June 14, 2010

VIA ELECTRONIC MAIL:  http://www.regulations.gov

General Services Administration
Regulatory Secretariat (MVCB)
1800 F Street, NW
Room 4041
ATTN: Hada Flowers
Washington, DC 20405

RE:  FAR Case 2009-006, Labor Relations Costs
Docket 2010-0084
RIN 9000-AL39

To Whom It May Concern:

Thank you for the opportunity to submit comments on Councils’ proposed amendments to the Federal Acquisition Regulation to implement Executive Order 13494.1 We respectfully submit these comments on behalf of the Society for Human Resource Management (SHRM) and the College and University Professional Association for Human Resources (CUPA-HR).

STATEMENT OF INTEREST

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.

CUPA-HR serves as the voice of human resources in higher education, representing more than 11,000 HR professionals at over 1,700 colleges and universities across the country, including 90 percent of all U.S. doctoral institutions, 70 percent of all master’s institutions, more than half of all bachelor’s institutions and 500 community colleges. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 states.

COMMENTS

A.  The Order and Implementing Regulations Are Preempted and, Consequently, Both Should be Withdrawn

Both SHRM and CUPA-HR believe the Order and proposed implementing regulations are preempted by the National Labor Relations Act (NLRA) and, consequently, should be withdrawn.

President Obama issued on January 30, 2009, Executive Order 13494, which is titled, Economy in Government Contracting. The Order states contracting departments and agencies “shall treat as unallowable the costs of any activities undertaken to persuade employees … to exercise or not to exercise, or concerning the manner of exercising, the right to organize or bargain collectively….” The Order provides the following examples of unallowable costs:

1. preparing and distributing materials;
2. hiring or consulting legal counsel or consultants;
3. holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and
4. planning or conducting activities by managers, supervisors, or union representatives during work hours.

Councils are required under the Order to adopt rules and regulations and issue orders deemed necessary and appropriate.

The Order and the proposed regulations are an attempt by the Administration to regulate employer speech related to whether employees should or should not organize a union or collectively bargain. The Administration also attempts through the Order to regulate employer speech concerning the manner by which employees organize, such as whether employees should organize by a secret ballot election supervised by the National Labor Relations Board or a method more susceptible to union coercion, like card check recognition.

The Supreme Court has held that this type of limit on employer speech is preempted by the National Labor Relations Act. See Chamber of Commerce v. Brown, 544 U.S. 60 (2008) (striking down a similar requirement in California state law AB 1889). In addition, courts have recognized that the doctrine of NLRA preemption extends to Executive Orders and other actions of the Executive Branch. See e.g., Chamber of Commerce v. Reich, 74 F.3d 1322 (DC Cir. 1996) (striking down on NLRA preemption grounds Executive Order 12954, which prohibited the federal government from contracting with certain firms that used striker replacements). Executive Order 13494, as it attempts to regulate the substance and methods of federal contractor communication with employees, is thus preempted by the NLRA.

B. The Order and Proposed Regulations Are Vague and Impose a High Compliance Burden

Neither the Order nor the proposed regulations provide adequate information about what costs are unallowable. Employers will undoubtedly have difficulty ascertaining which communications and actions are unallowable and which are allowable costs “incurred in maintaining satisfactory relations between the contractor and its employees…” For example, taken to an extreme, unallowable costs could include union dues, given that a portion of those dues are used to promote organizing and card check recognition. As a result, federal agencies and employers are likely to face significant difficulties and timely and costly paperwork burdens in an effort to determine what constitutes an unallowable cost.
The proposed rule’s vague description of allowable and unallowable costs creates a difficult accounting burden particularly for smaller businesses. These employers, along with those who are majority or solely funded through federal contracts, are likely to cease all communications with employees regarding rights to organize and bargain collectively rather than confront the costs of administration and possible violations of the executive order.

CONCLUSION

For the foregoing reasons, we urge that the proposed regulation be withdrawn. Again, we appreciate the opportunity to submit these comments. If we can be of further assistance on this matter, please do not hesitate to contact us.

Respectfully submitted,

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