NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS: FINAL RULE REQUIREMENTS

AT A GLANCE

The Issue:
The Department of Labor (DOL) in the May 20 Federal Register published a final rule implementing the requirement of Executive Order 13496 (E.O. 13496) for federal contractors and subcontractors to post notices informing employees of their rights under federal labor laws. The final rule also requires specific employee notice provisions be included in these contracts and subcontracts. The requirements apply to all hospitals that are parties to federal government contracts or subcontracts resulting from solicitations on or after June 21 unless an exemption specified in the rule applies.

This final rule will affect some hospitals that have prime contracts with federal agencies, such as the Department of Veterans Affairs, the Indian Health Service, the Bureau of Prisons or the Department of Defense. In addition, DOL asserts – incorrectly, we believe – that some other hospitals are subcontractors because they are providers under certain federal employee health benefit plans. For example, DOL has asserted in various proceedings that hospitals participating as an HMO-style provider in the Federal Employee Health Benefits Program or Tricare are federal "subcontractors."

Our Take:
Unfortunately, the final rule retains language in the employee notice that is over-broad and/or that inaccurately states coverage and requirements of the National Labor Relations Act (NLRA) as applied to health care. These inaccuracies could inadvertently encourage employees to engage in activities that are not protected by the NLRA and, thereby, violate lawful hospital policies.

What You Can Do:
✔ Share this advisory with your senior management team, including your human resources officer, legal counsel and contracts management staff.
✔ Determine, in consultation with legal counsel, whether your organization is a federal contractor subject to requirements of the Executive Order and the final rule.
✔ If your organization is determined to be a federal contractor, obtain and appropriately post the required Notice of Employee Rights. In addition, implement policies and procedures to ensure that your organization includes the required employee notice provision, either directly or by reference, in all subcontracts necessary to your hospital’s performance of any primary federal contract.

Further Questions:
Please contact Lawrence Hughes, assistant general counsel, at (202) 626-2346 or lhughes@aha.org.

AHA's Legal Advisories are produced whenever there are significant developments that affect the job you do in your community. A seven-page, in-depth examination of this issue follows.
NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS: FINAL RULE REQUIREMENTS

BACKGROUND

The Department of Labor (DOL) in the May 20 Federal Register published a final rule requiring federal contractors and subcontractors with whom the federal contractor does business to post notices informing employees of their rights under federal labor laws. The final rule also requires that a specific employee notice provision be included in these contracts and subcontracts. This final rule implements Executive Order 13496 (E.O. 13496), which was signed by President Obama on January 30, 2009. E.O. 13496 is intended to ensure that “workers are well informed of their rights under federal labor laws, including the National Labor Relations Act” (NRLA).

Although receipt of federal payments under the Medicare and Medicaid programs does not confer contractor status on a hospital, see Order No. ADM 93-1/JUR by OFCCP Acting Director Leonard J. Biermann (Dec. 16, 1993), hospitals that have prime contracts with federal agencies such as the Department of Veterans Affairs, the Indian Health Service, the Bureau of Prisons, or the Department of Defense are federal contractors. In addition, other hospitals have been asserted – incorrectly, we believe – to be subcontractors because they are providers under certain federal employee health benefit plans. For example, DOL has long asserted that a hospital participating as an HMO-style provider in the Federal Employee Health Benefits Program or Tricare is a federal "subcontractor." As a result, some hospitals are covered by the requirements of the final rule even without a written government contract.

The final rule applies to all contracts or subcontracts that are entered into as a result of contract solicitations dated June 21, 2010 or later. Penalties for violating the requirements include fines, suspension or cancellation of all current federal contracts and debarment from future federal contracts.

AT ISSUE

Unfortunately, the final rule retains in the notice that must be posted language that is over-broad and/or that inaccurately states coverage and requirements of the NLRA. The AHA and its personal membership group the American Society
for Healthcare Human Resources Administration (ASHHRA) raised concerns about this notice language in a September 1, 2009 letter to Secretary of Labor Hilda Solis. As our letter suggested, "[t]hese inaccuracies could inadvertently encourage employees to engage in activities that are not protected by the NLRA. The result would be increased conflict between labor and management and a threat to the job security of employees who engage in activities that violate lawful employer policies."

The final rule fails to ensure that the notice, which ultimately will be seen and read by millions of American employees, including many who work for hospitals and health care systems, accurately reflects current law. Precisely, the following concerns about the language of the required employee notice remain.

**Solicitation and Distribution.** The AHA’s comments noted that the statement that employees have an unqualified right to solicit in "non-working time" and to distribute literature in "non-working time" and "non-work areas" is misleading for the health care industry. To the contrary, the U.S. Supreme Court has held that the NLRA should not be interpreted to permit such activities in immediate patient care areas or when they otherwise disrupt patient care. DOL quotes the AHA’s suggested addition to the notice, and even agrees that our statement of the law is accurate: "More specifically, the Department recognizes that under the NLRB’s precedent, a hospital's prohibition of solicitation or distribution of literature in immediate patient care areas, even during employees' non-working time, is presumptively lawful."

However, DOL states that "the limitations on the format preclude the inclusion of factual permutations in which a general right may not apply or may only apply with qualifications, and hospital employees, as well as other employees, can contact the NLRB with specific questions about the lawfulness of their employers' rules governing solicitation and literature distribution." Although in this case space did not allow an accurate description, DOL nonetheless had no problem lengthening this same section of the notice to make clearer which times are "non-work times" and which places are "non-work areas" – changes requested by labor. The final notice states that it is illegal for employers 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 lot or break rooms."

**Union Insignia in the Workplace.** The AHA’s comments noted that the section of the poster regarding union pins and other insignia correctly noted that the same could be prohibited in patient care areas, but that it again failed to explicitly recognize the importance of restrictions in the "immediate patient care area." However, acting upon comments from organized labor, the original proviso now has been eliminated from the notice. DOL states: "For reasons of format, the notice cannot accommodate those comments suggesting that this provision specify those cases in which the Board has found ‘special circumstances’ to exist..."
The lengthy list supplied by some comments highlights that the addition of only one example of ‘special circumstances’ – the patient care example – may mislead or confuse employees. Thus, the general caveat that special circumstances may defeat the application of the general rule, coupled with the advice of employees to contact the [National Labor Relations Board (NRLB)] with specific questions about particular issues, achieves the balance required for an employee notice of rights about union insignia in the workplace.”

**Exemption from Posting Requirement for Non-NLRA Employers.** The AHA’s comments also requested that the regulations expressly state that they do not apply to any "employer" not covered by the NLRA. As the AHA pointed out, while the list in the proposed rule of employers who are not subject to the notice-posting requirement was essentially correct, it overlooked that there are a wide range of employers who are not subject to NLRA jurisdiction due to policy or administrative considerations rather than a statutory exemption. The specific concern was health care institutions with small gross revenue that are exempt from NLRB’s jurisdiction by *East Oakland Health Alliance*, 218 NLRB 1270 (1975), and religious institutions, which in some circumstances are not covered by the NLRA as a matter of constitutional law. DOL does not acknowledge these comments and keeps the original list from the proposed rule that identifies 11 categories of employers, which tracks only those employers that are exempt from the NLRA by virtue of Sections 2(2) and (3). DOL does state that it will not require the notice to be posted by any employer not actually subject to NLRB jurisdiction, however.

Overall, DOL did very little to address general management concerns in the final rule other than some fairly minor editing and increasing the number of illegal union activities that are also given as examples of NLRA violations (the initial draft only included one example of a union violation of the law). Specifically, DOL added as examples of illegal union activity that it would be unlawful for a union to "Cause or attempt to cause an employer to discriminate against you because of your union-related activity [or] Take other adverse action against you based on whether you have joined or support the union."

In addition, despite employer group requests that it do so, DOL did not revive the "Beck notice" as part of the notice. Under *Communication Workers v. Beck*, 487 U.S. 735 (1988), employees are permitted to seek reimbursement of that portion of dues or fees collected under a union security clause in a collective bargaining agreement that is not used for collective bargaining, contract administration or grievance adjustments. DOL explained that “further explication of *Beck* rights will not be included because of space limitations and because of the policy choice, as expressed in Executive Order 13496, to revoke a more explicit notice to employees of *Beck* rights,” citing Sec. 13, E.O. 13496, 74 FR at 6110.
Generally, under the final rule, a federal contractor must comply with two specific obligations:

- Posting a specific notice of employee rights under federal labor laws; and
- Obligating certain subcontractors to do the same by including a specific employee notice clause in any subcontracts that are necessary to the contractor's performance of any of its primary government contracts.

However, the rule provides for certain limited exemption from its obligations, including for:

- Primary government contracts – but not subsequent subcontracts that flow from those primary contracts – that involve purchases below the simplified acquisition threshold set by Congress under the Office of Federal Procurement Policy Act, 41 USC 403. Sec. 2, 74 FR at 6107. Currently, that threshold is set at $100,000. Contracts for supplies or services simply designed to avoid application of the rule do not qualify for the exemption.
- Government contracts that resulted from a solicitation issued before the rule's effective date.
- Subcontracts of $10,000 or less in value, provided that they were not designed to procure supplies or services simply to avoid application of the rule.
- Contracts and subcontractors for work performed exclusively outside U.S. territorial limits.

In addition, the director of the DOL's Office of Labor-Management Standards may permit federal departments or agencies to exempt particular contracts and subcontractors (or any class of them) from the requirements of the rule if: (1) application of any of the requirements would not serve its purpose or would impair the government's ability to obtain goods or services efficiently and economically; or (2) special circumstances require an exemption to meet a national interest. However, the department or agency must apply in writing for an exemption. Approval of an exemption may be withdrawn any time as necessary or appropriate to achieve the purposes of the Executive Order and the final rule.

**Notice Posting Requirements.** The prescribed Notice of Employee Rights must be posted both physically and electronically. One method may NOT be used in lieu of, or as a substitute for, the other.

**Physical posting.** The employee notice must be displayed in 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.
In addition, the notice must be displayed where employees covered by the NLRA engage in activities relating to the performance of the contract. An employee is engaged in activities relating to the performance of the contract if:

- The employee's duties include work that fulfills a contractual obligation, or that is necessary to, or that facilitates, performance of the contract or any of its provisions; or
- Any costs of the employee’s position is allowable as a cost of the contract under the principles set forth in the Federal Acquisition Regulation at 48 CFR Ch. 1, part 31, unless the cost of the position was not allocable in whole or in part as a direct cost to any Government contract, and only a de minimis (less than 2 percent) portion of the cost of the position was allocable as an indirect cost to government contracts, considered as a group.

Where a significant portion of a contractor’s workforce is not proficient in English, the notice must be provided in the language(s) the employees speak.

**Electronic posting.** The required notice also must be posted electronically where the contractor or subcontractor customarily posts notices to employees electronically. This means, a link to DOL’s website that contains the full text of the poster must be included prominently on any website 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. The link must read: “Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers.” It should be “no less prominent” than any other notices to employees.

Where a significant portion of a contractor’s workforce is not proficient in English, the link to DOL’s website must contains the full text of the poster in the language the employees speak, which the Office of Labor-Management Standards will provide translations of the link to DOL’s website to be displayed on the contractor's or subcontractor's website.

**Obtaining copies of the notice.** The final text of the notice is found on Page 28399 of the final rule in Appendix A to Subpart A. However, copies of the employee notice for physical posting, including translations in languages other than English, generally are provided by the federal contracting agency. However, copies also may be obtained from:

Division of Interpretations and Standards  
Office of Labor-Management Standards  
U.S. Department of Labor  
200 Constitution Avenue, N.W., Room N-5609,  
Washington, DC  20210
or from any field office of the Office of Labor-Management Standards or the Office of Federal Contract Compliance Programs. The notice also may be downloaded at http://www.dol.gov/olms/regs/compliance/EO13496.htm. In addition, contractors may reproduce and use exact duplicative copies of the official poster.

**Required Contractual Language.** Unless an exception applies, all government contracts and subcontracts that are necessary to the performance of the primary government contract are required to include the lengthy employee notice clause set out in Appendix A to Subpart A of Part 471. However, the clause does not have to be quoted verbatim in contracts, subcontracts or purchase orders. Incorporation by reference to “29 CFR Part 471, Appendix A to Subpart A” is permissible.

Under the final rule, the director of DOL’s Office of Labor-Management Standards is authorized to issue promptly any rules, regulations or orders that might be needed to ensure that contracts continue to include appropriate language to achieve the purposes of the Executive Order and the final rule, should a change in law, clarification by the courts or the NLRB, or other circumstances necessitate modification of the required contractual provision. The AHA will keep you apprised of any such rules, regulations or orders.

**NEXT STEPS**

Determining, in consultation with your organization’s legal counsel, whether your hospital is a federal contractor subject to requirements of the Executive Order and the final rule is an important first step toward compliance. With the availability of federal stimulus dollars for hospitals, it is especially important for hospitals to review during 2010 their contracts and grants to determine whether the hospital has federal contractor status.

But every health care employer also should consider whether it is connected to another entity’s primary government contract or grant. Certain recent developments in the law may expand the definition of federal contractor and subcontractor to include hospitals and other health care organizations that provide medical services to federal employees through a health maintenance organization (HMO). These requirements have been asserted against hospitals that had no written agreement with the federal government and, indeed, had never received prior notice that they were deemed parties to a government contract or subcontract. The September 2009 issue of the AHA’s *Health Care Labor Report* includes an article titled “Federal Contractor Status: The Changing Regulatory Landscape,” which provides a more in-depth examination of a new Administrative Review Board (ARB) case that could impact whether a health care employer is considered a federal contractor. *Health Care Labor Report* is a
In addition, hospitals will need to implement policies and procedures to ensure that they include the required employee notice provision, either directly or by reference, in all subcontracts that are necessary to the hospital's performance of any of its own primary federal contracts.

Finally, hospitals should be aware that the director of DOL's Office of Federal Contract Compliance Programs (OFCCP) may conduct a compliance evaluation to determine whether a federal contractor is in compliance with the requirements of the final rule. The evaluation may be a specific examination of compliance with the final rule or done in conjunction with evaluations under other laws, Executive Orders or regulations enforced by the OFCCP and/or DOL. Also, an employee may file a complaint alleging that a contractor has failed to post the employee notice as required by the rule or to include the notice clause in its relevant subcontracts or purchase orders.

If a violation of the requirements is found, the director of OFCCP will make reasonable efforts to secure compliance through a conciliation process. This means, the contractor will be required to correct the specific violation by, for example, appropriately posting the required notice and/or amending its subcontracts or purchase orders to include the notice clause. The contractor also must commit, in writing, not to repeat the violation. Only if conciliation efforts are unsuccessful will other actions be taken against a contractor, including, for example, the imposition of fines, suspension or cancellation of all current federal contracts and/or debarment of the contractor from future federal contracts.

Questions about the rule and this Advisory should be referred to Lawrence Hughes, AHA assistant general counsel, at (202) 626-2346 or lhughes@aha.org.