

EMPLOYMENT LAW ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Executive Order 13496 Expands Labor-Related Notice Requirements for Federal Contractors

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As many of you have heard, as of June 21, 2010, Executive Order 13496, which was signed by President Obama right after he took office in January 2009, places new workplace notice requirements on certain federal contractors and subcontractors. The notice requirements, in essence, require federal contractors to inform employees of their right to join a union and exercise their Section 7 rights under the National Labor Relations Act ("NLRA").

This practice is not unusual for incoming administrations. However, with the signing of a new notice requirement, it is wise for employers to refresh themselves on what notice is required and on who "federal contractors" really are. This alert will address those topics in sequence.

Notice Requirements

The E.O. 13496 poster informs employees of their rights under the NLRA, including: the right to bargain collectively; form, join, or assist a union; and strike or picket. The poster outlines unlawful employer conduct, such as surveillance of union activities and threats, bribery, retaliation or discrimination related to an employee's union-related activity. It also discusses unlawful union conduct, such as retaliation and discrimination based on an employee's union-related activity. The notice provides instruction on how employees can contact the National Labor Relations Board and encourages them to do so in the event that they believe their NLRA rights have been violated.

The Department of Labor ("DOL") issued implementing regulations on May 20, 2010. The regulations provide that in any contract covered by E.O. 13496, the government contracting agency must include an "employee notice clause" stating that the contractor must display a poster in the workplace notifying employees of their NLRA rights throughout the term of the contract. If the contractor then subcontracts any portion of the contract, the contractor must similarly include an employee notice clause in the subcontract.

The regulations require a covered contractor or subcontractor to display the required notice in "conspicuous places in and about the contractor's plants and offices so that the notice is prominent and readily seen by employees." This includes areas in which the contractor posts other employment-related notices to employees and areas where employees covered by the NLRA engage in activities related to the performance of the government contract. If a significant portion of the contractor's or subcontractor's work force is not proficient in English,

the notice must also be posted in the language spoken by such employees. Contractors and subcontractors may obtain posters (currently available in English, Spanish and Mandarin) from the DOL Office of Labor-Management Standards' Web site, <http://www.dol.gov/olms/regs/compliance/E013496.htm>. Contractors and subcontractors needing a poster in a language other than English, Spanish and Mandarin may request one on the same Web site.

Covered contractors or subcontractors that have a practice of posting notices to employees electronically must also post the E.O. 13496 notice electronically. This can be satisfied by prominently displaying on the contractor's or subcontractor's Web site a link to the poster contained on the DOL's Web site. The link to the DOL's Web site must read, "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers." Please note, however, that electronic posting cannot be used as a substitute for physically displaying the poster in the workplace.

Covered Contractors and Subcontractors

The provisions of E.O. 13496 do not apply to all government contracts. Exemptions include: (1) contracts below the Simplified Acquisition Threshold, currently set at \$100,000; (2) subcontracts below \$10,000; (3) contracts or subcontracts for work performed exclusively outside the territorial United States; or (4) contracts or subcontracts entered into prior to June 21, 2010. Other exemptions include Federal Reserve banks, any state or political subdivision thereof, and any individual subject to the Railway Labor Act.

The regulations further state that a government contract does not include federal financial assistance, which is generally defined as "grants and loans of federal funds" or any federal agreement "which has as one of its purposes the provisions of assistance." For healthcare providers, the main question is whether being reimbursed by Medicare or Medicaid qualifies as federal financial assistance so as to exempt the provider from E.O. 13496. The Office of Federal Contract Compliance Programs' (OFCCP) position is that reimbursement made under Medicare Parts A and B and Medicaid qualify as federal financial assistance and, therefore, do not, on their own, make the recipient a federal contractor. However, reimbursements made under Medicare Parts C and D, TRICARE, and FEHPB may, in some situations, qualify as federal contracts rather than federal financial assistance.

Compliance

E.O. 13496 compliance will be enforced in two ways. Employees may file written complaints with the Office of Labor-Management Standards (OLMS) or the OFCCP regarding contractors and subcontractors that fail to comply with the posting requirements, and contractors that fail to include the employee notice clause in subcontracts. The OFCCP will then conduct an investigation into the complaint. The OFCCP may also conduct compliance evaluations to determine whether a contractor or subcontractor is in compliance with E.O. 13496. The evaluation may be limited to compliance with E.O. 13496 or may be included in a compliance evaluation conducted under other federal laws, Executive Orders, and/or regulations enforced by the DOL.

If either a complaint or a compliance evaluation leads to a finding that the contractor or subcontractor is in violation of E.O. 13496, the OFCCP will first attempt to remedy the situation

with conciliation. If conciliation efforts are not successful, the matter may be referred to administrative enforcement proceedings under the Solicitor of Labor. The enforcement proceedings will provide an opportunity for a hearing before an administrative law judge and an appeal before the DOL's Administrative Review Board. Potential sanctions include cancellation or suspension of an existing federal contract and debarment from future federal contracts and subcontracts.

Generally, E.O. 13496 compliance should be a fairly simple process, as the notice requirements are not overly burdensome. The concern lies in whether the notice will assist unions in their organizing efforts. E.O. 13496, therefore, is yet another reason for employers to be in touch with their work force and aware of any potential organizing efforts.

If you have any questions about this alert, please call one of our Labor and Employment attorneys listed below.

Bass, Berry & Sims Labor and Employment Attorneys

L. Lymari Cromwell
(615) 742-7903
lcromwell@bassberry.com

Davidson French
(615) 742-6240
dfrench@bassberry.com

Tim K. Garrett
(615) 742-6270
tgarrett@bassberry.com

Robert W. Horton
(615) 742-7708
rhorton@bassberry.com

Lin B. Howard
(615) 742-7927
lhoward@bassberry.com

Alonda W. McCutcheon
(615) 742-7717
amccutcheon@bassberry.com

Michael S. Moschel
(615) 742-6297
mmoschel@bassberry.com

Annie Warnock Neal
(615) 742-6517
aneal@bassberry.com

William N. Ozier
(615) 742-6232
bozier@bassberry.com

Justin A. Page
(615) 742-7786
jpage@bassberry.com

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