



Federal Court Upholds Federal Contractor Union Notice Requirement

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On May 20, 2010, the U.S. Department of Labor (DOL) issued its final Regulation implementing Executive Order (EO) 13496. The Order requires non-exempt federal contractors and subcontractors to post a notice informing employees of their rights under the National Labor Relations Act (NLRA). Essentially, it states that employees have the right to organize or join a union, bargain collectively, strike and picket, or choose not to do any of those activities. The notice also lists the obligations of employers and unions under the NLRA.

After DOL issued the Regulation, trade groups representing government contractors challenged it in federal court, claiming that the posting requirement violates employers' First Amendment rights. On May 7, 2015, the Federal District Court for the District of Columbia rejected those challenges.

First, the Court found that the requirement does not violate employers' First Amendment rights. Initially, the Court opined that the rule does not compel a federal contractor to speak at all. According to the Court, a contractor has a choice between posting the notice or foregoing performance of federal contracts. Additionally, the Court noted that the rule does not interfere with an employer's right to express its views on union organizing. "Indeed, nothing in the rule prevents a contractor from creating its own posting" and placing it next to the notice.

Second, the Court held that the *NAM v. NLRB* decision of the District of Columbia Circuit Court of Appeals does not compel a finding that the DOL's rule is unconstitutional. In *NAM*, the Court held that the NLRB's notice (which is substantially identical to the DOL's notice) violated § 8(c) of the NLRA. Because the *NAM* decision was based on § 8(c) of the NLRA (the so-called "free speech" provision) rather than the First Amendment, the Court declined to find that it required a determination that the DOL rule violates the First Amendment.

Third, the Court held that the President did not exceed his authority under the Federal Procurement Act by issuing EO 13496. Relying on an earlier decision that found the Procurement Act authorized an EO requiring contractors to post a notice informing employees of their right to refrain from joining a union, the Court held that EO 13496 was, similarly, a valid exercise of Presidential authority under the Procurement Act. The Court also relied on that case in holding that the posting rule has a sufficiently close nexus to procurement policy that it was not “arbitrary and capricious.”

Finally, the Court found that the NLRA did not preempt the DOL’s authority to require the posting.

Bottom Line

If you are a federal contractor covered by the DOL’s notice posting rule, continue to post the notice. You may, however, want to consider posting the Beck Notice, which stemmed from President George W. Bush’s EO requiring federal contractors to post a notice informing employees of their right not to join a labor union and not to pay fees for union expenses unrelated to labor representation matters. Although one of President Obama’s first EOs revoked the Beck Notice requirement, federal contractors may still *voluntarily* post such a notice.

For more information, please contact [D. Patton Pelfrey](#), [Lacey A. Napper](#), or any other attorney in the Frost Brown Todd [Labor and Employment](#) practice group.

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