

# Monday Morning Quarterback



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## FEDERAL CONTRACTING

### New Contract Clause and Posting Requirement for Federal Contractors

The U.S. Department of Labor (DOL) Office of Labor-Management Standards on May 20 issued a **final rule** implementing **Executive Order 13496**, which requires federal contracting agencies to include in most contracts a new clause requiring contractors and subcontractors to post notices informing employees about their rights under the National Labor Relations Act ("NLRA"). The rule, which takes effect on June 21, establishes the content of the notice, clarifies flow-down requirements, and sets forth penalties and procedures for noncompliance. It applies only to contracts directly with the federal government and related subcontracts, not to federally assisted contracts made with other nonfederal government entities.

Several changes were made from the **proposed rule** issued in August 2009, including many made in response to **comments** submitted by AGC. For example, DOL adopted AGC's recommendation to abandon the requirement that government contracts include the entire text of the employee notice – which is quite lengthy – and to allow incorporation by reference. DOL also expanded the description of unlawful union conduct contained in the text of the employee notice, in response to objections raised by AGC and others that the notice contained an imbalanced list focused on employer misconduct.

Furthermore, DOL favorably responded to AGC's concerns that the proposed rule appeared to give DOL improper authority to enforce compliance with the NLRA – which is the role of the National Labor Relations Board – and authorized overly severe sanctions for even minor violations. While it did not change the text of the final rule on these matters, DOL explained in the preamble that "contractors will not receive harsh sanctions for inadvertent or unintentional violations of the rule." The preamble also "assures the contractor community that [DOL] cannot, nor will it, attempt to enforce the substantive provisions of the notice."

The executive order and rule exempt prime contracts for purchases below the simplified acquisition threshold (currently \$100,000). However, the proposed rule did not exempt subcontracts below the threshold, and DOL declined to change this in the final rule, despite AGC's protests. A subcontract that is below the threshold is covered by the rule, provided that it is "necessary to the performance" of a prime contract above the threshold. The final rule does, however, add a *de minimis* standard exempting subcontracts with a value of \$10,000 or less. The rule requires inclusion of the new clause in nonexempt contracts and subcontracts at all tiers, not just first-tier subcontracts, and provides that DOL may require a contractor to enforce subcontractor compliance. The preamble explains that, while a contractor may not "turn a blind eye toward noncompliance of its subcontractors," it is only required to

## UPCOMING WEBINARS

- ➔ A Practical Framework for Implementing BIM - Presented in partnership with Autodesk, Inc.
- ➔ LAST CHANCE - IPD Webinar Registration Just \$39

## CHAPTER NEWS

- ➔ AGC of Minnesota gets Pilot Car Legislation Passed

## EVENTS

- ➔ Registration Open for Building Contractors Conference and Lean Construction Forum
- ➔ Building Division Chapter Subcommittee Meeting Scheduled for June 9
- ➔ 2010 ACI-NA/ACC/AGC Airport Project Delivery Systems Summit
- ➔ AGC's Construction Estimators Workshop
- ➔ AGC-NCAII Meeting for New England Collective Bargaining Chapters to Take Place August 4
- ➔ AGC's 2010 IT Forum Conference
- ➔ 2010 Training & Development Conference and HR Professionals Conference
- ➔ Registration Open for AGC Safety & Health Conference

## 2011 ANNUAL CONVENTION

- ➔ Call for Presentations for AGC's 92nd Annual Convention

## BOOKSTORE

- ➔ Bookstore Featured Product - Job Hazard Analysis: A Blueprint for Success

## Other Newsletters

- ➔ Construction Legislative Week in Review
- ➔ News & Views
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seek compliance and will not be liable if the subcontractor still fails to comply.

The rule contains various directives about the manner and location of the posting. If the contractor posts notices to employees physically, then it must also physically post the NLRA notice. The posting must be made in "conspicuous places," including areas (1) where other notices about employment terms and conditions are posted and (2) where employees covered by the NLRA engage in activities related to performance of the government contract. A noteworthy change for many AGC members in the final rule requires contractors to provide the notice in other languages "where a significant portion of a contractor's workforce is not proficient in English." The rule does not explain what "significant portion" means, but the standard is adopted from rules implementing the Family and Medical Leave Act. The rule states that DOL will provide an official poster in English and various other languages on its website at [www.olms.dol.gov](http://www.olms.dol.gov), but, as of publication of this article, only English posters were provided, available in two formats via links at <http://www.dol.gov/olms/regs/compliance/EO13496.htm>.

If the contractor "customarily" posts notices to employees electronically, then it must also post the NLRA notice electronically by prominently displaying on any website customarily used for employee notices about terms and conditions of employment a link that reads "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers" and links to the DOL Web page where the full text of the poster is found. Again, foreign languages must also be used if a significant portion of the workforce is not English literate, and DOL will provide translations.

Contractors should promptly advise appropriate staff to begin to look for the new contract clause in federal contracts and subcontracts resulting from solicitations issued on or after June 21, and to prepare for compliance. DOL's Office of Federal Contract Compliance (OFCCP), which is tasked with conducting compliance evaluations under this rule, has stated in recent months that its enforcement efforts will target the construction industry. (Click [here](#) and [here](#) to learn more.) AGC will meet with OFCCP on May 24 to discuss this and other initiatives.

***For more information, contact Denise Gold, Associate General Counsel, at (703) 837-5326 or [goldd@agc.org](mailto:goldd@agc.org). [Return to Top](#) ↑***

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