September 2, 2009

Attn: Ms. Denise M. Boucher
Director, Office of Policy, Reports and Disclosure, OLMS, ESA
Room N-5609
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: RIN 1215-AB70


SHRM is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

SHRM recognizes the inherent rights of employees to form, join, assist in or refrain from joining a union. Further, SHRM believes that HR professionals have a responsibility to understand, support and champion employment-related actions that are in the best interests of their organizations and their employees with regard to third-party representation by unions. Employee NLRA rights to form, join, assist in or refrain from joining a union without threats, interrogation, promises of benefits, or coercion by employers or unions must be protected.

As HR professionals, SHRM members have substantial knowledge and experience working with both union-represented and non-union workforces. It is the considered view of SHRM that the proposed notice contained in the NPRM (1) conflicts with the National Labor Relations Act, as amended, (NLRA), 29 U.S.C. §§151 et seq, (2) is inconsistent with National Labor Relations Board (NLRB) statements regarding the NLRA, and (3) interferes with employer speech regarding unionization. At a minimum, SHRM recommends that the notice as proposed in the NPRM should be redrafted to specifically, precisely and neutrally state statutory rights and prohibitions that are consistent with the NLRA and NLRB statements.
1. **Background of the NPRM and the proposed notice**

The January 30, 2009 executive order's purpose is "to promote economy and efficiency in Government procurement by ensuring that employees of certain Government contractors are informed of their rights under Federal Labor laws." 74 FR 38488. The executive order requires Government contracts that exceed $100,000 to contain a specific provision requiring contractors and subcontractors to post notices informing their employees of their rights as employees under federal labor laws. Consequently, all federal contractors and subcontractors necessary to the performance of the government contracts are required to post the notice "in and about its plants and offices…including in all places where notices are customarily posted both physically and electronically." 74 FR 6107.

The executive order directs the Secretary of the Department of Labor (DOL) to prescribe the content of the notice. The August 3, 2009 NPRM enumerated the exact text of the notice to be posted by federal contractor and subcontractors (proposed notice):

**NOTICE TO EMPLOYEES**

**RIGHTS OF EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT**

It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.

Under federal law, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through a duly selected union for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment with your co-workers or a union; join other workers in raising work-related complaints with your employer, government agencies, or members of the public; and seek and receive help from a union subject to certain limitations.
- Take action with one or more co-workers to improve your working conditions, including attending rallies on non-work time, and leafleting on non-work time in non-work areas.
- Strike 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.
- Choose not to do any of these activities, including joining or remaining a member of a union.
It is illegal for your employer to:

- Prohibit you from soliciting for the union during non-work time or distributing union literature during non-work time, in non-work areas.
- Question you about your union support or activities.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in other activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances, for example, as where doing so might interfere with patient care.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

It is illegal for a union or for the union that represents you in bargaining with your employer to: discriminate or take other adverse action against you based on whether you have joined or support the union.

If your rights are violated:

Illegal conduct will not be permitted. The National Labor Relations Board (NLRB), an agency of the United States government, will protect your right to a free choice concerning union representation and collective bargaining and will prosecute violators of the National Labor Relations Act. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits and may order an employer or union to cease violating the law. The NLRB can only act, however, if it receives information of unlawful behavior within six months.

If you believe your rights or the rights of others have been violated, you must contact the NLRB within six months of the unlawful treatment. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: http://www.nlrb.gov. Click on the NLRB's page titled About Us, which contains a link, Locating Our Offices. You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

This is an official Government Notice and must not be defaced by anyone.
2. The proposed notice conflicts with the NLRA.

SHRM is concerned that the proposed notice misstates Congressional policy by declaring that "[i]t is the policy of the United States to encourage collective bargaining." If this statement were accurate, it would necessarily follow that federal policy favors and, indeed, encourages unionization since collective bargaining under the NLRA can only occur between an employer and a labor organization representing employees. 29 U.S.C. §§ 152(5) and 158(d). The only “right” extended by the NLRA, however, is granted to employees to freely choose whether to be represented making the proposed notice’s claim regarding Congressional policy correct only to the extent that employees freely choose to be represented. 29 U.S.C. § 157.

The critical point is that "Congress struck a balance of protection, prohibition, and laisse-faire in respect to union organization, collective bargaining, and labor disputes." Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140, n. 4 (quoting Cox, "Labor Law Preemption Revisited," 85 Harv. L. Rev. 1337, 1352 (1972)).

The proposed notice contains 23 paragraphs, yet it’s only reference to the NLRA’s right to choose/right to refrain from union membership and union activities appears in the ninth paragraph.

The proposed notice also contains eight paragraphs providing examples of unlawful employer conduct but only one paragraph for illegal union conduct. By comparison, the NLRA itself contains a more balanced view, enumerating five categories of employer unfair labor practices and seven (some with multiple sub-parts) addressing labor organization violations. Compare 29 U.S.C. §§8(a)(1)-8(a)(5) with 8(b)(1)-8(b)(7).

The declared purpose of the NPRM is to inform employees of their rights under federal labor laws. Not only is the proposed notice content not balanced or neutral, it is unreasonable and incomplete. While the proposed notice speaks to rights of the unrepresented, it fails to inform represented employees of core rights under the NLRA. The proposed notice is silent regarding Federal labor law rights to decertify or withdraw from third-party union representation, to seek relief for a union's failure to represent employees fairly, and/or to object to paying the portion of union dues or fees used to support activities unrelated to collective bargaining, contract administration, or grievance adjustment. Levitz Furniture Co. of the Pac., Inc., 333 NLRB 717 (2001); 29 U.S.C. §185; Communications Workers v. Beck, 487 U.S. 735 (1988).

Comparing the executive order’s stated purpose "to promote economy and efficiency in Government procurement" by doing business with contractors “whose work will not be interrupted by labor unrest” with the proposed notice’s selective and skewed presentation of rights under Federal labor laws, the conclusion necessarily drawn is that unionization is preferred. Not only are there no referenced government studies supporting the assumption that unionized contractors and subcontractors are less costly, more efficient, and/or more reliable than unorganized providers but even were that so, it would be irrelevant. Federal labor law is neutral regarding an employee’s free choice to join or not join a union or to engage in concerted activities or not.

Further, the NLRA’s declared “policy [is]…to eliminate the causes of certain substantial obstructions to the free flow of commerce…[including] certain practices by some labor organizations....” 29 U.S.C. §151; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 23 (1937); Office of the General Counsel, National Labor Relations Board, "Basic Guide to the National Labor
For these reasons, SHRM concludes that the proposed notice is not neutral or a complete description regarding employee free choice and conflicts with the NLRA.

3. **The proposed notice is inconsistent with NLRB statements regarding the NLRA**

   The NPRM refers to the DOL's deliberations regarding the crafting of the proposed notice. The NPRM maintains that DOL rejected posting the statute or "a simplified list of rights based on the statutory provision." 74 FR 38490. Congress placed authority for the primary interpretation of the NLRA with the National Labor Relations Board. In *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953), the Supreme Court addressed the problem of multiple voices interpreting the NLRA:

   Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specially constituted tribunal….Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of the substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.

   For its entire 74 years, the NLRB has not required a notice posting of the NLRA or of redacted statutory language or of any NLRB public advisories. Nevertheless, the NLRB publicly provides, and has provided for many years, a variety of information options:

   http://www.nlrb.gov/about_us/overview/national_labor_relations_act.aspx


   http://www.nlrb.gov/workplace_rights/employee_rights.aspx

   http://www.nlrb.gov/workplace_rights/nlra_violations.aspx

   Regarding employee rights, NLRB public information offers the following:

   **What rights does the NLRB protect?**
   a) Your right to engage in protect concerted activities, which are group activities that you are involved in to try to improve working conditions, wages and benefits.
   b) Your right to engage in union activities and to support a union.
   c) Your right not to engage in protected concerted activities or union activities.
While the referenced NLRB public statement presents three “rights,” the proposed notice contains eight paragraphs describing federal law rights. Similar disparities are present when comparing the notice with the NLRB’s “Basic Guide” publication. Where the notice describes eight categories of rights, the NLRB publication presents five items:

**Examples of Section 7 rights.**

- Forming or attempting to form a union among the employees of a company.
- Joining a union whether the union is recognized by the employer or not.
- Assisting a union to organize the employees of an employer.
- Going out on strike to secure better working conditions.
- Refraining from activity on behalf of a union.

A notification of Federal labor law rights under the NLRA is strikingly simple – restate Section 7 verbatim:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). 29 U.S.C. § 157.

Regarding illegal/unlawful/objectionable activities undermining employee free choice, one NLRB publication offers the following:

**Examples of conduct the Board considers to interfere with employee free choice are:**

- Threats of loss of jobs or benefits by an employer or a union to influence the votes or union activities of employees.
- A grant of benefits or promise to grant benefits to influence the votes or union activities of employees.
- An employer firing employees to discourage or encourage their union activities or a union causing an employer to take such action.
- An employer or a union making campaign speeches to assembled groups of employees on company time within the 24-hour period before the election.

Source:


Source:

• The incitement of racial or religious prejudice by inflammatory campaign appeals made by either an employer or a union.
• Threats or the use of physical force or violence against employees by an employer or a union to influence their votes.
• The occurrence of extensive violence or trouble or widespread fear of job losses which prevents the holding of a fair election, whether caused by an employer or a union.


In stark contrast to the NLRB’s public information presenting seven examples of interference with employee free choice of which six clearly apply to both employers and unions, the proposed notice lists seven paragraphs of employer illegal activities but only one item of union misconduct. Notably, the one item regarding the granting of benefits in the NLRB’s public information which does not reference either employers or unions applies to both parties by NLRB case law. NLRB v. Exchange Parts Co., 375 U.S. 405 (1964); Owens-Illinois, Inc., 271 NLRB 1235 (1984).

The proposed notice does not fairly state NLRB public information regarding the NLRA. Thus, SHRM concludes that employees – unrepresented and represented – are at risk of misinformation concerning Federal labor rights and obligations which may lead to employee actions that unintentionally violate the NLRA or to inaction through ignorance of NLRA rights.

4. The NPRM interferes with employer speech regarding unionization

In UAW Labor Employment v. Chao, 325 F. 3d 360 (DC Cir. 2003); cert. denied, 541 U.S. 987 (2004), the court upheld Executive Order 13201 (now revoked by the executive order) requiring federal contractors performing contracts exceeding $100,000 to post workplace notices informing employees of their “Beck” rights. Communications Workers v. Beck, 487 U.S. 735 (1988). Finding the Order setting a broad policy on government procurement, the court held the Order regulatory, subject to Federal preemption doctrine. Chao, 325 F. 3d at 363 citing Chamber of Commerce v. Reich, 74 F. 3d 1322, 1336-1337. The Chao court reasoned there to be no right to silence under NLRA Section 8(c), despite the NLRB previously holding that an employer’s failure to post a Beck notice was not an unfair labor practice. Chao, 325 F. 3d at 365.

While an Executive Order notice posting requirement may be lawful, the exercise of such authority must not conflict with the NLRA. Under the Supreme Court’s NLRA pre-emption doctrine, “Congress wished the ‘uniform application’ of its substantive rules and to avoid the ‘diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies,’” Chamber of Commerce v. Reich, 74 F. 3d 1322 (DC Cir. 1996) quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)(quoting Garner v. Teamsters Union, supra).

Because the proposed notice conflicts with and misstates the NLRA, as well as NLRB public information regarding the NLRA, SHRM believes that requiring qualifying contractors and subcontractors to post the proposed notice would force speech in conflict with Federal labor law and risks altering “the delicate balance of bargaining and economic power that the NLRA establishes….“
Reich, 74 F. 3d at 1338. Such a result promises “a direct conflict with the NLRA, thus running afoul of …pre-emption doctrine.” Id. at 1338.

5. Conclusions

For the foregoing reasons, SHRM finds that the proposed NOTICE is objectionable and runs afoul of Federal preemption doctrine. The proposed notice misstates Federal labor law and Congressional policy regarding employee free choice and misinforms employees regarding NLRA rights and protections. The impact of the proposed order is far-reaching given the relatively low contract dollar threshold and extension to all subcontractors regardless of dollar amount.

As noted previously, SHRM recommends that the notice as proposed in the NPRM should be redrafted to specifically, precisely and neutrally state statutory rights and prohibitions that are consistent with the NLRA and NLRB statements.

We welcome the opportunity to talk further with the Department on this very important issue.

Respectfully submitted,

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