



Legal Alert: Federal Contractors to Post New Union Notice June 21, 2010

5/21/2010

On May 20, 2010 the Department of Labor (DOL) issued a final regulation implementing Executive Order 13496, signed by President Obama on January 30, 2009. EO 13496 requires non-exempt federal contractors and subcontractors to post a notice informing their employees of their rights under the National Labor Relations Act (NLRA). The final regulation does not apply to public sector employers and employers covered by the Railway Labor Act. The final regulation can be accessed at: <http://www.dol.gov/olms/regs/compliance/EO13496.htm> (go to More Information, then click on the link for Final Rule Implementing Executive Order 13496).

Effective June 21, 2010, all contractors with a contract in excess of \$100,000 must post this new notice in a conspicuous area. Employers with subcontracts of \$10,000 or less are exempt from this requirement. Employers which generally post electronic notices will be required to use specific language on their web site that will contain a link to the full text of the notice. The DOL will print the required notice poster and provide it to federal contractors through the federal contracting agency. Alternatively, contractors will be able to obtain it from the Office of Labor-Management Standards (OLMS): http://www.dol.gov/olms/regs/compliance/EmployeeRightsPoster11x17_Final.pdf. Contractors will need to follow the specific document requirements below when printing their own copy of the notice.

A few points about the actual notice should be noted. The size, color, or content of the poster provided by the Department of Labor cannot be altered; thus, the poster must be printed on 11 x 17 inch paper (or in the 11 x 8.5 inch two-page format). This may make it more difficult (although not impossible) for federal contractors to simply buy an "all-in-one" poster that consolidates all the federally mandated labor and employment notices (since this is usually done by shrinking the posters to fit the lay-out). In addition, if a "significant portion of the contractor's workforce" is not proficient in English, the employer must post the notice in the language of such employees. Finally, if an employer generally posts electronic notices as explained above and a significant portion of its workforce does not speak English, the employer must provide a web site link to a copy of the notice in the language the employees speak.

The final regulation also sets out the four paragraphs that the EO requires to be included in all non-exempt government contracts and subcontracts (the "employee notice clause"). Unlike the proposed regulation, the final regulation does not require that the employee notice clause be quoted

verbatim; instead it can be included in the contract by citation to 29 CFR Part 471, Appendix A to Subpart A.

Enforcement:

The Director of the Office of Federal Contract Compliance Programs (OFCCP) may conduct compliance evaluations to determine whether a contractor holding a covered contract is in compliance with the requirements of EO 13496. The evaluation may be limited to compliance with EO 13496 or may be included in a compliance evaluation conducted under other laws, Executive Orders, and/or regulations enforced by the DOL. Hence, going forward, OFCCP audits likely will include this component.

An employee of a covered contractor may file a complaint alleging that the contractor has failed to post the employee notice as required and/or has failed to include the employee notice clause in subcontracts or purchase orders. Complaints may be filed with the OLMS or the OFCCP.

In investigating complaints, the Director of the OFCCP will evaluate the allegations of the complaint and develop a case record. The record will include findings regarding the contractor's compliance with the requirements of EO 13496 and if applicable, a description of conciliation efforts made, corrective action taken, and/or enforcement recommended. The bases for a finding of a violation may include, but are not limited to:

- the results of a compliance evaluation;
- the results of a complaint investigation;
- a contractor's refusal to allow a compliance evaluation or complaint investigation to be conducted;
- a contractor's refusal to cooperate with the compliance evaluation or complaint investigation, including failure to provide information sought during those procedures.

If a violation is found, the contractor must correct the violation and must commit, in writing, not to repeat the violation, before the contractor may be found to be in compliance. If a violation cannot be resolved through conciliation efforts, the OFCCP Director will refer the matter to the Director of OLMS who may refer the matter to the Solicitor of Labor for institution of administrative enforcement proceedings.

Penalties:

In enforcing EO 13496, the Director of OLMS may direct a contracting agency to cancel, terminate or suspend any contract for failure of the contractor to comply with its contractual provisions. Contracts may be canceled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon compliance. Additionally, an order of debarment may be issued.

OFCCP Webinar on Compliance Fundamentals:

On June 3, 2010, the OFCCP will present a webinar for federal contractors and subcontractors to provide them with information about how to comply

with this new regulation. For more information about the webinar, interested parties can subscribe to OFCCP's E-mail updates at <http://www.dol.gov/OFCCP/>.

Employers' Bottom Line:

EO 13496 is just one of many labor and employment obligations to which government contractors and subcontractors are subjected. If you have questions about this EO, the final regulation or other government contracting issues, please contact Karen Tyner, kytyner@fordharrison.com, Bennet Alsher, balsher@fordharrison.com, Michelle Harkavy, mharkavy@fordharrison.com, or any member of Ford & Harrison's Government Contracts practice group.