DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Part 471

RIN 1215–AB70; RIN 1245–AA00

Notification of Employee Rights Under Federal Labor Laws

AGENCY: Office of Labor-Management Standards, Department of Labor.

ACTION: Final rule.

SUMMARY: On August 3, 2009, the Office of Labor-Management Standards ("OLMS") in the Department of Labor ("the Department") issued a proposed rule implementing Executive Order 13496. This final rule sets forth the Department's review of and response to comments on the proposal and any changes made to the rule in response to those comments.

President Barack Obama signed Executive Order 13496 ("Executive Order" or "E.O. 13496") on January 30, 2009. The Executive Order requires nonexempt Federal departments and agencies to include within their Government contracts specific provisions requiring contractors and subcontractors with whom they do business to post notices informing their employees of their rights as employees under Federal labor laws. The Executive Order requires the Secretary of Labor ("Secretary") 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. Under the Executive Order, unless a specified exception or exemption applies, Federal Government contracting departments and agencies must include the required contract provisions in every Government contract. As required by the Executive Order, this final rule establishes the content of the notice required by the Executive Order's contract clause, and implements other provisions of the Executive Order, including provisions regarding sanctions, penalties, and remedies that may be imposed if the contractor or subcontractor fails to comply with its obligations under the Order and the implementing regulations.

DATES: *Effective Date:* This rule will be effective on June 21, 2010.

FOR FURTHER INFORMATION CONTACT: Denise M. Boucher, Director, Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, (202) 693–0123 (this is not a toll-free number), (800) 877–8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The Regulatory Information Number (RIN) identified for this rulemaking changed with publication of the Spring Regulatory Agenda due to an organizational restructuring. The old RIN was assigned to the Employment Standards Administration, which no longer exists; a new RIN has been assigned to the Office of Labor-Management Standards.

I. Background on the Rulemaking

On August 3, 2009, the Department issued a Notice of Proposed Rulemaking ("NPRM" or "proposed rule"), 74 FR 38488, to implement Executive Order 13496, "Notification of Employee Rights Under Federal Labor Laws," 74 FR 6107, Feb. 4, 2009. The Department invited written comments on the proposed regulations from interested parties, including current and potential Government contractors, subcontractors, and vendors, and current and potential employees of such entities; labor organizations; public interest groups; Federal contracting agencies; and the public. In addition, when proposing certain provisions of the rule, the Department invited public comment regarding issues addressed in those specific provisions. The public comment period closed on September 2, 2009, and the Department has considered all timely comments received in response to the proposed rule.[1]

The Department received 86 unique and timely comments from a wide variety of sources. Commenters included individuals, labor organizations, and other organizations and associations representing the interests of employees, employers and government contractors and subcontractors. The Department recognizes and appreciates the value of comments, ideas, and suggestions from members of the public, labor organizations, employers, industry associations and other interested parties.

II. The Executive Order

On January 30, 2009, President Barack Obama signed Executive Order 13496, entitled "Notification of Employee Rights Under Federal Labor Laws." 74 FR 6107, Feb. 4, 2009. The purpose of the Executive Order 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. *Id.,* Sec. 1. As the Order states, "When the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those 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 Federal labor laws, including the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.*" *Id.* The Order reiterates the declaration of national labor policy contained in the National Labor Relations Act ("NLRA"), 29 U.S.C. 151, that "encouraging the practice and procedure of collective bargaining and * * * protecting 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 or protection" will "eliminate the causes of certain substantial obstructions to the free flow of commerce" and "mitigate and eliminate these obstructions when they have occurred." *Id.,* Sec. 1, quoting 29 U.S.C. 151. As the Order concludes, "[r]elying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government's contracts." *Id.*

The Executive Order achieves the goal of notification to employees of federal contractors of their legal rights through two related mechanisms. First, Section 2 of the Order provides the complete text of a contract clause that Government contracting departments and agencies must include in all covered Government contracts. Sec. 2, 74 FR at 6107–08. Second, through incorporation of the specified clause in its contracts with the Federal government, contractors thereby agree to post a notice in conspicuous places in their plants and offices informing employees of their rights under Federal

[1] The Department received a single request to extend the comment period for an additional 30 days. The commenter, a law firm, asserted that the 30-day comment period was too brief and that, as a result, many interested parties were unaware of the proposed rule. After due consideration, the Department has determined that the 30-day comment period was sufficient, and additional time in which to respond is not warranted. The commenter requesting the extension was able to submit a lengthy, substantive comment within the 30-day period and attached additional comments from many of its clients. In addition, the Department received within the 30-day period a notable number of substantive comments representing a broad spectrum of interests associated with the proposed rule. Finally, no other commenter requested such an extension.

labor laws. Sec. 2, para. 1, 74 FR at 6107–08.

The Executive Order states that the Secretary "shall be responsible for [its] administration and enforcement." Sec. 3, 74 FR at 6108. To that end, the Executive Order delegates to the Secretary the authority to "adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order." *Id.,* Sec. 3(a). In particular, the Executive Order requires the Secretary to prescribe the content, size, and form of the employee notice. *Id.,* Sec. 3(b). In addition, the Executive Order permits the Secretary, among other things, to make modifications to the contractual provisions required to be included in Government contracts (Sec. 3(c)); to provide exemptions for contracting departments or agencies with respect to particular contracts or subcontracts or classes of contracts or subcontracts for certain specified reasons (Sec. 4); to establish procedures for investigations of Government contractors and subcontractors to determine whether the required contract provisions have been violated (Sec. 5); to conduct hearings regarding compliance (Sec. 6); and to provide for certain remedies in the event that violations are found (Sec. 7). 74 FR at 6108–09.

III. Statutory Authority for the Executive Order and the Department's Regulation

A. Legal Authority

The President issued Executive Order 13496 pursuant to his authority under "the Constitution and laws of the United States," expressly including the Federal Property and Administrative Services Act ("Procurement Act"), 40 U.S.C. 101 *et seq.* The Procurement Act authorizes the President to "prescribe policies and directives that [he] considers necessary to carry out" the statutory purposes of ensuring "economical and efficient" government procurement and supply. 40 U.S.C. 101, 121(a). Executive Order 13496 delegates to the Secretary of Labor the authority to "adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order." Sec. 3, 74 FR at 6108. The Secretary has delegated her authority to promulgate these regulations to the Office of Federal Contract Compliance Programs ("OFCCP") and the Office of Labor-Management Standards ("OLMS"). Secretary's Order 7–2009, 74 FR 58834, Nov. 13, 2009; Secretary's Order 8–2009, 74 FR 58835, Nov. 13, 2009.

B. Interagency Coordination

Section 12 of the Executive Order requires the Federal Acquisition Regulatory Council ("FAR Council") to take action to implement provisions of the Order in the Federal Acquisition Regulation (FAR). 74 FR at 6110. Accordingly, the Department has coordinated with the FAR Council for the insertion of language into the FAR that implements the Executive Order.

IV. Summary of the Final Rule and Discussion of the Comments

This final rule establishes standards and procedures for the implementation and enforcement of Executive Order 13496. Subpart A of the rule sets out definitions, the prescribed requirements for the size, form and content of the employee notice, exceptions for certain types of contracts, and exemptions that may be applicable to contracting departments and agencies with respect to a particular contract or subcontract or class of contracts or subcontracts. Subpart B of the rule sets out standards and procedures related to complaint procedures, compliance evaluations, and enforcement of the rule. Subpart C sets out other standards and procedures related to certain ancillary matters. This preamble follows the same organizational outline, and within each section of the preamble the Department has noted and responded to the comments addressed to that particular section of the rule.

During the interagency review process that preceded the publication of the NPRM, the Department received requests to improve the readability and understandability of the regulatory text by employing "plain language," which includes, among other things, the use of common, everyday words, except for necessary technical terms, the use of the active rather than the passive voice, and the use of short sentences. The Department has made revisions to the regulatory text of the final rule in accordance with these guidelines.

As part of a Departmental restructuring, effective November 8, 2009, the Department abolished the Employment Standards Administration ("ESA"), which was the administrative umbrella for several agencies within the Department, including OLMS and OFCCP. As the administrator overseeing both OLMS and OFCCP, the Assistant Secretary for Employment Standards had designated administrative and enforcement functions under the proposed rule. Due to the elimination of ESA and the position of Assistant Secretary for Employment Standards, the final rule has been revised so that the roles and functions assigned to the Assistant Secretary in the proposed rule are reassigned. *See* §§ 471.2, 471.13, 471.14, 471.15, 471.16, 471.21, 471.22, and 471.23. Generally speaking, the Assistant Secretary's enforcement review functions have been reassigned to the Department's Administrative Review Board, and the administrative functions in the rule have been reassigned to the Directors, formerly called the Deputy Assistant Secretaries, of OFCCP or OLMS, or both.[2] In addition, the definition of "Assistant Secretary" has been deleted from § 471.1, and definitions have been added for easy reference to the "Director of OFCCP" and the "Director of OLMS" in the body of the rule.

A. The Purpose of Executive Order, Statutory Authority and Preemption

The Department received a number of comments about the Executive Order and its purpose, the President's authority to issue it, and the asserted preemption of the Order or the Department's regulation by the National Labor Relations Act ("NLRA"), 29 U.S.C. 151, *et seq.* First, the Department received several comments opposing the Executive Order generally, each of which suggests, for various reasons, that the Executive Order constitutes unnecessary interference with private enterprise. Several commenters also commented on the purpose of the Executive Order. Some commenters were doubtful that the Executive Order would fulfill its stated goals of promoting economy and efficiency in government procurement through notifying employees of their rights, and suggested instead the Executive Order would have the opposite effect and actually increase costs to taxpayers and amplify labor-management conflict, among other negative effects cited. Other commenters stated that the Executive Order would undoubtedly achieve its stated goals. In particular, these commenters indicated that informing employees of their rights will enhance industrial peace and worker productivity, promote a stable workforce and improve employee morale, reduce intimidation, misinformation, harassment, and fear in the workplace, eliminate injustice, and contribute to positive labor-management relations—all of which will foster labor peace and reduce costs to the government.

[2] For ease of reference and to avoid confusion, the Directors of OLMS and of OFCCP are referred to in this preamble by their current title, "Director," even when this preamble is discussing passages of the NPRM that refer to their former title, "Deputy Assistant Secretary."

One commenter suggested that the Procurement Act provides an insufficient basis of authority for the President to issue Executive Order 13496. Although the comment acknowledges that the courts have rejected a similar challenge alleging insufficient authority under the Procurement Act for the issuance of an executive order requiring federal contractors to post notices to their employees, the commenter suggests that the scope of the notice required by Executive Order 13496 is broader than the Procurement Act permits.

The Department disagrees with the assertion that Executive Order 13496 is not within the President's authority under the Procurement Act. The Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to" "provide the Federal Government with an economical and efficient system" of government procurement. 40 U.S.C. 101, 121. The Procurement Act grants the President flexibility and "broad-ranging authority," and executive orders issued under the authority of the Procurement Act need only meet a "lenient standard" that requires that the order have a "sufficiently close nexus" to the values of providing the government an economical and efficient system for procurement and supply. *UAW-Labor Employment Training Corp. v. Chao,* 325 F.3d 360, 367–68 (DC Cir. 2003). Various executive orders have passed this "lenient standard," even in cases in which the link between the order and efficient procurement may seem attenuated, where an argument can be made that the order will have the opposite effect of its stated goal, or when the order increases costs to the government in the short term. *Id.* at 367–68.[3] Executive Order 13496, which is intended to reduce government procurement costs through better informing employees of their rights so that obstructions to commerce stemming from labor unrest will be mitigated or eliminated, certainly meets this standard.

Five commenters contend that the Executive Order or the Department's regulations implementing it are preempted by the National Labor Relations Act. The comments invoke both theories of NLRA preemption fashioned by the Supreme Court, so-called *Garmon* preemption (*San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244 (1959)), which prohibits regulation of activities that are protected by Section 7 or prohibited by Section 8 of the NRLA, and so-called *Machinists* preemption (*Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 144 (1976)), which prohibits regulation of areas that Congress intended to be left "unregulated and to be controlled by the free play of economic forces." 427 U.S. at 144. The Court has described *Machinists* pre-emption as creating a "free zone from which all regulation, 'whether federal or State,' is excluded." *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 111 (1989), *quoting Machinists,* 427 U.S. at 153.

The Department disagrees with the contention that the Executive Order or this implementing regulation is preempted by the NLRA. *Garmon* preemption is inapplicable because the activity regulated by the Executive Order—the posting of an accurate, noncoercive notice of employee rights—is not conduct that is either protected by Section 7 or prohibited by Section 8 of the NLRA. Similarly, *Machinists* preemption is inapplicable because the provision of accurate, noncoercive information to employees about their NLRA rights is not within the zone of conduct intended by Congress to be reserved for market freedom. Further, *Chamber of Commerce v. Brown,* 128 S.Ct. 2408 (2008), in which the Court held that *Machinists* preemption invalidated a State statute that prohibited employers that receive State funds from assisting, promoting, or deterring union organizing, is distinguishable because the State law in that case attempted regulation of speech about unionization that was within the zone of conduct intended to be left to market forces. In this case, federal contractors remain free to advocate about unionization, and there is no interference with speech rights protected by Section 8(c) of the NLRA. Further, the regulation does not interfere with the primary jurisdiction of the National Labor Relations Board ("NLRB" or "Board") to draw the lines defining coercive speech that violates Section 8 of the NLRA, 29 U.S.C. 158, or that is prejudicial to a fair representation election under Section 9, 29 U.S.C. 159.

B. The Definitions

Section 471.1 of the final rule contains definitions of terms used in the rule. The Department received six comments from the public about the proposed definitions and, as noted below, has made some modifications to the definitions after reviewing the comments.

The Department received three related to the definitions of "contractor" and "contract." The NPRM defined a "contractor" to include both a prime contractor and a subcontractor, and defined "contract" to include both a Government contract and a subcontract. The effect of these definitions, taken together with the substantive obligations of the Executive Order and the rule, creates no differentiation between the obligations of the prime contractor—the contractor that directly does business with the Federal government—and the subcontractors of the prime contractor. The three comments noted that the broad definitions of "contractor" and "contract" improperly and without limitation impose the substantive obligations of the rule on all subcontractors. The three comments all suggest that the definitions should be modified to reflect some limitation on the application of the rule to subcontractors, such as the application of the simplified acquisition threshold, 41 U.S.C. 403, to subcontractors or a limitation on the application of the rule to subcontractors below the first tier. One of the three comments notes that although the proposed rule stated that the simplified acquisition threshold did not apply to subcontracts, because the definition of "contract" and "contractors" included "subcontract"

[3] Since the passage of the Procurement Act in 1949, successive administrations have issued executive orders governing labor and employment practices of federal contractors, and such orders have been sustained in the federal courts of appeals against attacks asserting that the President exceeded his authority under the Procurement Act. *See, e.g.,* Executive Order 11246, 3 CFR 339 (1964–65 Compilation) (1965) (applying equal opportunity principles to federal contractors), upheld by *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854, (1971); Executive Order 12092, 43 FR 51,375 (1978) (imposing wage controls on federal contractors), upheld by *AFL–CIO v. Kahn,* 618 F.2d 784 (DCCir.) (en banc), *cert. denied,* 443 U.S. 915 (1979); Executive Order 13202, 66 FR 11225 (2001) (agencies and entities receiving federal assistance for construction projects may neither require nor prohibit bidders or contractors from entering into project labor agreements), upheld by *Bldg. and Constr.. Trades Dept, AFL–CIO v. Allbaugh,* 295 F.3d 28 (DC Cir. 2002); E.O. 13201, 66 FR 11221 (2001) (requiring federal contractors to include in their contracts a provision agreeing to post notices informing employees of *Beck* rights), upheld by *UAW-Labor and Employment Training Corp. v. Chao,* 325 F.3d 360 (DCCir. 2003). *See also City of Albuquerque v. U.S. Dept. of Interior,* 379 F.3d 901 (10th Cir. 2004) (Procurement Act provided a sufficient statutory foundation for executive order directing that in meeting federal space needs in urban areas, first consideration be given to centralized community business areas; order's directions were sufficiently related to the Act to be a valid exercise of the Act's delegated authority); *AFL–CIO v. Carmen,* 669 F.2d 815 (DC Cir. 1981) (executive action to phase out free parking for federal employees was authorized since the institution of parking charges for federal employees would assist government in utilizing its property efficiently and economically).

and "subcontractor," the rule arguably applies the simplified acquisition threshold to subcontracts. 74 FR at 38491.

The remaining comments about the definitional section of the rule were all submitted by one commenter. This commenter noted that the limited definition of "collective bargaining agreement" in the proposed rule is inconsistent with the definition of "collective bargaining agreement" in the NLRA, and may lead to confusion. The same commenter requests an explanation for the inclusion of "weatherization" in the definition of "construction," noting that the definition of "construction" in similar Departmental regulations does not include the term. Finally, this commenter recommends that the definition of "government contract" should expressly exclude contracts for the purchase of "commercial items," as defined in the Federal Acquisition Regulation, 48 CFR 2.101, so that the terms and conditions of sales of commercial items to the government will be as similar as possible to sales in the private sector where a contract with the government is not involved.

After full consideration of these comments about the definitions in the proposed rule, the Department has made the following decisions. The Department endorses the definitions of "contract" and "contractor" as set out in the proposal, and has made no change to these definitions in the final rule. As discussed in greater detail below, the obligations of the final rule apply to both the government contractor and its subcontractors at any tier. In addition, the exception in the Executive Order, and in this implementing rule, for government contracts below the simplified acquisition threshold applies only to the prime contract and not to subcontracts of the prime contract. Finally, as further explained below, the Department has decided to except from application of the final rule subcontracts that are *de minimis* in value, which the Department has defined as those subcontracts that do not exceed $10,000. This exception has been incorporated into the rule in § 471.3(a), and no modification to the definitions is required in order to implement this new exception for *de minimis* value subcontracts.

The Department declines to exclude from the definition of "government contract" contracts for commercial items as defined in the Federal Acquisition Regulations, 48 CFR 2.101. The Department acknowledges, as the comment suggests, that the application of this rule to contracts for commercial items means that such contracts will differ from the purchase of the same items when the Federal government is not the purchaser. However, the judgment underlying the Executive Order, and the Department's judgment in this implementing rule, is that cost savings in Federal contracting can be made when employees are well informed of their NLRA rights, and this principle holds true whether the contract is for commercial items or for some other product or service.

The Department agrees that the definition of "collective bargaining agreement" in the rule, which is intended only to identify a class of collective bargaining agreements under the Federal Service Labor Management Relations Statute ("FSLMRS"), 5 U.S.C. 7101 *et seq.,* that are excepted from coverage under the Executive Order, may be confusing to readers accustomed to the usage of the same term in the NLRA. Therefore, the definition of this term has been removed from § 471.1, and the exception for collective bargaining agreements entered into under the FSLMRS is set out more fully in § 471.3 without cross-reference to the definitional section. In order to treat the other coverage exception similarly, the definition of "simplified acquisition threshold" has been removed from § 471.1, and the exception for government contracts below the simplified acquisition threshold has been made more explicit in § 471.3 without cross-reference to the definitional section. In addition, in response to a comment, the Department notes that because of the Federal government's increased emphasis on energy efficiency, the inclusion of weatherization activities within the definition of "construction" was important to ensure that Federal contracts involving weatherization are subject to the rule. For consistency, a similar revision has been made to the definition of "construction work site." Finally, in response to a comment received during interagency review of the final rule, the Department has modified the definition of "labor organization" to more precisely duplicate the definition of "labor organization" in the NLRA, 29 U.S.C. 152(5).

C. The Content of the Employee Notice

1. Statutory Rights Included in the Notice

Executive Order 13496 requires the Secretary to "prescribe the size, form and content of the notice" that contractors must post to notify employees of their rights. Sec. 3(b), EO 13496, 74 FR at 6108. Appendix A to Subpart A of the proposed regulatory text presented the content of the Secretary's proposed notice, which sets forth employee rights under the NLRA. 74 FR at 38498–99. As a threshold matter, the Department concluded in the NPRM that providing notice of employee rights under the NLRA best effectuates the purpose of the Executive Order. 74 FR at 38489–90. Section 1 of the Executive Order clearly states that the Order's policy is to attain industrial peace and enhance worker productivity through the notification of workers of "their rights under Federal labor laws, including the National Labor Relations Act." Sec. 1, 74 FR at 6107. The policy of the Executive Order goes on to emphasize the foundation underlying the NLRA, which is to encourage collective bargaining and to protect workers' rights to freedom of association and self-organization, and notes that efficiency and economy in government contracting is promoted when contractors inform their employees of "such rights." Further, the contract clause prescribed by the Executive Order requires Federal contractors to post the notice "in conspicuous places in and about plants and offices where employees covered by the National Labor Relations Act engage in activities related to performance of the contract. * * *" Sec. 2, para. 1, 74 FR at 6107 (emphasis added). Because of these specific references to the NLRA, the NPRM proposed including in the notice only employee rights contained in the NLRA.

The Department received one comment noting a textual ambiguity in the Executive Order relating to the content of the notice. The commenter pointed out that the Executive Order refers to the provision of notice about "rights under Federal labor laws, including the National Labor Relations Act," which, the commenter submits, suggests that the Department should include rights under other "Federal labor laws" in the notice as well. In particular, this commenter suggested that the notice should include statutory rights under the Railway Labor Act ("RLA"), 45 U.S.C. 151–188, the Federal law governing labor-management relations in the airline and rail industries. Two other commenters suggested the inclusion in the notice of rights under the Labor-Management Reporting and Disclosure Act ("LMRDA") 29 U.S.C. 401 *et seq.,* which guarantees certain rights to union members. A final commenter on this subject agreed with the Department that

the notice should be limited to rights under the NLRA.

The Department has considered the inclusion of other statutory rights in the notice, but has concluded that there is overwhelming textual support in the Executive Order, as noted above, for its original conclusion that rights under the NLRA should be the sole focal point of the required notice. Taken together, these provisions of the Executive Order offer strong evidence that its intent is to provide notice to employees of rights under the NLRA. Furthermore, no other Federal labor or employment laws are mentioned expressly in the Executive Order.[4] Therefore, there is no textual support—other than the plural reference to "Federal labor laws"—that would support the inclusion of rights under either the LMRDA or the RLA, as suggested by the comments. Inclusion of rights under the RLA is precluded for another reason as well. Because Executive Order 13496 requires that the notice be posted "where employees covered by the National Labor Relations Act" work, 74 FR 6107, and the NLRA expressly excludes from its coverage employers covered under the RLA and their employees, 29 U.S.C. 152(2) and (3), when the Executive Order and the NLRA are read together, federal contractors that are covered by the RLA are excluded from the requirements of the Executive Order.

2. Overview of the Comments on the Content of the Proposed Notice

As noted in the NPRM, the Department considered the level of detail the notice should contain regarding NLRA rights. The Department considered requiring a verbatim replication of the NLRA's enumeration of employee rights in Section 7, 29 U.S.C. 157, or a simplified list of rights based upon that statutory provision.[5] In the end, however, the Department concluded in the NPRM that inclusion of the statutory language itself or a simplified list of rights in a notice would be unlikely to convey the information necessary to best inform employees of their rights under the Act. Instead, the Department proposed a statement of employee rights, contained in Appendix A to Subpart A of Part 471 ("NPRM notice" or "proposed notice"), 74 FR at 38498–99, that provided greater detail of NLRA rights derived from Board or court decisions and that would more effectively convey such rights to employees. The proposed notice also contained examples of general circumstances that constitute violations of employee rights under the Act. Thus, the Department proposed a notice that provided employees with more than a 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. The Department specifically invited comment on the statement of employee rights proposed for inclusion in the required notice to employees. In particular, the Department requested comment on whether the notice contains sufficient information of employee rights under the Act; whether the notice effectively conveys the information necessary to best inform employees of their rights under the Act; and whether the notice achieves the desired balance between providing an overview of employee rights under the Act and limiting unnecessary and distracting information.

The content of the proposed notice received more comments than any other single topic addressed in the proposed rule. Many comments from both individuals and organizations offered general support for the content of the proposed notice, stating that employee awareness of basic legal rights will promote a fair and just workplace, improve employee morale, and foster workforce stability, among other benefits. Several employee and civil rights organizations registered support for the rule, and maintained that because employers are required to post notices informing employees of other federal workplace rights, this notice represents little or no additional burden and, in fact, is long overdue given the other required notices.[6] Labor organizations were also supportive of the proposed notice generally, noting that employees' awareness of their basic workplace rights in a clear and effective manner will promote the free exercise of those rights and prevent employer interference and intimidation of employees regarding self-organization and collective bargaining.

Other commenters were less enthusiastic about the content of the proposed notice. A significant number of commenters—approximately one-third—including many employer, industry and interest groups, argued that the content of the notice is not balanced, and appears to promote unionization instead of employee freedom of association. In particular, many commenters stated that among the rights contained in Section 7 of the NLRA is the right to refrain from union activity, but this right is given little attention in comparison to other rights in the proposed notice. In addition, many of these commenters also noted that the examples of employer and union unfair labor practices are unbalanced—the list of employer misconduct in the proposed notice was seven items long, while the example of union misconduct contained only one item. Several commenters also noted that the proposed notice excludes rights associated with an anti-union position, including the right to *seek* decertification of a bargaining representative, the right to abstain from union membership in so-called right-to-work states, and rights associated with the Supreme Court's decision in *Communication Workers* v. *Beck,* 487 U.S. 735 (1988), permitting employees to *seek* reimbursement of that portion of dues or fees collected under a union security clause in a collective bargaining agreement that is not used for collective bargaining, contract administration, or grievance adjustments. Many of these comments noted that a neutral and even-handed government position on unionization would be more inclusive of these rights.

Many comments addressed the issue of complexity, as it pertains both to the

[4] The Postal Reorganization Act, 39 U.S.C. 101 *et seq.,* extended the jurisdiction of the NLRB to employees of the United States Postal Service. *See* 39 U.S.C. 1201–1209.

[5] Section 7 of the NLRA, 29 U.S.C. 157, states that: "[e]mployees 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 such activities except to the extent 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) [section 158(a)(3) of this title]."

[6] The Department of Labor implements employee notification requirements pertaining to employers covered by the Fair Labor Standards Act, 29 U.S.C. 211 (implementing regulation 29 CFR 516.4); the Occupational Safety and Health Act, 29 U.S.C. 657(c) (implementing regulation 29 CFR 1903.2); the Family Medical Leave Act, 29 U.S.C. 2601 *et seq.,* (implementing regulation 29 CFR 825.300, .402); the Uniformed Service Employment and Reemployment Rights Act, 38 U.S.C. 4334 (implementing regulation 20 CFR 1002); Employee Polygraph Protection Act, 29 U.S.C. 2003 (implementing regulation 29 CFR 801.6); and the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1821(b), 1831(b) (implementing regulation 29 CFR 500.75, .76). Federal contractors specifically have additional notification requirements, including equal employment opportunity rights under Executive Order 11246, the Rehabilitation Act of 1973, 29 U.S.C. 793, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, (implementing regulations at 41 CFR Chapter 60–l .42; 41 CFR 60–250.4(k); and 41 CFR 60–74 1.5(a)(4)), and rights under the Davis-Bacon Act, 40 U.S.C. 3142(c)(2) (implementing regulation 29 CFR 5.5(a)(l)) and the Service Contract Act, 29 U.S.C. 351(a)(4) (implementing regulation 29 CFR 4.6(e), .184).

law and to the content of the proposed notice. Approximately ten comments stated that the Department's attempt to summarize NLRA decisional law was flawed because the law is far too complex to condense into a single workplace notice. Many of these comments noted that NLRA law has been developed over 75 years, and involves interpretations by both the NLRB and the federal courts, sometimes with conflicting results. Some commenters noted that because of Board member turnover, which alters the political composition of the Board, legal precedent changes frequently, thus requiring frequent updates to the content of the notice. Several commenters cited the NLRB's *Basic Guide to the National Labor Relations Act: General Principles of Law Under the Statute and Procedures of the National Labor Relations Board* (*Basic Guide to the NLRA*) (1997), *available at http://www.nlrb.gov/nlrb/shared_files/brochures/basicguide.pdf,* to make their point about legal complexity. In the Foreword to the *Basic Guide to the NLRA,* the Board's General Counsel states that "[a]ny 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." The thrust of these comments about legal complexity was that NLRA decisional law is too complex, dynamic, and nuanced, and any attempt to summarize it in a workplace notice will result in an oversimplification of the law and lead to confusion, misunderstanding, inconsistencies, and some say, heightened labor-management antagonism.

Similarly, six comments stated that the proposed notice itself was too complex to be helpful or informative to employees. Some said the notice was too long and wordy, and therefore likely to confuse or mislead employees, which, as one commenter noted, is contrary to the purpose of the Executive Order. Another said the notice is too long and contains examples of employer misconduct that are arbitrary and too specific.

Comments asserting that the content of the proposed notice was too detailed dovetailed with the many comments suggesting that the required notice should specify only those rights contained in Section 7 of the NLRA or, alternatively, those rights and obligations as stated in employee advisories on the NLRB's Web site.[7] Approximately sixteen comments suggested this simplified approach, while only three advocated in favor of the level of complexity in the notice, noting particularly that the detail in the notice comports with the Executive Order's requirement that employees should be "well informed of their rights." Those comments favoring a more streamlined notice suggested that a simplified version of the notice based on Section 7 or the NLRB's Web site advisory would be clear, straightforward, and easily understood; would not be stated in "legalese"; would be unlikely to confuse or inflame tensions; would defer to the statute's drafters or to the NLRB's expertise to provide a statement of rights; would be unbiased; and would decrease the likelihood of misleading employees; and would improve readability.

In addition to these general comments about the proposed notice, many comments offered suggestions for specific revisions to individual provisions within the four sections of the proposed notice: the preamble, the statement of affirmative rights, the examples of unlawful conduct, and the enforcement and contact information. The following discussion presents in succession the comments related to individual provisions of the notice, followed by the Department's decisions regarding the content of the final notice made in response to all comments on the content of the notice.

3. Comments Addressing the Preamble of the Proposed Notice

The preamble of the proposed notice stated that "[i]t 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." 74 FR at 38498. The proposed preamble was based on Section 1 of the NLRA, 29 U.S.C. 151, and Executive Order 13496, Section 1. The Department specifically sought comment on this description of policy in the proposed notice.

Five commenters support the statement in the preamble that U.S. policy encourages collective bargaining and the full exercise of worker self-determination rights. Many supportive comments noted that the preamble is appropriate given that Section 1 of the Executive Order also reiterates the policy of encouraging collective bargaining. Fourteen commenters opposed the preamble on various grounds. Many negative commenters noted that the preamble resembles text from Section 1 of the NLRA, "Findings and Policies," 29 U.S.C. 151, but substantially misstates it.[8] These commenters note that U.S. policy as stated in Section 1 of the NLRA is "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred," and that one means to achieve that policy goal is through the encouragement of collective bargaining and free exercise of rights. By overlooking the statute's true stated purpose to eliminate obstructions to commerce, these commenters say, the notice's preamble improperly elevates the "encouragement of collective bargaining" to a guiding principle rather than simply a means to achieve the free flow of commerce. Other commenters noted that the policy of the U.S. is, or should be, to remain neutral regarding labor-management relations, and the preamble should reflect neutrality by emphasizing employee choice, which includes the right to refrain from collective bargaining or other union activities. One commenter noted that Section 1 of the NLRA must be read together with Section 9 of the NLRA, 29 U.S.C. 159, which establishes procedures for the election of a collective bargaining representative by a vote of a majority, thus underscoring that U.S. policy encourages collective bargaining only when a majority of employees have freely chosen workplace representation. Observing some differences between the text of the notice's preamble and the statement of purpose in the Executive Order, two commenters noted that the preamble does not accurately track the Executive Order's precatory language.[9] Finally,

[7] *See http://www.nlrb.gov/Workplace_Rights/employee_rights.aspx.*

[8] Section 1 of the NLRA states that "[i]t is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting 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 or protection." 29 U.S.C. 151.

[9] Section 1 of the Executive Order, 74 FR 6107, states:

As the [NLRA] recognizes, "encouraging the practice and procedure of collective bargaining and * * * protecting 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 or protection" will "eliminate the causes of certain substantial obstructions to the free flow of commerce" and "mitigate and eliminate these obstructions when they have occurred." 29 U.S.C. 151.

several commenters suggested that the preamble be eliminated altogether so that these drafting issues need not be addressed.

4. Comments Addressing the Statement of Affirmative Rights in the Proposed Notice

The proposed notice contains the following statement of affirmative rights:

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.

Comments on the statement of affirmative rights offered both general guidance on the provisions overall, as well as specific recommendations for revising each provision individually. Generally, two labor organizations suggested that the statement of affirmative rights should present only the basic rights without any attempt to present the limitations to those basic rights that have developed over the decades of decisional law. The first labor organization argues that such limitations are themselves subject to further exceptions, which cannot be included in the notice without overwhelming and confusing employees. This comment notes that the limitations to the basic rights included on the notice involve fact-dependent scenarios that do not assist employees in understanding their basic rights. None of the basic rights, the comment asserts, have ever been understood as absolutes without any exceptions or limitations, so the attempt to include those in the notice is unnecessary and confusing. One commenter from the retail industry noted generally that the statement of affirmative rights should contain a disclaimer that "certain types of speech and expression in the workplace are not protected." As an example, the commenter indicated that some employers may permissibly prohibit third-party solicitations or leafleting, or wearing of any insignia, in a retail setting. The final general comment regarding the statement of affirmative rights suggested that the use of the second-person pronouns "you" and "your" is overly inclusive because not all casual readers of the poster are covered by the statement of rights. This comment suggests that the notice must make it clear that the enumerated rights apply only to covered employees, as the Department has done with the notice required by the Family and Medical Leave Act, 29 CFR part 825 Appendix C. This comment notes that a statement regarding eligibility would eliminate confusion for employees who are not covered by the NLRA but may read the notice.

Many comments about the notice's statement of affirmative rights were directed at whether each individual provision, *e.g.,* the right to bargain collectively or the right to discuss union issues with coworkers, constitutes an informative, accurate, and/or complete statement of the law. Some general conclusions emerge from a review of the comments on each provision, which is set out in more detail below. First, labor organizations tended to favor statements of rights that were short and without qualifications or exceptions, and disfavored the "subject to certain exceptions" limitations added to some of the provisions. Groups representing employers, on the other hand, argued in favor of adding exceptions and limitations to the notice, sometimes to the extent that the notice would lose the quality of a poster and would become instead a more comprehensive manual.

a. The Right To Organize and the Right To Form, Join and Assist a Union

There were no comments, positive or negative, specifically about the text of the notice referencing employees' rights to organize a union or form, join or assist a union.

b. The Right To Bargain Collectively

Two comments suggested that the statement that employees have the right to bargain collectively with their employers through a duly selected union over wages and other terms and conditions of employment is misleading and vague. The first comment argues that the statement is misleading because it fails to acknowledge that an employer does not have an obligation under the NLRA to consent to the establishment of a collective bargaining agreement, but instead only has the statutory duty to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d). Moreover, the failure to reach an agreement is not *per se* unlawful, and the finding of an unfair labor practice instead depends on whether the parties engaged in good faith bargaining. This commenter suggests that the notice should instead note that the NLRA requires the parties to bargain in good faith but does not compel agreement or the making of concessions, and that, in some instances, a bargaining impasse will result, permitting the parties to exercise their economic weapons, such as strikes or lockouts. A few other commenters similarly suggested that the notice should include a statement that both employers and unions have an obligation to bargain in good faith.

The second comment submitted about this particular provision argues that the term "duly selected" union is so vague that it permits misunderstanding. For instance, the comment suggests, the phrase permits the reader to erroneously conclude that an employer is obligated to bargain with a union supported by the majority of employees signing union authorization cards but not certified by the NLRB following a government-supervised secret ballot election. Alternatively, the comment submits that the phrase permits readers to erroneously believe that an employer must bargain with a minority union. To remedy the misstatements in this and other sections of the notice, the comment suggests that the Department rely on the text of the NLRB's very brief brochure entitled, *Protecting Workplace Democracy.*[10]

c. Discuss With Coworkers, Join With Other Coworkers

Both labor organizations and management groups suggested changes to the third provision in this section of the notice. One labor organization suggested significant streamlining of this provision so that it references only employees' "communication" rights, and recommends the inclusion of the other "action" rights ("join other workers," etc.) in the following provision. This comment advised that separation of communication from action would clarify each provision. Thus, the comment suggests that this provision should read simply: "Discuss your terms and conditions of employment or union organizing with your coworkers or with a union." A second labor organization

[10] The brochure can be accessed at *http://www.nlrb.gov/nlrb/shared_files/brochures/OutreachBrochure_Rev_10-30-07.pdf.*

agreed that communication and action rights should be separated, but adds that this provision should emphasize employees' rights to communicate with their coworkers *at their place of work* about union issues. While this comment suggests that this provision reference "employee's rights of workplace access/communication," it makes no specific proposal for revision of the text.

Comments from the groups representing employer interests generally suggest one of two approaches—either that the provisions should be stricken entirely because the law in this area is too complex to summarize or that the general statement in the provision is inaccurate because it fails to include limitations and qualifications on an employee's right to discuss union issues with coworkers. One law firm representing employers suggests that the provision be stricken entirely, because the notice cannot possibly accurately summarize Board law on this point, which is constantly evolving. Four other commenters assert that the following complexities or subtleties are missed in the overly succinct statement about communication rights: The statement fails to notify employees that employers can lawfully prohibit certain communication, such as a no-talk rule about a drug investigation or disparagement of employer's product or service; the statement fails to include the Board's recently articulated rules governing employee use of and access to employer e-mail for union talk,[11] omits references to the fact that an employee does not have an absolute right to speak to a union organizer on an employers' property, does not discuss the meaning of "mutual aid," fails to discuss an employees' duty not to disparage employers' products or services, and does not reference the limitations on so-called *Weingarten* rights involving an employee's right to have a union representative present in a disciplinary meeting; and the provision does not clarify that concerted activity must be both "concerted" and "for the mutual aid and protection" of employees, nor does it reflect that not all action taken together with coworkers is protected, for example, a sit down strike; and the provision does not explain that certain expressions or conduct, for instance, profanity directed at the employer, may not be protected (Jackson Lewis). As proposed revisions to this provision, one comment suggests that provisions should include the general "subject to certain limitations" language; another suggests sole reliance on the NLRB's brochure, *Protecting Workplace Democracy, See supra* n. 12; and the remaining comments suggest the inclusion of the level of detail that would effectively turn the notice into a multi-page legal reference.

d. Attending Rallies

All four comments about the right to attend rallies suggest that this provision should be eliminated. One comment suggests that the term "rally" has no legal history or meaning under the NLRA, and that the reference is misleading because it erroneously indicates that there might be some legal protection for a rally on company property on non-work time. Other comments similarly suggest that the provision is flawed because it does not distinguish between types of protected and unprotected rallies and is confusing. In addition to deleting the reference to rallies, one labor organization's proposed revision suggests deleting the reference to leafleting, discussed further below, and establishing this provision as the "action" provision in counterpoint to the "communication" provision above. Thus, this comment suggests the following revision: "Take action with one or more of your co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and *seeking* help from a union."

e. Leafleting

Four of the five comments about the inclusion of the right to leaflet on non-work time in non-work areas level criticisms similar to criticisms of other provisions—that the provision is too general and does not distinguish between types of leafleting conduct that are protected and those that are unprotected. For instance, the comments indicate that the provision fails to note limitations related to the rights of off-duty employees to handbill, that leafleting can be prohibited in patient care areas, and that some types of communications, such as the disparagement or vilification of an employer's reputation, are unprotected. The fifth comment on this topic suggests elimination of the provision because the right to engage in literature distribution is adequately addressed in the examples of violations and need not be addressed in the statement of affirmative rights.

f. Striking and Picketing

The notice's reference to the right to strike and picket received eight comments, and the comments are aligned generally as they have been with other provisions: Labor organizations suggest the removal of the "subject to certain other limitations" language and the suggestion that "[i]n some circumstances, your employer may permanently replace strikers," while comments representing employer interests suggest the provision is flawed because of the absence of further limitations, exceptions, and distinctions.

One labor organization suggests that the right to strike and picket be presented as are the other rights in the notice, with a plain affirmative statement of the right and without describing possible limitation on the exercise of the right in question. The reference to the limitation on the right in the presence of a contractual no-strike clause both overstates and understates the possible limitations on the right, this commenter submits, depending, for example, on the nature of the no-strike clause in question. A second labor organization echoes the criticism, and further suggests that the introduction of the complex law regarding an employer's right to permanently replace certain striking employees adds an unnecessary and ultimately confusing limitation, which will lead employees to fear exercising the right. Other labor organizations specifically endorse this criticism.

Among the permutations missed in the proposed formulation, other commenters argue, are the distinctions that may lead to a determination that certain strike activity is unprotected, such as whether the strike is for recognition or bargaining, whether the strike has a secondary purpose, whether picketing involves a reserved-gate, whether the strike is a sit-down or minority strike, whether the conduct is a slow down and not a full withholding of work, whether the strike is partial or intermittent, whether the strike involves violence, and whether the strike is an unfair labor practice strike or an economic strike. One law firm suggests this area of law is so complex that it cannot be reduced to a single provision in the notice, and thus should be eliminated altogether.

g. Choosing To Refrain From Union Activity

All nine comments about the right to refrain from engaging in union activity universally criticized its lack of prominence, two of these comments asserting that the provision's prominence was so diminished that they did not notice the statement at all. Some comments accused the Department of "burying" the provision in the text far below the other rights to

[11] *See The Register Guard,* 351NLRB 1110 (2007).

engage in union activity, further exemplifying, some say, that the Department favors union activity. Suggested revisions to amplify the prominence of the provision include stating that employees have the right to refrain from protected, concerted activities and/or union activities; stating that employees' right to refrain includes the right to actively oppose unionization, to not sign union authorization cards, to request a secret ballot election, to decertify a union representative, to not be a member of a union or pay dues or fees (addressed further below); and stating that employees have the right to be fairly represented even if not a member of the union. One employer suggested that if the notice retains its current emphasis favoring union activity and disfavoring the freedom to refrain from such activity, employers will be compelled to post their own notices, which the commenter states is not unlawful, that emphasize and elaborate on the right to refrain. Rather than subject employees to two posters, the commenter suggests, the Department should better balance this notice.

h. Rights Related to Union Membership

Eight commenters want the notice to include a statement about an employee's rights under *Communication Workers v. Beck,* 487 U.S. 735 (1988) ("*Beck* rights"). Typical of these comments is a submission suggesting that the notice should include the right to not be a member of a union, to not pay union dues or fees as condition of employment if the employee is in a so-called right-to-work state, and not to pay full union dues as condition of employment in non-right-to-work state. This commenter suggests that the failure to include these rights would make clear the Secretary's purpose to assist unions and union officials that themselves enjoy no rights under the NLRA. Another commenter made a somewhat different point about *Beck* rights, suggesting that the notice must include the right to refrain from being a full dues-paying member although an employee may have to pay representational fees; the right to refuse to pay any dues in a right-to-work state; and the right to withhold dues earmarked for political, lobbying or other non-representational activities. A third commenter suggests that if *Beck* rights are included, the Department may find it difficult to explain "compulsory unionism."

5. The Examples of Unlawful Conduct in the Notice

The proposed Notice contained the following examples of unlawful conduct:

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.

As a general matter and as noted earlier, there were many comments about the disproportionate number of examples of employer misconduct as compared to the single example of union misconduct. Thirteen comments made this point, many relying on the number of paragraphs devoted to illegal employer conduct (7) and the number of paragraphs devoted to illegal union conduct (1). Several comments indicated that when one compares the employer misconduct listed in Section 8(a) of the NLRA with union misconduct listed in Section 8(b), no such imbalance appears in the text of the statute. In order to comply with the Executive Order's directive to accurately inform workers of their rights, several comments indicated, additional examples of illegal union conduct must be included. Many suggested reliance on the statutory text of Section 8 to achieve the proper balance. Several commenters provided additional examples of union misconduct that may be listed, including the refusal to process a grievance because the employee is not a union member, requiring nonmembers to pay a fee to receive contract benefits, videotaping non-striking employees, disciplining members for engaging in activity adverse to a union-represented grievant, disciplining members for refusing to engage in unprotected activity, engaging in perfunctory or careless grievance handling, failing to notify employees of their *Beck* rights, causing or attempting to cause an employer to discriminate against an employee regarding union security, requiring employees to agree to dues checkoff instead of direct payment, discriminatorily applying hiring hall rules, and conditioning continued employment on the payment of a fine.

Four commenters offered general comments about the examples of unlawful employer conduct. Of those, two suggested relatively minor revisions—one asked for more specific examples of violations and one suggested the inclusion of the concept that low-level supervisors must not engage in misconduct. A third suggested the inclusion of examples of employer misconduct that interferes with or restrains an employee's right to oppose unionization. The fourth, from a labor organization, suggests that the Department should delete the specific references to solicitation, distribution and insignia, and instead categorically state that "it is unlawful for employers to interfere with any and all employee rights, including all examples of rights listed above." This comment contends that this would be clearer and more accurate than the current provision, which lists only some but not all violations.

As with the notice's statement of affirmative rights, the individual provisions in this section of the notice each received numerous comments and suggestions for improvement. The vast majority of the comments about the specific provisions are from representatives of employers, and most suggest that the examples are too broad and fail to reflect the various permutations that would convert some conduct from prohibited to permitted.

a. No Solicitation and No Distribution Rules

Seven commenters were critical of the provision stating that an employer cannot lawfully prohibit employees from "soliciting for the union during non-work time or distributing union literature during non-work time, in non-work areas." Of those, two labor organizations suggest that the references to "non-work time" and "non-work areas" are too abstract, ambiguous and confusing, and suggest additions to the text to explain the references. Thus, one labor organization proposes that the notice state that employers may not "prohibit you from soliciting for a union during non-work time, such as before or

after work or during break times; or from distributing union literature during such non-work time, in non-work areas, such as parking lots or break rooms." [12] The second labor organization offered the same clarification of the reference to non-work time, but goes further. This comment suggested that "solicitation" has a narrow meaning and involves asking someone to join the union by signing an authorization card, which is subject to the restrictions suggested in the notice. The comment submits, however, that this should be distinguished from more general "union talk"—discussing the advantages and disadvantages of unionization—which, the comment asserts, cannot be lawfully restricted by employers.

The remaining comments criticize the provision for failing to note any limitations on employees' rights to solicit and distribute, such as the limited rights of off-duty employees, and limitations in the retail and health care establishments. One comment, in particular, wants the notice to advise hospital employees that they do not enjoy a protected right to solicit in immediate patient care areas or where their activity might disturb patients, and proposes including the qualification, "except that a hospital or other health care employer may prohibit all solicitation in immediate patient care areas or outside those areas when necessary to avoid disrupting health care operations or disturbing patients." Another comment suggested that the law in this area is so complex that no meaningful but succinct provision can be constructed, and therefore recommends deleting it entirely.

b. Interrogating Employees About Union Activity

Four commenters, all representing employer interests, suggested that the notice's provision indicating that it is unlawful for an employer to question an employee about his or her union support or activities is too broadly stated. Three of the four suggested that the provision should include the Board's standard for analysis of interrogation charges, *i.e.,* whether the questioning interferes with an employee's rights given the totality of the circumstances. Two of those three suggested the inclusion of the circumstances that might be considered to determine whether questioning is unlawful, including the presence of employer hostility to unions, the identity of the questioner, the place and method used, and the employee's response. The fourth comment asserted that the provision should be stricken because the law in this area is too complex to summarize.

c. Taking Adverse Action Against Employees for Engaging in Union-Related Activity

Four comments, all from employer groups, disapprove of the provision describing unlawful employer discrimination against employees for engaging in union activity. Two of the four suggest that the provision is inadequate because it does not recognize the application of the Board's burden-shifting analysis in *Wright Line, Inc.,* 251 NLRB 1083 (1980) to determine whether unlawful discrimination has occurred. Another comment suggests that the provision is inaccurate because it does not reflect that in states without right-to-work laws and where a collective bargaining agreement contains a union security clause, some employers may be required to terminate employees who choose not to join the union or pay union dues or fees. The final comment complains that this provision is inaccurate because it does not include or explain protection for "concerted activity."

d. Threats To Close

Five comments, all from employer groups, criticize the overgeneralization of the provision stating that it is unlawful to threaten to close if a union is chosen to represent employees. Most comments note that, as with unlawful interrogation, a threat to close is evaluated under a totality of circumstances, and that an employer is permitted to state the effects of unionization on the company so long as the statement is based on demonstrably probable consequences of unionization. Also, as with other provisions, one commenter suggested that the provision should be eliminated because the law in this area is too complex to capture. A final comment suggests that the provision implies that a union can guarantee job security.

e. Promising Benefits

One comment from a group representing employer interests states that this provision is "the only substantive statement that the Department has proposed in the notice that we do not find fault with." The only two other comments state that the provision fails to recognize that an employer may promise or grant benefits that are not coercive in nature.

f. Prohibitions on Union Insignia

Two labor organizations and six employer groups are critical of this provision. One labor organization criticizes both the inclusion of the "special circumstances" exception as well as the reference to "patient care areas" as an example of a special circumstance. In addition to asserting that it inaccurately states the law because it fails to include "immediate" as a characterization of "patient care areas," this comment suggests that the provision would be better stated as an affirmative right rather than an employer unfair labor practice. The second labor organization suggests the elimination of "patient care area" as an example of the "special circumstances" exception.

The six remaining comments suggest that the provision fails to illuminate the conditions under which "special circumstances" may exist, including in hotels or retail establishments where the insignia may interfere with the employer's public image, or when the insignia is profane or vulgar. Another comment indicates that the provision is overly broad because it does not reflect that a violation depends on the work environment and the content of the insignia. All either suggest that more detail should be added to the provision to narrow its meaning, or it should be stricken.

g. Spying or Videotaping

Five commenters challenged the accuracy of this provision, asserting primarily that observation of union activity that occurs out in the open and videotaping for security purposes is lawful. Aside from the common suggestion that the provision be stricken, no specific revisions were suggested in the comments.

h. Union Discrimination or Adverse Action

There were no comments specifically addressing the one example of unlawful union conduct.

6. The Enforcement and Contact Information in the Notice

The proposed notice included NLRB contact information and basic enforcement procedures to enable employees to find out more about their rights under the Act and to proceed with enforcement if necessary. Accordingly, the required notice stated that illegal conduct will not be permitted, provided information regarding the NLRB and filing a charge with that agency, and indicated that the Board will prosecute violators of the Act. Furthermore, the notice indicated

[12] This comment also suggested changing the reference in the proposed provision from "*the* union" to "*a* union" to avoid the suggestion that there is a preferred union, such as an incumbent union. This suggestion has been adopted.

that there is a 6-month statute of limitations applicable to making allegations of violations and provides NLRB contact information for use by employees. The Department invited suggested additions or deletions to these procedural provisions that would improve the content of the notice.

Three commenters offered suggestions for this section of the notice. One commenter provided the following text to substitute for the paragraph in the proposed notice that begins, "If you believe your rights * * *":

> If you believe your rights or the rights of others have been violated, you should contact the NLRB immediately. You may inquire concerning possible violations without your employer or anyone else being informed of the inquiry. If the NLRB representative with whom you speak believes that a violation might have occurred he or she will inform you how you may file a charge seeking redress of the violation. Charges may be filed by any person and need not be filed by the employee directly affected by the violation.

The same commenter also suggested that the NLRB's telephone number appear before its Web site information because, the comment asserts, more people are likely to use the telephone to make the contact. A second commenter suggested that the contact information provide the important assurance that employees may raise employment questions or concerns with the NLRB in confidence, which is a revision that the first commenter's proposed paragraph incorporates. Finally, a third commenter suggested that the admonition in the notice that an employee "must contact the NLRB within six months of the unlawful treatment" if the employee believes a violation has occurred suggests that contacting the NLRB is mandatory and ignores those employees who may not want to contact the NLRB. The commenter suggests that the provision include the phrase, "if you desire relief from the NLRB."

7. Suggestions To Incorporate Three Additional Provisions

One comment suggested that the use in the proposed notice of the second-person pronouns "you" and "your" is overly inclusive because not all casual readers of the poster will be covered by the NLRA. This comment suggested that the notice should clarify that the specified rights apply only to covered employees in order to eliminate confusion for employees who are not covered by the NLRA but may read the Notice.

Four commenters suggested that the Notice include a provision referencing the NLRA's obligation on employers and labor organizations to bargain in good faith. One of these comments requested the inclusion as an express limitation on the provision that employees have the right to bargain collectively, in order to clarify that the employer's obligation was only to bargain in good faith and not necessarily to reach an agreement.

One commenter from the retail industry noted generally that the statement of affirmative rights should contain a qualification that "certain types of speech and expression in the workplace are not protected." As an example, the commenter indicated that some employers may permissibly prohibit third-party solicitations or leafleting, or wearing of any insignia, in a retail setting. Although this comment suggests a statement indicating limitations on certain employee speech rights, the Department has considered whether such a statement may be appropriate more broadly for application to all the rights and obligations listed in the notice, particularly in light of the many comments criticizing the proposed notice because its provisions do not indicate that the rights and obligations are subject to exceptions and limitations.

8. Revisions to the Notice Based on the Comments

After fully considering these comments, the Department has decided to revise the employee notice that will be included in the final rule ("final notice") as follows.

a. The Introduction to the Final Notice

The Department has substantially revised the preamble, or introduction, to the final notice to achieve several goals. First, the Department agrees with those comments suggesting that the preamble included in the NPRM notice contained content that did not promote employees' awareness of their *specific* rights under the NLRA, and that such a prominent place on the notice merited text that better served that goal. Second, the Department has included in this premier paragraph the concept that the NLRA prohibits both employer and union misconduct. Third, the Department agrees with comments suggesting that the final notice should contain a provision indicating which employers and employees are covered by the NLRA, and that coverage provision has been added with an asterisk in the new introduction. Fourth, in response to the many comments indicating that the NPRM notice included only broad generalities and did not include exceptions or limitations to the general rights listed in the notice based on particular facts or circumstances, which, if heeded, would convert a simple employee notice into a lengthy legal guide, the Department has included a cautionary note at the outset that the stated rights are general in nature, and the notice is not intended to provide specific advice about their application in all circumstances. Finally, the Department has made prominent the NLRB investigation and enforcement role, and has suggested that that agency can assist employees with specific questions or concerns should they arise. As a result, the final notice contains a new introduction that better serves these goals, as follows

> The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below if you have any questions about specific rights that may apply in your particular workplace.

The coverage provision, associated with the asterisk in the introduction, states:

> The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

b. The Statement of Affirmative Rights in the Final Notice

The Department concluded that no change was necessary to three of the seven affirmative rights listed in the proposed notice. As previously noted, the first two rights listed—the right to organize a union to bargain collectively and the right to form, join and assist a union—attracted no specific comments, either positive or negative, and therefore these provisions are unmodified in the final notice. The third right that the Department has left unchanged—the right to refrain from union activity, including joining or remaining a member of a union—received several comments suggesting that this right was given diminished prominence in favor of rights that promote activity in support of unions. This contention is misguided. The list of rights included in

the notice is patterned after the list of rights in the NLRA, 29 U.S.C. 157, which includes the right to refrain last, after stating several other rights before it. *See, supra,* n. 5. Similarly, the NLRB's Web site page follows the same pattern, listing the right to refrain fifth on a list of five specified rights. *See http://www.nlrb.gov/Workplace_Rights/employee_rights.aspx*

In addition, the notice's examples of unlawful employer conduct include the concept that it is illegal for an employer taking adverse action against an employee " because [the employee] choose[s] not to engage in any such [union-related] activity[,]" further underscoring an employee's right to refrain. Accordingly, the Department concludes that the notice sufficiently addresses this right among the list of statutory rights.

The Department has amended the statement in the notice regarding the right to bargain collectively. Based on comments discussed above, this provision was modified to substitute the statutory phrase "representatives of [employees'] own choosing" for the phrase "duly selected union" to eliminate the ambiguity of the latter. The substituted phrase retains the intent of the original phrase, which was to reflect that bargaining representatives can be elected or can be voluntarily recognized by an employer based on a verifiable showing that the labor organization enjoys majority support among employees in the bargaining unit, but employs the words of the statute instead. Thus, the final notice states that employees have the right to "bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions."

Based on comments, the next two provisions—discuss terms and conditions of employment and take action—have been substantially modified to achieve several goals. First, the Department agrees that these two provisions as presented in the proposed notice could be simplified and clarified by separating employees' communication rights from their conduct rights. In addition, the Department agrees that inclusion of the right to leaflet was duplicative of the provision regarding employer interference with distribution of union literature, and so this reference has been deleted from the final notice. Next, the Department decided to delete the reference to the right to attend rallies on non-work time so as not to complicate a list of essential and fundamental rights under the NLRA. Finally, because the reference in the proposed notice to "seeking and receiving help from a union" was moved to the following provision and in an effort to retain the concept that employees can discuss union-related activity among themselves, the Department added to the employee discussion provision the right to talk about unions and union organizing. As a result, the two provisions in the final notice state that employees have the right to, "discuss your terms and conditions of employment or union organizing with your co-workers or a union" and "take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union."

As noted earlier, the provision in the proposed notice related to the rights to strike and picket received several comments. Labor organizations suggested the removal of the references to a contractual no-strike provision, permanent replacements, and the phrase "subject to certain other limitations." By contrast, comments from employers suggested the provision is flawed because of the absence of the many limitations, exceptions, and distinctions related to these rights. By necessity, the notice cannot contain an exhaustive list of limitations on and exceptions to the rights to strike and picket, as suggested by employers. Indeed, the various permutations of these rights comprehensively documented by such comments reflect that in highlighting just a few limitations, or referring to them ambiguously as "other limitations," the proposed notice fell short of the goal to clearly inform employees about their rights. However, because exercising the right to strike, in particular, can significantly affect the livelihood of employees, the Department considers it vital to reflect in one general phrase that there are caveats associated with it. The Department is satisfied that the addition of a general caveat, coupled with the admonition in the new introduction to contact the NLRB with specific questions about the application of rights in certain situations, provides sufficient guidance to employees about the exercise of these rights while still staying within the constraints set by a necessarily brief employee notice. Thus, this provision in the final notice states that employees have the right to "Strike and picket, depending on the purpose or means of the strike or the picketing."

As noted, the Department received several comments suggesting that the notice contain provisions related to *Beck* rights. The final notice will retain, as part of the right to refrain, the provision stating that an employee has the right to not join or remain a member of a union that represents the employee's bargaining unit. However, further explication of *Beck* rights will not be included because of space limitations and because of the policy choice, as expressed in Executive Order 13496, to revoke a more explicit notice to employees of *Beck* rights. *See* Sec. 13, E.O. 13496, 74 FR at 6110.

c. The Examples of Unlawful Conduct in the Final Notice

The Department has decided that three examples of unlawful employer conduct—regarding unlawful threats to close, promises or grants of benefits, and spying or videotaping—need no revision for the final notice. The comments related to these three provisions all shared a common theme, as discussed above, that the provisions are overgeneralizations that neither capture the legal standard associated with evaluating allegations of unlawful conduct nor indicate factual scenarios in which the highlighted conduct may be lawful. After review of these comments and the case law cited therein, the Department concludes that the provisions as proposed are accurate and informative, and, as with the notice as a whole, strike an appropriate balance between being simultaneously instructive and succinct.

The Department has decided to modify the remaining four examples of illegal employer conduct in order to clarify them. First, the Department has modified the provision related to employers' no-solicitation and no-distribution rules for the final notice. The Department agrees with those comments suggesting that the terms "non-work time" and "non-work areas," while used commonly in Board law, are not readily ascertainable, and the addition of common examples of each would assist employees in understanding their rights. Therefore, the provision was modified to clarify the meaning of "non-work time" and "non-work areas." The remaining comments suggesting the inclusion of the various circumstances in which no-solicitation and no-distribution rules may be lawful were rejected due to limitations imposed by a notice format. More specifically, the Department recognizes that under the NLRB's precedent, a hospital's prohibition of solicitation or distribution of literature in immediate patient care areas, even during employees' nonworking time, is presumptively lawful. *Brockton Hospital,* 333 NLRB 1367, 1368 (2001).

Once again, however, the limitations on the format preclude the inclusion of factual permutations in which a general right may not apply or may only apply with qualifications, and hospital employees, as well as other employees, can contact the NLRB with specific questions about the lawfulness of their employers' rules governing solicitation and literature distribution. Finally, the Department acknowledges, as one comment noted, that the NLRB distinguishes between "solicitation" for a union, which generally means encouraging a coworker to participate in supporting a union, and so-called "union talk," which generally refers to discussions about the advantages and disadvantages of unionization. *W.W. Grainger,* 229 NLRB 161, 166 (1977), *enforced,* 582 F.2d 1118, (7th Cir.1978); *Jensen Enterprises, Inc.,* 339 NLRB 877, 878 (2003). However, this provision is intended to expressly address the former; the right to engage in "union talk" is now encompassed more specifically by the revision, as noted above, to the "discussion" provision in the affirmative rights section of the final notice. Accordingly, this provision in the final notice indicates that it is illegal for employers to "prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms."

The comments about the next provision regarding employers' questions about union support or activity correctly note that the Board's test for determining the legality of such questions is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed employees by the Act. *Rossmore House,* 269 NLRB 1176, 1177 (1984), *enforced,* 760 F.2d 1006 (9th Cir. 1985). Under this totality of circumstances approach, consideration is given to whether the interrogated employee is an open or active supporter of the union, the background surrounding the interrogation, the nature and purpose of the information sought, the identity of the questioner, the place and/or method of the interrogation, and the truthfulness of any reply by the questioned employee. *Id.* The Board has said that these factors are not to be mechanically applied but rather are useful indicia that serve as a starting point for assessing the totality of the circumstances. *Id.* The comments suggesting revisions of this provision, as with many of the prior suggestions, request inclusion of substantial detail, much of which is beyond the purview of this notice. However, the Department has concluded that the provision would be clarified by reference to the concepts that unlawful questioning interferes with employees' Section 7 rights and that the interference is judged under the circumstances of the questioning. Thus, this provision in the final notice states that it is unlawful for employers to "question you about your union support or activities in a manner that discourages you from engaging in that activity."

Comments about employers' taking, or threatening to take, adverse action against employees because of their union-related or other protected activity request the inclusion of complicated references to legal complexities, such as the application of a burden-shifting analysis to determine whether unlawful discrimination has occurred, *Wright Line, Inc.,* 251 NLRB 1083 (1980), or the consideration of the impact of right-to-work laws. This provision is intended to supply employees with notice of their fundamental right to be free from discrimination based on union activity, and its accuracy and instructiveness will be diminished by such complicated references. However, the Department agrees with one comment suggesting that the provision can be improved with the substitution of one word to underscore that the protections of the NLRA attach to activity that is concerted in nature. Thus, this provision in the final notice instructs employees that it is unlawful for employers to "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 *concerted* activity for mutual aid and protection, or because you choose not to engage in any such activity."

The final provision regarding unlawful employer conduct that the Department decided to revise is related to union insignia in the workplace. Generally, an employer may not prohibit the wearing of union insignia, absent special circumstances. *Airport 2000 Concessions, LLC,* 346 NLRB 958, 960 (2006). For reasons of format, the notice cannot accommodate those comments suggesting that this provision specify those cases in which the Board has found "special circumstances" to exist, such as where insignia might interfere with production or safety; where it conveys a message that is obscene or disparages a company's product or service; where it interferes with an employer's attempts to have its employees project a specific image to customers; where it hinders production; where it causes disciplinary problems in the plant; or where it would have any other consequences that would constitute special circumstances under settled precedent. *Escanaba Paper Co.,* 314 NLRB 732 (1994), *enforced,* 73 F.3d 74 (6th Cir. 1996). In addition, as noted earlier, an employer's prohibition on wearing union insignia in immediate patient care areas is presumptively valid. *London Memorial Hospital,* 238 NLRB 704, 708 (1978). This lengthy list supplied by some comments highlights that the addition of only one example of "special circumstances"—the patient care example—may mislead or confuse employees. Thus, the general caveat that special circumstances may defeat the application of the general rule, coupled with the advice to employees to contact the NLRB with specific questions about particular issues, achieves the balance required for an employee notice of rights about union insignia in the workplace.

The proposed notice had only one very broad description of union conduct that is unlawful under the NLRA. Although this provision generally encompassed a wide range of illegal union activity, it was criticized in comments for lacking specificity, and thus resulting in imbalance as compared to the examples of unlawful employer activity.[13] After reviewing the comments, the Department has revised the notice in order to more thoroughly reflect the range of unlawful union conduct.

Thus, the final notice contains the following five examples of unlawful union conduct:

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

[13] The Department notes that the NLRB reported that in fiscal year 2008, 22,497 unfair labor practice charges were filed. *Seventy-Third Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2008,* at 5, *available at http://www.nlrb.gov/nlrb/shared_files/brochures/annual%20reports/NLRB2008.pdf.* Of these, 16,179 charges were against employers, and 6,210 charges were filed against unions. *Id.* Thirty-nine percent of all charges were found to have merit, and 1108 complaints were issued. *Id.* at 7. Of complaints issued, 86 percent were against employers and 14 percent were against unions. *Id.* at 8.

• Take other adverse action against you based on whether you have joined or support the union.

d. The Inclusion of the Duty to Bargain in Good Faith

The Department agrees with those comments that suggested that employees should be aware that their employer and their bargaining representative have a statutory duty to bargain in good faith. Thus, the final notice states that "if you and your coworkers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement." The latter sentence regarding the union's duty of fair representation is somewhat duplicative of provisions above exemplifying union misconduct, but the Department concluded that it was important to note a union's duty to fairly represent all bargaining unit members specifically in connection with its obligation to bargain in good faith.

e. The Contact Information

The proposed notice contained two paragraphs about the NLRB, its enforcement procedures, and its contact information, which have been streamlined into one paragraph for the final notice. In doing so, and after reviewing the comments, the Department has substituted the word "should" for the word "must" to indicate that it is not mandatory that the NLRB be notified of unlawful conduct; retained the admonition to employees to act promptly and within the six month statute of limitations; added a sentence that underscores the confidentiality associated with contacting the NLRB; added a sentence that indicates that anyone can file a charge with the NLRB; and retained the sentence relating to possible reinstatement, back pay and cease-and-desist remedies. The final notice, as modified on the basis of comments discussed above, is set forth in Appendix A to Subpart A of this rule.

D. Incorporation of the Contract Clause in Government Contracts and Subcontracts

As proposed in § 471.2(a), all nonexempt prime contractors and subcontractors are required to include the employee notice contract clause in each of their nonexempt contracts and subcontracts. In order to ensure that contractors are made aware of their contractual obligation to post the required notice, proposed § 471.2(b) provided that the employee notice contract clause must be set out verbatim in a contract, subcontract or purchase order, rather than being incorporated by reference in those documents. In the NPRM, the Department requested comment regarding the utility of setting out the employee notice clause verbatim, as opposed to incorporation of the clause by reference.

The Department received ten comments about this requirement, only one of which agreed with the Department that full inclusion of the employee notice clause in every contract and subcontract will ensure that contractors and subcontractors fully understand their obligations under the rule. The other nine comments suggested that the rule should permit the inclusion of the employee notice clause by reference for various reasons, including that full inclusion provides little utility, and is burdensome and unreasonable because many contractors would have to substantially revise their procurement and contract documents, many of which are purposefully brief, standard-form documents, in order to comply. One commenter noted that because the content of the notice itself may be subject to updating, the contract clause will also require modification, and contractors who are unaware of the necessary update may inadvertently rely on outdated contract documents or provisions. Another commenter suggested that the notice in the contract clause is very long and contains language that will confuse readers of contracts and purchase orders. Finally, several commenters also noted that the prohibition on incorporation by reference is inconsistent with various laws—some of which are implemented by the Department—that permit contract clause incorporation by reference, including Executive Order 11246, Vietnam Era Veterans Readjustment Assistance Act, and Section 503 of the Rehabilitation Act of 1973, among others.

Following full consideration of these comments, and in order to ease contractor compliance with the requirements of this rule, the Department has decided to permit inclusion of the employee notice clause by reference. Therefore, in place of proposed § 471.2(b) that disallowed incorporation by reference, the final rule contains a new § 471.2(b), that permits incorporation by reference. The Department has coordinated with the FAR Council to implement this provision.

E. Application of the Rule to Contractors and Subcontractors; Exceptions and Exemptions; Other Limitations

As proposed in § 471.2(a), all nonexempt prime contractors and subcontractors are required to include the employee notice contract clause in each of their nonexempt subcontracts so that the obligation to notify employees of their rights flows to subcontractors of a government contract as well. The Executive Order expressly excepts from its application two types of Government contracts: Collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and contracts involving purchases below the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403. Sec. 2, 74 FR at 6107. The simplified acquisition threshold is currently set at $100,000. 41 U.S.C. 403. Section 471.3(a)(1) and (2) of the proposed rule implemented these exceptions. 74 FR at 38498. In addition, the Executive Order's provision regarding its effective date excepts contracts resulting from solicitations issued prior to the effective date of the final rule promulgated pursuant to this rulemaking. Sec. 16, 74 FR 6111. Proposed § 471.3(a)(3) implemented this provision of the Executive Order. 74 FR at 38498.

The NPRM concluded that the obligations of the rule apply to government contractors and all subcontractors of the government contract, regardless of whether the subcontractor is a first-tier subcontractor or a more remote subcontractor. This conclusion was based on the Department's construction of the interrelated terms of the Executive Order. The NPRM noted that paragraph 4 of the contract clause in the Executive Order requires the contractor to incorporate only paragraphs 1 through 3 of the clause in its subcontracts. 74 FR at 38490. A narrow reading of the operation of this provision outside the full context of the Executive Order, the NPRM noted, might suggest that the obligation to include the contract clause is limited to contracts between the government agency and the prime contractor. *Id.* Under this reading, subcontractors would be required only to post the notice of employee rights, and their subcontractors (sometimes called second-tier contractors) would have no responsibilities under the Executive Order. However, the NPRM reasoned that provisions of the Executive Order establishing exemptions and exceptions for the application of the Executive Order's obligations do not expressly specify that

its obligations do not flow past the first-tier subcontractor, a significant limitation that would normally be made explicit in the text of the Executive Order rather than by operation of the contract clause's incorporation provision. In addition, the NPRM noted that in the Department's past regulatory treatment of a similar issue, it had adapted through regulation the application of an executive order's contract inclusion provisions so that the obligation to abide by the mandates of the orders flows to subcontractors below the first tier. *See, e.g.,* 69 FR 16378, Mar. 29, 2004 (final rule implementing E.O. 13201) (based on identical contract incorporation provision, "the intent of the Order was clearly that the clause be passed to subcontractors below the first tier"); 57 FR 49591, Nov. 2, 1992 (final rule implementing E.O. 12800) ("It is clear, however, that the intent of Executive Order 12800 was that the clause flow down below the first-tier level"). The NPRM concluded that the Department's experience with regulatory implementation of prior executive orders establishing that the obligations of those orders flow past the first-tier subcontractor supported the application of this rule to subcontractors below the first tier, and best achieves the purposes of this Executive Order. 74 FR at 38491. Accordingly, the Department concluded that in order to fully implement the intent of Executive Order 13496, proposed § 471.2(a) was adapted to require the inclusion of paragraphs 1 through 4, rather than 1 through 3, of the contract clause. The Department specifically sought comments on this proposal.

The NPRM also concluded that although the Executive Order clearly did not apply to government contracts for purchases below the simplified acquisition threshold, the Executive Order did not provide for the same exception for subcontracts involving purchases below the simplified acquisition threshold. However, the Department noted that inclusion of the express limitation in the definition of "subcontract" that "subcontracts" consist only of those instruments that are "necessary to the performance of the government contract," NPRM § 471.1(r), was intended as a control on the otherwise universal application of the rule to subcontracts. 74 FR at 38491, *citing OFCCP v. Monongahela R.R.,* 85–OFC–2, 1986 WL 802025 (Recommended Decision and Order, April 2, 1986), *aff'd,* (Deputy Under Secretary's Final Decision and Order, Mar. 11, 1987) (railroad transporting coal to power generation plant of energy company contracting with GSA was subcontractor because delivery of coal is necessary for the power company to perform under its contract with GSA). Thus, the NPRM noted that although the rule may result in coverage of subcontracts with relatively *de minimis* value in the overall scheme of government contracts, covered subcontractors include only those who are performing subcontracts that are necessary to the performance of the prime contract. The Department invited comment on whether a further limitation on the application of the rule to subcontracts is necessary, and if it is, whether such a limitation is best accomplished through the application of this or another standard, for instance, a threshold related to the monetary value of the subcontract.

The Department received numerous comments about the application of the rule to subcontractors below the first tier, the non-application of the simplified acquisition threshold to subcontractors, and the proposed "necessary to the performance" limitation on the application of the rule to subcontractors. Four comments supported the application of the rule to subcontractors below the first tier. These commenters noted various reasons for their support, including that application of the rule to more remote subcontractors would prevent circumvention of the rule through subcontracting, would further the Executive Order's goal of preventing labor unrest, and was similar to the Department's implementation of prior executive orders. One commenter noted that it is not unusual for a vast majority of laborers on a jobsite to be employed by subcontractors of the prime contractor or its subcontractors, and that the rule should apply equally to such jobsites regardless of the remoteness of the subcontract to the prime contract. Three commenters argued that the Department should not apply the rule to subcontractors below the first tier, and one commenter requested clarification on the application of the rule below the first tier. Those comments opposing lower-tier application suggested that the rule has gone too far in its application, and that coverage of the rule should be limited to first-tier subcontractors. One commenter in particular disagreed with the Department's modification of the contract inclusion provision discussed above, contending that the Department's reliance on its prior regulatory implementation of Executive Orders 13201 and 12800 was inapt. The commenter noted that each of those executive orders contained a provision, not present in Executive Order 13496, stating that the Secretary may exempt "subcontracts below an appropriate tier set by the Secretary," thus indicating that the application of the rule to any tier of subcontractors was contemplated by the executive order but subject to administrative limitation. *See* Sec. 3(b)(v), E.O. 13201, 66 FR 11221, Feb. 22, 2001 (revoked by Executive Order 13496); Sec. 3(b)(v), E.O. 12800, 57 FR 12985, April 13, 1992 (revoked by Executive Order 12836). By contrast, the commenter notes, Executive Order 13496 contains no such language permitting the Secretary to limit the application of the rule, thus indicating that flow-down below the first tier is not contemplated by the plain language of the Executive Order.

The Department received eleven comments regarding the proposal in the NPRM to apply the simplified acquisition threshold only to government contracts and not to subcontracts, and all universally stated that the simplified acquisition threshold should apply to subcontracts as well. Most comments noted the incongruity associated with the application of the threshold to prime contracts but not to subcontracts, asserting that it makes little sense to except prime contracts below a set monetary limit but then apply the rule to reach subcontracts below that same limit. Most negative comments similarly noted that the failure to apply the simplified acquisition threshold to subcontracts will result in coverage of very small contracts and contractors, which, they argue, the Executive Order clearly intended to avoid by requiring the application of the dollar limit to prime contracts. Coverage of small subcontractors is burdensome to those contractors, many commenters asserted, and will result in the application of the rule to very small procurement contracts and will discourage some contractors from bidding for work associated with a government contract. Some commenters said they failed to see the policy reason supporting the non-application of the threshold to subcontracts. One commenter contended that the application of the rule to small subcontractors violates a Congressional mandate in the Small Business Act, 15 U.S.C. 637(d), that requires Federal agencies to give preference to small and disadvantaged businesses. Another comment noted the apparent inconsistency in proposed § 471.3(a)(2)(ii), which applies the simplified acquisition threshold to "contracts and subcontracts" for an indefinite quantity, but not to contracts

for a defined quantity. As noted above in the discussion of comments about the rule's definition section, because the definitions of "contract" and "contractor" include "subcontract" and "subcontractor," commenters argued that the rule by its terms does in fact apply the simplified acquisition threshold to limit its application to subcontracts. Finally, one commenter suggested that if the Department is concerned that application of the simplified acquisition threshold to subcontractors will unnecessarily limit the reach of the rule to small contractors, it should nevertheless include some other limitation on the application of the rule to prevent its application to very small contractors.

The Department's proposed limitation on the application of the rule to only those subcontracts that are "necessary to the performance of the prime contract" received little support from commenters. By contrast, five commenters submitted that the term was so general and vague as to be completely ineffective as a significant limitation on the rule's application. Two commenters suggested that *all* subcontracts in some manner, no matter how attenuated, are necessary to the performance of the prime contract, or the subcontract would not have been executed in the first place. In this vein, one commenter noted that the Department's use of the phrase suggests pejoratively that some subcontracts are unnecessary to the performance of the government contract. Other commenters queried how a subcontractor at the time of the execution of the subcontract is to know whether the subcontract is necessary to the performance of the government contract, particularly when such a determination by the Department will only be made during subsequent enforcement proceedings that may have adverse consequences for the subcontractor. One commenter noted that when a subcontractor or vendor receives a purchase order from a firm, the subcontractor or vendor may have no way of knowing of the purchase order's connection to a government contract without conducting an investigation into the purchaser's connections, which may be considered intrusive. One commenter stated that the Department's reliance on *OFCCP* v. *Monongahela R.R.,* 85–OFC–2, 1986 WL 802025 (Recommended Decision and Order, April 2, 1986), *aff'd,* (Deputy Under Secretary's Final Decision and Order, Mar. 11, 1987) to support explication of the phrase raised concerns because the rule should not apply to subcontractors that only supply material to a job site but do not install it.

Four commenters suggested alternative standards that would serve to limit the application of the rule to subcontractors. Suggested limitations included establishing a value for *de minimis* subcontracts to which the rule would not apply, which was phrased by another commenter as establishing an exemption for small contractors based on the monetary value of the subcontract; creating an exception for application of the rule to firms with a small, defined number of employees; and application of the rule to only those contractors and subcontractors that provide services, as opposed to supplies, to the government. One commenter noted that the rule should include a "minimum size threshold [below] which a contractor is exempt," but the commenter did not indicate whether the limit should be connected to the size of the subcontract's value, the size of the subcontractor's workforce, or the size of the subcontractor's revenue. This same commenter submitted that the rule must also provide some means by which a subcontractor will be notified that the subcontract is covered by the rule and some clarification on compliance in those situations in which a subcontractor does not have control over the site where the prime contract is being performed.

After carefully considering all the comments related to the application of the rule to subcontractors, the Department has made the following decisions. The Department will retain the provision, as proposed in enumerated paragraph 4 of the contract clause set out in Appendix A ("paragraph 4"), requiring government contractors to incorporate paragraphs (1) through (4) in every subcontract. As noted in the proposal, the contract inclusion provision in paragraph 4 cannot be read in isolation, but rather it must be read in conjunction with other operative words and phrases of paragraph 4 and in the Executive Order as a whole in order to fully implement its purpose. Many aspects of the Executive Order demonstrate the President's intent to apply the obligations of the Order not just to government contracts, but also to subcontracts of the government contract at all levels. As the proposal noted, no other provision in the Executive Order, save for the mechanical operation of paragraph 4, suggests that the intent of the Executive Order was to except subcontracts below the first tier. The Department concludes that silence in failing to include lower tier subcontractors in the Executive Order's exemptions and exceptions provisions indicates that they were meant to be covered. In addition, the Department broadly interprets paragraph 4's directive that the contractor "*will include* the provisions of paragraphs 1 through 3 above in *every* subcontract entered into *in connection with this contract* * * * so that such provisions will be binding upon *each* subcontractor[.]" The Department reads the terms "will include" in "every subcontract" to mean that the initial contractor will ensure, to the extent possible, that the posting obligation will be included in *all* subcontracts in connection with the prime contract, whether at the first tier level or below. Read in this fashion, this directive can be implemented only by requiring, as does the final rule, that every subcontract pass through such an obligation to any lower tier subcontractors. In addition, the Department interprets broadly the reference to "contractor" in paragraph 4 ("The *contractor* will include paragraphs (1) through (3) above * * *") to encompass a "subcontractor," so that the provision is read to require each subcontractor on a government contract, regardless of tier, to include posting requirements in any of its subcontracts.

Other provisions in the Executive Order outside paragraph 4 evince an intent to apply the rule to subcontracts below the first tier. References to "contractors" (Sec. 1), "any Government contractor, subcontractor, or vendor" (Sec. 5), and "a Government contractor or subcontractor" (Sec. 5) are unqualified or modified, and the Department interprets the references to mean subcontractors at all tiers. This broad interpretation is most fitting in application to the statement of policy in Section 1 of the Executive Order, which provides that "[w]hen the Federal government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest" and "relying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government's contracts." 74 FR 6107. Given the frequency with which the performance of government contracts are subcontracted, the policy of the Executive Order is best understood as reaching contracts below the first tier. This is particularly true when the government contract is, for instance, a large, multi-million dollar transaction, and its performance is subcontracted in multiple tiers. The

economy and efficiency that is sought to be promoted by the Executive Order would not be realized if subcontractors below the first tier of a large government contract were not subject to this rule, and a labor dispute at a lower tier subcontractor interfered with the delivery of the large prime contract. In such a case, "the efficient and economical completion of the Federal Government's contracts" would not be realized. 74 FR 6107. As a result, the Department interprets the Executive Order as a whole as seeking to avoid just such a scenario.

In addition, as noted in the proposal, the interpretation of Executive Order 13496 has been informed by the interpretation of Executive Orders 12800 and 13201. In both those cases, the Department similarly interpreted the text of the orders, which had contract incorporation provisions that were virtually identical to paragraph 4 of Executive Order 13496, to provide for application of the obligations to subcontractors below the first tier. *See* 69 FR 16378, Mar. 29, 2004; 57 FR 49591, Nov. 2, 1992. The Department has concluded that Executive Order 13496 was drafted with awareness of these earlier Executive Orders, and that it was intended to be implemented in the same manner as its predecessors.

One commenter emphasized that the regulatory implementation of Executive Orders 12800 and 13201 was supportable because those orders granted authority to the Secretary to exempt subcontracts below an appropriate tier, suggesting application of the obligations of those orders to lower contract tiers. *See* Section 3(b)(v) of Executive Orders 12800 and 13201, 57 FR 12986, Apr. 13, 1991; 66 FR 11222, Jan. 17, 2001 ("subcontracts below an appropriate tier set by the Secretary" may be exempted). In this case, the comment notes, Executive Order 13496 does not grant the Secretary similar regulatory authority to exempt contracts below an appropriate tier, thus suggesting that the Executive Order does not contemplate reaching contracts other than first tier subcontracts. However, the Department views the absence of such regulatory authority to exempt contracts below a certain tier as supporting its interpretation that the Executive Order intends that its obligations are to apply to all subcontracts of the prime contract regardless of tier. The President omitted from Executive Order 13496 any administrative authority to exempt lower tier subcontractors because he did not intend to permit *any* tier-based exemption, and not because it was contemplated that lower tier subcontractors would, at some point, be outside the reach of the purposes of the Executive Order. Thus, the Department interprets silence as to tier coverage within the text of the Executive Order as reflecting an intent for all tiers to be covered.

The Department's grant of authority to promulgate regulations under the Executive Order is broad, and permits the Department to implement the Order in a manner that is "necessary and appropriate to achieve the purposes" of the Order. Sec. 3(a), 74 FR at 6108. In addition, the Secretary has the express authority under the Executive Order to "make modification of the contractual provisions * * * necessary to achieve purposes of this order[.]" Sec. 3(c), 74 FR at 6108. Accordingly, in order to implement the purpose, intent, and express provisions of the Executive Order, which the Department concludes applies to nonexempt government contracts and all subcontracts of the government contract, the Department will retain paragraph 4 of the contract clause as proposed.

The Department will also retain the interpretation set out in the proposal that the exception for contracts below the simplified acquisition threshold applies only to the prime contract. The Department views as plain and unambiguous the text of the Executive Order on this point. Section 2 of the Order states that "all *Government contracting departments and agencies* shall, to the extent consistent with law, include the [contract clause] in *every Government contract,* other than * * * purchases under the simplified acquisition threshold. * * *" 74 FR 6107 (emphasis added). Based on this provision, the exception for contracts below the simplified acquisition threshold applies only to the original government contract, and has no application to subsequent subcontracts. In response to comments, the Department does not consider the result—excepting prime contracts below the simplified acquisition threshold and covering subcontracts below that threshold—to be incongruous. The Department concludes that the Executive Order embodies a sound policy choice that when the Federal government enters into a large prime contract (defined as exceeding the simplified acquisition threshold), *all employees* working under the umbrella of that prime contract will be notified of their rights under federal labor law, including employees of lower tier subcontractors. Indeed, it *would* be incongruous to seek economical and efficiency improvements in government procurement through a well-informed contractor workforce and yet *not* apply those standards to all subcontracts flowing from the covered prime contract regardless of their size. The Department notes that the application of the rule to subcontracts below the simplified acquisition threshold presents no greater notice-posting obligation than many of those employers already have with other notice-posting obligations under various labor and employment laws. For instance, the notice-posting obligation of USERRA, the Uniformed Services Employment and Reemployment Rights Act, requires *all* employers regardless of size to post notices to their employees about their USERRA rights. 38 U.S.C. 4334; 20 CFR 1002 (implementing regulations). The reach of this rule is not incompatible or inconsistent with the reach of other labor and employment notice-posting obligations.

After full consideration of comments about the application of the rule to *de minimis* value subcontracts, the Department has concluded that it is "necessary and appropriate," Sec. 3 of the Executive Order, to establish a *de minimis* value standard for subcontracts below which the rule will not apply. Such a standard expressly employs the principle that certain activity is of such modest concern to the application of the legal standard that it can be set apart from its application. *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.,* 505 U.S. 214 (1992) (the maxim—"the law cares not for trifles"—is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept). A *de minimis* standard based on the dollar value of the subcontract also has the advantage of permitting subcontractors to ascertain at the time of entry into the subcontract that this rule will or will not apply to them. In implementing the equal opportunity contract clause requirements of Executive Order 11246, the Department has established a $10,000 threshold for contracts and subcontracts below which that rule will not apply. *See* 41 CFR 60–1.5(a). The Department considers suitable the application of a similar $10,000 threshold for subcontracts below which this rule will not apply, and this *de minimis* standard has been added to § 471.3(a)(4). In addition, as with the admonition in § 471.3(a)(2)(i) that agencies and contractors may not enter into contracts so as to avoid the application of the rule, contractors and subcontractors similarly may not enter into contracts so as to avoid application of the rule, and that constraint has also

been added to § 471.3(a)(4). In addition to the exception for *de minimis* contracts, the definition of subcontract, as proposed in the NPRM, will continue to be limited to those that are "necessary to the performance of" the government contract.

In addition to the exceptions for certain contracts, the Executive Order establishes two exemptions that the Secretary, in her discretion, may provide to contracting department or agencies that the Secretary finds appropriate for exemption. Sec. 4, 74 FR 6108. These provisions permit the Secretary to exempt a contracting department or agency or group of departments or agencies from the requirements of any or all of the provisions of the Order with respect to a particular contract or subcontract or any class of contracts or subcontracts if she finds either that the application of any of the requirements of the Order would not serve its purposes or would impair the ability of the government to procure goods or services on an economical and efficient basis, or that special circumstances require an exemption in order to serve the national interest. *Id.* Proposed § 471.3(b) implemented these exemptions, and provided for the submission of written requests for exemptions to the Director of OLMS. It also provided that the Director may withdraw an exemption if a determination is made that such action is necessary or appropriate to achieve the purposes of the rule. The Department invited comments on the standards and procedures for requesting an exemption and the Department's withdrawal of a granted exemption, but received no comments applicable to these proposed revisions. Therefore, the proposed provisions implementing the exemptions stated in the Executive Order have been carried over to the final rule unchanged. *See* §§ 471.3(b) and (c).

F. Physical and Electronic Posting Requirements

1. Physical Posting Requirements

The contract clause in the Executive Order requires a contractor to post the employee notice "in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including in all places where notices to employees are customarily posted both physically and electronically." Sec. 2, 74 FR 6107. This provision from the Executive Order establishes a number of criteria for posting, including "conspicuous" posting, posting in locations where NRLA-covered employees work, posting in locations where contract-related activity is performed, and posting where employee notices are customarily placed. The NPRM summarized the physical posting criteria by stating that the provision establishes that a contractor is required to post the notice physically at its place of operation where employees are likely to see it. 74 FR at 38491. In addition, proposed § 471.2(d) provided that the Department will print the required employee notice poster and supply it to Federal contractors through the Federal contracting agency. The NPRM also noted the poster may be obtained from OLMS, whose contact information was provided in this subsection of the proposed rule, or can be downloaded from OLMS's Web site, *http://www.olms.dol.gov.* The NPRM observed that the Department's printing of the poster and provision of it to Federal contractors will reduce the burden on those contractors to comply with the Executive Order and this regulation, and will ensure conformity and consistency with the Secretary's specifications for the notice. Proposed § 471.2(d) also permitted contractors to reproduce in exact duplicate the poster supplied by the Department to satisfy their obligations under the Executive Order and this rule. The Department invited comment on its proposal to make available print and electronic format posters containing the employee notice.

The Department received nine comments on issues related to the physical posting requirements. As a general matter, a few comments stated support for the requirements for physical posting, and a few complained that the posting would create workplace clutter. However, most comments requested clarification of the criteria for posting and the meaning of specific terms, including "customary" placement and "activities related to the performance of the contract."

The contract clause in the Executive Order requires covered contractors to post notices in "places where notices to employees are customarily posted." 74 FR 6107. One comment sought guidance on this provision, asking whether "customary" postings means placement where the employer posts routine notices to employees such as general personnel information, or whether it instead means placement where the employer posts other legally mandated notices, which may be different.

One comment suggests that the contract clause establishes two independent requirements for posting: First, a contractor must post the notice where NLRA-covered employees perform work related to the contract, and second, they must post it in all places where notices to employees are customarily posted. This comment suggests that the first requirement is separate from the second, so the notice must be posted where contract work is being performed, even if not where customary employee notices are posted, *and* a notice must also be posted where employee notices are customarily posted. Under this interpretation, a contractor must post, for example, on the work floor *and* where other notices are posted. In a similar vein, a second commenter suggests that DOL "mandate effective physical posting" because "employees working at diverse or remote locations may not always pay attention to electronic notices but do take note of physical postings *in their work areas*" (emphasis added).

Several commenters raised concerns about the application of the phrase "activities relating to the performance of the contract." One commenter submitted that the meaning of where employees "engage in activities relating to the performance of the contract" is vague and unclear. Must a contractor post the notice, the commenter asks, in a location in which employees *indirectly* engage in contract activities, such as where employees provide some but not all products and/or services related to the contract; where employees spent only 20% of their work time on products and/or services that would "eventually" be used at a second facility in performance of the contract; where the product or service was altered prior to fulfillment of the contract; or where human resources personnel work at a separate location by providing support to employees working on the contract? In short, the commenter posits, what "nexus" must exist between an employee and work related to the performance of the contract?

A second commenter suggests that posting should be required only where employees work *directly* on the contract. The comment argues that requiring employers to post where employees are not working directly on the government contract may cause compliance challenges and would give contractors "significant pause" before entering into future government contracts. This commenter requests guidance from the Department regarding employees that do not directly perform contract work but perform supportive work, such human resources and accounting employees. Similarly, a third comment requests clarification on posting where the contractor's employees perform "remote tasks," such as payroll employees at a separate

facility, or employees at a distribution center that sends parts to the assembly facility where the contract work is performed. This comment also proposes that the Department interpret the provision to mean work performed *directly* on the contract, thus eliminating "upstream" and "downstream" employees. To the extent the rule covers administrative functions, the comment requests more specific guidance on how such work is "related to the performance of the contract."

Finally, two commenters contended that the rule's posting requirements conflict with the Executive Order. Specifically, they observe that § 471.10(b)(1) requires that the notice be posted at "each of the contractor's establishments and/or construction work sites* * *[,]" which appears to be broader than the contract clause requirement to post where employees engage in activities related to contract performance. The comment recommends revision to regulatory text to state that posting is only required where employees engage in contract's performance.

The Department received several comments about the physical poster itself. Two comments suggested that the poster be printed in other languages, particularly Spanish. Two agree with the Department that in order to ensure that the notice is not reduced or otherwise modified, the poster as supplied by the Department cannot be altered in size or substance and that only exact duplicates of the Department-supplied poster can be utilized. By contrast, two commenters noted that this no-alteration requirement prevents contractors from purchasing the poster through a commercial source that consolidates Federally mandated posters into a single poster, provides updates to posters when the content is revised by the implementing agency, or both.

After carefully reviewing the comments related to the physical posting requirements, the Department has concluded the following. The Executive Order requires a contractor to post the employee notice "in conspicuous places in and about its plants and offices[,] including all places where notices to employees are customarily posted * * * physically." Sec. 2, para. 1, 74 FR 6107. Because the Department received no comments raising issues regarding the meaning of posting "in conspicuous places[,]" the Department concludes that contractors are accustomed to such a requirement and it has a well-accepted meaning. A notice is conspicuously posted if it is placed in a central location where employees are likely to see it. *Dunham v. McLaughlin Body Co.,* 812 F. Supp 867, 872 (DC Ill. 1992) (notice required under Age Discrimination in Employment Act). *See also* 29 CFR 825.300, which requires covered employers to "post and keep posted" the notice required by the Family and Medical Leave Act ("FMLA"), 29 U.S.C. 2601 *et seq.,* "on its premises, in conspicuous places where employees are employed," which means "prominently where it can be readily seen by employees and applicants for employment." Accordingly, for the purposes of this rule, a contractor meets the requirement to post the employee notice conspicuously if the notice is prominent and can be readily seen by employees. This standard has been incorporated into a new subsection of § 471.2(d), which establishes the regulatory standards for a contractor's physical posting of the employee notice.[14]

The requirement to post "in and about [a contractor's] plants and offices * * *, including in all places where notices to employees are customarily posted[,]" when read together with the "conspicuous" requirement, requires widespread posting that is prominent and readily observable throughout the contractor's plants and offices, and emphasizes that among these locations is placement where other employee notices are posted. "Other notices to employees" is not limited to Federally mandated legal notices, but includes notices to employees regarding the terms and conditions of their employment. *See* § 471.2(d)(1).

In response to comments, the Department has determined that it is necessary and appropriate to require a contractor that employs a significant number of employees who are not proficient in English to post the employee notice in languages other than English to achieve the purposes of the Order, and this requirement has been incorporated into § 471.2(d). In implementing a similar requirement under the FMLA, 29 CFR 825.300(a)(4), the Department stated that "when the employer employs a significant portion of employees who are not literate in English, the employer [must] provide the poster and general notice to employees in a language in which they are literate." 73 FR 67991, Nov. 17, 2008. The Department similarly adopts this standard for application in this rule, and will require a contractor to post the employee notice in a language or languages spoken by a significant portion of the contractor's workforce. *See* § 471.2(d). Employers with multiple locations may post notices in different languages at different locations, if the posted notices are provided in languages in which the employees are literate at each location. The Department will provide necessary translations of the poster. *See* § 471.2(e). With regard to the requirement in § 471.2(e) that the poster not be altered by the contractor, the Department clarifies that this prohibition is not intended to, and should not, impair the ability of contractors to utilize a commercial poster service that might provide the instant employee notice consolidated onto one poster with other Federally mandated labor and employment notices, so long as such consolidation does not alter the size, color, or content of the poster provided by the Department.

Finally, the Department agrees with the comments that additional guidance is needed to advise contractors and employees regarding the meaning of the requirement to post where employees "engage in activities relating to the performance of the contract." 74 FR 6107. The starting point for interpretation and implementation of this phrase is two prior executive orders that similarly obligated notice-posting through contract clause incorporation. Although neither Executive Order 11246 nor 13201 included the operative phrase as a provision setting the outside bounds of the posting requirement, they each employed the operative phrase inversely to establish the basis of a coverage exemption.[15] As a result, both Executive Orders 11246 and 13201 provided that the Department may grant exemptions to facilities of a contractor that are "in all respects separate and distinct from *activities of the contractor related to the performance of the contract.*" *See* E.O. 11246, Sec. 204(d), as amended (available at *http://www.dol.gov/ofccp/regs/statutes/eo11246.htm*); E.O. 13201, Sec. 3(c), 66 FR 11222–23 (emphasis added).

In implementing the "separate and distinct facilities" exemption for

[14] Subsequent subsections of § 471.2 have been re-lettered following the insertion of new subsection (d).

[15] The contract clause prescribed by Executive Order 13201 specified that "[d]uring the term of this contract, the contractor agrees to post a notice, of such size and in such form as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices, including all places where notices to employees are customarily posted." Sec. 2(a)(1), 66 FR 11221. Section 202 of Executive Order 11246 requires that "[t]he contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause." Sec. 202(1), E.O. 11246 (available at *http://www.dol.gov/ofccp/regs/statutes/eo11246.htm*).

Executive Order 11246, the Department has adopted a multi-factor analysis to determine whether activity at a certain facility is separate and distinct from activity related to the performance of the contract.[16] Although these exemption factors are facility-based, and are inherently intended to analyze whether entire facilities are contract-related, they are nevertheless instructive because they suggest that indirect support of or benefit from the government contract may cause the denial of an exemption or waiver request.

In addition to analyzing the implementation of the phrase as it operated in the two predecessor executive orders, the Department has also looked to the implementation of a similar phrase that affirmatively established the bounds of a contractor's obligations without regard to the possibility of waivers or exemptions. The Department's previous experience implementing Section 503 of the Rehabilitation Act, 29 U.S.C. 793, provides such an analog. Prior to a statutory amendment in 1992, the affirmative action requirements of Section 503 required government contracts in excess of $10,000 to "contain a provision requiring that, *in employing persons to carry out such contract,* the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities." 29 U.S.C. 793 (1991 compilation) (emphasis added). Accordingly, the affirmative action provision of Section 503 applied only insofar as the contractor was employing persons to "carry out" or, as with Executive Order 13496, "engage in activities related to the performance of," the government contract. The similar focus of these provisions is thus directed to the specific nature of the employees' work, and is not based on the conduct of the work at a facility.

To determine whether contractors were "employing persons to carry out" a government contract for the purposes of Section 503, the Department established a disjunctive test. 29 CFR 60–741.4(a)(2). Under that test, the Department considered a position to have been engaged in carrying out a contract if:

> (A) The duties of the position included work that fulfilled a contractual obligation, or work that was necessary to, or that facilitated, performance of the contract or a provision of the contract; or
>
> (B) The cost or a portion of the cost of the position was allowable as a cost of the contract under the principles set forth in the Federal Acquisition Regulation at 48 CFR Ch. 1, part 31: Provided, That a position shall not be considered to have been covered by this part by virtue of this provision if the cost of the position was not allocable in whole or in part as a direct cost to any Government contract, and only a de minimis (less than 2%) portion of the cost of the position was allocable as an indirect cost to Government contracts, considered as a group.

29 CFR 60–741.4(a)(2)(A)-(B). In proposing this regulatory test, the Department explained that subsection A includes "work that is necessary to or that facilitates contract performance, even if not directly required by an express contract term, [which] is intended to reflect the practical reality that performance of a contract generally requires the cooperation of a variety of individuals engaged in auxiliary and related functions beyond direct production of the goods or provision of the services that are the object of the contract." 57 FR 48092, Oct. 21, 1992.

The Department has uniformly concluded in each of these prototypes—Executive Orders 11246 and 13201, and Section 503—that contract-related work includes more than direct work that effectuates that product or service that is the subject of the contract. Under the Department's interpretations, included in contract-related activity is indirect or auxiliary work without which the contract could not be effectuated, such as maintenance, repair, personnel and payroll work.

Accordingly, the Department will adopt the disjunctive test previously used for implementing the affirmative action requirements of Section 503 of the Rehabilitation Act to determine whether, under Executive Order 13496, particular employees are "engage[d] in activities relating to the performance of the contract." *See* § 471.2(d)(2).[17] In determining whether employees are engaging in activities relating to the performance of the contract under § 471.2(d)(2)(i), the Department notes that a contract for production and sale of goods to the Government commonly requires the work not only of the production employees assembling the goods, but also of those engaged in functions such as repairing the machinery used in producing the goods; maintaining the plant; assuring quality control and security; storing the goods after production; delivering them to the Government; hiring, paying, and providing personnel services for the employees engaged in contract-related work; keeping financial and accounting records; performing related office and clerical tasks; and supervising or managing the employees engaged in such tasks. This list is not intended to be exhaustive, but only to illustrate that a variety of functions may commonly be involved in activities related to the performance of the contract. Whether a particular employee is engaged in activities related to the performance of the contract depends on the facts. In each case, the question is whether the duties of the employee's position include work that contributes to or furthers the performance of the contract, or work whose omission would impede the contract's performance.

2. Electronic Posting Requirements

The NPRM stated that those contractors that customarily post notices to employees electronically must also post the required notice electronically. In proposed § 471.2(e), the Department indicated that such contractors may satisfy the electronic posting requirement on any Web site that is maintained by the contractor or subcontractor and customarily used for employee notices, whether external or internal. The NPRM noted that a contractor must display prominently on its Web page or electronic site where other employee notices are customarily placed a link to the DOL's Web page that contains the full text of the employee notice. The contractor must also place the link in the prescribed text contained in § 471.2(e). The prescribed text is the introductory language of the notice. The Department sought comments on this proposal for electronic compliance, and particularly requested feedback regarding whether it should prescribe standards regarding the size, clarity, location, and brightness with regard to the link, including how to prescribe electronic postings that are at least as large, clear and conspicuous as the contractor's other posters.

The Department received numerous comments about the electronic posting requirements of the rule. About half of those comments sought additional

[16] These factors are found in Office of Federal Contractor Compliance Programs Directive, Separate Facility Waivers/Exemptions (Sept. 13, 2002) (available at *http://www.dol.gov/ofccp/regs/compliance/directives/dir260.pdf*). Other factors that may be considered include the number of facilities connected to the contractor's Government contracts and the nature of the contractor's contractual relationship with the Government. *Id.* at 4. The Department's implementation of now revoked Executive Order 13201 concluded that the identical factors would be used to consider requests for waivers for separate and distinct facilities under that rule. *See* 69 FR 16384.

[17] In addition, Proposed § 471.10(b)(1), which stated that compliance evaluations will determine whether the notice is posted "in an about each of the contractor's establishments and/or construction worksites," has been modified to reflect that compliance evaluations will assess conformity with the applicable physical and electronic posting standards contained in § 471.2(d) and (f).

guidance on the meaning of particular terms used in the rule that establish the electronic posting requirement, and the other half commented on the text prescribed to accompany the electronic link to the notice. In addition, the Department received one comment responding particularly to whether the Department should adopt standards regarding display of the link. Finally, one comment challenged the requirement to post electronically as unnecessary, redundant and ultimately burdensome because, the commenter submitted, most employees are accustomed to finding notices on employee bulletin boards. This comment also suggested that posting this notice electronically, when other Federally mandated notices are required to be posted only physically, heightens the impact of this notice and suggests that it may have priority over other required notices. The comment suggests that this outcome is not supported by the requirements of the Executive Order.

Two comments suggested additional limitations on the meaning of "customarily post[ing] notices to employees electronically," which is the threshold standard that triggers the obligation to post this notice electronically as well. The first comment applauds the use of electronic notification to employees, but suggests that the requirement to post electronically be limited to those cases in which the employer posts only other Federally mandated notices electronically. The comment suggests that employers may post a variety of notices to employees electronically, and the mere use of electronic communications would trigger the e-posting requirement for this notice. The second comment suggests that in those cases in which an employer posts notices to employees both physically and electronically, the rule should be modified to give employers the option to post only physically. The comment supports the optional requirement with the example of firms that engage in manufacturing that may post some notices electronically. The most effective way to reach the employees engaged in the manufacturing process, the comment contends, is to physically post notices on the shop floor. This comment suggests the electronic posting in such instances would be needless and burdensome, and defeat the intent of the Executive Order. The comment suggests that the requirement to post electronically be limited to those cases in which employees engaged in activities related to the contract have regular access to electronic postings and access to electronic postings may be limited to employees engaged in activities related to the contract.

Three comments sought clarification of the requirement to "display prominently" the link to the Department's Web site containing the full text of the notice. The first comment suggests that many employers have intranet sites that are devoted entirely to communication with employees, and absent further guidance on prominent display, such employers will be uncertain where on those sites to include the link to the required notice. One labor organization suggested that placement of the link be required "immediately" on any page referencing employee notices so that successive clicks are avoided. A second labor organization suggested that the rule require the link to be no less prominent than the employer's display of other comparable notices. Finally, in response to the Department's specific query regarding whether it should prescribe standards regarding the size, clarity, location and brightness of the link, one commenter responded negatively, arguing that such regulation would be "intrusive, overreaching and over-regulating." Instead of assuming that contractors may try to minimize the link, the comment suggested that the Department simply require that the link be displayed in the same size and clarity as other information on the employer's Web site.

The Department received six comments on the text required to be included with the link to the notice, and because the prescribed text is identical to the preamble of the notice, the comments were analogous to comments discussed earlier about the text of the preamble—some favored the statement regarding encouraging collective bargaining and some opposed it. In addition to comments about the content of the text, two commenters objected to the length of the prescribed text, one suggesting that it is cumbersome and impractical and the other suggesting that the prescribed text simply state, "Your Rights Under the National Labor Relations Act." Two labor organizations favored the inclusion of the prescribed text, and suggested that it include the heading, "Important notice of Your Federal Rights with Regard to Collective Bargaining."

After full consideration of the comments about the rule's electronic posting requirements, the Department has made the following decisions. The Executive Order requires posting in "*all* places where notices to employees are customarily posted *both* physically and electronically." Sec. 2, para. 1, 74 FR 6107 (emphasis added). Thus, the Order indicates that the physical and electronic posting requirements are simultaneous, and one cannot be used in lieu of, or as a substitute for, the other. Accordingly, if an employer customarily posts employee notices both physically and electronically, it must post this notice both physically and electronically. As with the physical posting requirements, the Department concludes that a contractor "customarily posts employee notices electronically" within the meaning of the rule when the contractor posts messages to employees electronically about the terms and conditions of their employment, and such messages are not limited to Federally mandated communications and employee rights. Thus, a contractor must post this notice electronically in those places that it customarily posts electronically other messages to employees about the terms and conditions of their employment. Further, inherent in the concept of a contractor's "customary" electronic posting is employee access to those communications. Presumably, a contractor would not electronically post notices to employees about the terms and conditions of their employment if its employees did not have regular access to those notices. Therefore, the Department need not at this time provide guidance or set standards regarding employee access to electronic postings.

The Executive Order's requirement to post "conspicuously" was interpreted in proposed § 471.2(e) of the NPRM as requiring the "prominent display" of the link to the Department's Web site, and comments reflected uncertainty regarding the meaning of this provision. In particular, as noted in the comments, large contractors may have entire intranets that are available for communication to employees. Other contractors may maintain a Web site on which notices to employees are not consolidated into one location. Until compliance experience is further developed, the Department will not adopt a standard for "prominent display" that precisely regulates the location of electronic notice by a set number of successive "clicks" away from a starting page, as suggested in some comments. Instead, the Department will consider that the electronic notice is displayed prominently if the link to the Department's Web site containing the notice is no less prominent than the contractor's other notices to employees. In addition, at this time the Department will not set regulatory standards

regarding the clarity or brightness of the link to the Department's Web site. Further, in response to comments and for a variety of reasons, including limitations on space available for electronic notices, the Department has eliminated the requirement to include text specified in proposed Appendix B with the link to the Department's Web site containing the employee notice. Instead, the link to the Department's Web site must read, "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers," and this requirement has been included with the other requirements for electronic posting in § 471.2(f).

Finally, as with the requirement to post translations of the physical employee notice, where a significant portion of a contractor's workforce is not proficient in English, the contractor must provide the required electronic notice in the language the employees speak. This requirement will be satisfied by prominent display, as required in § 471.2(f), of a link to the Department of Labor's Web site that contains the full text of the poster in the language or languages the employees speak. In such cases, the Office of Labor-Management Standards will provide translations of the link to the Department's Web site that must be displayed on the contractor's or subcontractor's Web site.

G. Application of the Rule to Employers of "Employees Covered by the NLRA"

Proposed § 471.4 implemented the policy noted above that the Executive Order requires notice-posting in those workplaces in which employees covered by the NLRA perform work related to the Federal contract. Thus, § 471.4 of the proposed regulatory text established coverage of the rule that is coterminous with NLRA coverage, and stated that the rule did not apply to employers excluded from the definition of "employer" in the NLRA, 29 U.S.C. 152(2), and employers of employees excluded from the definition of "employee" under the NLRA, 29 U.S.C. 152(3).[18]

One commenter agreed with proposed § 471.4 as a starting point, but suggested that the rule must clarify several points with respect to NLRA coverage. First, the comment suggests that the rule should state that it does not apply to contractors without employees. Second, the comment suggests that the rule should exempt employers that do not fall within the NLRB's discretionary jurisdictional standards related to the volume and character of the business done by the employer. Third, the comment states that the rule should indicate that the Board's jurisdiction does not extend to some employers, such as religious school and tribal enterprises. A second comment agrees that the Department should state that employers who are not covered by the Board's discretionary jurisdictional standards, or are exempted from coverage for other reasons, such as certain religious educational institutions or the horse-racing industry, should be expressly excluded from the rule's application. Two comments raised the issue of application of the rule to foreign operations. The first comment urges the exemption of posting requirements for [presumably U.S. firms with] "employees performing work outside of the United States" because "the nations in which our companies operate overseas have labor management requirements of their own." The second comment raises the concern that requiring notice-posting "in foreign contracts and subcontracts would be confusing to employees working abroad who would not be subject to the statute." This comment notes that OFCCP has incorporated a similar exclusion in its regulations at 41 CFR 60–1.5(a)(3), and suggests a similar exemption for work performed on contracts and subcontracts outside the U.S.

As noted, Section 2 of the Executive Order requires contractors to post the required notice "where employees covered by the National Labor Relations Act" perform contract-related activities. The NLRA applies to employers and employees that are not excluded from coverage under the definitions of those terms in the Act. 29 U.S.C. 152(2)–(3). Section 10(a) of the Act empowers the Board "to prevent any person from engaging in any unfair labor practice affecting commerce," and § 9 of the Act extends the jurisdiction to representation cases where commerce would be affected. 29 U.S.C. 160(a), 159. Sections 2(6) and 2(7) provide statutory definitions of "commerce" and "affecting commerce." 29 U.S.C. 152(6), (7).

The Supreme Court has determined that Congress granted the Board with "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Corp.,* 371 U.S. 224, 226 (1963). Although the NLRA's statutory jurisdiction is coextensive with congressional power to legislate under the Commerce Clause, the Board has established discretionary standards that limit the assertion of its broad statutory authority to those cases which, in its opinion, have a substantial effect on commerce. These discretionary standards are based on the volume and character of the business done by the employer. *See* "An Outline of Law and Procedure in Representation Cases," Chapter 1, Jurisdiction (August 2008) (available at *http://www.nlrb.gov/nlrb/legal/manuals/outline_chap1.html*). However, even where an employer fails to meet the appropriate discretionary monetary standard, the Board will assert its jurisdiction to the extent necessary to address alleged violations of Section 8(a)(4), which prohibits retaliation against employees who give testimony or file charges under the Act, if it can be established that the Board has statutory jurisdiction, *i.e.,* a greater than de minimis flow of goods or services across State lines. *Pickle Bill's, Inc.,* 224 NLRB 413 (1976).

After due consideration, the Department declines to limit the application of the notice-posting requirements based on the Board's discretionary jurisdictional standards for the following reasons. First, had the President wanted the application of the rule to be limited in such a fashion, the words of the Executive Order would create such a limitation, but no such text appears in the Order. Second, the Board's discretionary jurisdictional standards were established to better effectuate the purposes of the Act to "promote the prompt handling of major cases" by limiting the exercise of its jurisdiction "to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce." *Hollow Tree Lumber Company,* 91 NLRB 635, 636 (1950). The application of the notice-posting

[18] Under the NLRA, the term "employer" excludes the United States, any wholly owned Government corporation, any Federal Reserve Bank, any State or political subdivision thereof, any person subject to the Railway Labor Act [45 U.S.C. 151 *et seq.*], any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. 152(2). Section 471.4(a)(3) of the NPRM contained an inadvertent drafting error, which combined two employer exclusions into one subparagraph. The two exclusions—any State or political subdivision of a State and any person subject to the Railway Labor Act—have been listed in separate subparagraphs in the final rule, thus increasing by one the number of employer exclusions listed in § 471.4(a).

The NLRA's definition of "employee" also excludes those employed as agricultural laborers, in the domestic service of any person or family in a home, by a parent or spouse, as an independent contractor, as a supervisor, or by an employer subject to the Railway Labor Act, such as railroads and airlines. 29 U.S.C. 152(3). Section 471.4(b) has been modified to include the NLRA's catchall definition of excluded employees, *i.e.,* someone who is employed "by any other person who is not an employer as defined" in the NLRA. 29 USC 152(3).

rule to employers outside the Board's discretionary jurisdictional limits raise no similar concerns related to the prompt handling of major unfair labor practice or representation cases, and thus no similar rationale demands the inclusion of such a limitation. Third, the Board's discretionary jurisdictional standards are numerous and unwieldy for the purposes of this rule. The jurisdictional standards that have the broadest application are those for retail and non-retail operations, but the Board has established numerous separate individual standards to address certain industries and types of enterprises, including health care organizations, newspapers, and educational institutions, among others. *See* "An Outline of Law and Procedure in Representation Cases," *supra,* Chapter 1, Jurisdiction (discussing jurisdictional standards applicable by industry). Finally, as illustrated in *Pickle Bill's, Inc., supra,* 224 NLRB at 413, certain public policies, such as remedying an employer's unlawful interference with the statutory right of all employees freely to resort to and participate in the Board's processes, demand that the Board's discretionary jurisdictional standards not apply. The Department likewise concludes that the public policy underlying this rule favoring notification to employees of their rights similarly demands that the Board's discretionary jurisdictional standards not apply. Therefore, the Department has determined that the rule applies to employers of "employees covered by the National Labor Relations Act," Sec. 2, 74 FR at 6107, without regard to the Board's discretionary jurisdictional limitations.[19]

These comments also raise the issue of the application of the rule to certain contractors that might implicate the First Amendment, such as religiously affiliated employers. *See NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979) (reading the NLRA in light of the Religion Clauses of the First Amendment, NLRB lacks jurisdiction over church-operated schools). Because such limits to the NLRA's jurisdiction are constitutional in nature and similarly implicate the Department's action under the Executive Order with respect to such contractors, the rule will not apply to contractors that hold themselves out to the public as a religious institution, that are nonprofit, and are religiously affiliated. *See University of Great Falls v. NLRB,* 278 F.3d 1335 (DC Cir. 2002) (employing three-part test for implementing *Catholic Bishop); Universidad Central de Bayamon v. NLRB,* 793 F.2d 383 (1st Cir. 1985) (en banc) (Breyer, Circuit Judge) (same).

As noted, the comments also raise the issue of the application of the rule to U.S. firms doing business abroad. The Supreme Court has stated that the statutory jurisdiction of the NLRA extends only to employees "of our own country and its possessions." *Benz v. Compania Naviera Hidalgo, S.A.,* 353 U.S. 138, 144 (1957). More precisely, the Act only applies to employees in the territorial United States, and not to American employees located abroad. *See, e.g., RCA Oms,* 202 NLRB 228 (1973); *Range Sys's. Eng'g Support,* 326 NLRB 1047 (1998); *Computer Sci.'s Raytheon,* 318 NLRB 966 (1995); *GTE Automatic Elec. Inc.,* 226 NLRB 1222 (1976). Similarly, the regulations implementing Executive Order 11246 exempt from coverage "work performed outside the United States by employees who were not recruited within the United States." 41 CFR. 60–1.5(a)(3). For these reasons, the Department has determined that this rule will not apply to government contracts for work performed exclusively by employees of U.S. firms operating outside the territorial United States, and § 471.3(a)(5) has been added to reflect this determination.

Finally, the comments raise the issue regarding the application of the rule to tribal governments. The NLRA is a statute of general applicability, and therefore may be applicable to the activities of Indian tribes. *NLRB v. Chapa-De Indian Health Program Inc.,* 316 F.3d 995 (9th Cir. 2003). The Board's standard for determining the circumstances under which it will exercise jurisdiction over Indian-owned and -operated enterprises is based on the nature of the enterprise and not its location. *San Manuel Indian Bingo & Casino,* 341 NLRB 1055 (2004). In *San Manuel,* the Board overruled prior precedent and applied the statute to the conduct of Indian tribes, unless the law touches the exclusive rights of self-government in purely intramural matters, the application of the law would abrogate treaty rights, or there is evidence in the statute or legislative history that Congress did not intend the law to apply to Indian tribes. *Id.* The Department will utilize the same standard, and apply this rule to Federal contractors that are Indian-owned or -operated enterprises, unless one of the exceptions articulated by the Board in *San Manuel* applies.

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

Subpart B of the proposed rule established standards and procedures the Department will use to determine compliance with obligations of the rule, take complaints regarding noncompliance, address findings of violations, provide hearings for certain matters, impose sanctions, including debarment, and provide for reinstatement in the case of debarment. The standards and procedures proposed in the NPRM were taken largely from the Department's prior rule administering and enforcing Executive Order 13201, 66 FR 11221. *See* 29 CFR Part 470 (2008), rescinded under authority of E.O. 13496, 74 FR 14045, March 30, 2009. The Department invited comment on the administrative and enforcement procedures proposed in Subpart B.

The NPRM noted that OFCCP administers and enforces several laws that ban discrimination and require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment. Therefore, OFCCP already has responsibility for monitoring, evaluating and ensuring that contractors doing business with the Federal government conduct themselves in a manner that complies with certain Federal laws. Proposed § 471.10 built on this practice and expertise, and established authority in the Director of OFCCP to conduct evaluations to determine whether a contractor is in compliance with the requirements of this rule. Under proposed § 471.10(a), such evaluations may be done solely for the purpose of assessing compliance with this rule, or may be undertaken in conjunction with an assessment of a Federal contractors' compliance with other laws under OFCCP's jurisdiction. This proposed section also established standards regarding location of the posted notice that will be used by OFCCP to assess compliance and indicates that an evaluation record will reflect efforts made toward conciliation, corrective action and/or recommendations regarding enforcement actions.

The Department received three comments that each raised concerns about OFCCP evaluations to determine

[19] As one comment notes, the Board has declined completely to exercise jurisdiction over the horseracing and dogracing industries because they are peculiarly related to, and regulated by, local governments, and because further regulation of them would not contribute to stability in labor relations in those industries. *See* 29 CFR 103.3. Because the Board has expressly found that its jurisdiction would not enhance labor-management stability in those industries, and because the purpose of this rule is to promote labor peace and reduce labor unrest, the Department will follow this jurisdictional standard and not apply the rule to the horseracing or dogracing industries.

whether a contractor is in compliance with the contract clause-inclusion and notice-posting requirements of the rule. The thrust of these comments is that OFFCP compliance evaluators do not have substantive expertise about the rights and obligations contained in the NLRA, and therefore should not be permitted to dispense advice to employees regarding those rights and obligations during compliance reviews. One comment noted that employees are likely to be confused by OFCCP's role in implementing the rule, because the NLRB has enforcement authority regarding the rights stated in the notice. A second commenter noted that the Department should delegate authority for compliance to the NLRB, since it has the proper enforcement authority. Two commenters noted that the Department must ensure that OFCCP compliance evaluators refer any questions regarding substantive rights and obligations under the NLRA to the NLRB. In response to these concerns, the Department notes that the purpose of an OFCCP compliance evaluation is to determine whether a contractor is in compliance with the requirements of this rule, in particular, whether the contractor has satisfied the notice-posting and contract clause-inclusion requirements applicable to that contractor. To the extent that questions are raised regarding the substantive provisions of the notice during a compliance evaluation, the OFCCP reviewer will refer such questions to the NLRB. Therefore, no change to the proposed § 471.10 is required.

Proposed § 471.11 provided for the Department's acceptance of written complaints alleging that a contractor doing business with the Federal government has failed to post the notice required by this rule. The proposed section established that no special complaint form is required, but that complaints must be in writing. In addition, as proposed in § 471.11, written complaints must contain certain information, including the name, address and telephone number of the person submitting the complaint, and the name and address of the Federal contractor alleged to have violated this rule. This proposed section established that written complaints may be submitted either to OFCCP or OLMS, and the contact information for each agency was contained in this subsection. Finally, proposed § 471.11 established that OFCCP will conduct investigations of complaints submitted under this section, make compliance findings based on such investigations, and include in the investigation record any efforts made toward conciliation, corrective action, and recommended enforcement action.

The Department received one comment regarding the "informality" of the complaint submission process. The comment suggests that because the complaint is not required to be submitted under penalty of perjury or similar standard, the process permits the filing of false complaints for harassment or other wrongful purposes. Unlike most other complaints alleging an employer's violation of a legal obligation, however, a complaint filed under § 471.11 requires only a straightforward allegation that an employer has not posted the required notice physically and/or electronically, or has not included the contract clause in its covered contracts or subcontracts. Once notified that such a complaint has been received, the alleged violation is either easily remedied or easily disproved, providing virtually no opportunity for harassment or other misuse of the complaint process. In addition, because the factual basis underlying a complaint is easily corrected, an employee who files a true complaint may be vulnerable to retaliation by an employer who quickly corrects the violation and then subjects the complaining employee to repercussions that may result from a penalty-of-perjury standard. Finally, the complaint process for the Department's former and now-revoked employee notice rule, 29 CFR 470.11 (2008) was identical to this process. For these reasons, the Department has decided to retain the complaint process as proposed in the NPRM. *See* § 471.11.

Proposed § 471.12 set out the initial steps that the Department will take in the event that a contractor is found to be in violation of this rule, including making reasonable efforts to secure compliance through conciliation. Under this proposed section, a noncompliant contractor must take action to correct the violation and commit in writing to maintain compliance in the future. If the contractor fails to come into compliance, OLMS may proceed with enforcement efforts proposed in § 471.13.

One comment regarding the conciliation process requested that the Department clarify the extent of a contractor's liability for penalties if the contractor has fully cooperated with reasonable conciliation effort and complies with the requirements of the rule. The same comment suggests that a contractor be given notice of the conciliation process and an opportunity to appear at that stage before the Director for Federal Contract Compliance, and that if compliance results, a written decision be issued to that effect.

The comment misconstrues the conciliation and enforcement processes of the rule. Enforcement proceedings against a contractor, discussed further below, will result when a violation has not been corrected through conciliation. § 471.13(a)(2). If, during the conciliation process, a contractor comes into full compliance with the requirements of the rule and commits in writing not to repeat the violation, § 471.12(b), there is no need to refer the matter for enforcement, and no attendant penalties can result. Similarly, because of the informality of the conciliation process and the absence of any penalties associated with it, there is no basis to provide a contractor with formal notice, an opportunity to be heard, or a decision on the record at that stage of the process.

Proposed § 471.13 implemented Section 6 of the Executive Order, 74 FR 6108–09, and established steps that the Department will take in the event that conciliation efforts fail to bring a contractor into compliance with this rule. Under this proposed section, enforcement proceedings may be initiated if violations are found as a result of either a compliance evaluation or a complaint investigation, or in those cases in which a contractor refuses to allow a compliance evaluation or complaint investigation or refuses to cooperate with the compliance evaluation or complaint investigation, including failing to provide information sought during those procedures. The enforcement procedures proposed in § 471.13 relied primarily on the Department's regulations at 29 CFR part 18, which govern administrative hearings before an Administrative Law Judge ("ALJ"), and on the provisions for expedited hearings at 29 CFR 18.42. The procedures in this proposed section established that an ALJ will make recommended findings and conclusions regarding any alleged violation to the Assistant Secretary for Employment Standards ("Assistant Secretary"), who would issue a final administrative order. The final administrative order may include a cease-and-desist order or other appropriate remedies in the event that a violation is found. The procedures in this proposed section also established timetables for submitting exceptions to the ALJ's recommended order to the Assistant Secretary, and also provided for the use of expedited proceedings. Other than the substitution of the Administrative Review Board for the Assistant Secretary, as noted earlier, no changes were made to proposed

§ 471.13, and it is unchanged in the final rule.

Proposed § 471.14 addressed the imposition of sanctions and penalties in cases in which violations are found, and established post-hearing procedures related to such sanctions or penalties. Section 7 of the Executive Order provides the framework for the scope and nature of remedies the Department may order in the event of a violation. 74 FR 6109.

Section 7(a) of the Executive Order provides that the Secretary may issue a directive that the contracting department or agency cancel, terminate, suspend, or cause to be cancelled, terminated or suspended any contract or portion of a contract for noncompliance. *Id.* In addition, the Executive Order indicates that contracts may be cancelled, terminated or suspended absolutely, or their continuance may be conditioned on a requirement for future compliance. *Id.* Prior to issuing such a directive, the Secretary must offer the head of the contracting department or agency an opportunity to object in writing to the remedy contemplated, and the objections must contain reasons why the contract is essential to the agency's mission. *Id.* Finally, Section 7 of the Executive Order prevents the imposition of such a remedy if the head of the contracting department or agency, or his or her designee, continues to object to the issuance of the directive. *Id.* Proposed § 471.14(a), (b), (c), and (d)(1) fully implemented the standards and procedures established in Section 7(a) of the Executive Order.

Section 7(b) of the Executive Order provides that the Secretary may issue an order debarring noncompliant contractors "until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of the order." 74 FR 6109. As with the remedies discussed above, prior to the imposition of debarment, the Secretary must offer the head of the contracting department or agency an opportunity to object in writing to debarment, and the objections must contain reasons why the contract is essential to the agency's mission. *Id.* Finally, Section 7(b) of the Executive Order prevents the imposition of debarment if the head of the contracting department or agency, or his or her designee, continues to object to it. *Id.* Proposed § 471.14(d)(3) of the rule established the availability of the debarment remedy. Section 471.14(f) of the proposed rule indicated that the Assistant Secretary will periodically publish and distribute the names of contractors or subcontractors that have been debarred for noncompliance. Other than the substitution of the Director of OLMS for the Assistant Secretary, as noted earlier, no changes were made to proposed § 471.14, and it is unchanged in the final rule.

Proposed § 471.15 permitted a contractor or subcontractor to *seek* a hearing before the Assistant Secretary before the imposition of any of the remedies outlined above. Other than the substitution of the Director of OLMS for the Assistant Secretary, as noted earlier, no changes were made to proposed § 471.15, and it is unchanged in the final rule. Proposed § 471.16 provides contractors or subcontractors that have been debarred under this rule an opportunity to *seek* reinstatement by requesting such in a letter to the Assistant Secretary. Under this proposed provision, the Assistant Secretary may reinstate the debarred contractor or subcontractor if he or she finds that the contractor or subcontractor has come into compliance with this rule and has shown that it will fully comply in the future.

As noted above, § 471.2(a) required all nonexempt prime contractors and subcontractors to include the employee notice contract clause in each of its nonexempt subcontracts so that the obligation to notify employees of their rights is binding upon each successive subcontractor. Regarding enforcement of the requirements of the rule as to subcontractors, the Executive Order requires the contractor to "take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance." Sec. 2, para. 4, 74 FR 6108. Accordingly, in the event that the Department determines that a subcontractor is out of compliance with the requirements of this rule regarding employee notice or inclusion of the contract clause in the subcontractor's own subcontracts, the Secretary may direct the contractor to require the noncompliant subcontractor to come into compliance. As indicated in the Executive Order, if such a directive causes the contractor to become involved in litigation with the subcontractor, the contractor may request the United States to enter the litigation in order to protect the interests of the United States. Sec. 2, para. 4, 74 FR 6108. If the contractor is unable to compel subcontractor compliance on its own accord, the compliance review, complaint, investigation, conciliation, hearing and decision procedures established in §§ 471.10 through 471.16 to assess and resolve contractor compliance with the requirements of this rule are also applicable to subcontractors. In those instances in which a contractor fails to take the action directed by the Secretary regarding a subcontractor's noncompliance, the contractor may be subject to the same enforcement and remedial procedures that apply to noncompliance with requirements to provide employee notice or include the contract clause in its contracts. *See* § 471.13(a)(1).

The Department received a number of comments regarding the enforcement procedures of the rule, the vast majority of which raised concerns regarding the Department's purported enforcement of the substantive provisions of the notice. Eight comments raised the issue with respect to the second paragraph of the contract clause, which states that the "contractor will comply with all provisions of the Secretary's notice, and related rules, regulations, and orders of the Secretary of Labor." 74 FR 6107. These comments note that this provision, when taken together with the rule's enforcement procedures, suggest that the Department will be adjudicating violations of the substantive provisions of the notice, which they correctly indicate is solely within the purview of the National Labor Relations Board. Other commenters raise the same issue more generically, and suggest that the Department's enforcement against contractors that violate the Department's rule interferes with the NLRB's exclusive jurisdiction. Overall, the comments indicate that the Department's interference with the NLRB's adjudicatory role would violate principles of preemption and primary jurisdiction, and incorrectly impose sanctions precluded by the NLRA.

In response to these comments, the Department assures the contractor community that it cannot, nor will it, attempt to enforce the substantive provisions of the notice against contractors or subcontractors. As the comments correctly note, such enforcement authority is within the exclusive jurisdiction of the National Labor Relations Board. The primary purpose of the Executive Order is to reduce the government's contracting costs by ensuring that employees are well-informed of their rights under the NLRA. 74 FR 6107. The mechanism by which the Executive Order achieves this goal is through requiring that a contractor agree in the government contract to post a notice, developed by the Department, to its employees about those rights. The grant of enforcement authority to the Department in Sections 6 and 7 of the Executive Order is limited, and the Order sanctions the Department's enforcement activity only

as to a contractor's compliance with the contract clause-inclusion requirements and the notice-posting requirements of this final rule. The Department does not construe the second paragraph of the contract clause as establishing an independent basis of authority for the enforcement of the substantive provisions of the notice. Of course, the substantive provisions of the notice are an accurate reflection of NLRA law. As a result, if a contractor is failing or refusing to comply with those provisions, the contractor may be in violation of the NLRA, and in that case charges may be lodged solely with and adjudicated solely by the NLRB.

Beyond questions related to alleged overlapping jurisdiction, comments regarding enforcement of the rule made general observations and consisted of some requests for clarification. Two commenters submitted general support for the administrative and enforcement procedures of the rule. One comment indicated that these same enforcement procedures worked well in implementing the now-revoked Executive Order 13201, and urged the Department to similarly emphasize compliance assistance rather than "heavy-handed enforcement." One commenter described the available sanctions, particularly debarment, as "unduly extreme," and is concerned that a contractor might face such sanctions in the event of an unintentional or inadvertent violation, such as when a notice has fallen off the wall. Another comment requested more guidance on reinstatement from debarment under § 471.16, including the steps a contractor must take to *seek* reinstatement and the requirement of a written decision on the request. This comment offers as an example the reinstatement procedures established in 41 CFR 60–1.31. Another comment requests that the Department clarify that a contractor has no affirmative obligation to compel a subcontractor's compliance with the rule, and that a contractor can only be compelled to itself comply. This comment suggests that it is unrealistic of the Department to require that contractors police their subcontractors for compliance, and that the Department should take enforcement action directly against a subcontractor in the event of the subcontractor's noncompliance. The final comment regarding enforcement suggests that the rule must be revised to reflect the Department's elimination of the Employment Standards Administration and the abolition of the position of Assistant Secretary for Employment Standards, which, as previously noted, has been done.

In response to these comments, the Department notes that contractors will not receive harsh sanctions for inadvertent or unintentional violations of the rule. Indeed, the primary purpose of the conciliation procedures is to seek a contractor's cooperation and compliance with the rule, so inadvertent and unintentional noncompliance will be addressed long before any sanctions may be imposed. Further, the Department has decided to clarify the standards for reinstatement of a debarred contractor, and, as suggested, those standards are modeled on the regulation governing reinstatement of contractors debarred under Executive Order 11246, 41 CFR 60–1.31. Thus, under amended § 471.16, in connection with a reinstatement request to the Director of OLMS, debarred contractors are required to show that they have established and will carry out policies and practices in compliance with the Executive Order and implementing regulations. Before reaching a decision, the Director of OLMS may request that a compliance evaluation of the contractor be conducted, and may require the contractor to supply additional information regarding the request for reinstatement. If the Director of OLMS finds that the contractor or subcontractor has come into compliance with and will carry out the Executive Order and the regulation, the contractor or subcontractor may be reinstated. In addition, under the revised provision, the Director of OLMS shall issue a written decision on the request. *See* § 471.16.

Finally, in response to the comment suggesting that contractors not be compelled to police their subcontractors to determine compliance, the Department concludes that the operative provision in paragraph 4 of the contract clause of the Executive Order does not support the position suggested in the comment. This provision requires a contractor to "take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non-compliance." 74 FR 6108. The provision thus indicates that a prime contractor cannot turn a blind eye toward noncompliance of its subcontractors, and should the Department become aware that a prime contractor has a significant number of subcontractors that are out of compliance with this rule, the Department may order that prime contractor to require its subcontractors to come into compliance. In the event that the contractor disregards such an order to *seek* compliance among its subcontractors, such disregard may make the prime contractor liable for penalties and sanctions in the same manner as if the contractor had failed to incorporate the contract clause or post the employee notice. In this regard, however, the prime contractor is liable for penalties and sanctions only insofar as it fails or refuses to *seek* compliance among subcontractors following an order by the Department to do so. If a prime contractor diligently *seek*s subcontractor compliance following such an order, but a subcontractor's compliance is not forthcoming, the prime contractor will not be liable for the subcontractor's noncompliance. As noted above, only § 471.16 of this subpart was modified in response to comments.

Subpart C—Ancillary Matters

A number of discrete issues unrelated to the issues *addressed* in the two previous subparts merit attention in this rule, and they are set out in this subpart. Consequently, this subpart addresses delegations of authority within and outside the Department to administer and enforce this rule, rulings under or interpretations of the Executive Order, standards prohibiting intimidation, threats, coercion or other interference with rights protected under this rule, and other provisions of the Executive Order that are included in this rule. The Department invited comment on these provisions and received none, save the suggestion discussed earlier in the context of enforcement that the Department delegate its enforcement role to the NLRB. Therefore, the provisions as proposed in this subpart will be retained, except that, as noted earlier, the roles and responsibilities given to the Assistant Secretary for ESA have been reassigned.

Section 471.20 implements Section 11 of the Executive Order, 74 FR 6110, which permits the delegation of the Secretary's authority under the Order to Federal agencies within or outside the Department. Revised § 471.21 of the rule indicates that the Directors of OLMS and OFCCP will share the authority to make rulings under or interpretations of this rule, as appropriate and in accordance with their respective responsibilities under the rule. In this connection, requests for such rulings or interpretations must be submitted to the Director of OLMS, who will consult with the Director of OFCCP to the extent necessary and appropriate to issue the requested ruling or interpretation. Section 471.22 *seeks* to prevent intimidation or interference with rights

protected under this rule, so it indicates that the sanctions and penalties available for noncompliance set out in § 471.14 will be available should a contractor or subcontractor fail to take all steps necessary to prevent such intimidation or interference. Activities protected by this section include filing a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, a complaint investigation, hearing or any other activity related to the administration and enforcement of this rule. Finally, § 471.23 implements Section 9 of the Executive Order, 74 FR 6109, which requires that contracting departments and agencies cooperate with the Secretary in carrying out her functions under the Order, and implements Section 15 of the Executive Order, 74 FR 6110, which establishes general guidelines for the Order's implementation.

IV. Regulatory Procedures

Executive Order 12866

This final rule has been drafted and reviewed in accordance with Executive Order 12866, Section 1(b), Principles of Regulation. 58 FR 51735–36, Oct. 4, 1993. The Department has determined that this rule is not an "economically significant" regulatory action under Section 3(f)(1) of Executive Order 12866. 58 FR 51738. Based on the Department's analysis, including a cost impact analysis set forth more fully below with regard to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* this rule is not likely to: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or (4) raise novel legal or policy issues. 58 FR 51738. As a result, the Department has concluded that a full economic impact and cost/benefit analysis is not required for the rule under section 6(a)(3)(B) of the Executive Order. 58 FR 51741. However, because of its importance to the public, the rule was reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 ("RFA") requires agencies promulgating final rules to prepare a final regulatory flexibility analysis and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. 5 U.S.C. 601 *et seq.* The focus of the RFA is to ensure that agencies "review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA]." E.O. 13272, Sec. 1, 67 FR 53461 ("Proper Consideration of Small Entities in Agency Rulemaking"). However, an agency is relieved of the obligation to prepare a final regulatory flexibility for a final rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). Based on the analysis below, in which the Department has estimated the financial burdens to covered small contractors and subcontractors associated with complying with the requirements contained in this final rule, the Department has certified to the Chief Counsel for Advocacy of the Small Business Administration ("SBA") that this rule will not have a significant economic impact on a substantial number of small entities.

The primary goal of Executive Order 13496 and these implementing regulations is the notification to employees of their rights with respect to collective bargaining and other protected, concerted activity. This goal is achieved through the incorporation of a contract clause in all covered Government contracts. The Executive Order and this rule impose the obligation to ensure that the contract clause is included in all Government contracts not on private contractors, but on Government contracting departments and agencies, which are not "small entities" that come within the focus of the RFA. Therefore, the costs attendant to learning of the obligation to include the contract clause in Government contracts and modifying those contracts in order to comply with that obligation is a cost borne by the Federal government, and is not incorporated into this analysis.

Once the required contract clause is included in the Government contract, contractors then begin to assume the burdens associated with compliance. Those obligations include posting the required notice and incorporating the contract clause into all covered subcontracts, thus making the same obligations binding on covered subcontractors. For the purposes of the RFA analysis, the Department estimates that, on average, each prime contractor will subcontract some portion of its prime contract three times, and the prime contractor therefore will expend time ensuring that the contract clause is included in its subcontracts and notifying those subcontractors of their attendant obligations. To the extent that subcontractors subcontract any part of their contract with the prime contractor, they, in turn, will be required to expend time ensuring that the contract clause is included in the next tier of subcontracts and notifying the next-tier subcontractors of their attendant obligations. Therefore, for the purpose of determining time spent on compliance, the Department will not differentiate between the obligations of prime contractors and subsequent tiers of subcontractors in assessing time spent on compliance; the Department assumes that all contractors, whether prime contractor or subcontractor, will spend equivalent amounts of time engaging in compliance activity.

The Department estimates that each contractor will spend a total of 3.5 hours per year in order to comply with this rule, which includes 90 minutes for the contractor to learn about the contract and notice requirements, train staff, and maintain records; 30 minutes for contractors to incorporate the contract clause into each subcontract and explain its contents to subcontractors; 30 minutes acquiring the notice from a government agency or Web site; and 60 minutes posting them physically and electronically, depending on where and how the contractor customarily posts notices to employees. The Department assumes that these activities will be performed by a professional or business worker, who, according to Bureau of Labor statistics data, earned a total hourly wage of $31.02 in January 2009, including accounting for fringe benefits. The Department then multiplied this figure by 3.5 hours to estimate the average annual costs for contractors and subcontractors to comply with this rule. Accordingly, this rule is estimated to impose average annual costs of $108.57 per contractor (3.5 hours × $31.02). These costs will decrease in subsequent years based on a contractor's increasing familiarity with the rule's requirements and having already satisfied its posting requirements in earlier years.[20] Based

[20] The Department received two comments suggesting that the annual compliance costs were underestimated in the proposed rule. The first comment indicated that contractors will spend time each year reviewing the notice to assess whether it is consistent with legislation, or Board or court decisions. This comment also suggested that contractors would be "working under contract terms which would not only be out-of-sync which [sic]

upon figures obtained from USASpending.gov, which compiles information on federal spending and contractors across government agencies, the Department concludes that there were 186,536 unique Federal contractors holding Federal contracts in FY 2008.[21] Although this rule does not apply to Federal contracts below the simplified acquisition threshold, the Department does not have a means by which to calculate what portion of all Federal contractors hold *only* contracts with the government below the simplified acquisition threshold. Therefore, in order to determine the number of entities affected by this rule, the Department counted all Federal contractors, regardless of the size of the government contract held. Based on data analyzed in the Federal Procurement Data System (fpds.gov), which compiles data about types of contractors, of all 186,536 unique Federal prime contractors, approximately 35% are "small entities" as defined by the Small Business Administration (SBA) size standards.[22] Therefore, for the purposes of the RFA analysis, the Department estimates that this rule will affect 65,288 small Federal prime contractors.

As noted above, for the purposes of this analysis, the Department estimates that each prime contractor subcontracts a portion of the prime contract three times, on average. However, the community of prime contractors does not utilize a unique subcontractor for each subcontract; the Department assumes that subcontractors may be working under several prime contracts for either a single prime contractor or multiple prime contractors, or both. In addition, some subcontractors may also be holding prime contracts with the government, so they may already be counted as affected entities. Therefore, in order to determine the unique number of subcontractors affected by this rule, the Department estimates there are the same number of unique subcontractors as prime contractors, resulting in the estimate that 186,536 subcontractors are affected by this rule. Further, for the purposes of this analysis, the Department assumes that all subcontractors are "small entities" as defined by SBA size standards. Therefore, in order to estimate the total number of "small" contractors affected by this rule, the Department has added together the estimates for the number of small prime contractors calculated above (65,288) with the estimate of all subcontractors (186,536), all of which we assume are small. Accordingly, the Department estimates that 251,824 small prime and subcontractors are affected by this rule.

Based on this analysis, the Department concludes that this final rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act does not define either "significant economic impact" or "substantial" as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, "what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact." *See A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,* Office of Advocacy, U.S. Small Business Administration at 17 (available at *http://www.sba.gov*) ("SBA Guide"). As to economic impact, one important indicator is the cost of compliance in relation to revenue of the entity or the percentage of profits affected. *Id.* In this case, the Department has determined that the average cost of compliance with this rule in the first year for all Federal contractors and subcontractors will be $108.57. The Department concludes that this economic impact is not significant. Furthermore, the Department has determined that of the entire regulated community of all 186,536 prime contractors and all 186,536 subcontractors, 67% percent of that regulated community constitute small entities (251,824 small contractors divided by all 373,072 contractors). Although this figure represents a substantial number of federal contractors and subcontractors, because Federal contractors are derived from virtually all segments of the economy and across industries, this figure is a small portion of the national economy overall. *Id.* at 20 ("the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall").[23]

the updated law, but also potentially in conflict with the updated law, thereby needlessly exposing them to potential liabilities or penalties." The second comment indicated that the time allocated for incorporation in full of the contract clause was too low, but the comment did not suggest an alternate figure for that allocation.

The Department concludes that neither of these comments provides an adequate basis to reassess the annual compliance cost estimates in the proposed rule. First, a contractor will not need to review legislation and Board or court decisions to ensure that the notice in the contract clause is accurate; this is the job of the Department. Second, the time allotment for the incorporation of the contract clause, whether by reference or in full, is essentially the same—the contractor must ensure that its subcontracts are revised to include a standard-form provision that establishes the duty to post the notice. After the first time the contractor ensures the accuracy of the provision that must be incorporated, the time a contractor devotes to ensuring the proper inclusion of the provision on an ongoing basis should not increase as a result of the length of the provision. In any event, as noted above, the Department has revised the prohibition against incorporation of the contract clause by reference proposed in the NPRM, and the final rule now permits incorporation of the contract clause by reference. Finally, the Department rejects the premise that the notice or the contract clause containing it will be "out-of-sync" with the state of the law, thereby exposing a contractor to liabilities or penalties.

[21] The Federal Funding Accountability and Transparency Act of 2006, Pub. L. 109–282 (Sept. 26, 2006), requires that the Office of Management and Budget establish a single searchable Web site, accessible by the public for free, that includes for each Federal award: (1) The name of the entity receiving the award; (2) the amount of the award; (3) information on the award including transaction type, funding agency, etc.; (4) the location of the entity receiving the award; and (5) a unique identifier of the entity receiving the award. *See* 31 U.S.C.A. § 6101 note. In compliance with this requirement, USASpending.gov was established.

[22] The Federal Procurement Data System ("FPDS") compiles data regarding small business "actions" and small business "dollars" using the criteria employed by SBA to define "small entities." In FY 2008, small business actions accounted for 50% of all Federal procurement action. However, deriving a percentage of contractors that are small using the "action" data would overstate the number of small contractors because contract actions reflect more than just contracts; they include modifications, blanket purchase agreement calls, task orders, and federal supply schedule orders. As a result, there are many more contract actions than there are contracts or contractors. Accordingly, a single small contractor might have hundreds of actions, e.g., delivery or task orders, placed against its contract. These contract actions would be counted individually in the FPDS, but in fact represent only one small business.

Also reflected in FPDS, in FY 2008, small business "dollars" accounted for 19% of all Federal dollars spent. However, deriving a percentage of contractors that are small using the "dollars" data would understate the number of small contractors. Major acquisitions account for a disproportionate share of the dollar amounts and are almost exclusively awarded to large businesses. For instance, Lockheed Martin was awarded $34 billion in contracts in FY 2008, which accounted for 6% of all Federal spending in that year. The top five federal contractors, all large businesses, accounted for over 20% of contract dollars in FY 2008. As a result, because the largest Federal contractors disproportionately represent "dollars" spent by the Federal government, the FPDB's data on small "dollars" spent understates the number of small entities with which the Federal government does business.

The Department concludes that the percentage of all Federal contractors that are "small" is probably somewhere between 19% and 50%, the two percentages derived from the FPDS figures on small "actions" and small "dollars." The mean of these two percentages is approximately 35%, and the Department will use this figure above to estimate how many of all Federal contractors are "small entities" in SBA's terms.

[23] The Department received one comment asserting that the Department erroneously concluded in the proposed rule that an effect on an estimated 67% of the federal contractor community was insubstantial. To the contrary, the Department noted in the proposed rule, as here, that the rule was likely to affect a "substantial number of federal

Continued

Accordingly, the Department concludes that the rule does not impact a substantial number of small entities in a particular industry or segment of the economy. Therefore, under 5 U.S.C. 605, the Department concludes that the final rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform

For purposes of the Unfunded Mandates Reform Act of 1995, this rule would not include any Federal mandate that might result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than $100 million in any one year.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a public consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Certain sections of this rule, including § 471.11(a) and (b), contain information collection requirements for purposes of the PRA. In accordance with the PRA, the August 3, 2009 NPRM solicited comments on the information collections as they were proposed. Additionally, the Department separately requested comments on the information collections in a 60 day notice published in the Federal Register on September 8, 2009 (74 FR 46236), and submitted a contemporaneous request for OMB review of the proposed collection of information. The Department did not receive any comments in response to either the NPRM PRA analysis or the September 8, 2009 notice. OMB did not approve the collections of information contained in the NPRM stage of this rulemaking, and directed the Department to resubmit the relevant PRA documentation to OMB at the final rulemaking stage.

The rule requires contractors to post notices and cooperate with any investigation in response to a complaint or as part of a compliance evaluation. It also permits employees to file complaints with the Department alleging that a contractor has failed to comply with those requirements. The application of the PRA to those requirements is discussed below.

The final rule imposes certain minimal burdens associated with the posting of the employee notice poster required by the Executive Order and § 471.2(a). As noted in § 471.2(e), the Department will supply the notice, and contractors will be permitted to post exact duplicate copies of the notice. Under the regulations implementing the PRA, "[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public" is not considered a "collection of information" under the Act. *See* 5 CFR 1320.3(c)(2). Therefore, the posting requirement is not subject to the PRA.

The final rule will also impose certain burdens on the contractor associated with cooperating with an investigation into failure to comply with Part 471. The regulations implementing the PRA exempt any information collection requirements imposed by an administrative agency during the conduct of an administrative action against specific individuals or entities. *See* 5 CFR 1320.4. Once the agency opens a case file or equivalent about a particular party, this exception applies during the entire course of the investigation, before or after formal charges or complaints are filed or formal administrative action is initiated. *Id.* Therefore, this exemption would apply to the Department's investigation of complaints alleging violations of the Order or this rule as well as compliance evaluations.

As for the burden hour estimate for employees filing complaints, the Department estimates, based on the experience of OFCCP administering other laws applicable to Federal contractors, that it will take an average of 1.28 hours for such a complainant to compose a complaint containing the necessary information and to send that complaint to the Department. This number is also consistent with the burden estimate for filing a complaint under E.O. 13201 and the now-revoked Part 470 regulations.

The Department has estimated it would receive a total of 50 employee complaints in any given year, which is significantly larger than the estimate contained its most recent PRA submission for Executive Order 13201. In that submission, the Department estimated it would receive 20 employee complaints. This number itself had been revised downwards because the Department never received any employee complaints pursuant to the now-revoked Part 470 regulations. Because the applicability of the final rule and Executive Order 13496 is greater in scope than the now-revoked Part 470 and Executive Order 13201 in terms of geography (the now-revoked Part 470 regulations only applied to states without right-to-work laws, whereas this rule applies nationwide), the Department has revised upwards its estimate of employee complaints under this rule from 20 to 50.

Section 471.3(b) permits contracting departments to submit written requests for an exemption from the obligations of the Executive Order (waiver request) as to particular contracts or classes of contracts under specified circumstance. The PRA does not cover the costs to the Federal government for the submission of waiver requests by contracting agencies or departments or for the processing of waiver requests by the Department of Labor. The regulations implementing the PRA define the term "burden," in pertinent part, as "the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency." 5 CFR 1320.3(b)(1). The definition of the term "person" in the same regulations includes "an individual, partnership, association, corporation (including operations of government-owned contractor-operated facilities), business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or a political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision." 5 CFR 1320.3(k). It does not include the Federal government or any branch, political subdivision, or employee thereof. Therefore, the cost to the Federal

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contractors and subcontractors." 74 FR at 38495. However, the purpose of the RFA, and it focus, is to minimize the impact of agency regulations on particular industries or sectors of the economy. *See* SBA Guide at 15–20. As stated in the proposed rule and above, federal contractors and subcontractors represent all industries and sectors of the economy, thus the effect of the rule is dissipated across the economy. As an alternative approach, the comment urged the Department to recognize federal contractors and subcontractors as a discrete "industry," which the Department declines to do because the adoption of such a standard would defeat the focus of the analysis. Finally, in assuming both here and in the proposed rule that 100% of subcontractors were small within SBA's terms, the Department employed an expansive estimate that undoubtedly inflated of the overall number of affected entities. The use of the broad assumption serves to illustrate the point that even if a substantial number of federal contractors and subcontractors are affected by the final rule, the effect of the rule on the economy as a whole is not substantial.

government for the submission of waiver requests by contracting agencies and departments need not be taken into consideration.

The Department invited the public to comment on whether each of the proposed collections of information: (1) Ensures that the collection of information is necessary to the proper performance of the agency, including whether the information will have practical utility; (2) estimates the projected burden, including the validity of the methodology and assumptions used, accurately; (3) enhances the quality, utility, and clarity of the information to be collected; and (4) minimizes the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses). As noted above, the Department received no comments on the PRA analysis.

The Department notes that a federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number.

As instructed by OMB and in accordance with the PRA (5 CFR 1320.11 (h)), in connection with this final rule, the Department submitted an ICR to OMB for its request of the new information collection requirements contained in this rule. OMB approved the ICR on May 5, 2010, under OMB Control Number 1215–0209, which will expire on May 31, 2013.

Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that the rule does not have "federalism implications." The employee notice required by the Executive Order and part 471 must be posted only by employers covered under the NLRA. Therefore, the rule does not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Executive Order 13084 (Consultation and Coordination With Indian Tribal Governments)

The Department certifies that this final rule does not impose substantial direct compliance costs on Indian tribal governments.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 29 CFR Part 471

Administrative practice and procedure, Government contracts, Employee rights, Labor unions.

Text of Final Rule

■ Accordingly, a new Subchapter D, consisting of Part 471, is added to 29 CFR Chapter IV to read as follows:

Subchapter D—Notification of Employee Rights Under Federal Labor Laws

PART 471—OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS; NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Sec.
471.1 What definitions apply to this part?
471.2 What employee notice clause must be included in Government contracts?
471.3 What exceptions apply and what exemptions are available?
471.4 What employers are not covered under the rule?

Appendix A to Subpart A of Part 471—Text of Employee Notice Clause

Sec.

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

471.10 How will the Department determine whether a contractor is in compliance with Executive Order 13496 and this part?
471.11 What are the procedures for filing and processing a complaint?
471.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?
471.13 Under what circumstances, and how, will enforcement proceedings under Executive Order 13496 be conducted?
471.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?
471.15 Under what circumstances must a contractor be provided the opportunity for a hearing?
471.16 Under what circumstances may a contractor be reinstated?

Subpart C—Ancillary Matters

471.20 What authority under this part or Executive Order 13496 may the Secretary delegate, and under what circumstances?
471.21 Who will make rulings and interpretations under Executive Order 13496 and this part?
471.22 What actions may the Director of OLMS take in the case of intimidation and interference?
471.23 What other provisions apply to this part?

Authority: 40 U.S.C. 101 *et seq.;* Executive Order 13496, 74 FR 6107, February 4, 2009; Secretary's Order 7–2009, 74 FR 58834, Nov. 13, 2009; Secretary's Order 8–2009, 74 FR 58835, Nov. 13, 2009.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

§ 471.1 What definitions apply to this part?

Construction means the construction, rehabilitation, alteration, conversion, extension, demolition, weatherization, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term construction also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

Construction work site means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, weatherization or repair, and any temporary location or facility at which a contractor or subcontractor meets a demand or performs a function relating to the contract or subcontract.

Contract means, unless otherwise indicated, any Government contract or subcontract.

Contracting agency means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, that enters into contracts.

Contractor means, unless otherwise indicated, a prime contractor or subcontractor.

Department means the U.S. Department of Labor.

Director of OFCCP means the Director of the Office of Federal Contract Compliance Programs in the Department of Labor.

Director of OLMS means the Director of the Office of Labor-Management Standards in the Department of Labor.

Employee notice clause means the contract clause set forth in Appendix A that Government contracting departments and agencies must include in all Government contracts and subcontracts pursuant to Executive Order 13496 and this part.

Government means the Government of the United States of America.

Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale, or use of personal property or non-personal services. The term "personal property," as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term "non-personal services" as used in this section includes, but is not limited to, the following services: utilities, construction, transportation, research, insurance, and fund depository. The term Government contract does not include:

(1) Agreements in which the parties stand in the relationship of employer and employee; and

(2) Federal financial assistance, as defined in 29 CFR 31.2.

Labor organization means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Modification of a contract means any alteration in the terms and conditions of that contract, including amendments, renegotiations, and renewals.

Order or *Executive Order* means Executive Order 13496 (74 FR 6107, Feb. 4, 2009).

Person means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

Prime contractor means any person holding a contract with a contracting agency, and, for the purposes of subparts B and C of this part, includes any person who has held a contract subject to the Executive Order and this part.

Related rules, regulations, and orders of the Secretary of Labor, as used in § 471.2 of this part, means rules, regulations, and relevant orders issued pursuant to the Executive Order or this part.

Secretary means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or non-personal services that, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

Subcontractor means any person holding a subcontract and, for the purposes of subparts B and C of this part, any person who has held a subcontract subject to the Executive Order and this part.

Union means a labor organization as defined above.

United States means the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

§ 471.2 What employee notice clause must be included in Government contracts?

(a) *Government contracts.* With respect to all contracts covered by this part, Government contracting departments and agencies must, to the extent consistent with law, include the language set forth in Appendix A to Subpart A of Part 471 in every Government contract, other than those contracts to which exceptions are applicable as stated in § 471.3.

(b) *Inclusion by reference.* The employee notice clause need not be quoted verbatim in a contract, subcontract, or purchase order. The clause may be made part of the contract, subcontract, or purchase order by citation to 29 CFR Part 471, Appendix A to Subpart A.

(c) *Adaptation of language.* The Director of OLMS may find that 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 to achieve the purposes of the Executive Order and this part. In such circumstances, the Director of OLMS will promptly issue rules, regulations, or orders as are needed to ensure that all future government contracts contain appropriate provisions to achieve the purposes of the Executive Order and this part.

(d) *Physical Posting of Employee Notice.* A contractor or subcontractor that posts notices to employees physically must also post the required notice physically. Where a significant portion of a contractor's workforce is not proficient in English, the contractor must provide the notice in the language employees speak. The employee notice must be placed:

(1) In conspicuous places in and about the contractor's plants and offices so that the notice is prominent and readily *See*n by employees. Such conspicuous placement includes, but is not limited to, areas in which the contractor posts notices to employees about the employees' terms and conditions of employment; and

(2) Where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract. An employee shall be considered to be so engaged if:

(i) The duties of the employee's position include work that fulfills a contractual obligation, or work that is necessary to, or that facilitates, performance of the contract or a provision of the contract; or

(ii) The cost or a portion of the cost of the employee's position is allowable as a cost of the contract under the principles set forth in the Federal Acquisition Regulation at 48 CFR Ch. 1, part 31: Provided, That a position shall not be considered covered by this part by virtue of this provision if the cost of the position was not allocable in whole or in part as a direct cost to any Government contract, and only a de minimis (less than 2%) portion of the cost of the position was allocable as an indirect cost to Government contracts, considered as a group.

(e) *Obtaining a poster with the employee notice.* A poster with the required employee notice, including a poster with the employee notice translated into languages other than English, will be printed by the Department, and will be provided by the Federal contracting agency or may be obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, or from any

field office of the Department's Office of Labor-Management Standards or Office of Federal Contract Compliance Programs. A copy of the poster in English and in languages other than English may also be downloaded from the Office of Labor-Management Standards Web site at *http://www.olms.dol.gov*. Additionally, contractors may reproduce and use exact duplicate copies of the Department's official poster.

(f) *Electronic postings of employee notice.* A contractor or subcontractor that customarily posts notices to employees electronically must also post the required notice electronically. Such contractors or subcontractors satisfy the electronic posting requirement by displaying prominently on any Web site that is maintained by the contractor or subcontractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment, a link to the Department of Labor's Web site that contains the full text of the poster. The link to the Department's Web site must read, "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers." Where a significant portion of a contractor's workforce is not proficient in English, the contractor must provide the notice required in this subsection in the language the employees speak. This requirement will be satisfied by displaying prominently on any Web site that is maintained by the contractor or subcontractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment, a link to the Department of Labor's Web site that contains the full text of the poster in the language the employees speak. In such cases, the Office of Labor-Management Standards will provide translations of the link to the Department's Web site that must be displayed on the contractor's or subcontractor's Web site.

§ 471.3 What exceptions apply and what exemptions are available?

(a) *Exceptions for specific types of contracts.* The requirements of this part do not apply to any of the following:

(1) Collective bargaining agreements as defined in the Federal Service Labor-Management Relations Statute, entered into by an agency and the exclusive representative of employees in an appropriate unit to set terms and conditions of employment of those employees.

(2) Government contracts that involve purchases below the simplified acquisition threshold set by Congress under the Office of Federal Procurement Policy Act. Therefore, the employee notice clause need not be included in government contracts for purchases below that threshold, provided that

(i) No agency or contractor is permitted to procure supplies or services in a manner designed to avoid the applicability of the Order and this part; and

(ii) The employee notice clause must be included in government contracts for indefinite quantities, unless the contracting agency or contractor has reason to believe that the amount to be ordered in any year under such a contract will be less than the simplified acquisition threshold set in the Office of Federal Procurement Policy Act.

(3) Government contracts resulting from solicitations issued before the effective date of this rule.

(4) Subcontracts of $10,000 or less in value, except that contractors and subcontractors are not permitted to procure supplies or services in a manner designed to avoid the applicability of the Order and this part.

(5) Contracts and subcontracts for work performed exclusively outside the territorial United States.

(b) *Exemptions for certain contracts.* The Director of OLMS may exempt a contracting department or agency or groups of departments or agencies from the requirements of this part with respect to a particular contract or subcontract or any class of contracts or subcontracts when the Director finds that either:

(1) The application of any of the requirements of this part would not serve its purposes or would impair the ability of the Government to procure goods or services on an economical and efficient basis; or

(2) Special circumstances require an exemption in order to serve the national interest.

(c) *Procedures for requesting an exemption and withdrawals of exemptions.* Requests for exemptions under this subsection from a contracting department or agency must be in writing, and must be directed to the Director of OLMS, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5603, Washington, DC, 20210. The Director of OLMS may withdraw an exemption granted when, in the Director's judgment, such action is necessary or appropriate to achieve the purposes of this part.

§ 471.4 What employers are not covered under this part?

(a) The following employers are excluded from the definition of "employer" in the National Labor Relations Act (NLRA), and are not covered by the requirements of this part:

(1) The United States or any wholly owned Government corporation;

(2) Any Federal Reserve Bank;

(3) Any State or political subdivision thereof;

(4) Any person subject to the Railway Labor Act;

(5) Any labor organization (other than when acting as an employer); or

(6) Anyone acting in the capacity of officer or agent of such labor organization.

(b) Additionally, employers exclusively employing workers who are excluded from the definition of "employee" under the NLRA are not covered by the requirements of this part. Those excluded employees are employed:

(1) As agricultural laborers;

(2) In the domestic service of any family or person at his home;

(3) By his or her parent or spouse;

(4) As an independent contractor;

(5) As a supervisor as defined under the NLRA;

(6) By an employer subject to the Railway Labor Act; or

(7) By any other person who is not an employer as defined in the NLRA

Appendix A to Subpart A of Part 471—Text of Employee Notice Clause

"1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The "Secretary's notice" shall consist of the following:

"**Employee Rights Under The National Labor Relations Act**"

"The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

"Under the NLRA, 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 representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.

• Discuss your terms and conditions of employment or union organizing with your co-workers or a union.

• Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and *seeking* help from a union.

• Strike and picket, depending on the purpose or means of the strike or the picketing.

• Choose not to do any of these activities, including joining or remaining a member of a union.

"Under the NLRA, it is illegal for your employer to:

• Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

• Question you about your union support or activities in a manner that discourages you from engaging in that activity.

• 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 concerted 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.

• Spy on or videotape peaceful union activities and gatherings or pretend to do so.

"Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

• Threaten you that you will lose your job unless you support the union.

• Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.

• Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.

• Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

• Take other adverse action against you based on whether you have joined or support the union.

"If you and your coworkers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

"Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. 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. 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 (6572) for hearing impaired.

"* The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

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

"2. The contractor will comply with all provisions of the Secretary's notice, and related rules, regulations, and orders of the Secretary of Labor.

"3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order 13496 of January 30, 2009. Such other sanctions or remedies may be imposed as are provided in Executive Order 13496 of January 30, 2009, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

"4. The contractor will include the provisions of paragraphs (1) through (4) herein in every subcontract or purchase order entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 3 of Executive Order 13496 of January 30, 2009), so that such provisions will be binding upon each subcontractor. The contractor will take such action with respect to any such subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: Provided, however, if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

§ 471.10 How will the Department determine whether a contractor is in compliance with Executive Order 13496 and this part?

(a) The Director of OFCCP may conduct a compliance evaluation to determine whether a contractor holding a covered contract is in compliance with the requirements of this part. Such an evaluation may be limited to compliance with this part or may be included in a compliance evaluation conducted under other laws, Executive Orders, and/or regulations enforced by the Department.

(b) During such an evaluation, a determination will be made whether:

(1) The employee notice required by § 471.2(a) is posted in conformity with the applicable physical and electronic posting requirements contained in § 471.2(d) and (f); and

(2) The provisions of the employee notice clause are included in government contracts, subcontracts or purchase orders entered into on or after June 21, 2010, or that the government contracts, subcontracts or purchase orders have been exempted under § 471.3(b).

(c) The results of the evaluation will be documented in the evaluation record, which will include findings regarding the contractor's compliance with the requirements of the Executive Order and this part and, as applicable, conciliation efforts made, corrective action taken and/or enforcement recommended under § 471.13.

§ 471.11 What are the procedures for filing and processing a complaint?

(a) *Filing complaints.* An employee of a covered contractor may file a complaint alleging that the contractor has failed to post the employee notice as required by the Executive Order and this part; and/or has failed to include the employee notice clause in subcontracts or purchase orders. Complaints may be filed with the Office of Labor-Management Standards (OLMS) or the Office of Federal Contract Compliance Programs (OFCCP) at 200 Constitution Avenue, NW., Washington, DC 20210, or with any OLMS or OFCCP field office.

(b) *Contents of complaints.* The complaint must be in writing and must include:

(1) The employee's name, address, and telephone number;

(2) The name and address of the contractor alleged to have violated the Executive Order and this part;

(3) An identification of the alleged violation and the establishment or construction work site where it is alleged to have occurred;

(4) Any other pertinent information that will assist in the investigation and resolution of the complaint; and

(5) The signature of the employee filing the complaint.

(c) *Complaint investigations.* In investigating complaints filed with the Department under this section, the Director of OFCCP will evaluate the allegations of the complaint and develop a case record. The record will include findings regarding the contractor's compliance with the requirements of the Executive Order and this part, and, as applicable, a description of conciliation efforts made, corrective action taken, and/or enforcement recommended.

§ 471.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?

(a) If any complaint investigation or compliance evaluation indicates a violation of the Executive Order or this part, the Director of OFCCP will make reasonable efforts to secure compliance through conciliation.

(b) Before the contractor may be found to be in compliance with the Executive Order or this part, the contractor must correct the violation found by the Department (for example, by posting the required employee notice, and/or by amending its subcontracts or purchase orders with subcontractors to include the employee notice clause), and must commit, in writing, not to repeat the violation.

(c) If a violation cannot be resolved through conciliation efforts, the Director of OFCCP will refer the matter to the Director of OLMS, who may take action under § 471.13.

(d) For reasonable cause shown, the Director of OLMS may reconsider, or cause to be reconsidered, any matter on his or her own motion or in response to a request.

§ 471.13 Under what circumstances, and how, will enforcement proceedings under Executive Order 13496 be conducted?

(a) *General.* (1) Violations of the Executive Order or this part may result in administrative enforcement proceedings. The bases for a finding of a violation may include, but are not limited to:

(i) The results of a compliance evaluation;

(ii) The results of a complaint investigation;

(iii) A contractor's refusal to allow a compliance evaluation or complaint investigation to be conducted; or

(iv) A contractor's refusal to cooperate with the compliance evaluation or complaint investigation, including failure to provide information sought during those procedures.

(v) A contractor's refusal to take such action with respect to a subcontract as directed by the Director of OFCCP or the Director of OLMS as a means of enforcing compliance with the provisions of this part.

(vi) A subcontractor's refusal to adhere to requirements of this part regarding employee notice or inclusion of the contract clause in its subcontracts.

(2) If a determination is made by the Director of OFCCP that the Executive Order or the regulations in this part have been violated, and the violation has not been corrected through conciliation, he or she will refer the matter to the Director of OLMS for enforcement consideration. The Director of OLMS may refer the matter to the Solicitor of Labor to begin administrative enforcement proceedings.

(b) *Administrative enforcement proceedings.* (1) Administrative enforcement proceedings will be conducted under the control and supervision of the Solicitor of Labor, under the hearing procedures in 29 CFR part 18, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.

(2) The administrative law judge will certify his or her recommended decision issued under 29 CFR 18.57 to the Administrative Review Board. The decision will be served on all parties and amicus curiae.

(3) Within 25 days (10 days if the proceeding is expedited) after receipt of the administrative law judge's recommended decision, either party may file exceptions to the decision. Exceptions may be responded to by the other parties within 25 days (7 days if the proceeding is expedited) after receipt. All exceptions and responses must be filed with the Administrative Review Board.

(4) After the expiration of time for filing exceptions, the Administrative Review Board may issue a final administrative order, or may otherwise appropriately dispose of the matter. In an expedited proceeding, unless the Administrative Review Board issues a final administrative order within 30 days after the expiration of time for filing exceptions, the administrative law judge's recommended decision will become the final administrative order. If the Administrative Review Board determines that the contractor has violated the Executive Order or the regulations in this part, the final administrative order will order the contractor to cease and desist from the violations, require the contractor to provide appropriate remedies, or, subject to the procedures in § 471.14, impose appropriate sanctions and penalties, or any combination thereof.

§ 471.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?

(a) After a final decision on the merits has issued and before imposing the sanctions and penalties described in paragraph (d) of this section, the Director of OLMS will consult with the affected contracting agencies, and provide the heads of those agencies the opportunity to respond and provide written objections.

(b) If the contracting agency provides written objections, those objections must include a complete statement of reasons for the objections, which must include a finding that, as applicable, the completion of the contract, or further contracts or extensions or modifications of existing contracts, is essential to the agency's mission.

(c) The sanctions and penalties described in this section will not be imposed if:

(1) The head of the contracting agency, or his or her designee, continues to object to the imposition of such sanctions and penalties, or

(2) The contractor has not been given an opportunity for a hearing.

(d) In enforcing the Executive Order and this part, the Director of OLMS may take any of the following actions:

(1) Direct a contracting agency to cancel, terminate, suspend, or cause to be canceled, terminated or suspended, any contract or any portions thereof, for failure to comply with its contractual provisions required by Section 7(a) of the Executive Order and the regulations in this part. Contracts may be canceled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon compliance.

(2) Issue an order of debarment under Section 7(b) of the Executive Order providing that one or more contracting agencies must refrain from entering into further contracts, or extensions or other modification of existing contracts, with any non-complying contractor.

(3) Issue an order of debarment under Section 7(b) of the Executive Order providing that no contracting agency may enter into a contract with any non-complying subcontractor.

(e) Whenever the Director of OLMS exercises the authority in this section, the contracting agency must report the actions it has taken to the Director of OLMS within such time as the Director of OLMS will specify.

(f) Periodically, the Director of OLMS will publish and distribute to all executive agencies a list of the names of contractors and subcontractors that have, in the judgment of the Director of OLMS, failed to comply with the provisions of the Executive Order and this part, or of related rules, regulations, and orders of the Secretary of Labor, and as a result have been declared ineligible for future contracts under the Executive Order and the regulations in this part.

§ 471.15 Under what circumstances must a contractor be provided the opportunity for a hearing?

Before the Director of OLMS takes either of the following actions, a contractor or subcontractor must be given the opportunity for a hearing:

(a) Issues an order for cancellation, termination, or suspension of any contract or debarment of any contractor from further Government contracts under Sections 7(a) or (b) of the Executive Order and § 471.14(d)(1) or (2) of this part; or

(b) Includes the contractor on a published list of non-complying contractors under Section 7(c) of the Executive Order and § 471.14(f) of this part.

§ 471.16 Under what circumstances may a contractor be reinstated?

Any contractor or subcontractor debarred from or declared ineligible for further contracts under the Executive Order and this part may request reinstatement in a letter to the Director of OLMS. In connection with a request for reinstatement, debarred contractors and subcontractors shall be required to show that they have established and will carry out policies and practices in compliance with the Executive Order and implementing regulations. Before reaching a decision, the Director of OLMS may request that a compliance evaluation of the contractor or subcontractor be conducted, and may require the contractor or subcontractor to supply additional information regarding the request for reinstatement. If the Director of OLMS finds that the contractor or subcontractor has come into compliance with the Executive Order and this part and has shown that it will carry out the Executive Order and this part, the contractor or subcontractor may be reinstated. The Director of OLMS shall issue a written decision on the request.

Subpart C—Ancillary Matters

§ 471.20 What authority under this part or Executive Order 13496 may the Secretary delegate, and under what circumstances?

Section 11 of the Executive Order grants the Secretary the right to delegate any functions or duties under the Order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

§ 471.21 Who will make rulings and interpretations under Executive Order 13496 and this part?

The Director of OLMS and the Director of OFCCP will make rulings under or interpretations of the Executive Order or the regulations contained in this part in accordance with their respective responsibilities under the regulations. Requests for a ruling or interpretation must be submitted to the Director of OLMS, who will consult with the Director of OFCCP to the extent necessary and appropriate to issue such ruling or interpretation.

§ 471.22 What actions may the Director of OLMS take in the case of intimidation and interference?

The Director of OLMS may impose the sanctions and penalties contained in § 471.14 of this part against any contractor or subcontractor who does not take all necessary steps to ensure that no person intimidates, threatens, or coerces any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, complaint investigation, hearing, or any other activity related to the administration or enforcement of the Executive Order or this part.

§ 471.23 What other provisions apply to this part?

(a) The regulations in this part implement only the Executive Order, and do not modify or affect the interpretation of any other Department of Labor regulations or policy.

(b) Each contracting department and agency must cooperate with the Director of OLMS and the Director of the OFCCP, and must provide any information and assistance that they may require, in the performance of their functions under the Executive Order and the regulations in this part.

(c)(1) This subpart does not impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart must be implemented consistent with applicable law and subject to the availability of appropriations.

(d) Neither the Executive Order nor this part creates any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Signed in Washington, DC, May 7, 2010.

John Lund,

Director, Office of Labor-Management Standards.

Patricia A. Shiu,

Director, Office of Federal Contract Compliance Programs.

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