

PUBLICATION

Federal Contractors and Subcontractors: Hang 'Em High!

June 01, 2010

Federal contractors and subcontractors are now required to post information in the workplace regarding workers' rights under the National Labor Relations Act (NLRA), according to Executive Order (EO) 13496 issued by President Obama in January 2009, and implemented into a Final Rule by the Office of Labor-Management Standards (OLMS) on May 20, 2010. The EO demands all federal contractors and subcontractors meet two requirements

(1) Display a poster in the workplace that provides notice to employees of their right to form, join, and assist unions; to bargain collectively with their employers with or without the support of a union; and the option to refrain from all such endeavors.

(2) Include in every covered federal contract a clause requiring subcontractors to comply with the notice display requirements.

This final rule is the first to be implemented of the three related executive orders President Obama issued in January 2009. Though the poster is markedly pro-union, it is a slight improvement over the proposed rule from August 2009. The final rule still lists the rights of employees to unionize and collectively bargain with employers, but it also details five examples of unlawful union conduct, including threats by a union that it will have a worker fired if he/she does not support the union.

It is important to note that although EO 13496 rescinded the *Beck* poster requirement, there is nothing in the final rule that requires employers to remove any *Beck* posters currently displayed.

What Must You Do to Comply?

Employers must comply with the regulation by June 21, 2010. The poster is available from OLMS's [website](#). Covered contracts are those prime contracts issued or modified on or after June 21, 2010, the value of which meets or exceeds the simplified acquisition threshold (currently \$100,000). However, subcontracts are covered so long as the value of the subcontract exceeds \$10,000. In other words, even if the prime contract is under the simplified acquisition threshold, a subcontract that exceeds \$10,000 and is necessary to the performance of the prime contract is subject to the posting requirement.

Contractors are required to post the notice only where employees covered by the NLRA perform contract-related activities. To determine if the employees at a specific site perform "contract-related activities," the test is whether the duties of any employee's position include work that contributes to or furthers the performance of the contract, or work whose omission would impede the contract's performance. For example, if a contractor has two facilities, one of which involves employees whose work does not contribute to or further the performance of the contract, but the other facility involves employees whose work contributes to or furthers the performance of the contract, the poster need only be displayed at the latter facility. Employees working in positions, the cost of which is not allocable as a direct cost to the contract, and indirectly is allocable as less than 2% to the cost of the contract, are not considered to be engaged in performing the work of the contract.

The poster must be displayed "conspicuously." In other words, contractors must post the notice in all places where employee announcements are typically placed. It must be displayed prominently and be readily observable. In addition, if notices to employees are customarily posted electronically, whether on external or internal websites, contractors must electronically post the notice. The rule provides specific instructions for complying with the electronic posting requirement. Further, if a significant number of employees are not literate in English, contractors must post the notice in languages in which the employees are literate. Poster translations may be found on the OLMS website listed above.

Enforcement

The Office of Federal Contract Compliance Programs (OFCCP) is charged with conducting audits to determine whether a contractor is in compliance with the above requirements. These audits need not be made in conjunction with other compliance reviews (such as under EO 11246), but may be done solely for the purpose of determining whether an employer has complied with the notice posting and contract clause inclusion requirements. Contractors found in violation of this regulation will be asked to correct the offense through conciliation. In extreme cases, employers may be subject to sanctions, including suspension of their contract until they are in compliance, or even debarment.

For Further Help

On June 3 and June 10, 2010, the OFCCP will host a webinar for federal contractors and subcontractors on what the rule specifically requires. To learn more about the webinar, visit <http://www.dol.gov/OFCCP/>. As always, Baker Donelson's Labor and Employment attorneys stand ready to assist contractors in complying with this Rule as well as any issues that may arise in the federal contracting arena. Do not hesitate to contact your Baker Donelson attorney or any of our 70 Labor & Employment attorneys, located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.