HR POLICY ASSOCIATION
The Association of Senior Human Resource Executives

August 31, 2009

Submitted Via Federal eRulemaking Portal: http://www.regulations.gov

Ms. Denise M. Boucher
Director of the Office of Policy, Reports and Disclosure
Office of Labor-Management Standards
Department of Labor
200 Constitution Avenue, N.W.
Room N-5609
Washington, D.C.20210

RE: Comments of HR Policy Association Responding To RIN 1215-AB70; Notification of Employee Rights Under Federal Labor Laws; Proposed Rule; Request For Public Comment 74 Fed. Reg. 38488 (August 3, 2009)

Dear Ms. Boucher:

The HR Policy Association (HR Policy) welcomes the opportunity to submit written comments on the Proposed Rule issued by Office of Labor-Management Standards, Employment Standards Administration, Department of Labor (the "Department") and published in the *Federal Register* on August 3, 2009 to implement Executive Order 13496 of January 30, 2009, Notification of Employee Rights Under Federal Labor Laws (the "Executive Order").

Statement Of Interest

HR Policy represents the senior human resource executives of over 280 leading employers doing business in the United States. Collectively, HR Policy's members employ over 12 percent of the United States private sector workforce or some 10 million employees in the U.S. and 19 million worldwide. HR Policy's members have a significant depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of federal labor law policy. Most of HR Policy's member companies are federal contractors. As such, they have a direct and ongoing interest in the proper application and interpretation by the Department and the courts of this Executive Order and its implementing regulations.

Our comments regarding sections of the Proposed Rule that are of particular interest to our members can be found below.

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Proposed Section 471.2 and Appendix A to Subpart A of Part 471 – Posting of Notice and Contract Clause

HR Policy is very concerned about a significant ambiguity and inconsistency in both the Executive Order and the Proposed Rule. The Executive Order has been portrayed as a mere notice-posting requirement. Indeed, in reviewing the Proposed Rule and its preamble, one is be led to believe that contractors would only be subject to the penalties and/or requirements set forth in the Executive Order and Proposed Rule if a contractor either (i) fails to properly comply with the Notice posting requirements set forth in Appendix A (hereinafter "Notice" or "Secretary's Notice"), or (ii) fails to include the appropriate contract clause set forth in Appendix A.[1] The provisions in the Proposed Rule and preamble indicating that the scope of the Executive Order is limited to the two above referenced requirements include, but are not limited to, the following:

- § 471.10 – During a compliance review an evaluation will be made on whether (1) the appropriate Notice is posted properly; and (2) the provisions of such Notice are included in a contractor's subcontracts or purchase orders.[2]

- §471.11 – Complaints may be filed alleging a contractor has failed to post the appropriate Notice in the designated manner and/or has failed to include such Notice in a contractor's subcontracts or purchase orders.[3]

- §471.12 – In case a violation is discovered, a contractor must correct the violation by posting the required Notice and/or amending its subcontracts or purchase orders.[4]

- §471.13 – Enforcement proceedings under the Executive Order will be conducted, for among other reasons, based on a subcontractor's refusal to post the required Notice or include the contract clause in its subcontracts.[5]

[1] Notification of Employee Rights Under Federal Labor Laws, 74 Fed. Reg. 38488 (Aug. 3, 2009) (to be codified at 29 C.F.R. pt. 471). Under Section 471.22, the Proposed Rule also provides that contractors would also be subject to sanctions or penalties if they "fail to take all necessary steps to ensure that no person intimidates, threatens, or coerces an individual for the purpose of interfering with the filing of a complaint, furnishing information,…".

[2] *Id*. at 38499.

[3] *Id*.

[4] *Id*. at 38500.

[5] *Id*.

- Preamble Summary – The Executive Order requires government contracts to contain specific provisions requiring contractors and subcontractors to post the required Notice.[6]

- Preamble Summary – The Executive Order "achieves the goal of notification to employees" by providing the complete text of a contract clause that must be included in all government contracts and through incorporation of the contract clauses, contractors agree to post the Notice in conspicuous places in their establishments.[7]

- Preamble Regulatory Procedures – The Department estimates that contractors will only spend 3.5 hours per year to comply with the requirements of the Executive Order and the Proposed Rules with 90 minutes allotted for contractors to learn about the contract and Notice requirements; 30 minutes to incorporate the contract clauses into each subcontract and explain the clauses to subcontractors; 30 minutes acquiring the Notice; and 60 minutes posting the Notice.[8]

The above referenced provisions of the Proposed Rule seem to strongly indicate that the intent of the Rule is that a contractor would only be subject to sanctions and penalties under the Executive Order and Proposed Rule for failing to post proper Notice or by failing to include the appropriate contract clauses in subcontracts.[9] However, the precise wording of the Executive Order and Proposed Rule creates a significant ambiguity and inconsistency, which the Department must clarify.

Section 471.2 of the proposed rule requires that all government contracts include the contract clauses set forth in Appendix A, which obligates covered contractors to post the Secretary's Notice or "Notice to Employees". Both the Executive Order and paragraph 2 of the contract clause under Appendix A, mandate that contractors "comply with *all provisions in the Secretary's Notice*, and related rules, regulations, and orders of the Secretary of Labor." (emphasis added). A literal reading of this requirement would have a much broader scope in which a contractor could be deemed to violate the Executive Order not only by failing to post the Secretary's Notice or including the required contract clauses in subcontracts, but also, by violating any of the labor laws or rights contained in the Notice.

Such an interpretation is extremely troubling because contractors would be subject to sanctions and penalties under the Executive Order and the Proposed Rule based on violations of federal labor laws. These penalties and sanctions could include, among

[6] *Id*. at 38488.

[7] *Id*. at 38489.

[8] *Id*. at 38494.

[9] *See also*, *supra* n. 1.

other things, having government contracts cancelled or terminated, being debarred from receiving further federal contracts, and being included on a published list of non-complying contractors.

The Department, however, is not authorized to determine whether a contractor has failed to comply with the standards or violated rights set forth in the Secretary's Notice. Congress, instead, vested such authority exclusively in the National Labor Relations Board (NLRB). Similarly, Congress established remedies and sanctions, which are exclusively set forth in the National Labor Relations Act (NLRA). Imposing additional sanctions and remedies based on the Executive Order and Proposed Rule would be an unwarranted expansion of sanctions and remedies for violations of the NLRA by Executive Order and such action is simply unauthorized and inconsistent with congressional intent. For these reasons, the Executive Order, like the steel seizure order in *Youngstown Steel & Tube Co. v. Sawyer*,[10] "directs that a presidential policy be executed in a manner prescribed by the President" in derogation of Congress's "exclusive constitutional authority to make laws."

In the Final Regulations, the Department should clarify the scope of the Executive Order and Regulations by explaining that the purpose of the Executive Order and Regulations are to increase employees' awareness of their rights under federal labor law through posting the Secretary's Notice and by including the required contract clauses in all government contracts. Moreover, the Department should specifically clarify that contractors would not be subject to sanctions and penalties under the Executive Order and the Regulations based on violations of federal labor laws as set forth in the Secretary's Notice.

Proposed Appendix A to Subpart A of Part 471 – Content of the Secretary's Notice

HR Policy is concerned about the content of the "Notice to Employees" proposed for inclusion on the required Notice to employees. The proposed Notice is both over inclusive and under inclusive.

The Secretary's Notice is Over Inclusive and Could Lead to Employees Engaging in Unprotected Activities Subject to Discipline or Termination

The Department's attempt to provide "greater detail of NLRA rights" in order to "more effectively convey such rights to employees"[11] may very well mislead employees. The more detailed approach may lead employees to believe that certain activities are protected under the NLRA when, in fact, they are not. For example, the Notice provides that employees have the right to "[s]trike and picket, unless your union has agreed to a

[10] 343 U.S. 579, 588 (1952).

[11] 74 Fed. Reg. 38490.

no-strike clause *and subject to certain other limitations*."[12] This statement may lead employees to believe they would be engaging in protected activity by participating in an unprotected strike such as an intermittent one. It is longstanding law that such strikes are not protected and employees engaging in such activities may be disciplined.[13] Most employees would not understand the difference between a strike and an intermittent strike but by reading the Notice they very well could be mislead. Thus, even though the notice is intended to advise employees of their rights, it could inadvertently mislead them into situations where they could be lawfully disciplined or even terminated.

The Secretary's Notice also provides that an employer may not prohibit employees "from wearing union hats, buttons, t-shirts, and pins in the workplace *except under special circumstances*…".[14] This declaration may likewise mislead employees by convincing them that they could wear such material in almost all work situations. Most employees, however, would not know the ins-and-outs of the so-called "special circumstances." Consider, for example, an employee who worked for an employer that provided uniforms to employees including shirts and hats. Such an employee, after reading this Notice, may very well believe that instead of wearing the company's uniform as required by company policy, he or she could substitute a union hat and t-shirt for the company attire. Assuming the employer consistently applies the company dress code, such a substitution of attire would not be protected.[15]

The Secretary's Notice Is Under Inclusive

The Notice attempts to provide a detailed list of rights, legal standards and unlawful employer conduct under Section 8 (a) of the NLRA but the Notice fails to offer anything close to a similar list of actions or protections employees have against unlawful union activity under Section 8 (b) of the NLRA. If the purpose of the Notice is to provide greater awareness of rights and protections under the NLRA, then the Notice should also inform employees that they are protected from certain union actions.

HR Policy Association recommends that the Department simply use the statutory language of Sections 7, 8 (a) and 8 (b) in the Notice. It will decrease the chances of employees being misled by the statements in the Notice and it would also provide a more balanced approach to listing employee rights and protections under the NLRA.

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[12] *Id.* at 38499. (emphasis added).

[13] *International Union, U.A.W.A., A.F.L., Local 232 v. Wisconsin Employment Relations Board (Briggs-Stratton)*, 336 U.S. 245 (1949). Intermittent strikes are a series of short-term strikes with little or no notice to the employer. In such situations, employers are unable to predict when and where the strikes may occur and the ability to maintain operations with other non-striking employees such as supervisors or temporary employees is effectively eliminated.

[14] 74 Fed. Reg. 38499.

[15] *See e.g.*, *The Hertz Corp.*, 305 N.L.R.B. 487 (1991).

Proposed Appendix A to Subpart A of Part 471 – Location of Posting

HR Policy is concerned about the Proposed Rule's vagueness regarding where the "Notice to Employees" must be posted. The Executive Order and Proposed Rule directs that the Notice must be posted "in conspicuous places in and about [a contractor's] plants and offices where employees covered by the [NLRA] engage in activities relating to the performance of the contract."[16]

The Proposed Rule Is Vague Regarding When A Contractor Must Post The Notice

The immediate concern is the manner in which "engag[ing] in activities related to the performance of the contract" will be interpreted and enforced. Consider, for example, a contractor that has employees who work at one facility and provide some products and/or services to the contractor's employees working at a different facility and who are working directly on providing the products and/or services under the government contract. These employees use the products and/or services received from the other facility in completing the final product as required under the contract. It seems clear enough from the Proposed Rule that the contractor must post the Notice in the facility where the employees are working directly on products and/or services required under the contract. But it is not at all clear whether the contractor would be required to post the Notice at the other facility, which had some employees who merely provided some products and/or services that went into the final product or service required under the contract. Furthermore, there are numerous other questions that arise from the vague language including:

- Would posting the Notice be required if the employees at the first facility spent only 20 percent of their work time laboring on a product and/or services that would eventually be used in some manner by employees at the second facility as a product and/or service under the contract?

- Would posting the Notice be required if the product and/or service were altered before being used to fill the government contract?

- Would posting the Notice be required for human resource personnel who work at a third location but provide support regarding any human resource issue that may arise at either of the other two facilities?

The Department should clarify the scope of what constitutes "engag[ing] in activities related to the performance of the contract". Specifically, the Department should identify the nexus that must exist between an employee's work and work which constitutes engaging in activities related to the contract before the Notice must be posted.

[16] Exec. Order No. 13496, 74 Fed. Reg. 6107 (Feb. 4, 2009); 74 Fed. Reg. 38498.

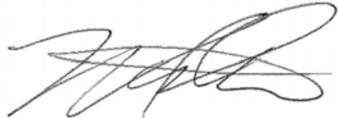
The Language Regarding Posting Is Unclear

The Executive Order and Proposed Rule both mention that a contractor must post the Notice in "all places where notices to employees are customarily posted both physically and electronically."[17] Does the Department intend for the phrase to mean other notices that are permanently posted in a contractor's facilities such as required Equal Employment Opportunity (EEO) notices or would "notices to employees" include a periodic reminder contained in an envelope with an employee's paystub or periodic email to employees? If interpreted broadly, the posting requirement would be extremely burdensome. A reasonable interpretation would be that the Notice must be posted where the contractor posts other required notices, such as EEO notices, or where contractors were required to post *Beck* notices under Executive Order 13201.[18] The preamble to the Proposed Rule, which discusses the amount of time—60 minutes—a contractor will spend complying with the physical and electronic posting requirements further supports a limited interpretation.[19] If the Department adopted an expansive interpretation, contractor would surely spend much more than 1 hour complying with the physical and electronic posting requirements. The Department should adopt a limited interpretation regarding the physical and electronic posting requirements.

Conclusion

HR Policy appreciates the opportunity to comment on the Department's Proposed Rule, and respectfully ask that it clarify and revise the proposal as discussed above.

Respectfully submitted,



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[17] Exec. Order No. 13496, 74 Fed. Reg. 6107; 74 Fed. Reg. 38498.

[18] *See* Exec. Order No. 13201, 66 Fed. Reg. 1121 (Feb. 22, 2001) and the implementing regulations 29 C.F.R. Part 470 (2008), rescinded under Exec. Order 13946, 74 Fed. Reg. 14045 (March 30, 2009).

[19] 74 Fed. Reg. 38494.