitted. The National Labor Relations Board (NLRB), an agency of the United States government, will protect your right to a free choice concerning union representation and collective bargaining and will prosecute violators of the National Labor Relations Act. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits and may order an employer or union to cease violating the law. The NLRB can only act, however, if it receives information of unlawful behavior within six months.

If you believe your rights or the rights of others have been violated, you must contact the NLRB within six months of the unlawful treatment. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: <http://www.nlr.gov>.

Click on the NLRB's page titled About Us, which contains a link, Locating Our Offices. You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

This is an official Government Notice and must not be defaced by anyone.

2. The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor.

3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order 13496 of January 30, 2009. Such other sanctions or remedies may be imposed as are provided in Executive Order 13496 of January 30, 2009, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

4. The contractor will include the provisions of paragraphs (1) through (4) herein in every subcontract or purchase order entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13496 of January 30, 2009, so that such provisions will be binding

upon each subcontractor. The contractor will take such action with respect to any such subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: Provided, however, if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

This Affirmative Action update was prepared by Donna Eich Brooks, an attorney with the law firm of Lehr, Middlebrooks, & Vreeland. Donna can be reached for questions/further information at dbrooks@lehrmiddlebrooks.com or at (205) 226-7120.

Lehr Middlebrooks & Vreeland, P.C.
P.O. Box 11945
Birmingham, AL 35202-1945
(205) 326-3002

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