



## Legal Alert: DOL Issues Proposed Rule Implementing Executive Order Requiring Posting of Employee Rights

8/20/2009

On August 3, 2009 the Department of Labor issued a proposed regulation to implement Executive Order 13496, signed by President Obama on January 30, 2009. EO 13496 requires non-exempt Federal contractors and sub-contractors to post notices informing their employees of their rights under the Federal Labor laws, and more specifically, the National Labor Relations Act (NLRA). The proposed regulation does not apply to public sector employers or employers covered by the Railway Labor Act. The full text of the proposed regulation is available at:  
<http://edocket.access.gpo.gov/2009/E9-17577.htm>.

Under the proposed regulation, all non-exempt federal contractors and sub-contractors must agree, as a condition of their contract, to post the notice in a conspicuous area. Additionally, employers who generally post electronic notices will be required to use specific language on their website 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.olms.dol.gov>, or they may reproduce and use exact duplicates of the official poster.

The proposed regulation also sets out the four paragraphs that the EO requires to be included in all non-exempt government contracts. The first paragraph of the proposed contract clause (set forth below) specifies the content of the notice that must be provided. Note that the preamble contained in the notice encourages collective bargaining as a way for employees to be protected in the workplace.

### **PROPOSED 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.*

(End of the notice paragraph of the proposed employee notice contract clause.)

#### **Enforcement:**

The Deputy Assistant Secretary for Federal Contract Compliance 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 OLMS or the OFCCP.

In investigating complaints, the Deputy Assistant Secretary for Federal Contract Compliance 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 Deputy Assistant Secretary will refer the matter to the Deputy Assistant Secretary for Labor-Management Programs. The Deputy Assistant Secretary for Labor-Management Programs may refer the matter to the Solicitor of Labor for institution of administrative enforcement proceedings.

**Penalties:**

In enforcing EO 13496, the Assistant Secretary 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.

**Comment Period:**

The DOL will accept comments on the proposed regulation until September 2, 2009.

**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 proposed regulation or other government contracting issues, please contact Michelle Harkavy, [mharkavy@fordharrison.com](mailto:mharkavy@fordharrison.com), 901-291-1533 or any member of Ford & Harrison's Government Contracts practice group.