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VIA ELECTRONIC MAIL: <http://www.regulations.gov>

Denise M. Boucher
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Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5609
Washington, DC 20210

**RE: RIN 1215-AB70
Comments on the Proposed Regulations to Implement Executive Order 13496**

Dear Ms. Boucher:

Thank you for the opportunity to submit comments on the proposed rule issued by the U.S. Department of Labor (DOL or the Department) Office of Labor-Management Standards to implement Executive Order 13496 (Executive Order or Order).¹ We respectfully submit these comments on behalf of the American Council on Education (ACE) and the College and University Professional Association for Human Resources (CUPA-HR).

STATEMENT OF INTEREST

Founded in 1918, ACE serves as higher education's unifying voice, representing all types of accredited, degree-granting colleges and universities and higher education associations. Through advocacy, research and innovative programs, ACE represents the interests of more than 1,800 institutions. Together, ACE member institutions serve eighty percent of today's college students. ACE speaks as higher education's voice in matters of public policy in Washington, DC, and throughout the nation, and provides vital programs, information and a forum for dialogue on key issues.

CUPA-HR serves as the voice of human resources in higher education, representing more than 11,000 HR professionals at over 1,700 colleges and universities across the country, including 90 percent of all U.S. doctoral institutions, 70 percent of all master's institutions, more than half of all bachelor's institutions and 500 community colleges. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 states.

Many colleges and universities, including many of ACE's and CUPA-HR's member institutions, contract with the federal government and will be subject to the Executive Order and the Department's final rule implementing the Order.

¹*Notification of Employee Rights Under Federal Labor Laws*, 74 *Fed. Reg.* 38488 (August 3, 2009).

COMMENTS ON THE PROPOSED RULE

President Obama signed Executive Order 13496 on January 30, 2009. The Order is entitled “Notification of Employee Rights Under Federal Labor Laws,” and its stated purpose is “to promote economy and efficiency in Government Procurement” by promoting industrial peace. The Order states such peace is “most easily achieved ... when workers are well informed of their rights under Federal labor laws.”

The Order sets forth the text of several contract provisions that must be included in each covered government contract. The required contract provisions require covered contractors to post a notice, the content of which the Secretary of Labor shall prescribe, “in conspicuous places in and about its plant and offices where employees covered by the National Labor Relations Act engage in activities related to the performance of the contract...” The Executive Order and required contract provisions further provide that the Secretary of Labor may terminate or suspend contracts or debar contractors for failure to post the notice or comply with other requirements in the Secretary of Labor’s final rule implementing the Executive Order.

We support increasing awareness of rights and obligations under federal labor laws. The Department’s proposed notice and other aspects of the Department’s proposed rule, however, may lead to confusion among employees and employers alike and unnecessarily and unduly burden higher education institutions with smaller subcontracts. Below, we provide suggestions on how the Department could improve the notice and streamline the requirements for those with smaller contracts. With this in mind, we respectfully submit the following comments on specific sections of the proposed rule.

1. Requirements for Employee Notice

Content of the Notice

DOL concluded in the proposed rule that based on various references to the National Labor Relations Act (NLRA or the Act) in the Order, “providing notice of the rights under the NLRA best effectuates the purpose of the Executive Order.” 74 *Fed. Reg.* at 38489. Accordingly, the Department also concluded that, “the Executive Order’s terms provide that the employee notice it requires must be posted only by employers in the private sector, with some statutory exceptions, and need not be posted by employers in the public sector,” as the term employer under the NLRA only includes private employers. *Id.* at 38490.

We agree with DOL on both counts. The Order specifically references the NLRA in its statement of policy and requires covered contractors to post the notice “in conspicuous places in and about its plant and offices where employees covered by the National Labor Relations Act engage in activities related to the performance of the contract...” This strongly suggests that the scope of the Order is limited to the NLRA. We also agree that it would serve no purpose to require public employers whose employees are not covered by the NLRA to post the notice.

We have concerns, however, with the content of the notice DOL has proposed. The Department states in the NPRM, that while it considered using language verbatim from the NLRA or a

simplified list of NLRA statutory rights for the notice, it did not believe that those options “will be likely to convey the information necessary to best inform employees of their rights under the Act.” *Id.* As a result, the Department created a proposed notice that it believes, “contains greater detail of NLRA rights, derived from Board or court decisions implementing such rights . . .” *Id.*

While we understand DOL’s desire to provide employees with adequate information about NLRA rights, we think the best source for those rights is the NLRA itself or the National Labor Relations Board (NLRB or Board), which is the federal agency that enforces employees’ rights under the Act. Having two separate federal agencies attempt to interpret employees’ rights under any statute is fraught with risk of conflict and misunderstanding. This is particularly true of the NLRA, which encompasses an immensely complex body of law derived from almost 75 years of NLRB and federal court decisions. As the Board’s Office of General Counsel states in its basic guide on NLRA rights, “Any effort to state basic principles of law in a simple way is a challenging and unenviable task. This is especially true about labor law, a relatively complex field of law.” *General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, U.S. GOVERNMENT PRINTING OFFICE WASHINGTON, 1997, available at http://www.nlr.gov/nlr/shared_files/brochures/basicguide.pdf.

Given the complexity of the law, any inconsistencies or apparent inconsistencies between DOL’s and the NLRB’s summaries of the NLRA is likely to cause confusion amongst employees and employers alike. Moreover, any attempt by DOL to require employers to post an interpretation of the NLRA that is arguably inconsistent with Board interpretations of the law could run afoul of the NLRA preemption doctrine.²

We also believe DOL’s attempt to provide some details on specific rights in the limited space available in the posting may actually confuse parties and is certainly not the most effective way “to best inform employees of their rights under the Act.” 74 *Fed. Reg.* at 38490. Providing limited details on complex areas of the law may actually operate to further confuse parties, leading them to make assumptions about their rights or obligations that may not be accurate because of specific circumstances or peculiarities of the law. As the NLRB Office of General Counsel cautioned about its own summary, “Only by evaluation of specific fact situations in the

² While a Federal Court of Appeals found a prior posting requirement mandated by Executive Order 13201 was not preempted under the NLRA, the court did not conclude that *any* posting requirement mandated by Executive Order would be immune from NLRA preemption. *UAW-Labor Employment and Training Corporation v. Chao*, 325 F.3d 360 (D.C. Cir. 2003). To the contrary, the court’s decision turned on the fact the Board specifically ruled in *Rochester Manufacturing Co.*, 323 N.L.R.B. 260, 1997 WL 113885 (1997) that employers were not required to post a notice in question and that parties had made “no claim that *posting* is arguably an unfair practice.” In other words, the court’s decision turned on the content of the notice required in Order 13201 and a Board decision related to that content. Moreover, the Supreme Court’s subsequent decision in *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008) makes the issue of possible preemption in this circumstance even more poignant. In *Brown*, the Court found that Congress intended noncoercive employer speech in the labor relations context to be unregulated, and thus the California law in question was preempted. Indeed, the *Brown* decision calls into question whether the *Chao* court’s finding Executive Order 13201 was not preempted is still good law. The *Chao* and *Brown* cases illustrate why DOL is less likely to publish a posting that runs afoul of NLRA preemption if the posting language is taken directly from the Act or an existing publication of the Board. As noted in the text of our comments, the Board’s website provides several summaries of NLRA rights and protections that DOL could use for notice.

light of current principles and with the aid of expert advice would a person be in a position to know definitely where the proposed conduct may fit under the statute.” *General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, available at http://www.nlr.gov/nlr/shared_files/brochures/basicguide.pdf.

We think a better approach for DOL is to provide a posting with a simpler statement of NLRA rights and provide more details about the NLRB, its processes and how to contact the agency. This would provide basic information about NLRA rights and encourage interested employees to seek more information from NLRB and its website, which provides by far the best information on NLRA and related rights and obligations.

As such, we recommend DOL change the content of the notice to either:

1. a “verbatim replication of the statute’s enumeration of employee rights in Section 7 of the NLRA,” and basic information about the Board, its processes and how to contact the agency, or
2. a simple statement of NLRA rights taken verbatim from an existing NLRB publication and basic information about the Board, its processes and how to contact the agency.

With respect to the later, one possible source is a pamphlet the NLRB has “specifically designed to provide a general explanation to employees about their workplace rights under the” NLRA. The pamphlet can be found at:

http://www.nlr.gov/nlr/shared_files/brochures/OutreachBrochure_Rev_10-30-07.pdf. Other possible sources for language in the notice include statements of rights from the NLRB website (*see, e.g.,* http://www.nlr.gov/Workplace_Rights/employee_rights.aspx) or statements taken from *General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, which is available at: http://www.nlr.gov/nlr/shared_files/brochures/basicguide.pdf.

Requiring the Notice be Inserted Verbatim in the Contract

Section 471.2(b) of the proposed rule would require the notice be set out verbatim “in a contract, subcontract or purchase order, rather than being incorporated by reference in those documents.” 74 *Fed. Reg.* at 38491. In the preamble to the NPRM, the Department seeks “comment regarding the utility of setting out the employee notice clause verbatim, as opposed to incorporation by reference, to ensure that contractors will be aware of their contractual obligation to post the required notice.” *Id.*

We see no utility in including the notice verbatim in the contract. Section 2 of the Order already requires that each covered contract include a provision that will make it abundantly clear to contractors that they have a contractual obligation to post the notice. Specially, Section 2 of the Order requires the following be inserted into all covered 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 National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The notice shall include the information contained in the notice published by the Secretary of Labor in the Federal Register (Secretary's Notice).

Moreover, by requiring that the notice be inserted verbatim in the contract, DOL will impose significant and unnecessary burdens on the government and contractors whenever the content of the notice is altered. As is recognized under Section 3 of the Order and section 471.2(c) of the proposed rule, DOL may need to make adjustments to the notice in response to changes in the law. If the notice language is included verbatim in every contract, federal agencies and contractors will need to modify existing covered contracts by deleting the old notice language and replace it with the new language every time DOL makes an adjustment. This significant burden could be avoided simply by requiring contracting parties to incorporate the notice by reference into each contract, rather than requiring it be inserted verbatim. To ensure federal agencies, contractors and subcontractors are aware of changes in the notice, DOL could notify them via mechanism the government currently uses to notify agencies, contractors and potential contractors of changes in contract requirements (press release, mail and e-mail notices, etc.). In fact, the regulations implementing Executive Order 13201 - an older NLRA posting requirement that was revoked by Executive Order 13496 - took this approach. Specifically, the Executive Order 13201 regulations state, "The employee notice clause need not be quoted verbatim in a contract, subcontract, or purchase order. The clause may be made part of the contract, subcontract, or purchase order by citation to 29 CFR part 470." 29 C.F.R. Part 470.2(b).

Clarifying Scope of Executive Order

Paragraph 2 of the required contract provisions in Section 2 of the Order states: "The contractor will comply with all of the provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor." Paragraph 1 in the same section defines "Secretary's Notice" as the notice published in the Federal Register. It appears the word "notice" in this context refers to the final rule rather than the content of the posting. Thus, it is our understanding that the provision *only* requires contractors abide by requirements to post the notice and insert required language in contracts and the Department is *not* creating additional contractual or regulatory remedies for violations or alleged violations of the NLRA rights and obligations addressed in the posting itself.

Nonetheless, some have raised concerns that Paragraph 2 and other sections of the proposed rule could be read as creating additional contractual or regulatory remedies for matters regulated under the NLRA. We do not think the Department intends this outcome. Nor do we believe the Department intends to otherwise further regulate activities that are arguably protected or prohibited by the NLRA or regulate areas of labor relations Congress specifically intended to be left unregulated by the NLRA. Any attempt to do so by the Department is clearly preempted by the NLRA. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Lodge 76*,

Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

The proposed rule is confusing on this issue, however, and the Department should clarify in the final rule that the requirements of the Executive Order and rule only extend to contractors' and subcontractors' obligation to post the notice and include the required provisions in the covered contracts and that neither the Order nor the contract provisions create any additional mechanism for the enforcement of the rights protected or obligations created by the NLRA, as those matters are exclusively the jurisdiction of the NLRB.

2. Exceptions for Specific Types of Contracts and Exemptions Available to Contracting Departments or Agencies With Respect to Particular Contractors

By its terms, the Order applies to every "Government contract other than collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and purchases under the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403." As the Department notes in the NPRM, the simplified acquisition threshold is currently set at \$100,000.

DOL claims that because the Executive Order does not specifically exempt from its coverage subcontracts involving purchases below the simplified acquisition threshold, the Order's requirements apply to subcontracts below the threshold as long as such subcontracts "are necessary to the performance of the prime contract." 74 *Fed. Reg.* at 38491. In the NPRM, the Department "invites comment on whether a further limitation on the application of the rule to subcontracts is necessary, and if it is, whether such a limitation is best accomplished through the application of this or another standard, for instance, a threshold related to the monetary value of the subcontract." *Id.*

We believe the Order's requirements should only apply to subcontractors with contracts that exceed the simplified acquisition threshold and are necessary to the performance of the prime contract. It makes no sense to apply the requirements to a subcontractor with a \$3,000 contract, while exempting a prime contractor with a \$99,000 contract. Moreover, in various parts of the Order, the word contract or contractor is used to also mean subcontract or subcontractor. For example, Section 3 (b) states:

Within 120 days of the effective date of this order, the Secretary shall initiate a rulemaking to prescribe the size, form, and content of the notice to be posted by a contractor under paragraph 1 of the contract clause described in section 2 of this order. Such notice shall describe the rights of employees under Federal labor laws, consistent with the policy set forth in section 1 of this order.

The terms "contract" and "contractor" are clearly intended here to also apply to subcontractors and subcontracts. We believe this is also the case with Section 2's provision exempting contracts below the simplified acquisition threshold.

CONCLUSION

We appreciate the opportunity to submit these comments. If we can be of further assistance on this matter, please do not hesitate to contact us.

Respectfully submitted,



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