Inside The Beltway

Keeping You Informed

A publication of Nixon Peabody LLP's Washington, DC office

JUNE 7, 2010

Critical developments in labor and employment law

By John N. Raudabaugh

Executive branch/administration

Department of Labor (DOL) – Office of Labor-Management Standards (OLMS)

Final Rule – Notification of Employee Rights Under Federal Labor Laws, 29 CFR Part 471

Overview

Effective June 21, 2010, federal contracting departments and agencies must include provisions within their contracts for goods and/or services for supplies, use of real property, and non-personal services requiring prime contractors and subcontractors to post notices informing their employees engaged in performing contract-related work of their rights under the National Labor Relations Act (NLRA). The notice clause need not be quoted verbatim in the contract, subcontract, or purchase order, but reference to the notice is required by referring to 29 CFR 471, Appendix A, Subpart A. The employee notice will be provided by the federal contracting agency or may be obtained from OLMS or DOL's Office of Federal Contract Compliance Programs (OFCCP), or downloaded at: http://www.dol.gov/olms/regs/compliance/Employee Rights Poster11x17_Final.pdf.

The rule implements President Obama's January 30, 2009, Executive Order 13496 (EO), declaring that workers' productivity is enhanced, labor unrest avoided, and federal contracts are efficiently and economically completed when workers are well-informed of their federal labor law rights. EO 13496 revokes former President Bush's February 17, 2001, EO 13201 and companion regulation, "Notice of Employee Rights Concerning Payment of Union Dues or Fees," which was similar to former President G.H.W. Bush's April 13, 1992, EO 12800, which was revoked by former President Clinton's February 1, 1993, EO 12836.

Notably, the National Labor Relations Act (NLRA), 29 U.S.C. §§151 et. seq., is silent regarding the posting of a notice of rights and the National Labor Relations Board (NLRB) has never issued a decision or regulations addressing notice posting. Given that federal spending accounted for 22.2 percent of GDP in fiscal year 2009 and that nearly one in four private-sector workers is employed by

companies with federal government contracts, the new notice posting undoubtedly will have an effect on employees' views and actions regarding unionization. See *Monthly Budget Review*, CBO, November 6, 2009; "Plan to Seek Use of U.S. Contracts as a Wage Lever," *New York Times*, February 26, 2010.

Contractor and subcontractor coverage, exceptions, exemptions, and exclusions

Coverage, exceptions, exemptions, and exclusions include any contract or subcontract for the purchase, sale, or use of property or non-personal services necessary to the performance of any contract, excluding:

- contracts below $100,000, provided no agency or contractor procures supplies or services in a manner to circumvent the EO and applicable regulations (contracts for indefinite quantities are covered unless the total amount in any year is reasonably believed to be under the $100,000 threshold);
- subcontracts of $10,000 or less;
- contracts or subcontracts for work performed exclusively outside the United States;
- contracts resulting from solicitations issued before June 21, 2010;
- collective bargaining contracts covering federal government employees under the Federal Service Labor-Management Relations Statute;
- federal financial assistance, including grants or loans of federal funds or donations; sale, lease, or permission to use federal property or interests in property; or federal provision of assistance, e.g., banks, Medicare Parts A and B, and Medicaid reimbursements;
- in the national interest or where government procurement would be disadvantaged;
- any employer excluded from the definition of "employer" under the National Labor Relations Act (NLRA), 29 U.S.C. §152(2); or
- any worker excluded from the definition of "employee" under the NLRA, 29 U.S.C. 152(3).

Physical and electronic posting requirements

The employee notice must be posted for the duration of the contract or subcontract in conspicuous places in and about the contractor's plants and offices where the contractor or subcontractor physically posts notices to employees and in the language spoken by the employees fulfilling the government contracts. If a contractor or subcontractor customarily posts notices to employees electronically either internally or externally or both, the Employee Notice or a link to the Department of Labor's web site must be similarly posted. The link to the DOL website must read in the employees' spoken language: "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers." The DOL website provides translations of the notice text.

Targeted employees for notice

- Employees whose duties include fulfilling a contractual obligation, or work that is necessary to, or that facilitates performance of the contract or a provision of the contract.
- Employees for which the cost or portion of the cost of the employee's position is allowable in whole or in part as a direct cost to the contract and only a de minimus (less than 2 percent) portion of the cost of the position was allocable as an indirect cost.

Text of employee notice

[Note: Although the notice does not contain bold text, the bold excerpts below illustrate language employees would reasonably view as encouraging union organizing.]

EMPLOYEE RIGHTS Under The National Labor Relations Act

The NLRA guarantees the **right of employees to organize and bargain** collectively with their employers, and **to engage in other protected concerted activity.** Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, 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 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 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 **join**ing **or remain**ing **a member of a union.**

Under the NLRA, it is illegal for your 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.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take other adverse action against you based on whether you have joined or support the union.

If you and your coworkers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. 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. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: http://www.nlrb.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 (6572) for hearing impaired.

*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

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

Compliance review

The OFCCP will conduct compliance evaluations either limited to the employee notice regulation or as part of a compliance review of other laws, Executive Orders, and/or applicable regulations enforced by DOL. Compliance considers whether the employee notice is posted in conformity with the regulation and is included or referenced in the relevant government contracts, subcontracts or purchase orders entered into on or after June 21, 2010, unless otherwise exempt under the regulation.

Complaint and enforcement procedures

An employee of a covered contractor or subcontractor may file a written complaint with OLMS or OFCCP alleging that the contractor has failed to post the Employee Notice and/or that the notice clause is not included in relevant subcontracts and/or purchase orders. The OFCCP will investigate the complaint and develop the case record. If a violation of the Executive Order or regulations is found, OFCCP will attempt to secure compliance through conciliation. To be found in compliance, the contractor or subcontractor must correct the violation and commit in writing not to repeat the violation. The prime contractor is responsible for subcontractor compliance, but will not be sanctioned or penalized for a subcontractor's refusal to comply if the prime contractor exercised due diligence.

If a violation cannot be resolved through conciliation, OFCCP will refer the matter to OLMS for consideration to refer to the Solicitor of Labor for administrative enforcement proceedings. Enforcement proceedings are conducted before an administrative law judge (ALJ), who will issue a certified recommended decision. Exceptions may be filed within 25 days or seven days if pursuant to an expedited proceeding and responses to such exceptions must be filed within 25 days or within seven days if pursuant to an expedited proceeding. The Administrative Review Board (ARB) may issue a final order or otherwise dispose of the matter. In expedited proceedings, if the ARB does not issue a final order within 30 days after the expiration of time for filing exceptions, the ALJ's recommended decision will become the final order. In any case where violations are found, the contractor or subcontractor will be ordered to cease and desist, to provide appropriate remedies or be subject to sanctions, or any combination thereof.

Sanctions and penalties

Following a final ALJ decision, OLMS will consult with the relevant contracting agencies to allow for comments and written objections before imposing sanctions and penalties. Objections to sanctions and penalties must explain why the contract's completion, further contracts, contract extension, or modifications are essential to the agency's mission.

Sanctions and penalties include: (1) directing a contracting agency to cancel, terminate, or suspend any contract or portion thereof or condition continuance of contracts upon compliance; and or (2) issuing an order of debarment requiring contracting agencies to refrain from entering into further contracts, or extensions or other modifications of existing contracts, with the non-complying contractor or subcontractor. Actions taken by the contracting agency must be reported to OLMS. OLMS will issue an order for cancellation, termination, suspension, or debarment and publish and distribute a list of the names of non-compliant contractors and subcontractors declared ineligible for future contracts to all executive agencies.

Any debarred contractor or subcontractor may request reinstatement by letter to OLMS stating that they have established and executed policies and practices in compliance with EO 13496 and related regulations. OLMS may request a compliance evaluation and/or the submission of additional information. OLMS shall issue a written decision regarding the request for reinstatement.

Commentary and analysis

DOL issued the proposed rule on August 3, 2009, to implement EO 13496 signed on January 30, 2009. Comments from 86 sources, including employers, unions, and associations, were received. John Raudabaugh authored comments on behalf of the Society for Human Resource Management.

DOL's review of comments, as reported in the May 20, 2010, Final Rule, is both revealing of this Administration's perspective on labor law and instructive for *all* employers, regardless of whether a company is a federal contractor or subcontractor and/or unionized or not. Quite apart from statements in EO 13496 that unionization guarantees industrial peace and workers' productivity and that government efficiency and economy are enhanced when employees are informed of their rights to unionize, federal contractors and subcontractors may be able to leverage DOL's comments to limit the scope of posting and/or provide employees with additional information regarding their federal labor law rights and protections. For employers who are not federal contractors or subcontractors, lessons learned from DOL's analysis of comments submitted suggest definitive, precautionary actions regarding workplace postings, dissemination of information regarding labor law, and union avoidance and/or containment.

First, regarding physical posting of employee notices, DOL engaged in extensive discussion regarding the identification of the number of employees performing contract-related work for which employee notice posting must be prominent and readily seen. DOL also discussed whether activity at a facility that is separate and distinct from activity related to federal contract work is exempt from employee notice posting. Containing the extent of required notice posting presumably is desirable given the decidedly pro-organizing content of the employee notice.

Regarding the scope of contract-related work, DOL refers to its interpretations under EO 11246 (prohibiting federal contractors and subcontractors with contracts exceeding $10,000 from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin)

and Section 503 of the Rehabilitation Act of 1973 (requiring employers with federal contracts or subcontracts exceeding $10,000 to take affirmative action to hire, retain, and promote qualified individuals with disabilities). DOL defines "contract-related work" as reaching all employees whose duties include work contributing to or furthering the performance of the contract or work whose omission would impede the contract's performance. DOL offers the example of a government contract for the production and sale of goods to include not only the production employees assembling goods, but also those engaged in repairing machinery used in producing the goods, maintaining the plant, assuring quality control and security, delivering the goods to the government, hiring, paying, and providing personnel services for the employees engaged in contract-related work, keeping financial and accounting records, performing related office and clerical tasks, and supervising or managing the employees engaged in such tasks.

Given the breadth of the contract-related work definition, required employee notice posting under DOL's Final Rule, 29 CFR Part 471, presumably will extend to the entire facility, including front offices and warehousing and receiving/shipping. However, the Final Rule implies that posting would not be required at facilities where no contract-related work (direct and/or indirect) is ongoing. 29 CFR § 471.2(d)(2). Consequently, federal contractors and subcontractors that wish to limit the extent of notice posting should carefully consider limiting the direct and indirect contract fulfillment to discrete locations, and consult with the contracting agency in advance to obtain agreement on the designation of such facilities. Covered contractors and subcontractors may request separate facility exemptions or waivers from OLMS pursuant to 29 CFR §§ 471.3(b) and(c). See also http://www.dol.gov/ofccp/regs/compliance/directives/dir260.pdf.

The electronic posting requirement only applies if the covered contractor or subcontractor customarily posts notices to employees electronically. Moreover, the electronic posting extends to both internal and external web posting if customarily done for notice postings. Consequently, employers should consider whether electronic posting of notices generally is desirable and particularly whether external web posting is prudent as it would extend company-wide covering all facilities regardless of whether contract-related work is ongoing at any particular facility. Additionally, public website postings can be used by unions and third parties for a variety of cross-purposes.

Second, if, as DOL notes, "that cost savings in federal contracting can be made when employees are well informed of their NLRA rights," then surely additional, accurate information of those rights should not conflict with the Final Rule. This is particularly the case given that DOL rejected incorporating or referencing the NLRA statutory language or the NLRB website containing a summary overview of employee rights. One right not included in the Final Rule's employee notice is the right to not join or remain a member of a union that represents the employee's bargaining unit. DOL rejected any reference to *Beck* rights due to "space limitations [in the employee notice] and because of the policy choice, as expressed in Executive Order 13496, to revoke a more explicit notice to employees of *Beck* rights." *Communications Workers of America v. Beck,* 487 U.S. 735 (1988). In *Beck*, the Supreme Court held that a union may not use fees and dues that it collects from bargaining unit employees who have not joined the union to finance activities that are not "germane" to the union's representational purposes over the objection of such employees.

Despite the current administration's revocation of the Beck Notice/EO 13201, because the Supreme Court's *Beck* decision is also federal labor law, federal contractors and subcontractors may wish to

voluntarily post the "more explicit" *Beck* Notice to more fully inform employees of their federal labor law rights. The following is the text of the former *Beck* notice:

> NOTICE TO EMPLOYEES
>
> Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment.
>
> If you do not want to pay that portion of dues or fees used to support activities not related to collective bargaining, contract administration, or grievance adjustment, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.
>
> For further information concerning your rights, you may wish to contact the National Labor Relations Board (NLRB) either at one of its Regional offices or at the following address or toll-free number:
>
> National Labor Relations Board
> Division of Information
> 1099 14th Street, NW
> Washington, D.C. 20570
> 1-866-667-6572
> 1-866-315-6572 (TTY)
>
> To locate the nearest NLRB office, see NLRB's website at www.nlrb.gov.

Third, employers should consider whether to post the company's stated position on third-party representation. Such statements are frequently included in employee handbooks and, assuming the statement is lawful as drafted, posting the statement in advance of a contract award should avoid any subsequent dispute that the posting detracts from or was posted in response to the contracting agency's Employee Notice posting requirement.

Finally, the obvious concerns generated from posting notices emphasizing employee rights to engage in union organizing will prompt many non-union companies to not only question whether to seek Federal contracting opportunities but DOL's new regulation may well foreshadow future initiatives by the National Labor Relations Board or by Congress amending the NLRA to require workplace postings of employee rights under the Act.

For further information regarding Nixon Peabody's Government Contracts practice and Government Relations & Public Policy practice, please see:

- http://www.nixonpeabody.com/services_overview.asp?SID=76
- http://www.nixonpeabody.com/services_overview.asp?SID=557

For further information on the content of this alert, please contact your regular Nixon Peabody attorney or:

- John N. Raudabaugh at 202-585-8100 or jraudabaugh@nixonpeabody.com