



Before the
United States Department of Labor
Office of Labor-Management Standards

Notice of Proposed Rulemaking
29 CFR Part 471
Notification of Employee Rights Under Federal Labor Laws

RIN 1215-AB70

Comments of
Associated Builders and Contractors, Inc.

Associated Builders and Contractors, Inc. (ABC) submits the following comments in response to the above-referenced notice of proposed rulemaking (NPRM) published on page 38488 of the *Federal Register* of August 3, 2009.

The purpose of the rulemaking is, according to the NPRM, “to implement Executive Order 13496,” 74 Fed. Reg. at 38488, which, among other things, “requires nonexempt Federal departments and agencies to include within Government contracts specific provisions requiring that contractors and subcontractors with whom they do business post notices informing their employees of their rights as employees under the Federal labor laws.” *Id.* According to NPRM, the Executive Order requires the Secretary of Labor (hereinafter referred to as “DOL” or the “Department”) “to prescribe the size,

form, and content of the notice that must be posted by a contractor under paragraph 1 of the contract clause described in section 2 of the Order.” *Id.*

COMMENTS

A. **About Associated Builders and Contractors, Inc.:** ABC is a national construction industry trade association representing 25,000 individual employers in the commercial and industrial construction industry. ABC represents both general contractors and subcontractors throughout the United States. The majority of ABC’s member companies are “merit shop” companies, who support and practice full and open competition, without regard to labor affiliation. The merit-shop philosophy helps ensure that taxpayers and consumers alike receive the most for their tax and construction dollars.

Conservatively, ABC’s members employ more than 2.5 million skilled construction workers whose training, skills, and experience span all of the twenty-plus skilled trades that comprise the construction industry. The Bureau of Labor Statistics (BLS) most recent report states that the non-union private sector workforce in the construction industry comprises more than eighty four (84) percent of the total industry workforce.¹

ABC includes among its members many larger construction companies who have contracted directly with the federal government for many years in the successful construction of large projects of the type that will be covered by the proposed rule. At the same time, the proposed rule will obviously affect a significant number of subcontractors, many of which will be small businesses. In fact, the great majority of ABC’s contractor

¹ See bls.gov “*Union Members Summary*” (Jan. 2009).

members are classified as small businesses by the Small Business Administration.²

Accordingly, a significant number of ABC's members will be affected by the proposed rule.

For the reasons discussed below, ABC and its members, both large and small, have a number of concerns with the proposed rule and the manner in which it seeks to implement Executive Order (EO) 13496 and urge the Department to make a number of revisions to the proposed rule before a final rule is published.

B. ABC's specific comments and recommendations regarding the proposed rule:

1. **The proposed language in Appendix A that employers would have to conspicuously post and also be included in government contracts is preempted by the National Labor Relations Act and needs to be revised.** Although EO 13496 does not expressly say so, it is clear that the model upon which it is based, *i.e.*, the President's assertion of authority under the Procurement Act "to ensure the economical and efficient administration and completion of Government contracts," was EO 13201 (Beck Order), which EO 13496 expressly revoked. However, while there may arguably be a few similarities between the two executive orders, the substance and detail of EO 13496 and, in turn, the Department's proposed regulations to implement EO 13496, go well beyond the sum and substance of the Beck Order and seek to influence the outcome of labor management relations in a manner that exceeds the authority which the President and Department assert under the Procurement Act and is also preempted by the National Labor

² According to the Small Business Administration, the construction industry has one of the highest concentrations of small business participation; more than 86 percent. *The Small Business Economy: A Report To The President*, U.S. Small Business Administration, Office of Advocacy (2009), at 8.

Relations Act (NLRA).³ In particular, by providing select details on a subset of the rights protected by the NLRA, the proposed posting is likely to create confusion over the rights and obligations created by the Act, which is also contrary to the intent of the Executive Order.

Section 1 of EO 13496 states in relevant part that the

Federal Government has a proprietary interest in ensuring that [Federal] contracts will be performed by contractors whose work will not be interrupted by labor unrest. The attainment of industrial peace is most easily achieved and workers' productivity is enhanced when workers are *well informed of their rights* under the Federal labor laws, including the National Labor Relations Act.

(Emphasis added.)

Implicit in the Order's statement regarding the need for workers to be "well informed of their rights" is that the information which is to be conveyed to workers needs to be accurate and presented in a manner which is balanced and impartial; not in a manner which infers or expresses a preference for a specific outcome.⁴ Indeed, the need for such accuracy, balance and impartiality in the articulation of worker rights was clearly what Congress intended. As section 1(b) of the Labor Management Relations Act, 1947, 29 U.S.C. § 141(b) states:

Industrial strife which interferes with the normal flow of commerce and with the full protection of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

³ See discussion in subsection 4, *infra*.

⁴ It is noteworthy that the Department's conception of "balance" concerns solely "whether the notice achieves the desired balance between providing an overview of employee rights under the Act and limiting unnecessary and distracting information." 74 Fed. Reg. at 38490.

It is the purpose and policy of this chapter, on order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

It is clear that the authors of the Beck Order understood this long-standing Congress policy and therefore crafted the specific language which was to be contained in the Beck Order “Notice to Employees” in a narrow, precise and unambiguously neutral fashion which the language proposed in Appendix A and also Appendix B lack.⁵ The Beck Order was intended and crafted solely for the purpose of advising employees of a particularly specific right they have with respect to their dues payments, which the Supreme Court found was necessary to clarify in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) (Beck). The regulations promulgated specifically to implement the Beck Order kept within that narrow and limited focus.

The “Notice to Employees” (Notice) which the Department is now proposing to adopt as Appendix A takes the exact opposite approach. Without providing any empirical evidence to justify its conclusion, the NPRM advises “the Department does not believe that posting the statutory language itself or a simplified list of rights in a notice will be likely to convey the information necessary to best inform employees of their rights under the [National Labor Relations] Act.” 74 Fed. Reg. at 38490. As the NPRM goes on to say, *id.*, the Notice proposed by the Department:

contains greater detail of NLRA rights, derived from Board or court decisions – which will more effectively convey such rights to employees. A

⁵ ABC has separate concerns regarding the wording of the notice proposed in Appendix B. ABC’s concerns regarding Appendix B begin on page 16, below.

more complete and readable text will also better enable employees to apply the rights to actual workplace situations. Additionally, employees will be better apprised of their rights under the NLRA if the notice also contains examples of general circumstances, also derived from Board or court decisions further implementing section 7 and other provisions of the NLRA, that constitute violations of their rights under the Act. With the above principles in mind, the Department devised a notice that provides employees with a more than rudimentary overview of their rights under the NLRA, in a user-friendly format, while simultaneously not overwhelming employees with information that is unnecessary and distracting in the limited format of a notice.

ABC disagrees with the Department's conclusion that the detailed language proposed in Appendix A is necessary because posting the statutory language itself or a simplified list of rights would be insufficient. To the contrary, we believe the posting the Department proposes, which contains summaries with select details on a subset of the rights protected by the NLRA, will likely create greater confusion over the rights and obligations created by the Act. Moreover, ABC believes the Department does not have the authority under the Procurement Act or the National Labor Relations Act to mandate language which is as detailed or as specific as Appendix A proposes. These latter two issues are discussed separately in these comments, in subsection 4, *infra*.

The NLRA and the over 70 years of National Labor Relation Board (Board or NLRB) and court decisions interpreting the Act have created an extremely complicated body of law which cannot be easily summarized or simplified into a poster or contract clause. Adding to the current complexity is that fact that the NLRA is continuously being interpreted and reinterpreted by the Board and the courts.

The NLRB's Office of General Counsel highlights the risk of such summaries in the Forward to its *Basic Guide to the National Labor Relations Act*:⁶

⁶ The *Basic Guide* can be downloaded from the NLRB's website at http://www.nlr.gov/nlr/shared_files/brochures/BasicGuide.html#UnionSecurity

The Regional Offices of the National Labor Relations Board have found that, more than six decades after its enactment, there is still a lack of basic information about the National Labor Relations Act. *Staff members have expressed a need for a simply stated explanation of the Act to which anyone could be referred for guidance.* To meet this demand, the basic law under the Act has been set forth in this pamphlet in a nontechnical way so that those who may be affected by it can better understand what their rights and obligations are.

Any effort to state basic principles of law in a simple way is a challenging and unenviable task. This is especially true about labor law, a relatively complex field of law. Anyone reading this booklet must bear in mind several cautions.

First, it must be emphasized that the Office of the General Counsel does not issue advisory opinions and this material cannot be considered as an official statement of law. It represents the view of the Office of the General Counsel as of the date of publication only. *It is important to note that the law changes and advances. In fact, it is the duty of the Agency to keep its decisions abreast of changing conditions, yet within the basic statute. Accordingly, with the passage of time no one can rely on these statements as absolute until and unless a check has been made to see whether the law may have been changed substantially or specifically.*

Furthermore, these are broad general principles only and countless subprinciples and detailed rules are not included. Only by evaluation of specific fact situations in the light of current principles and with the aid of expert advice would a person be in a position to know definitely where the proposed conduct may fit under the statute. No basic primer or text can constitute legal advice in particular fact situations. This effort to improve basic education about the statute should not be considered as such. *Many areas of the statute remain untested.* Legal advisers and other experts can find the total body of “Board law” reported in other Agency publications.

(Emphasis supplied.)

The NLRB has itself applied the same logic as its General Counsel and followed virtually the General Counsel’s same path in the Board’s articulation of employee rights under the NLRA on the Board’s website. The Board’s webpage on Employee Rights provides the following overview:⁷

⁷ See http://www.nlr.gov/workplace_rights/employee_rights.aspx.

The National Labor Relations Act extends rights to many private-sector employees including the right to organize and bargain with their employer collectively. Employees covered by the Act are protected from certain types of employer and union misconduct and have the right to attempt to form a union where none currently exists.

Examples of Your Rights As An Employee Under the NLRA Are:

- Forming, or attempting to form, a union among the employees of your employer.
- Joining a union whether the union is recognized by your employer or not.
- Assisting a union in organizing your fellow employees.
- Engaging in [protected concerted activities](#). Generally, "protected concerted activity" is group activity which seeks to modify wages or working conditions.
- Refusing to do any or all of these things. However, the union and employer, in a State where such agreements are permitted, may enter into a lawful [union-security clause](#) requiring employees to pay union dues and fees.

The NLRA forbids employers from interfering with, restraining, or coercing employees in the exercise of rights relating to organizing, forming, joining or assisting a labor organization for collective bargaining purposes, or engaging in protected concerted activities, or refraining from any such activity. Similarly, labor organizations may not restrain or coerce employees in the exercise of these rights.

While the Department may believe it is prudent to provide more detailed information to employees than has been approved by the NLRB, it is in fact the NLRB and not the Department which has been vested by Congress and the courts with the **exclusive** authority to make such a regulatory determination under the NLRA. Moreover, the Department's additional information would provide no greater clarity nor address the General Counsel's concern regarding the "countless subprinciples and detailed rules [that] are not included." Consequently, the Department's approach invites employee misunderstanding of the law, particularly its complexities and nuances, and thereby risks confounding relations between employees and their employers, leading to less procurement

economy and efficiency and the likely promotion of the very labor concerns that EO 13496 claims it was hoping to prevent.

For example, under the Notice proposed by the Department employees would be told they have a right to “[s]trike and picket, unless your union has agreed to a no-strike clause and subject to certain other limitations. In some circumstances, your employer may permanently replace strikers.” 74 Fed. Reg. at 38499. The Department’s Notice would, however, fail to advise employees of how complex these two rights – striking and picketing – are and the exposure that employees can face if not properly exercised. By contrast, General Counsel provides the following discussion of these rights in the *Basic Guide to the National Labor Relations Act*, under the heading Summary of the Act⁸:

The Right to Strike. Section 7 of the Act states in part, “Employees shall have the right. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Strikes are included among the concerted activities protected for employees by this section.

Section 13 also concerns the right to strike. It reads as follows:

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

It is clear from a reading of these two provisions that: the law not only guarantees the right of employees to strike, but also places limitations and qualifications on the exercise of that right. See for example, restrictions on strikes in health care institutions, page 32.

Lawful and unlawful strikes. The lawfulness of a strike may depend on the object, or purpose, of the strike, on its timing, or on the conduct of the strikers. The object, or objects, of a strike and whether the objects are lawful are matters that are not always easy to determine. Such issues often have to be decided by the National Labor Relations Board. The consequences can be severe to striking employees and struck employers, involving as they do questions of reinstatement and backpay.

⁸ http://www.nlr.gov/nlr/shared_files/brochures/BasicGuide.html#UnionSecurity The full text of the *Guide*’s discussion of an employee’s right to strike and picket is provided here to demonstrate precisely how complicated this issue is, even for the Board’s General Counsel. That even good faith efforts to summarize rights arising under the NLRA can easily result in doing more bad than good by, for example, creating in employees a false belief that they can rely entirely upon a summary description of rights, especially when it is accompanied by examples.

It must be emphasized that the following is only a brief outline. A detailed analysis of the law concerning strikes, and application of the law to all the factual situations that can arise in connection with strikes, is beyond the scope of this material. Employees and employers who anticipate being involved in strike action should proceed cautiously and on the basis of competent advice.

Strikes for a lawful object. Employees who strike for a lawful object fall into two classes “economic strikers” and “unfair labor practice strikers.” Both classes continue as employees, but unfair labor practice strikers have greater rights of reinstatement to their jobs.

Economic strikers defined. If the object of a strike is to obtain from the employer some economic concession such as higher wages, shorter hours, or better working conditions, the striking employees are called economic strikers. They retain their status as employees and cannot be discharged, but they can be replaced by their employer. If the employer has hired bona fide permanent replacements who are filling the jobs of the economic strikers when the strikers apply unconditionally to go back to work, the strikers are not entitled to reinstatement at that time. However, if the strikers do not obtain regular and substantially equivalent employment, they are entitled to be recalled to jobs for which they are qualified when openings in such jobs occur if they, or their bargaining representative, have made an unconditional request for their reinstatement.

Unfair labor practice strikers defined. Employees who strike to protest an unfair labor practice committed by their employer are called unfair labor practice strikers. Such strikers can be neither discharged nor permanently replaced. When the strike ends, unfair labor practice strikers, absent serious misconduct on their part, are entitled to have their jobs back even if employees hired to do their work have to be discharged.

If the Board finds that economic strikers or unfair labor practice strikers who have made an unconditional request for reinstatement have been unlawfully denied reinstatement by their employer, the Board may award such strikers backpay starting at the time they should have been reinstated.

Strikes unlawful because of purpose. A strike may be unlawful because an object, or purpose, of the strike is unlawful. A strike in support of a union unfair labor practice, or one that would cause an employer to commit an unfair labor practice, may be a strike for an unlawful object. For example, it is an unfair labor practice for an employer to discharge an employee for failure to make certain lawful payments to the union when there is no union-security agreement in effect (Section 8(a)(3)). A strike to compel an employer to do this would be a strike for an unlawful object and, therefore, an unlawful strike. Strikes of this nature will be discussed in connection with the various unfair labor practices in a later section of this guide.

Furthermore, Section 8(b)(4) of the Act prohibits strikes for certain objects even though the objects are not necessarily unlawful if achieved by other means. An example of this would be a strike to compel Employer A to cease doing business with Employer B. It is not unlawful for Employer A

voluntarily to stop doing business with Employer B, nor is it unlawful for a union merely to request that it do so. It is, however, unlawful for the union to strike with an object of forcing the employer to do so. These points will be covered in more detail in the explanation of Section 8(b)(4). In any event, employees who participate in an unlawful strike may be discharged and are not entitled to reinstatement.

Strikes unlawful because of timing—Effect of no-strike contract. A strike that violates a no-strike provision of a contract is not protected by the Act, and the striking employees can be discharged or otherwise disciplined, unless the strike is called to protest certain kinds of unfair labor practices committed by the employer. It should be noted that not all refusals to work are considered strikes and thus violations of no-strike provisions. A walkout because of conditions abnormally dangerous to health, such as a defective ventilation system in a spray-painting shop, has been held not to violate a no-strike provision.

Same—Strikes at end of contract period. Section 8(d) provides that when either party desires to terminate or change an existing contract, it must comply with certain conditions. If these requirements are not met, a strike to terminate or change a contract is unlawful and participating strikers lose their status as employees of the employer engaged in the labor dispute. If the strike was caused by the unfair labor practice of the employer, however, the strikers are classified as unfair labor practice strikers and their status is not affected by failure to follow the required procedure.

Strikes unlawful because of misconduct of strikers. Strikers who engage in serious misconduct in the course of a strike may be refused reinstatement to their former jobs. This applies to both economic strikers and unfair labor practice strikers. Serious misconduct has been held to include, among other things, violence and threats of violence. The U.S. Supreme Court has ruled that a “sitdown” strike, when employees simply stay in the plant and refuse to work, thus depriving the owner of property, is not protected by the law. Examples of serious misconduct that could cause the employees involved to lose their right to reinstatement are:

- Strikers physically blocking persons from entering or leaving a struck plant.
- Strikers threatening violence against nonstriking employees.
- Strikers attacking management representatives.

The Right to Picket. Likewise the right to picket is subject to limitations and qualifications. As with the right to strike, picketing can be prohibited because of its object or its timing, or misconduct on the picket line. In addition, Section 8(b)(7) declares it to be an unfair labor practice for a union to picket for certain objects whether the picketing accompanies a strike or

not. This will be covered in more detail in the section on union unfair labor practices.⁹

ABC believes that the empirically-based, measured approach that the Board and its General Counsel have each intentionally taken is the best and most appropriate approach to ensure that employees are “effectively” informed of their rights, which the NPRM claims is the Department’s goal. 74 Fed. Reg. at 38490. Because of the NLRA’s continuous state of flux, the “more complete and readable text,” *id.*, proposed by the Department will not “better enable employees to apply the rights to actual workplace situations.” *Id.* Indeed, the Department’s approach ignores one of the many sound admonitions expressed by the General Counsel in the *Basic Guide to the National Labor Relations Act*: “Only by evaluation of specific fact situations in the light of current principles and with the aid of expert advice would a person be in a position to know definitely where the proposed conduct may fit under the statute.” *Supra*, at 7.

The Board and its General Counsel correctly recognize the NLRA’s significant complexity and ever-changing landscape and, for sound practical purposes, that examples will only as good as the facts to which they may be later applied. The Board and General Counsel’s philosophy, that it is far better to advise employees to contact the NLRB or seek other fact-based competent advice when they have questions concerning their rights in a particular instance before they act unilaterally, is far sounder and much more appropriate than the path proposed by the Department.

⁹ While ABC has highlighted here the discrepancy between the proposed Notice description of the rights to strike and picket and the more accurate description of those rights by the NLRB, this is hardly the only discrepancy between the Department’s proposed Notice and the NLRB’s publications. Without itemizing every such similar discrepancy, suffice it to say that the proposed Notice’s description of other employee rights is replete with similar departures from and oversimplifications of the NLRA, as expressed by the NLRB. Each of these discrepancies is objectionable and should be withdrawn.

For the foregoing reasons, therefore, ABC is opposed to the detailed language proposed in Appendix A for employee posters and government contracts. We believe the approach taken by the NLRB and its General Counsel to notify employees, as well as employers, of their respective rights under the National Labor Relations Act is the prudent approach and should be followed by the Department.

ABC therefore recommends that the language which the Department has proposed in Appendix A be replaced with the following language copied verbatim from the Board's website:¹⁰

“The National Labor Relations Act extends rights to many private-sector employees including the right to organize and bargain with their employer collectively. Employees covered by the Act are protected from certain types of employer and union misconduct and have the right to attempt to form a union where none currently exists.

“Examples of Your Rights As An Employee Under the NLRA Are:

- Forming, or attempting to form, a union among the employees of your employer.
- Joining a union whether the union is recognized by your employer or not.
- Assisting a union in organizing your fellow employees.
- Engaging in protected concerted activities. Generally, "protected concerted activity" is group activity which seeks to modify wages or working conditions.
- Refusing to do any or all of these things. However, the union and employer, in a State where such agreements are permitted, may enter into a lawful “union-security clause” requiring employees to pay union dues and fees.

“The NLRA forbids employers from interfering with, restraining, or coercing employees in the exercise of rights relating to organizing, forming, joining or assisting a labor organization for collective bargaining purposes, or engaging in protected concerted activities, or refraining from any such activity.

“Similarly, labor organizations may not restrain or coerce employees in the exercise of these rights.

“It is important to note that the rights discussed above are broad general principles only. There are countless subprinciples and detailed rules which are not discussed.

¹⁰ See http://www.nlr.gov/workplace_rights/employee_rights.aspx.

Evaluation of the specific facts and circumstances with the aid of a legal expert is the only way an employee can be certain of their rights under the NLRA.¹¹

“If you have a question about your rights under the NLRA contact the nearest regional office of the National Labor Relations Board (NLRB) at <http://www.nlr.gov>, or by calling toll-free 1-866-667-6572 or (TTY) 1-866-315-6572 (for the hearing impaired). If you believe your rights have been violated, you must contact the NLRB within six months of the treatment believed to be unlawful.¹²

“This is an official Government Notice and must not be defaced by anyone.”

2. **The inclusion of any detailed notice language in each government contract is unnecessary and unreasonable.** Regardless of whatever language may ultimately be required for the poster, there is no need for the same language to be included in each government contract, as the Department has proposed.

Pursuant to proposed section 471.2(c), the detailed language currently proposed in Appendix A would have to be inserted into every non-exempted government contract and then “adapted” every time “an Act of Congress, clarification of existing law by the courts or the National Labor Relations Board, or other circumstances make modification of the contractual provisions necessary,” which would be done “by such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government Contracts thereafter entered into.” 74 Fed. Reg. at 38498. The Department’s implementation of this presents a number of concerns.

¹¹ The language in this paragraph synthesizes the General Counsel’s caution set forth in the Forward to the *Basic Guide to the National Labor Relations Act*, which was discussed in these comments, *supra*, pp. 6-7 and has been added to here to ensure that employees understand the complexity of the NLRA and do not act in haste.

¹² With one exception, the language in this paragraph is an abbreviated version of what the Department has proposed. The exception concerns the Department’s reference to “unlawful treatment.” ABC asserts that the reference is highly presumptive and biased and its use therefore inappropriate for what EO 13496 claims is its purpose.

First, the administration of such a requirement would be highly inefficient for the government. It would require the Department to dedicate staff not only to review each and every Board and court decision to determine whether the existing contract language needs to be modified, but also to draft the new language. If the Department determines a change is necessary, it would also need to ensure every that federal agency with a covered contract had adapted their contracts by deleting the old language and inserting the new language. This is hardly efficient from the government's or taxpayer's standpoint. Second, regardless of whether the modification would be accomplished by rule, regulation or order, there would be a natural built-in delay in the process in order to complete the modification of the language. This, too, would be highly inefficient.

In addition, the administrative burdens which this could impose on employers could be quite significant. First, the proposed procedure makes it extremely likely that many employers would be not only be working under contract terms which would not only be out-of- sync with the updated law, but also potentially in conflict with the updated law, thereby needlessly exposing them to potential liability or penalties. Second, the proposed process would also necessitate employers to incur significant legal costs not only to modify existing contractors and subcontracts, but also in order to have the modified contract language authored by the Department reviewed in order to determine whether it is consistent with the legislation, Board or court decision, "other circumstances mak[ing] modification of the contractual provisions necessary." These are costs which the Department's Initial Regulatory Flexibility Analysis has completely failed to consider.

In contrast to what the Department has proposed, the regulations implementing the Beck Order took a more efficient approach, by incorporating the language of the poster by

reference into each contract. *See* current section 29 C.F.R. 470.2(a)(1). This alleviated the need to revise each contract when changes to the law occur. ABC believes the existing regulation was a much better approach and we recommend its continuance by the Department.

3. **The proposed language in Appendix B needs to be eliminated or substantially revised. It is neither a statement of “employee rights” as it purports nor neutral in its content.** ABC is opposed to the content of the notice proposed in Appendix B. While it purports to be a benign statement of the rights of employees under the NLRA, it clearly is not. Instead, it is the Department’s restatement of what the NPRM acknowledges is EO 13469’s “reiterate[ion] of the declaration of national labor policy contained in the National Labor Relations Act,” 29 U.S.C. 151. 74 Fed. Reg. at 38488. On this basis alone the proposed language needs to be revised.

However, the language of Appendix B goes further than merely “reiterating” § 151. When § 151 is read in its entirety, it becomes quickly clear that its declaration of the national labor policy is one of neutrality, favoring neither unions nor employers. The national labor policy which § 151 actually proclaims is one which “encourage[es] the practice and procedure of collective bargaining” but which also recognizes and “protects” every employee’s right of “full freedom of association,” *i.e.*, the right to choose or to reject being a member of a labor union. That, however, is not what Appendix B states, nor how EO 13496 asserts § 151 should be interpreted. Under Appendix B’s version of § 151, they are to be read exclusively in the conjunctive. ABC disagrees.

As ABC previously stated in footnote 8, to the extent the Procurement Act confers to the President and, in turn, the Department *any* authority to require some form of

notification regarding employee rights under the National Labor Relations Act, the Procurement Act requires that the content of the notification must accurately describe those rights, and must do so in a neutral manner. The Procurement Act does not give the President or Department the authority to mandate by regulation content which rewrites the National Labor Relations Act in a manner which advocates for a specific outcome or interest group, such as unions.

ABC is therefore opposed to the language proposed in Appendix B and ABC recommends it be replaced with the following, which is an abbreviated version of the revised language ABC recommends the Department adopt for posters:¹³

The NLRA forbids employers from interfering with, restraining, or coercing employees in the exercise of rights relating to organizing, forming, joining or assisting a labor organization for collective bargaining purposes, or engaging in protected concerted activities, or refraining from any such activity.

Similarly, labor organizations may not restrain or coerce employees in the exercise of these rights; for example, by discriminating or taking other adverse action against you based on whether you have joined or not joined or supported the union.

4. **The Department does not have the authority to require the level of detail and/or the specificity of the language it proposes to require be included in government contracts or conspicuously posted by affected employers.** ABC submits that, as the proposed rule is currently drafted, the Department is exceeding whatever authority the Department may otherwise have under the Procurement Act and conflicts with Section 8(c) of the NLRA.¹⁴ The Department does this by: (1) mandating that

¹³ The text of this language comes directly from the Board's website. See http://www.nlr.gov/workplace_rights/employee_rights.aspx.

¹⁴ See *Chamber of Commerce v. Brown*, ___ U.S. ___, 128 S. Ct. 2408 (2008) (Holding that Section 8(c) of the Act "expressly precludes regulation of speech about unionization).

employers must notify employees of rights under the NLRA well beyond the level and detail of the information which the Board – the agency with the primary authority in this area – is currently providing employees and, (2) by assuming for itself the authority not only to decide what specific additional information and level of detail should or should not be included in an employee rights notice but, more importantly, the right to interpret the NLRA for itself and then require that the Department’s depiction of those rights must be conveyed to employees.

There is a significant difference between the Department reliance on its “generalized” authority to promote greater economy and efficiency in the government’s procurement pursuant to the Procurement Act as the basis to mandate the level of detail and specificity in the language content being proposed for the instant Notice, and the Department’s exercise of more direct and specific authority to require employers to inform employees of their rights under other statutes.

For example, the Family and Medical Leave Act (FMLA), 29 U.S.C. §109(a), states:

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge.

The Occupational Safety and Health Act (OSHA), 29 U.S.C. §8(c (1), provides in relevant part:

The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards.

Likewise, the Veterans Benefits Improvement Act of 2004, 38 U.S.C. § 4334, directs:

(a) Requirement to provide notice.--Each employer shall provide to persons entitled to rights and benefits under the Uniformed Services Employment and Reemployment Rights Act a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.

(b) Content of notice.--The Secretary shall provide to employers the text of the notice to be provided under this section.

In each of the above-referenced examples, the Department has been specific authority to regulate employers in the areas covered by the particular statute, including the specific authority to prescribe or otherwise approve the content and text of the notices to be provided to employees concerning their rights under those statutes.

Although the notice required by the Beck Order was found to be lawful, *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) (*Chao*), the D.C. Circuit's interpretation of Section 8(c) of the NLRA has since been called into question by the Supreme Court's later holding in *Chamber of Commerce v. Brown*, ___ U.S. ___, 128 S. Ct. 2408 (2008) (*Brown*). The Ninth Circuit opinion which the Supreme Court reversed in *Brown, sub. nom., Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (2006), had relied extensively on the D.C. Circuit's construction of 8(c) in *Chao* when the Ninth Circuit found that the NLRA did not prohibit government from regulating employer speech. The Supreme Court, however, rejected the Ninth Circuit's analysis, holding that Section 8(c) "expressly precludes regulation of speech about unionization," 128 S. Ct. 2414, and constituted "explicit direction from Congress to leave noncoercive speech unregulated," *id.* . Plainly, the Notice being proposed in the NPRM constitutes a

governmental regulation of employer speech about unionization and is therefore preempted by the NLRA.

There is also a clear difference between the Beck Notice and the Notice being proposed here. In contrast to the Beck Notice, the Department's proposed Notice is infinitely more detailed in its specificity of the scope and content of the rights and tailoring of the wording of the rights which arise under the NLRA and as such intrudes into the regulation of labor relations in a far greater and substantive way than the Beck Notice did. The Department's Notice is unambiguously biased in its content, and there is no comparison between Department's effort to impose its own subjectivity in deciding what information to communicate, or not communicate to employees, which contrasts sharply with the narrow and targeted focus of the Beck Order's communication of the Supreme Court's *Beck* decision. Neither *Chao* nor *AFL-CIO v. Kahn*, 618 F.2d. 784 (D.C. Cir. 1979) (*Kahn*), a decision upon which the *Chao* court relied, give the President or Department an unfettered license to utilize the Procurement Act as the basis to regulate labor relations and/or to influence their outcome, as the Department seems to claim through the artifice of dictating with specificity the content and level of detail in the information which employers must convey to employees regarding their rights under the NLRA.¹⁵ ABC asserts this is especially so when, in contrast to the NLRB and its General Counsel, the language specifically being directed by the Department for inclusion (or exclusion) from the instant Notice appears designed to influence how employees should interpret and exercise their rights under the NLRA.

¹⁵ As the court cautioned in *Kahn*: "As is clear from the terms and history of the statute and from its implementation, our decision today does not write a blank check for the President to fill in at his will." 618 F.2d at 793.

5. **Subcontracts below the Simplified Acquisition Threshold should**

be exempted under the Final Rule. The NPRM asserts that the Department did not exclude subcontracts below the simplified acquisition threshold because “[t]he Executive Order does not exempt from its coverage subcontracts involving purchases below the simplified acquisition threshold.” 74 Fed. Reg. 38491. This would leave a general contractor with a \$50,000 contract exempt from the requirements, but a require subcontractor with a \$1000 contract to comply with the posting and contractual requirements. This is particularly troubling if the Department moves forward with its proposal to require the text of the notice be inserted verbatim in each contract as related legal costs for modifying the contract could exceed the value of the contract itself (see discussion herein in section b(2)). Such circumstances are the reason behind exempting smaller value contracts and subcontracts from certain requirements. ABC disagrees with the Department’s assertion and we believe its decision not to exclude such subcontracts is arbitrary and unnecessarily negatively impacts small businesses.

The language of EO 13496, Section 2, excluding from compliance contracts under the simplified acquisition threshold is identical to the exclusionary language contained in EO 13201, Section 2(a). Reading the very same language, when the Department issued its regulations implementing EO 13201 (the Beck Order) it exempted subcontracts below the simplified acquisition threshold from compliance.¹⁶

¹⁶ See 29 C.F.R. § 470.1, which defined “contract” to include subcontracts, and 29 C.F.R. § 470.3(a), which excluded *all* contracts below the simplified acquisition threshold. The Department’s departure from its prior reading of the same language is not only arbitrary but further underscores ABC’s contention that the Department is using this rulemaking as a subterfuge to regulate labor relations and/or influence their outcome.

ABC disagrees with the Department's revised interpretation and submits that the Department's decision not to exclude such subcontracts is arbitrary and will add to the burden the regulation imposes on small business.

6. **The Final Rule needs to clarify that that requirements of Appendix A do not create new individual or contractual rights.** Section 2 of Appendix A as currently proposed states: "The contractor will comply with all of provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor." The language raises two concerns for ABC's members.

First, some of our members fear that the foregoing language can be read to create a contractual obligation to comply with actual provisions contained the Notice (the list of rights cited in the Notice), creating additional penalties for matters that are within the jurisdiction of the NLRA. Any such contractual obligations imposed by the federal government on contractors and subcontractors would be preempted by the NLRA. *See Wisconsin Department of Labor and Industry v. Gould*, 475 U.S. 282 (1986). Although ABC does not believe that the Department intends the language to be read that way, the Department needs to clarify its position.

Second, the Department also needs to clarify what the word "related" means in its reference to "rules, regulations, and orders of the Secretary of Labor." ABC understands the reference to be limited to "rules, regulations, and orders of the Secretary of Labor" related to the notice required under the Executive Order and implementing regulations and does not extend to "rules, regulations, and orders of the Secretary of Labor" issued by the Department generally; e.g., a rule, regulation, or order relating to wage and hour or OSHA. This, too, needs to be clarified in the Final Rule.

7. **The Department’s Analysis of the impact of the NPRM on small entities is flawed and should be reconsidered under the Regulatory Flexibility Act.**

Contrary to the NPRM, the proposed rule will have a significant economic impact on a substantial number of small entities. The analysis set forth in the NPRM is flawed on its face, *inter alia*, in the following respects:

First, the Department acknowledges that 251,824 small contractors will be affected by the proposed rule, constituting 67 percent of the entire regulated community of government contractors; yet the Department contends that this figure is not a “substantial” number. The Department reaches this clearly erroneous conclusion by misstating the guidance issued by the Small Business Administration (SBA) for agency compliance with the RFA. According to the Department, the hundreds of thousands of small contractors who will be affected should be discounted because they are “derived from virtually all segments of the economy and across industries,” and so are a “small portion of the national economy overall.” 74 Fed. Reg. at 38495. The Department’s quotation of the SBA’s guidance on this point, however, is excerpted in such a way as to infer the *opposite* of what SBA actually stated.¹⁷ Moreover, the Department’s analysis ignores the fact that government contractors should themselves be recognized as an “industry,” so that two thirds of their number can only be described as a substantial number on an “industry-specific” basis.

¹⁷ As noted in the SBA Guide to the RFA: “The intent of the RFA, ... was not to require that agencies find that a large number of the entire universe of small entities would be affected by a rule. Quantification of “substantial” may be industry- or rule-specific. However, it is very important that agencies use the broadest category, “more than just a few.” See “A Guide for Government Agencies: How to Comply With the Regulatory Flexibility Act,” at 19, SBA Office of Advocacy (May 2003), available at sba.gov/advo/laws/rfaguide.pdf.

Second, the Department grossly understates the amount of time and money which will have to be expended by contractors and subcontractors to understand and implement the notice requirements, particularly the requirement that the overly detailed notice language be inserted in all subcontractor agreements. See discussion above at p. 15. For this reason as well, the Department has erred in its finding that there is no significant economic impact on a substantial number of small entities.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Hirsch", written in a cursive style.

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