



LABOR & EMPLOYMENT DEPARTMENT

ALERT

NEW INTERIM RULE IMPLEMENTS DOL FINAL RULE REQUIRING COVERED FEDERAL CONTRACTORS AND SUBCONTRACTORS TO POST EMPLOYEES' RIGHTS UNDER THE NLRA

By Andrez S. Carberry

On December 13, 2010, the Civilian Agency Acquisition Council and the Defense Acquisition Council (Councils) published an interim rule implementing the Department of Labor's (DOL) June 21, 2010, rule that requires covered contractors to notify employees of their rights under the National Labor Relations Act (NLRA). (See Fox Rothschild's June 2010 Labor & Employment Department Alert on this rule).

The interim rule does not alter the DOL's rule of June 21, 2010. Instead, it makes several changes to the Federal Acquisition Regulations (FAR) to implement sections of the DOL's rule. To accomplish this objective, the interim rule:

- Establishes a new subpart 22.16 and clause 52.222-40, "Notification of Employee Rights under the NLRA;" and
- Revises the FAR clauses at 52.212-5, "Contract Terms and Conditions Required to Implement Statutes or Executive Orders — Commercial Items," and 52.244-6, "Subcontracts for Commercial Items," to include the requirements of the new FAR clause 52.222-40.

Thus, effective December 13, 2010, contracting officers on all covered federal contracts above the simplified acquisition threshold (increased to \$150,000 by the Councils' final rule as of October 1, 2010), or subcontracts valued at \$10,000 or above, and purchase

orders issued on or after June 21, 2010, must include the FAR clause 52.222-40 in all solicitations and contracts, including acquisitions for commercial items and commercially available off-the-shelf items. This requirement does **not** apply to acquisitions or contracts:

- Issued before June 21, 2010;
- Under the simplified acquisition threshold;
- For work performed exclusively outside the United States; or
- Covered (in their entirety) by an exemption granted by the U.S. Secretary of Labor.

Posting Requirements

In addition to including the necessary language in the contracts and subcontracts as detailed above, covered contractors and subcontractors must still adhere to the DOL's posting requirements. Specifically, the DOL requires the poster be displayed "[i]n conspicuous places in and about the contractor's plants and offices so that the notice is prominent and readily seen by employees. . . ." and "[w]here employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract"

If employee notices are traditionally posted electronically, the rule's posting requirement is met by displaying prominently — on any web site maintained by the contractor or subcontractor and customarily used for

providing notices to employees about terms and conditions of employment — a link to the DOL’s web site that contains the full text of the [poster](#). However, the link must read, “Important Notice About Employee Rights To Organize and Bargain Collectively With Their Employers.” Additionally, if the contractor’s workforce is not proficient in English, the contractor must provide the notice, physical or electronic, in the language spoken by a “significant portion” of the employees.

What This Means To Federal Contractors and Sub-Contractors

Contractors and subcontractors should consult with counsel to review all federal contracts to determine if

they are covered by the DOL’s rule and this interim rule. If covered, contractors and subcontractors must take the necessary steps to comply with the rule’s contractual and posting requirements. Contractors should also work with counsel to develop a proper training program to teach supervisors and management how to address and respond to employee inquiries about their rights under the NLRA.

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