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Two New Challenges for Federal Contractors and Subcontractors

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Two recent regulatory actions pose new challenges for federal contractors and subcontractors. First, on May 20, 2010, the Department of Labor ("**DOL**") published its final rule on "Notification of Employee Rights Under Federal Labor Law" (the "**Labor Law Rule**").[1] The Labor Law Rule implements Executive Order 13496, signed by President Barack Obama on January 30, 2009, and requires covered federal contractors and subcontractors to (i) post both a hard copy and an electronic poster informing their employees of their rights under the National Labor Relations Act ("**NLRA**") and (ii) include a reference to the obligations of the Labor Law Rule in all subcontracts and purchase orders. The Rule takes effect on June 21, 2010.

Separately, on May 19, 2010, the Department of Defense ("DOD") published an interim rule, effective immediately, implementing FY 2010 defense appropriations legislation that prohibits contractors and subcontractors with contracts in excess of $1 million paid for with monies from that appropriations bill from requiring or enforcing agreements to arbitrate certain employment law claims as a condition of an individual's employment (the "Arbitration Rule").[2] Among other things, the interim rule requires contractors to "certify" compliance by their subcontractors after June 17, 2010. Comments on the interim rule must be submitted prior to July 19, 2010.

The Labor Law Rule

History of the Rule

In January 2009, President Obama signed three pro-labor Executive Orders. On August 3, 2009, the DOL issued a proposed rule implementing Executive Order 13496,[3] which: (1) requires covered federal contractors and subcontractors to post a required notice in their workplaces informing employees of their rights under federal labor laws, and (2) provides that the posting requirement language be included in all covered federal contracts and subcontracts.

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[1] Notification of Employee Rights Under Federal Labor Laws, 75 Fed. Reg. 28,368 (May 20, 2010) (to be codified at 29 C.F.R. pt. 471).

[2] Defense Federal Acquisition Regulation Supplement; Restrictions on the Use of Mandatory Arbitration Agreements, 75 Fed. Reg. 27,946 (May 19, 2010) (to be codified at 29 C.F.R. pts. 212, 222, and 252).

[3] Notice of Proposed Rulemaking to Implement Executive Order 13496, 74 Fed. Reg. 38,488 (Aug. 3, 2009).

This precursor to the Labor Law Rule proposed a revocation of Executive Order 13201, issued by President George W. Bush in 2001. That earlier Executive Order required employers to post the so-called "Beck Notice," which informed employees of federal contractors of their rights not to join a union and to "opt out" of paying the portion of union dues used for political contributions or otherwise not related to collective bargaining agreements.[4]

The DOL received more than eighty responses to its request for public comment on that proposed rule, which it considered in crafting its Final Rule. In its summary of the Final Rule, the DOL addressed many of these public comments. Most significantly, the DOL explicitly states that the NLRA does not preempt Executive Order 13496 to the extent that the Executive Order imposes obligations and penalties above and beyond those put in place by the NLRA.[5] Among the most significant criticisms was an argument that the DOL cannot regulate activities protected by Section 7 or prohibited by Section 8 of the NRLA.[6] The DOL ultimately determined that activities regulated by an Executive Order is not conduct covered by those sections of the NLRA.

Scope of the Rule

The requirements of the Labor Law Rule apply to all federal contractors with contracts meeting the simplified acquisition threshold (currently $100,000). The rule also applies to all subcontractors with subcontracts of at least $10,000,[7] so long as those subcontracts are "necessary to the performance of the prime contract," a definition the DOL has stated it intends to interpret broadly.[8]

The requirements of the final rule "flow down" to all subcontractors, whether they are at the first tier of subcontracting or below. Exempted from the requirements are:[9]

- subcontractors with subcontractors of less than $10,000;[10]
- non-profit and religious institutions;
- government contracts for work performed exclusively by employees of U.S. companies operating outside the U.S.;

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[4] The Beck Notice was named for the Supreme Court's 1988 decision in Communication Workers v. Beck, which recognized these rights.

[5] 75 Fed. Reg. 28,370. The history of labor law posting requirements started with President George H.W. Bush, who issued Executive Order 12800. That Order required federal contractors to post a notice that employees could not be required to join unions in order to keep their jobs. Within two weeks of his inauguration, President Clinton issued EO 12836, which rescinded EO 12800 in its entirety. The now revoked Executive Order 13201 was among the first Executive Orders issued by President George W. Bush.

[6] The Supreme Court recognized such preemption in its 1959 decision in *San Diego Bldg. Trades Council v. Garmon*.

[7] The DOL rejected comments that argued that the simplified acquisition threshold apply as well to subcontracts. 75 Fed. Reg. 28,382-83.

[8] 75 Fed. Reg. 28,383.

[9] 75 Fed. Reg. 28,399.

[10] Contractors should note, however, that despite the rule's "flow down" language, prime contractors are not liable for the actions of their subcontractors if they "diligently seek[] subcontractor compliance." 75 Fed. Reg. 28,393.

- entities not meeting the NLRA's definition of "employer," such as Federal Reserve Banks and state governments; and
- contractors subject to the Railway Labor Act, as opposed to the NLRA.

Posting Requirements

The poster required by the Final Rule must, among other things:[11]

- be incorporated by reference in contracts, subcontracts, and purchase orders;[12]
- be displayed in all places where posters to employees customarily are posted, both physically and electronically (electronic posting cannot substitute for physical posting);
- be conspicuous and readily seen by employees who engage in activities relating to the performance of a government contract;
- when provided electronically, contain a link to the DOL's website containing the full text of the poster, and be labeled "Important Notice About Employee Rights to Organize and Bargain Collectively With Their Employers"; and
- be provided in languages used by a "significant portion" of the contractor or subcontractor's workforce.

The Substance of the Poster

The poster required by the Final Rule provides a lengthy discussion of an employee's rights under the NLRA. Many of the employer-side comments were highly critical of the proposed language of the poster as unduly pro-union. For example, the proposed poster included a list of seven types of employer misconduct but only one example of union misconduct. The proposed poster gave slight attention to the right to refrain from union activity. Other commentators objected to the DOL's statement of employee rightsbecause it went beyond a mere enumeration of the Section 7 rights of the NLRA and sought to detail rights derived from NLRB and court decisions. Many of the employee rights, or employer or union misconduct, discussed in the poster have been subject to shifting interpretation by the NLRB and the courts.

The DOL responded to comments that the proposed poster was unbalanced by expanding the list to include five types of union misconduct: (i) threats of job loss for failure to support the union; (ii) refusal to process a grievance because of union criticism or non-membership; (iii) use of discriminatory standards or procedures in making job referrals from a hiring hall; (iv) causing or attempted causing of an employer to discriminate against an employee because of union-related

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[11] 75 Fed. Reg. 28,398-99.

[12] The proposed rule required that the language of the poster be inserted word for word into a contractor's subcontracts and purchase orders. This was the subject of extreme criticism by the contractor community which is already subject to various "flow down" requirements of regulations under: (1) Executive Order 11246, 41 C.F.R. pts. 60-1 and 60-2; (2) the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212 ("VEVRAA"); and (3) the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (the "Rehab Act"), all of which can be incorporated by reference. The Final Rule relented on this point, and the flow down language of the Labor Law Rule may be incorporated by reference into subcontracts and purchase orders.

activity; and (v) other adverse actions based on support of and/or membership in a union. The poster continues to list a more numerous types of employer misconduct, including but not limited to the following: (i) rules limiting solicitation during non-work time and non-work areas; (ii) interrogation and surveillance; (iii) adverse employment action for engaging in concerted activity; (iv) restrictions on wearing union insignia; and (v) threats or promises related to union activity. The poster also provides employees with information regarding their right to organize, to bargain collectively, and to take concerted action.[13]

Enforcement

The Office of Federal Contract Compliance Programs ("**OFCCP**") is charged with enforcing the requirements of the Final Rule and may conduct compliance evaluations. Violators may be subject to sanctions, including: termination, cancellation or suspension of the contract at issue, debarment; and ineligibility for further federal contracts.[14] The NLRB has exclusive jurisdiction to adjudicate disputes regarding alleged violations of the substantive notice.[15]

Implications for Employers

The Labor Law Rule, in connection with the other Executive Orders signed by President Obama near the start of his term, were intended to carry out his campaign pledge to encourage more union organizing activity. This is the first rule requiring employers to post notices of a broad range of employee rights under the NLRA, and employers should anticipate and prepare for an increase in union organizing activity, as well as an increase in the number of unfair labor practice charges filed with the NLRB. Unions and their supporters will clearly be watching to see if contractors are complying and will file complaints if they do not. Contractors should act now to make sure that the required posters are posted as appropriate prior to the June 21, 2010 deadline. Similarly, contractors will need to work with their procurement groups to amend the current flow down language to include the new language that may be incorporated by reference.

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[13] 75 Fed. Reg. 28,399.

[14] 75 Fed. Reg. 28,401.

[15] *Id.*

The Arbitration Rule

History of the Rule

On December 19, 2009, President Obama signed into law the Department of Defense Appropriations Act of 2010 (the "**Act**").[16] A provision of the Act,[17] originally proposed as an amendment by Senator Al Franken (D-MN), was a response to the alleged rape of an employee of a federal contractor in Iraq and her subsequent inability to sue her employer in court because of a mandatory arbitration agreement. On May 19, 2010, the DOD issued an interim rule implementing the Franken Amendment, the provisions of which took effect immediately.[18] The DOD is accepting comments on this interim rule until July 19, 2010, which it will consider before making the interim rule final.[19]

Scope of the Rule

Consistent with Section 8116 as enacted, the interim regulations provide that:[20]

- none of the funds appropriated or otherwise made available by this Act may be expended for any federal contract (including modified contracts), or subcontracts, for more than $1 million unless the contractor agrees not to require as a condition of employment that its employees or independent contractors resolve through arbitration (1) any claim under Title VII of the Civil Rights Act of 1964 and (2) any tort related to or arising out of sexual assault or harassment, including: assault and battery; intentional infliction of emotional distress; false imprisonment; or negligent hiring, supervision, or retention;
- a contractor may not take any action to enforce an existing agreement with an employee or independent contractor to resolve such claims through arbitration; and
- after June 17, 2010, contractors receiving funds appropriated by the Act must also certify that they have required each of their covered subcontractors to abide by these rules, but only with respect to those employees and independent contractors performing work related to such subcontracts.[21]

Importantly, the DOD's commentary acknowledges that a "contractor" is narrowly defined under the Act and applies only to the corporate entity that has the contract. Unless a parent or subsidiary corporation is a party to the contract, it is not affected.[22] In addition, the regulations do not apply to:

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16 P.L. 111-118

17 The "Franken Amendment" is contained in Section 8116 of the Act.

18 *See* footnote 2, *supra*.

19 The DOD's published commentary notes that issuing an interim rule that took effect immediately, without a prior opportunity for public comment, because of "urgent and compelling reasons" and to "preclude a contracting officer from inadvertently awarding a contract that is not in compliance[.]" 75 Fed. Reg. 27,947.

20 75 Fed. Reg. 27,947-48.

21 In other words, subcontractors are free to require arbitration for these prohibited types of claims with respect to employees working on non-DOD subcontracts.

22 75 Fed. Reg. 27,946.

- the acquisition of commercial items, including commercially available off-the-shelf items, or
- a contractor's or subcontractor's agreements with employees or independent contractors that cannot be enforced in a court of the United States.[23]

Finally, the Secretary of Defense may waive the requirements described above if he or she determines that such a waiver is "necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm."[24]

Implications for Employers

Employers with DOD contracts or subcontracts emanating from the 2010 appropriations bill, or those employers intending to bid for such contracts, should review their model employment agreements and revise any provisions mandating arbitration of the claims covered by the Act. They ,may also want to consider providing notice to their incumbant employees that such clauses in existing agreements are not enforceable. Even if they do not provide such notice, employers should evaluate all pending and new Title VII, sexual assault, and sexual harassment cases to determine if they contain claims that cannot be directed to arbitration through the enforcement of a pre-dispute agreement. Finally, employers immediately should seek compliance certifications from their covered subcontractors.

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[23] 75 Fed. Reg. 27,948.

[24] 75 Fed. Reg. 27,947-48.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyer:

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