

New Rule Requires Federal Contractors to Post Workplace Notice Advising Employees of Rights to Organize Union; Mandates Inclusion of Related Clause in All Government Contracts

Effective June 21, 2010, federal contractors and subcontractors covered by the National Labor Relations Act (NLRA) must include specific clauses in their contracts and to post notices in their workplaces advising employees of their rights under the Act. Late last week, the Department of Labor (DOL) published its Final Rule setting forth the text of the required contract clauses, the content of the required notice, and penalties for non-compliance. The Final Rule, 29 CFR Part 471, implements Executive Order 13496, signed by President Obama on January 29, 2009. See MLA Government Contracts Advisory, "President Obama's Executive Orders Regarding Labor Relations in Government Contracting," Vol. VII, No. 3 (Feb. 2, 2009).

The Rule requires all government contracts covered by the regulation to include a clause – by inclusion or reference -- which requires each employer to post the notice to employees "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..." Among a few notable exceptions, contracts involving purchases below the simplified acquisition threshold under the Office of Federal Procurement Policy Act and subcontracts of \$10,000 or less are exempt from the Rule's coverage. The text of the notice, set forth in Appendix A to Subpart A of the Final Rule, advises employees of their rights under the NLRA, including the rights 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 representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your 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.
- Choose not to do any of these activities, including joining or remaining a member of a union.

The notice also describes various ways in which an employer might violate those rights, asserting that it is unlawful for an employer to:

- Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- 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 concerted 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.

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

Finally, the Notice invites employees who believe their rights have been violated to contact the National Labor Relations Board, provides information about remedies available to employees, and explains how to find the appropriate Regional Office to seek assistance.

The second paragraph of the required contract language reads: "The contractor will comply with all provisions of the Secretary's notice and related rules, regulations and orders of the Secretary of Labor." Comments on the proposed Rule expressed concern that this provision would empower the DOL to cancel contracts or debar contractors for substantive violations of the National Labor Relations Act. In response to these comments, the Department expressly sought to "assure[] the contractor community" that it would not attempt to enforce the substantive provisions of the notice, which enforcement authority remains within the jurisdiction of the National Labor Relations Board. See 75 Fed. Reg. 28392 (May 20, 2010). This assurance, however, may not entirely address the issue of concern. The DOL's discussion of the Rule and Comments states:

The Department does not construe the second paragraph of the contract clause as establishing an independent basis of authority for the enforcement of the substantive provisions of the notice. Of course, the substantive provisions of the notice are an accurate reflection of NLRA law. As a result, if a contractor is failing or refusing to comply with those provisions, the contractor may be in violation of the NLRA, and in that case charges may be lodged solely with and adjudicated solely by the NLRB.

75 Fed. Reg. 28393 (May 20, 2010). The DOL discussion does not rule out the possibility, however, that a contractor might still suffer penalties related to its contract if the NLRB finds violations of the NLRA. The required notice lists several examples of conduct which may violate the NLRA. The Rule requires government contracts to include language committing the contractor to comply with the content of the notice. If the NLRB finds the contractor has violated the NLRA, arguably the contractor is in breach of its contractual commitment to the government not to violate the NLRA. Nothing here suggests the DOL may not take action against the contractor for that alleged breach of the government contract.

The Rule authorizes the OFCCP to conduct a compliance evaluation to determine whether a covered contractor or subcontractor is in compliance with the Rule's requirements. An evaluation may be performed in itself, or in conjunction with a broader OFCCP evaluation to determine compliance with other federal laws and regulations. The Director of the Office of Labor-Management Standards (OLMS) is empowered to enforce the Executive Order by:

- Directing the contracting agency to cancel, terminate, suspend any contract;
- Conditioning continuance of the contract upon compliance; and/or
- Issuing an order of debarment against any non-compliant contractor and/or subcontractor.

Contractors subject to the Rule must be prepared to comply with the contract and posting requirements. OFCCP is hosting a webinar on Thursday, June 3, 2010 regarding compliance with the Rule. [To view the Webinar invitation [please click here](#)]. Moreover, the language of the notice states some of the conduct which might violate the NLRA in vague or overly-broad fashion. In an effort to adhere to the required contract language's dictates to comply with all provisions of the Secretary's notice," contractors should make sure they have a thorough understanding of the NLRA and the conduct it allows and disallows. If you have questions about any of the foregoing, please contact the MLA professional with whom you normally consult, or one of the attorneys listed at right.