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Senior Vice President-Government Relations

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VIA ELECTRONIC FILING (www.regulations.gov)

Ms. Denise M. Boucher
Director of the Office of Policy, Reports and Disclosure
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Ave., N.W., Room N-5609
Washington, D.C. 20210

***Re: Notification of Employee Rights Under Federal Labor Laws;
Proposed Rule 1215-AB70; Docket No. LMSO-2009-002***

Dear Director Boucher:

On behalf of the National Association of Wholesaler-Distributors (NAW), we provide below comments on the proposed regulations intended to implement Executive Order 13496, which was signed by the President on January 30, 2009 (Order). The Notice of Proposed Rulemaking (NPRM) was published in the Federal Register on August 3, 2009, 74 Fed. Reg. 38488.

NAW is comprised of direct member companies and a federation of national, regional, state, and local associations and their member firms which collectively total approximately 40,000 companies with locations in every state in the United States. NAW members are a constituency at the core of our economy—the link in the marketing chain between manufacturers and retailers as well as commercial, institutional and governmental end users. Industry firms vary widely in size, employ millions of American workers, and account for \$4.5 trillion in annual economic activity.

The NPRM published by the Department of Labor would require nonexempt Federal departments and agencies to include within their government contracts specific provisions requiring that contractors and subcontractors with whom they do business post notices informing employees of their rights as employees under Federal labor laws. The proposed rule also includes language for the employee notice which includes a description of rights under the National Labor Relations Act (Act or NRLA). NAW strongly disagrees with language in the rulemaking that incorrectly states that the Act favors a collective bargaining environment. The policy of the U.S. government, as set forth in the Act, is one of general neutrality on the subject of collective bargaining. Thus, NAW registers its objection to the required notice to employees.

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

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The National Labor Relations Act was enacted in 1935 to curtail industry disruptions due to labor-management disputes by conferring on employees a right to organize and requiring employers to bargain collectively with employees through representatives of their own choosing. The cornerstone of the Act (Section 7), provides:

[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 . . . (29 U.S.C. § 157) (Emphasis added)

However, the Department proposes the following text, in the proposed notice to state “the Policy of the United States”:

[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.

The proposed notice does not accurately reflect the policy of the United States or the employee rights outlined in the Act. The Department deviates from the concise statement of rights in Section 7 and incompletely summarizes almost 75 years of National Labor Relations Board (“NLRB”) decisions interpreting those rights.

As drafted, the proposed notice suggests that it is the sole policy of the United States in this area to encourage collective bargaining. This suggestion is not only inaccurate but deceptive to the average individual who is not familiar with the Act. In fact, under the NLRA, it is the declared 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.” 29 U.S.C. § 151.

Encouraging the practice and procedure of collective bargaining is one way that this policy can be achieved. Full freedom of association on the part of employees also entails decisions to *refrain from* collective bargaining, if they decide that approach is in their best interests. That decision and process also is part of our national policy, as evidenced by the fact that in 2008 only 12.4 percent of workers were union members (7.6 percent of private sector workers), down from 20.1 percent in 1983. Any preamble must indicate that the national labor policy also supports the ability of workers to refrain from collective organization and bargaining, should they decide that path is in their interests.

Inaccurate Overview of Employee Rights

The proposed notice provides an inaccurate overview of employee rights under the Act. Employee rights under the NLRA are so nuanced that only a basic statement of rights based on the statutory language of the Act would provide an accurate, unbiased overview of the law. The proposed notice also includes examples of “illegal” employer conduct that oversimplifies the law. Furthermore, the proposed notice only briefly addresses what constitutes “illegal” conduct on the part of a union.

As currently drafted, the proposed notice does not provide employees with an unbiased understanding of the NLRA. For example, the notice should include a concise statement of the employee’s “*Beck*” rights.* Employees should be informed that they only have to pay fees to the union for collective bargaining, contract administration and grievance adjustment. Additionally, the DOL should include the right of employees to refrain from protected, concerted and/or union activities. This right is essential to the policy of the United States.

If the DOL is interested in informing employees of all of the rights included in the NLRA, it should not brush over examples of unlawful conduct by the union. Yet, the DOL fails to include examples of unlawful union conduct. In order to accurately inform workers of their rights under Federal labor laws, the Department must provide examples, derived from Board or court decisions, of unlawful conduct by a union.

Assignment of Enforcement Authority

The NPRM states that the Office of Federal Contract Compliance Programs (OFCCP) has authority to enforce the Order and has the power to impose sanctions against an employer, including not only the cancellation, termination, or suspension of the contract at issue, but also debarment from future government contracts and the publication and distribution of the contractor’s name on the list of contractors and subcontractors that have been debarred for noncompliance. This creates a legal conflict with the exclusive jurisdiction of the National Labor Relations Board (NLRB) to investigate and remedy unfair labor practices that violate the NLRA. The enforcement rights provided for under the NPRM will encroach on the exclusive jurisdiction of the NLRB to enforce employee rights under Section 7.

Moreover, the assignment of enforcement authority to OFCCP is not appropriate. While it is true that OFCCP already has responsibility for ensuring that contractors doing business with the Federal government conduct themselves in a manner that complies with certain Federal laws, their investigation expertise is on the enforcement of equal employment opportunity rules and regulations. The OFCCP has practically no expertise in the administration of the National Labor Relations Act, which is the essence of the posting requirements. Substantive questions or concerns on behalf of workers that their NLRA rights have been violated will have to be referred to the National Labor Relations Board—the appropriate enforcement agency.

* In *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), the Supreme Court held that unions could not use member dues for purposes unrelated to collective bargaining or contract administration without the members’ consent. Accordingly, these “*Beck*” rights guarantee all non-union members (in agency shops in Right-to-Work states) and financial core members (in union shops in non-Right-to-Work states) that they will not have to pay fees to unions other than for the purposes of collectively bargaining, contract administration, and grievance adjustment.

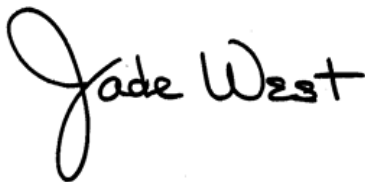
Exemption for Subcontracts

Concerning whether subcontracts of de minimis value should be exempt from application of the requirement to provide notice to employees, DOL notes in the proposed rule discussion that only subcontracts that are “necessary to the performance of the prime contract” are covered by the Order. Since the quoted phrase is all-encompassing (one would assume all subcontracts are necessary for the performance of the prime contract, otherwise why subcontract?), DOL should use the same limitation as the simplified acquisition threshold placed on the prime contract (\$100,000). Since the purpose of the Order is to make workers better informed about their rights to collectively bargain or to refrain from such, applying the notice provisions to subcontracts of relatively small value is overly burdensome.

Conclusion

NAW opposes the language and substance of the proposed regulations and the employee notice, which, we feel, do not accurately portray the full range of employee rights and protections under referenced Federal labor laws. The employee notice requires considerable revision to recognize the neutrality of the Federal labor laws and to provide a complete statement of employee rights under those laws.

Respectfully submitted,

A handwritten signature in black ink that reads "Jade West". The signature is written in a cursive, flowing style.

Jade West
Senior Vice President-Government Relations