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September 2, 2009

VIA INTERNET SUBMISSION

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

**Re: National Industry Liaison Group Comments on
Proposed Rulemaking Implementing Executive Order
13496**

Dear Director Boucher:

The National Industry Liaison Group (“NILG”) Board welcomes the opportunity to comment on the proposed rulemaking implementing Executive Order 13496 concerning the posting of a notice of employee rights under the National Labor Relations Act (hereinafter the “Notice”) in contractor plants and offices and the inclusion of the Notice in applicable government contracts, subcontracts and purchase orders.

By way of background, the NILG was created over 20 years ago as a partnership between the Office of Federal Contract Compliance Programs (“OFCCP”) and federal contractors as a forum for working together towards equality in the workplace. In addition, local Industry Liaison Groups (“ILGs”) throughout the country formed to further this unique partnership of public and private sector cooperation to deal proactively with advancing workplace equal opportunity. Over the years, the NILG and ILGs have reached out to OFCCP and other agencies, such as the EEOC, with mutual goals of fostering a non-discriminatory workplace. The NILG Board is comprised of members of the local ILGs from across the United States.



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We commend the Department of Labor (“DOL”) for proposing regulations that ensure employees are made aware of their rights under the National Labor Relations Act. In our comments below, we offer observations designed to ensure employees are made aware of their rights while at the same time balancing the contractor community’s legitimate interest in minimizing administrative burdens related to the Notice requirement. Our recommendations below seek a fair balance between ensuring appropriate dissemination of the Notice to employees and the contractors’ goal of disseminating that notice with minimal burden.

We have described below our specific comments regarding the proposed regulations.

Two Sections of the Proposed Regulations Are In Apparent Contradiction With Respect To Where Employers Must Post the Notice; To Be Consistent with the Executive Order, the Proposed Regulations Should Be Modified To Consistently Indicate That Contractors Are Required to Post the Notice Only In Plants and Offices Where Employees Engage In Activities Related To the Performance of the Contract

The proposed regulations (hereinafter the “regulations”), as written, contain an apparent inconsistency between two sections in the regulations as well as between one of those sections and Executive Order 13496 itself. Specifically, as described in the Executive Order and in Appendix A to the regulations, contractors are required 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...**” *Executive Order 13496; Appendix A, 29 C.F.R. § 471* (emphasis added). Therefore, pursuant to the Executive Order and the Notice contained in the regulations, employers would be required to post the Notice only in those locations where work is performed relating to the contract.

However, Subpart B (the General Enforcement section), provides that OFCCP will enforce the regulation by evaluating whether the Notice “...is posted in conspicuous places in and about **each of the contractor’s establishments and/or construction work sites...**” *29 C.F.R. § 471.10(b)(1)* (emphasis added). This section suggests that employers must post the Notice in **each location** and that employers will be evaluated by the OFCCP to determine whether they have in fact posted the Notice in “each” location.

In order to clarify which locations employers must post the Notice, the NILG recommends that proposed Section 471.10(b)(1) be modified to provide that OFCCP will evaluate whether the Notice is posted **only** in locations where employees are performing work relating to the contract (consistent with the Executive Order). We propose that Section 471.10(b) be modified, in relevant part, to read:



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LIAISON
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(b) During such an evaluation, a determination will be made whether:

(1) The employee notice required by part 471.2(a) is posted in conspicuous places in and about each of the contractor's establishments and/or construction work sites **where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract...** (emphasis added to identify NILG's proposed additional language).

The proposed language aligns this section with the specific language of the Executive Order and mirrors the Notice language contained in Appendix A to the regulations. Furthermore, adopting the proposed language will eliminate the apparent inconsistency described above and will conform the regulations to the intent and the plain language of the Executive Order.

The Proposed Regulations Should Be Modified To Allow the Notice To Be Included By Reference In Subcontracts and Purchase Orders

The NILG respectfully requests that the DOL reconsider proposed Section 471.2(b) that explicitly prohibits contractors from including the Notice by reference in subcontracts and purchase orders. Instead, contractors must include the Notice language verbatim in subcontracts and purchase orders. This requirement will impose, in our opinion, an unnecessary and unreasonable burden on contractors. For many employers, the requirement to include the Notice language verbatim would result in the need to substantially revise and expand many of their existing procurement documents.

For example, many employers' subcontracts and purchase orders are limited in length to one page. The Notice language is, by itself, nearly two pages long. As a result, the verbatim inclusion of the Notice language will far exceed subcontract and purchase order maximum length for many employers. In addition, the verbatim inclusion of the Notice language often will result in the overall document being dominated by the Notice language alone.

As an alternative, we propose that employers have the option to include by reference the Notice language. Permitting this will still require that employers include the language in all applicable subcontracts and purchase orders, thus putting subcontractors on notice regarding their potential obligations.

Furthermore, allowing the Notice to be included by reference is consistent with the inclusion by reference of many Federal laws that employers are permitted to incorporate by reference in subcontracts and purchase orders. To mandate inclusion of the Notice language verbatim in subcontracts and purchase orders undermines the inclusion by reference of other



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important Federal executive orders and laws, including, to name a few, Executive Order 11246, the Vietnam Era Veterans Readjustment Assistance Act of 1974, the Vocational Rehabilitation Act of 1973, the Federal Acquisition Regulations, the Food, Drug & Cosmetic Act, the Federal Hazardous Materials Transportation Act, the Consumer Product Safety Act, Child Labor and Wage & Hour laws, *etc.* all of which employers are permitted to include by reference in subcontracts and purchase orders.

Finally, inclusion of the Notice language verbatim is not environmentally friendly. In furtherance of the public policy interest of protecting the environment, allowing the inclusion by reference of the Notice language will better preserve paper and trees and protect the environment whereas inclusion of the Notice language verbatim will likely add several pages to applicable subcontracts and purchase orders.

We offer our proposed approach with the intent of balancing the important obligation for employers to make their subcontractors aware of potential obligations under the Executive Order while reducing employer burdens and better protecting the environment. Therefore, NILG respectfully requests that contractors be allowed to include the Notice language by reference in subcontracts and purchase orders.

The Proposed Regulations Should Be Expanded to Clarify That Only those Employers Who “Customarily Post Federal Notices Electronically” Must Also Post the Notice Electronically

The NILG applauds the DOL’s recognition that employers are utilizing technology to facilitate the communication of information to employees. Like the DOL, the NILG encourages employers to enhance the use of technology to streamline communication with employees. However, the NILG asks the DOL to clarify the obligation imposed by the regulations with respect to the mandatory posting of the Notice language electronically in circumstances where employers do not otherwise post federally-mandated employee notices electronically. Since the electronic posting requirement is in addition to posting the Notice in hard copy, the NILG recommends that the additional electronic posting be required of only those employers who “customarily post federal notices electronically” to strike a fair balance between ensuring notice to employees of their rights and the contractors’ goal of disseminating the Notice with minimal burden.

The regulations require that “a contractor or subcontractor who **customarily posts notices to employees electronically** must also post the required notice electronically.” 29 C.F.R. § 471.2(e) (emphasis added). However, the regulations are unclear as to what constitutes a “notice” as used in the above sentence. If the DOL broadly interprets “notice” to include any and all notices contractors provide to employees, then most contractors would be required to post electronically. On the other hand, if the DOL meant only those contractors who already post



NATIONAL
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federal notices, such as what is typically referred to as the Federal “5 in 1” poster, *etc.*, then it is only those same employers who would be obligated to post the Notice electronically. The regulations should be modified to clarify that only those employers who elect to customarily post federal notices electronically must also post the Notice electronically.

In addition, absent further guidance, the requirement that employers display the Notice “prominently” does not provide adequate guidance as to where and how to place the Notice electronically. Most employers’ intranet sites are set up to disseminate an employer’s internal information, such as information on benefits, compensation, promotional opportunities, *etc.* Logistically, most employers will not know where to place the Notice electronically so as to comply with the requirement that it be placed “prominently.” Absent further guidance on how to “prominently” display the Notice electronically, employers may be discouraged from implementing and utilizing extranet websites and email to communicate the Notice to employees (so as to avoid this requirement).

Just as inclusion of the Notice language verbatim in subcontracts and purchase orders could be viewed as undermining other federal executive orders or laws that contractors may include solely by reference, inclusion of the Notice on employer websites places an undue focus on this Notice as compared to other federally-mandated, important employee notices. Other important employee notices such as the Federal “5 in 1” poster, invitation to the disabled to self-identify, invitation to veterans to self-identify, affirmative action/equal employment opportunity policy statement, workers’ compensation, *etc.*, may be given less weight by the additional requirement that employers post ***only this*** Notice electronically. The Executive Order does not suggest that this notice should be given more weight or is of more importance than the aforementioned notices.

Similarly, this additional requirement to post electronically is, for most employers, unnecessary and redundant. Most employees are accustomed to reviewing notices of their rights, including notices concerning union rights, on employee bulletin boards. Requiring that employers provide employees the Notice yet again in electronic format (unless they are the class of employers that customarily posts other Federal notices electronically) is unnecessary. Moreover, the burden to employers to post the notice electronically outweighs the likelihood that the electronic Notice will reach more employees than the hard copy Notice already available to all employees.

For the reasons described above, the NILG respectfully requests that the DOL revise the regulations to require only those employers that elect to provide other Federal notices electronically to post the Notice electronically.

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We would like to thank the DOL in advance for its consideration of our observations. If the DOL should wish to discuss NILG's comments, please contact Mickey Silberman, NILG Board Counsel, to discuss at (303) 225-2400 or silbermm@jacksonlewis.com.

Respectfully submitted,

The National Industry Liaison Group (NILG)