

# TMG Update

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## New Posting Obligations for Federal Contractors and Subcontractors

(by Michael W. Chance, Principal)

### Introduction

Our clients and friends may remember that President Obama early in his term signed the Lilly Ledbetter Fair Pay Act that overturned a Supreme Court decision and extended the statutory time limit for the filing of complaints related to discriminatory pay practices. Quickly following, on January 30, 2009, the President issued three Executive Orders. Two of the orders related to the rights of workers employed by federal contractors and one restricted contractors from claiming reimbursement from the federal government for costs incurred in persuading employees whether or not to engage in union organizing activities. The President's actions offered a clear preview of his continuing support of organized labor. Most recently, the President's recess appointments to the National Labor Relations Board (NLRB) underscored his commitment to the country's unions.

### Executive Order (EO) 13496

In August of 2009 the Department of Labor (DOL) and the Office of Labor-Management Standards (OLMS) issued a proposed rule regarding one of the orders, EO 13496, and invited comments on it. After reviewing the comments filed, the Department of Labor issued its final rule on May 20, 2010; the final rule goes into effect on June 21, 2010. Under the final rule, government agencies and federal contractors subject to the National Labor Relations Act (NLRA) will be required to include new language in their contracts requiring contractors and subcontractors to conspicuously post notices of employee rights to unionize under federal labor law. The rights are similar to those addressed in the NLRA. The final rule describes the content of the notice required to be posted by contractors and most subcontractors, and outlines the penalties that can be imposed for non-compliance. The language of the notice lists many of the rights employees have to unionize, but only includes minimal

language regarding their right to refrain from unionizing.

### Contractor Obligations to Post Employee Rights Under the NLRA.

The final rule implementing EO 13496 has prompted a significant number of questions from TMG clients. The following information responds to the inquiries members of the firm have received as the final rule's implementation date approaches:

#### 1. Why has this posting requirement been directed by the President?

While some commentators have asserted that the EO is preempted by the National Labor Relations Act and that it interferes with private enterprise, others have indicated that it would enhance industrial peace, promote stability in the workforce, reduce employee intimidation by employers and contribute to the reduction of costs to the government. We believe the EO to be a single instance of this Administration's support of organized labor and its organizing goals. We foresee additional political and legislative actions and reforms that will result in employer challenges to remain union-free over the coming years.

#### 2. How do we know if our organization is required to post the notice?

The final rule states that the rule's obligations apply to prime federal government contractors and subcontractors at any tier who are covered by the NLRA. A contractor includes persons, corporations and agencies holding a contract with a governmental contracting agency. Contractors are intended to include both prime contractors and subcontractors. A subcontractor generally holds an agreement or arrangement with a contractor for the purchase, sale or use of personal property or non-personal services that is necessary to the performance (or a portion of the performance) of the contractor's obligation under a Government contract.

The posting obligation applies to those Government contracts resulting from solicitations made after the effective date of the final rule, June 21, 2010.

There are exceptions to the need for a "notice clause" and posting requirement in Government contracts, including those that involve purchases below the threshold set by Congress under the Office of Federal Procurement Policy Act, Government contracts resulting from solicitations issued before June 21, 2010, subcontracts of \$10,000 or less in value, and, contracts and subcontracts for work performed exclusively outside the territorial U.S.

#### 3. What language is required in government contracts?

The following "employee notice clause" which addresses the posting requirement is required in appropriate Government contracts: "During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the NLRA engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically." Contractors must ensure, to the extent possible, that the posting obligation will be included in all subcontracts in connection with the prime contract.

#### 4. What is the requirement for electronic posting?

The EO requires contractors that customarily post notices to employees electronically must also post the required notice of employee rights under federal labor law electronically. The requirement is satisfied by posting on any Web site that is maintained by the contractor

or subcontractor where other employee notices are posted. DOL's link to its Web page that contains the full text of the employee notice is also required. The link must read: "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers". Employers of multi-language employees must supply the notice in the language that the employees speak. OLMS will provide translations of the link.

#### **5. What happens if a contractor or subcontractor does not comply?**

An employee of a covered contractor may file a complaint alleging that the contractor has failed to post the employee notice or that the contractor has failed to include the employee notice clause in the subcontracts or purchase orders. We expect that any union interested in organizing a contractor or subcontractor will advise its supporters to look for the posting and, if it's not there, to file a complaint with the Department of Labor (OLMS). If any complaint investigation or compliance evaluation indicates a violation of the EO, the Director of the Office of Federal Contract Compliance Programs (OFCCP) will attempt to conciliate compliance. If conciliation efforts fail, the Director of the Office of Labor Management Standards (OLMS) may bring enforcement proceedings. Proceedings will be conducted by the Solicitor of Labor before an administrative law judge who will recommend his or her decision to an Administrative Review Board. If the Board determines the contractor or subcontractor has violated the EO, it will issue a cease and desist order, require appropriate remedies and may impose sanctions and penalties for noncompliance. Sanctions and penalties may include the termination or suspension of the Government's contract with the contractor, the issuance of an order of debarment providing that an agency must refrain from entering into further contracts, or extensions or other modifications of existing contracts, with the non-complying contractor or subcontractor.

#### **6. Should our organization be communicating to our employees about the notice requirement or the posting itself?**

- First, we would recommend that any organization determine whether or not it is covered by the definition of "contractor" or "subcontractor" provided in the final rule. Then, determine if you may be exempt from the contract clause and/or the posting requirements.
- If your organization is required to post, meet the EO's requirements as provided in the final rule by posting, physically or electronically, to avoid any complaints, enforcement proceedings or sanctions. A good idea might be to obtain one of the many "all-in-one" posters that address required federal notices, including "Employee Rights Under the National Labor Relations Act". By doing so you will meet the EO's requirements, but not draw unnecessary attention to the new union-related posting or create the impression that the organization has violated the EO or that it supports unionization. Alternatively, obtain a poster from the Department of Labor, Division of Interpretations and Standards, OLMS. A copy of the poster may also be downloaded from the OLMS Web site at <http://www.olms.dol.gov>. Remember to attend to the language requirements of your workforce.
- Make sure to communicate the posting requirement to your management team to insure that they are able to comfortably respond to any employee questions concerning the posting.
- Evaluate whether or not your organization has, within a reasonable time frame, clearly and legally addresses its position on unionization for all employees. Do you have a section of your Employee Handbook that addressed the organization's position? Do you communicate the organization's position on unionization during orientation? Have you recently communicated to employees why you believe that unions are not necessary in the organization? Do you periodically reiterate your organization's intention to remain in a direct relationship with employees without a union coming between the leadership and the employees? If you have recently engaged employees in this important area of employee relations, you may choose to do nothing more.
- However, if your organization has not recently addressed its position related to unionization, plan to address the subject in a legal and appropriate manner. Attend to the union-free aspect of your employee relations policy by discussing your position using appropriate communication media. Any written statement regarding the organization's position should not be posted in the vicinity of the notice to employees required by the EO.

#### **Conclusion**

The Obama Administration has introduced new opportunities for the labor movement through its appointments to the NLRB and other related government positions, its orders and rules and its interest in significant changes to federal labor laws and worker programs. In this new era, union-free employers should focus on their need for careful planning in employee relations and communications. At TMG we firmly believe that the best way to maintain positive employee relations and to develop a culture that enhances the likelihood of employee rejection of a union organizing attempt is to periodically assess areas such as wages, benefits, working conditions, communications and training and development opportunities. Take a look at "what's working and what's not". Maintain an awareness of labor union activities in your area. Plan to address employee issues and concerns that might transition into serious problems if left unresolved.

If you should have any questions related to the posting requirements, new executive orders or regulative changes in the labor relations area or should your organization wish to learn more about The Mickus Group, LLC and its services, please contact us.