

New Federal Posting Requirements—Effective June 21, 2010

By Karen S. Aframe, Esq. | June 18, 2010

Effective June 21, 2010, federal contractors will be required to: (i) post Employee Rights Notice(s) informing their employees about employee rights under the National Labor Relations Act (NLRA) and (ii) include an Employee Notice Clause in their subcontractor agreements connected with the prime contract that requires the subcontractor to post the same NLRA Employee Rights Notice. These new requirements are a result of the promulgation of U.S. Department of Labor regulations implementing President Obama's Executive Order 13496, 29 CFR Part 471.

The NLRA Employee Rights Notice can be downloaded from:
www.dol.gov/olms/regs/compliance/EmployeeRightsPoster11x17_Final.pdf

WHICH FEDERAL CONTRACTORS MUST COMPLY?

Any federal contractor or subcontractor that is an employer under the NLRA must comply with these regulations, unless the government contract is specifically excluded from coverage. The NLRA covers most private employers, even if their workers are not unionized. Any government contract for the purchase sale or use of personal property or non-personal services is covered by the regulations, unless a specific exemption applies. Non-personal services include, but are not limited to the following: utilities, construction, transportation, research, insurance, and fund depository. For example, most banks and financial institutions are government contractors covered by the regulations. Such institutions are covered if they are FDIC-insured, are an issuing or paying agent for US Savings bonds, or are federal funded depositories.

WHICH FEDERAL GOVERNMENT CONTRACTS ARE EXEMPT FROM THESE RULES?

The posting and subcontract clause requirements do not apply to the following federal government contracts:

- o Government contracts involving purchases under the Simplified Acquisition Threshold of \$100,000, or subcontracts for less than \$10,000 in value;
- o Contracts for work done exclusively outside the United States; and
- o Contracts/subcontracts for employers who exclusively employ workers excluded from coverage under the NLRA.

Under the federal regulations, "government contract" does not include "federal financial assistance". Thus, an employer which has a project funded by federal grants or loans, rather than a federal contract, is not required to comply with the rule. Federal financial assistance also includes reimbursements pursuant to Medicare Parts A and B, and Medicaid. Accordingly, the receipt of these reimbursements by hospitals, physician groups and other medical care facilities from Medicare Part A or B or Medicaid does not trigger the posting or notice requirements under the regulations. However, in some circumstances reimbursement pursuant to Medicare Parts C & D, TRICARE and FEHPB may qualify as government contracts that would require the medical care facility or physician group to post the NLRA Employee Rights Notice and include the Employee Notice Clause in its subcontracts.

WHAT MUST A COVERED FEDERAL CONTRACTOR/SUBCONTRACTOR DO TO COMPLY?

To comply with the regulations, the covered federal contractor or subcontractor must:

1. Post the NLRA Employee Rights Notice
 - a. For the duration of the contract (or continuously, in some circumstances where the contract's beginning and ending dates are not specified), in a conspicuous place so that the notice is prominent and readily seen by employees, including all places where notices to employees are customarily posted both physically and electronically.
 - b. Post the notice in a place where employees covered by the NLRA engage in activities directly or indirectly relating to the performance of the federal contract.
 - c. If an employer generally uses electronic methods to post notices, it must also post the notice electronically by including a link to the poster on the U.S. Department of Labor's (DOL) website, which must read: "Important Notice about Employee Rights to Organize and Bargain." The electronic posting cannot be used as a substitute for physical posting.
 - d. Where a significant portion of a contractor's workforce is not proficient in English, the contractor must provide the notice in the language that the employees speak.

2. Include the Employee Notice Clause in its subcontracts.

WHAT TRIGGERS THE OBLIGATION TO POST THE NLRA NOTICE OF EMPLOYEE RIGHTS?

For most covered federal contractors, the posting and notice obligations required by the regulations are triggered by the government agency's inclusion of an Employee Notice Clause in the government contract. The Employee Notice Clause may include explicit language requiring the contractor to post a NLRA Employee Rights Notice or may include only a reference to "29 CFR Part 471, Appendix A to Subpart A." Accordingly, any company entering, modifying or renewing a federal contract after June 21, 2010, should carefully review the contract to determine if the new posting and notice obligations are triggered.

Importantly, Department of Labor has stated that federal contractors that have federal government contracts with no clear beginning or ending date must begin to comply with these rules automatically as of June 21, 2010. Thus, as of June 21, 2010, any entity with such a contract, such as an FDIC-insured financial institution, must post the NLRA Employee Rights Notice and include the Employee Notice Clause in its subcontracts.

WHAT ARE THE PENALTIES FOR FAILURE TO COMPLY WITH THE POSTING REQUIREMENT?

Among the penalties for failure to comply with the notice and posting obligations are cancellation, termination or suspension of the government contract, in whole or in part, and becoming ineligible for future federal contracting.

FOR ADDITIONAL INFORMATION

For assistance with determining whether your company or organization must comply with this notice requirement and/or assistance with compliance, please contact Karen Aframe, kaframe@bernsteinshur.com, in our Manchester, New Hampshire office (603-623-8700) and Glenn Israel, gisrael@bernsteinshur.com in our Portland, Maine office (207-774-1200).