jackson lewis
Preventive strategies.
Positive solutions.

DOL Final Regulations on Contractors' Obligation to Notify Employees of Organizing Rights (EO 13496)

All We Do Is Work.
Workplace Law. In four time zones
and 46 major locations coast to coast.

www.jacksonlewis.com

JACKSON LEWIS

SERVING THE DIVERSE NEEDS OF MANAGEMENT

Jackson Lewis is one of the largest law firms in the country dedicated exclusively to representing management on workplace issues. The Firm has successfully handled cases in every state and is admitted to practice in all Circuit Courts of Appeal and in the United States Supreme Court. With 46 offices and almost 650 attorneys, the Firm has a national perspective and sensitivity to the nuances of regional business environments.

Since 1958 we have represented a wide range of public and private businesses and non-profit institutions in a vast array of industries. When issues arise, we devise optimal solutions that minimize costs and maximize results. Whether we are counseling on legal compliance or litigating a complex case, we assist our clients in achieving their business goals.

In addition, we help employers create policies and procedures promoting positive employee relations. We have built our practice and earned our national reputation over the years by helping companies reduce workplace-related litigation by educating management on legal trends, judicial developments, and statutory and regulatory compliance in the rapidly evolving area of workplace law. Our state-of-the-art preventive law programs utilize the Firm's expertise and unmatched experience to evaluate employment trends and related litigation, minimizing the risk of exposure in future lawsuits.

DOL Final Regulations on Contractors' Obligation to Notify Employees of Organizing Rights (EO 13496)

The Department of Labor's Office of Labor-Management Standards (the "Department") issued its final rule on *Notification of Employee Rights Under Federal Labor Law* (the "Final Rule") on May 20, 2010. The Final Rule, which went into effect on June 21, 2010, implements the provisions of Executive Order 13496, one of four pro-labor executive orders signed by President Barack Obama in early 2009. Executive Order 13496 requires covered federal contractors and subcontractors to post a notice informing employees of their right to unionize and to engage in certain protected activities under the National Labor Relations Act (the "NLRA"). This Special Report provides a brief overview of the history of Executive Order 13496, as well as detailed information regarding federal contractors' compliance obligations going forward.

I. Background

A. President Obama's Pro-Labor Executive Orders

President Obama issued three pro-union executive orders just ten days after his inauguration and issued a fourth less than a week later. These orders reverse certain obligations of federal contractors put in place by President George W. Bush and impose new obligations and restrictions on contractors.

The four executive orders are summarized below:

1. Notification of Employee Rights Under Federal Labor Laws ***(Executive Order 13496)***

   - Revokes Executive Order 13201 ("*Beck* Notice Requirements") and imposes new obligations for federal contractors to inform employees of their rights under the NLRA.

   - Contractors who fail to comply with the notice obligations or related rules may have their contract cancelled and could be debarred from future federal contracts.

2. Nondisplacement of Qualified Workers Under Service Contracts ***(Executive Order 13495)***

   - Revokes Executive Order 13204, issued in 2001, and requires that successive contractors offer a right of first refusal of employment to employees of prior contractor.

   - Effectively forces non-union contractors assuming a federal service contract to hire predecessors' employees.

   - Violations can result in a three-year debarment for the contractor, its responsible officers, and any firm in which the contractor has a substantial interest.

3. Economy in Government Contracting ***(Executive Order 13494)***

   - Contractors may not seek reimbursement for expenses incurred in attempting to persuade employees not to join a union or engage in collective bargaining.

   - Covered expenses include, but are not limited to, the cost of preparing materials, hiring legal counsel or consultants, holding meetings (including the cost of salaries for attendees) and planning such activities.

   - New accounting procedures may be needed to segregate costs, such as payroll costs for a 10-minute meeting or the paper and copying expenses for a bulletin board poster.

4. Use of Project Labor Agreements for Federal Construction Projects **(*Executive Order 13502*)**[1]

   - Authorizes executive agencies of the federal government to require every contractor or subcontractor on a large-scale construction project to negotiate or become a party to a Project Labor Agreement with one or more labor organizations.

   - Applies when total cost of project is $25 million or more.

   - Does not require employers to make any specific concessions to a union's bargaining demands.

B. A Closer Look at Executive Order 13496

Shortly after taking office in 2001, President Bush signed Executive Order 13201, which required all qualifying federal contractors to post a notice advising non-union employees of certain rights. Included were the right not to join a union and the right to "opt out" of paying that portion of dues used by unions for political contributions or other activity not related to administration of a collective bargaining agreement. The latter right had been recognized three years earlier by the United States Supreme Court in the decision *Communication Workers v. Beck*. The Office of Federal Contractor Compliance Programs ("OFCCP") was charged with enforcement of the "*Beck*" notice requirements, which also specified that *Beck* posting language be included in all qualifying contracts and subcontracts.

Executive Order 13496 repeals the *Beck* notice requirements and instead directs all nonexempt Federal departments and agencies to include in government contracts a specific provision requiring contractors to:

> [P]ost a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places

[1] The Defense Department, General Services Administration, and National Aeronautics and Space Administration, which together maintain the Federal Acquisition Regulation council, has published a final rule, amending the FAR, to implement this Executive Order. The rule is available at http://edocket.access.gpo.gov/2010/pdf/2010-8118.pdf. The rule is effective May 13, 2010.

> 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).

The Executive Order directs the Secretary of Labor to establish posting language advising employees of their rights to bargain collectively and to be protected in the exercise of their right to association, self-organization and designation of representatives for purposes of negotiating terms and conditions of employment (the "Employee Notice Clause").

The Order also requires prime contractors to include the Employee Notice Clause in their subcontracting agreements and to "take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions…."

On August 3, 2009, the Department issued a Notice of Proposed Rulemaking (the "Proposed Rule") to implement Executive Order 13496 and invited public comments up until September 2, 2009. The Department received scores of public comments regarding the Proposed Rule, including detailed comments from Jackson Lewis.

On May 20, 2010, the Department issued its Final Rule implementing the Executive Order. While many comments of the employer community were considered and addressed, a number were rejected.

II. What do the Executive Order and Final Rule Require?

A. Who Must Post?

1. Employers with Federal Contracts of $100,000 or More

As set forth in both the Executive Order and the Final Rule, Federal departments and agencies are not required to include the Employee Notice Clause in government contracts below the simplified acquisition threshold of **$100,000**. However, according to the Final Rule, the Employee Notice Clause must be included in contracts for indefinite quantities where there is reason to believe the value in any year will exceed the simplified acquisition threshold. *See* 29 CFR § 471.3(a)(2).

While the Final Rule went into effect on June 21, 2010, current government contractors above the simplified acquisition threshold are not required to post the specified notice until signing a new Federal contract, subcontract or modification covered by the Executive Order. *See* 471.3(a)(3). The new contract, subcontract or modification must be solicited after June 21, 2010.

2. What about Subcontractors?

a. Subcontracts of Less Than $10,000 Not Covered

While the Final Rule requires primary contractors to place the Employee Notice Clause in subcontracts "necessary to the performance of" the government contract (as did the Proposed Rule), responding to the concerns of Jackson Lewis and others, the Department has exempted "*de minimis*" subcontracts of less than **$10,000**. *See* §471.3(a)(4). The Department makes clear, however, that "contractors and subcontractors are not permitted to procure supplies or services in a manner designed to avoid the applicability of the Order…." *Id.*

Like prime contractors, otherwise covered subcontractors need not post the specified notice until entering into a new contract or modification solicited after June 21, 2010.

b. Incorporation by Reference

Prime contractors are specifically required to include the Employee Notice Clause in all non-*de minimis* subcontracts and purchase orders necessary to the performance of the primary contract. Consistent with Jackson Lewis' suggestion, the Final Rule allows the full text of the Employee Notice Clause—which is quite long—to be incorporated by reference in subcontracts and purchase orders. Thus, as per the Final Rule, 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 471, Appendix A to Subpart A." §471.2(b).

c. Prime Contractors' "Policing" Obligations

Aside from incorporating the Employee Notice Clause into its subcontracts and purchase orders, to what extent are contractors required to ensure their subcontractors post the required notice? The Department clarified the prime contractor's role in its summary of the Final Rule: While prime contractors "cannot turn a blind eye toward noncompliance of its subcontractors, … [i]f a prime contractor diligently seeks subcontractor compliance following an order [by the Department to do so], but a subcontractor's compliance is not forthcoming, the prime contractor will not be liable for the subcontractor's compliance." "In the event that the contractor disregards such an order to seek compliance among its subcontractors," however, "such disregard may make the prime contractor liable for penalties and sanctions in the same manner as if the contractor had failed to incorporate the contract clause or post the employee notice."

3. What Exceptions Apply and What Exemptions are Available?

In addition to the exceptions discussed above for contracts below the simplified acquisition threshold, *de minimis* subcontracts and contracts that pre-date June 21, 2010, the Employee Notice Clause is not required in collective bargaining agreements and contracts for work performed exclusively by employees of U.S. firms operating outside the territorial United States.[2] *See* §§ 471.3(a)(1), 471.3(a)(5).

[2] The Proposed Rule did not exempt covered employers from providing notice to employees who worked on contracts outside the United States and would thus be beyond the jurisdiction of the NLRA. Jackson Lewis suggested an exemption to this effect modeled on a similar exclusion made by the OFCCP in the affirmative action context.

Further, the Director of the Office of Labor-Management Standards may specifically grant an exemption where: (1) compliance would "not serve [the requirements'] purposes or would impair the ability of the Government to procure goods or services on an economical or efficient basis"; or (2) "[s]pecial circumstances require an exemption in order to serve the national interest." § 471.3(b)(1), 471.3(b)(2).

Contractors that are not "employers" for purposes of the NLRA are also exempt. *See* § 471.4.

B. The Notice: What and Where to Post?

1. Notice Itself More Balanced

The complete text of the Employee Notice Clause is attached as **Attachment 1** hereto. According to the Department, "[t]he content of the proposed notice received more comments than any other single topic addressed in the proposed rule." Jackson Lewis and others urged the Department to adopt a shorter, more balanced posting that allows employees to make informed choices regarding the right to unionize. In response, the Department revised the Employee Notice Clause to be more neutral. For example, the proposed notice contained only one example of unlawful union conduct, but the final version contains five. Additionally, the Department added a provision stating that a union owes a duty of fair representation to its members.

2. Obtaining the Notice for Posting

The required notice may be accessed and downloaded at http://www.dol.gov/olms/regs/compliance/EO13496.htm. The size of the poster must be 11x17 inches or larger. Employers who download the form from the Department's website may either print it on 11x17 inch paper or print in the 11x8.5-inch two-page format. Employers can also obtain a hard copy of the notice by sending a request to olms-public@dol.gov or calling (202) 693-0123.

3. Other Languages

Contractors and subcontractors must post the required notice in alternative languages where "a significant portion of a contractor's workforce is not proficient in English." §471.2(d).

4. Where Must Notice Be Posted?

Executive Order 13496 requires contractors to post the notice "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 Final Rule confirms that covered contractors and subcontractors must post the notice "[i]n conspicuous places in and about the contractor's plants and offices so that the notice is prominent and readily seen by employees. Such conspicuous placement includes, but is not limited to, areas in which the contractor posts notices to employees about the employees' terms and conditions of employment." §471.2(d)(1).

a. What Does Work Related to the Performance of the Contract Mean?

The Proposed Rule reiterated the Order's broad and ambiguous mandate that employers post the notice wherever employees covered by the NLRA perform work "related to the performance of the contract." While the Department clarified this directive in the Final Rule, it did not narrow it.

To determine whether work is "related to" the contract, the Department clarified it will use the disjunctive test established in connection with the implementation of Section 503 of the Rehabilitation Act. This broad standard is met if "[t]he duties of the employee's position include work that fulfills a contractual obligation, or work that is necessary to, or that facilitates, performance of the contract or a provision of the contract." §471.2(d)(2)(i). "Under the Department's interpretations, included in contract-related activity is indirect or auxiliary work without which the contract could not be effectuated, such as maintenance, repair, personnel and payroll work." In its summary of the Final Rule, the Department provided specific examples of this type of work, including employees who "assur[e] quality control and security; stor[e] the goods after production; deliver[] them to the government; hir[e], pay[], and provid[e] personnel services for the employees engaged in contract-related work; keep[] financial and accounting records; perform[] related office and clerical tasks; and supervis[e] or manag[e] the employees engaged in such tasks."

Given this broad definition, employers will be required to post notices throughout its place of business.

b. Different From the Affirmative Action Context: Obligation to Post Does Not Automatically Spread to Other Locations or Entities Within a Corporate Family

The obligation to develop and maintain written affirmative action programs under the federal affirmative action regulations arises when a non-construction contractor has at least fifty employees and: (i) enters into a contract for at least $50,000 to supply goods or services directly to the federal government; (ii) has Government bills of lading which in any 12-month period total, or can reasonably be expected to total, at least $50,000; (iii) serves as a depository of Government funds in any amount; or (iv) is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount. Coverage also arises when a subcontractor supplies goods or services to a government contractor and such goods or services are necessary, in whole or in part, to the fulfillment of a government contract.

A "covered" contractor must implement and maintain a written affirmative action plan (or plans) covering all employees and all establishments regardless of whether all facilities participate in the federal contract or subcontract. Additionally, intra-company relationships among parent, subsidiary, division or affiliate can spread affirmative action coverage from one entity to another within a corporate family of organizations.

Unlike in the affirmative action context, the obligation to post the notice under the Final Rule does not automatically spread throughout an organization. As noted above, the Final Rule requires employers to post the notice only where employees covered by the NLRA perform work "related to the performance of the contract."

5. Electronic Posting

As with the Proposed Rule, the Final Rule requires employers that typically post employee notices both physically and electronically to post the notice in both ways. More specifically:

> contractors or subcontractors satisfy the electronic posting requirement by displaying prominently on any Web site that is maintained by the contractor or subcontractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment, a link to the Department of Labor's Web site that contains the full text of the poster. The link to the Department's Web site must read, "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers." Where a significant portion of a contractor's workforce is not proficient in English, the contractor must provide the notice required in this subsection in the language the employees speak.

§471.2(f).

The Department rejected suggestions that the electronic-posting requirement is overly broad and would effectively require posting for the entire workforce rather than only at locations where employees do work "related to" the performance of the contract.

C. How Will the Department Determine Compliance?

The Final Rule empowers the Director of OFCCP to "conduct a compliance evaluation to determine whether a contractor holding a covered contract is in compliance" either strictly in connection with Executive Order 13496 or as part of a "compliance evaluation conducted under other laws, Executive Orders, and/or regulations enforced by the Department." § 471.10(a).

D. Is There a Complaint Procedure?

An employee of a covered contractor may file a complaint alleging that the contractor has failed to comply with the Executive Order. The Complaint must be in writing. The Director of OFCCP is charged with evaluating the allegations of the complaint and developing a case record. *See* § 471.11.

E. What if a Complaint Investigation or Compliance Evaluation Reveals a Violation?

In the event that the OFCCP's complaint investigation or compliance evaluation reveals a violation, the Director of OFCCP will "make reasonable efforts to secure compliance through conciliation." The contractor must then correct the violation and commit in writing not to repeat such a violation. If conciliation efforts are unsuccessful, the Director of OFCCP will refer the matter to the Director of the Office of Labor-Management Standards. *See* § 471.12.

F. Potential Sanctions and Penalties for Noncompliance

In certain circumstances detailed in the Final Rule, the Director of the Office of Labor-Management Standards may take any of the following actions:

(1) Direct a contracting agency to cancel, terminate, suspend, or cause to be canceled, terminated or suspended, any contract or any portions thereof, for failure to comply with its contractual provisions required by Section 7(a) of the Executive Order and the regulations in this part. Contracts may be canceled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon compliance.

(2) Issue an order of debarment under Section 7(b) of the Executive Order providing that one or more contracting agencies must refrain from entering into further contracts, or extensions or other modification of existing contracts, with any non-complying contractor.

(3) Issue an order of debarment under Section 7(b) of the Executive Order providing that no contracting agency may enter into a contract with any non-complying subcontractor.

§ 471.14(d)(1)-(3).

G. Reinstatement of Debarred Contractors

The Proposed Rule omitted explicit guidance on how a debarred contractor can request reinstatement. To promote transparency, Jackson Lewis suggested the Department incorporate the reinstatement guidelines found in other laws regulating federal contracts. Under the Final Rule, debarred contactors seeking reinstatement must "show that they have established and will carry out policies and practices in compliance with the Executive Order and implementing regulations." The Director of the Office of Labor-Management Standards then has the authority to request a compliance evaluation which may lead to a contractor's reinstatement. The Director's decision must be supported by a written decision. *See* § 471.16.

III. Best Practices for Employers Subject to the Final Rule

A. Train Supervisors on Their Rights Under the NLRA

Employers should ensure that all supervisors (as defined by the NLRA) are trained on handling employee inquiries about what the notice means and the significance of authorization cards, as well as on recognizing signs of organizing activity and how to lawfully communicate to employees the company's position on unionization. Under the NLRA, a supervisor is one who has the authority to do any of the following: hire, fire, discipline, discharge, assign overtime, direct and assign work or "effectively recommend" any of these actions. Since they have the most contact with rank and file employees, properly trained supervisors are an employer's first, and most important, line of defense against union organizing.

B. Resolve Festering Employee Issues

Employee organizing efforts can be preempted by creating an issue-free work environment. Businesses should conduct a self-assessment to identify and, to the extent possible, eliminate legitimate sources of discontent within the workforce. This includes a review of legal compliance issues that could spur

organizing and give a union leverage, such as the legality of wage and hour practices. Self-assessments may also have other benefits, such as revealing more efficient methods for the business to operate and areas of potential liability.

C. Bargaining Unit Analysis

Each employer should conduct a bargaining unit vulnerability analysis to assess potential bargaining unit configurations and, to the extent practicable, reconfigure its workforce to better serve company objectives. A bargaining unit analysis will evaluate the similarity of employees' terms and conditions of employment to determine whether they should collectively be part of one or more potential bargaining units. Employees who work in various job classifications who share certain terms and conditions of employment are more likely to be considered part of one unit. Therefore, an employer should attempt to distinguish various employee job classifications so as to minimize the chance that one cohesive potentially pro-union bargaining unit can be deemed appropriate.

D. Enhance and Reinforce Employee Communications

Free and open communication with employees is essential to maintaining a union-free workplace. To that end, employers should consider including a union-free philosophy in their employee handbook and incorporating a discussion of the policy and Executive Order 13496 in their new-hire orientation. Additionally, employers may wish to prepare and post their own notice alongside the notice mandated by Executive Order 13496 to reinforce their position regarding unionization. Further, employers should be prepared to respond to active organizing. For example, rapid-response teams should be on alert to quickly and effectively communicate the company's message to employees in the event of union activity.

* * *

Federal contractors who enter into a primary contract of $100,000 or more should be prepared to post the required notice and amend covered subcontracts and purchase orders to reference 29 CFR Part 471, Appendix A to Subpart A. Since the new notice posting may trigger union organizing activity, now may also be a good time to train managers on effective and lawful means to respond to union organizing.

For additional information, please contact:

Richard I. Greenberg
Partner | Jackson Lewis LLP
59 Maiden Lane, 39th Floor
New York, NY 10038
(T) 212-545-4080
greenber@jacksonlewis.com

Philip B. Rosen
Partner | Jackson Lewis LLP
59 Maiden Lane, 39th Floor
New York, NY 10038
(T) 212-545-4001
rosenp@jacksonlewis.com

Michael J. Lotito
Partner | Jackson Lewis LLP
199 Freemont Street, 10th Floor
San Francisco, CA 94105
(T) 415-536-6326
lotitom@jacksonlewis.com

Jonathan J. Spitz
Partner | Jackson Lewis LLP
1155 Peachtree Street, NE, Suite 1000
Atlanta, GA 30309
(T) 404-586-1835
spitzj@jacksonlewis.com

We would like to give a special thanks to associate **Daniel D. Schudroff** for assisting in the preparation of this Special Report.

Attachment A

EMPLOYEE RIGHTS

UNDER THE NATIONAL LABOR RELATIONS ACT

The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take other adverse action against you based on whether you have joined or support the union

If you and your coworkers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's website: www.nlrb.gov.

Click on the NLRB's page titled "About Us," which contains a link, "Locating Our Offices." You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or (TTY) **1-866-315-NLRB (6572)** for hearing impaired.

***The National Labor Relations Act covers most private-sector employers.** Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice
and must not be defaced by anyone.

U.S. Department of Labor