

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**NATIONAL ASSOCIATION OF
MANUFACTURERS**
1331 Pennsylvania Avenue, Suite 600
Washington, DC 20004,

and

**VIRGINIA MANUFACTURERS
ASSOCIATION**
2108 W. Laburnum Avenue, Suite 100F
Richmond, VA 23227

Plaintiffs,

v.

**THOMAS PEREZ, in his official
capacity as Secretary, United States
Department of Labor,**
200 Constitution Avenue, NW
Washington, DC 20210,

**UNITED STATES
DEPARTMENT OF LABOR,**
200 Constitution Avenue, NW
Washington, DC 20210,

**PATRICIA A. SHIU, in her official
capacity as Director, Office of Federal
Contract Compliance Programs, United
States Department of Labor,
Employment Standards Administration**
200 Constitution Avenue, NW
Room C-3310
Washington, DC 20210,

and

CASE NO. _____

JUDGE _____

**COMPLAINT FOR DECLARATORY,
INJUNCTIVE, AND OTHER RELIEF**

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
United States Department of Labor,
Employment Standards Administration**
200 Constitution Avenue, NW
Room C-3310
Washington, DC 20210,

**MICHAEL J. HAYES, in his official
capacity as Director
Office of Labor-Management Standards
United States Department of Labor**
200 Constitution Avenue, N.W.
Room N-1519
Washington, D.C. 20210

and

**OFFICE OF LABOR-MANAGEMENT
STANDARDS
United States Department of Labor**
200 Constitution Avenue, N.W.
Room N-1519
Washington, D.C. 20210

Defendants.

INTRODUCTION

1. This action is brought by the National Association of Manufacturers (“NAM”) and the Virginia Manufacturers Association (“VMA”) (together “Plaintiffs”) to declare unlawful and/or set aside the Department of Labor (“DOL”) Office of Labor-Management Standards’ (the “OLMS”) Rule requiring federal contractors to post notices entitled “Employee Rights Under the National Labor Relations Act” (the “Notice”), informing their employees and applicants of rights available under the National Labor Relations Act (“Act”) (the “Rule”). The OLMS’s promulgation of the Rule and its joint enforcement thereof with the Office of Federal Contract Compliance Programs (the “OFCCP”) is in excess of the OLMS’s and OFCCP’s authorities and

rights, violates the First Amendment of the United States Constitution, Section 8(c) of the Act, and is preempted by the Act .

2. The OLMS/OFCCP ordered notices set forth in the Rule are framed in such a way as to unfairly promote unionization. The imposition of such a notice requirement constitutes a massive and unprecedented expansion of the agencies' jurisdiction. The Rule adversely affects thousands of federal contractors and subcontractors by forcing them to promote unionization of their workforces upon pain of being debarred from federal contracts. The OLMS's promulgation of the Rule is plainly "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in direct violation of the Administration Procedure Act, 5 U.S.C. 701, as well as a violation of the First Amendment, and must therefore be enjoined and set aside.

PARTIES

3. The NAM is the largest manufacturing association in the United States, representing small and large employers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, has the largest economic impact of any major business sector and accounts for the lion's share of private-sector research and development.

4. The NAM's membership includes most of the Fortune 500 companies and 9,000 small manufacturers, and includes the VMA. The VMA's mission is to create the best business environment in the United States for world-class advanced technology businesses to manufacture and headquarter their companies for maximum productivity and profitability. The VMA represents over 6,000 manufacturers that employ over 220,000 individuals that contribute \$34 billion to the Virginia gross state product and account for over 80% of Virginia's exports to the global economy.

5. Many of Plaintiffs' members hold contracts with the federal government in excess of \$50,000. Other members of Plaintiffs are interested in securing such contracts in the future. Many, if not all, of Plaintiffs' members are otherwise eligible to bid on such contracts.

6. Plaintiffs have standing to pursue this action on behalf of their members under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), as (1) many, if not all, of Plaintiffs' members would otherwise have standing to sue in their own right, (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes, and (3) neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

7. Many of Plaintiffs' members would otherwise have standing to sue in their own right, because many of Plaintiffs' members hold contracts with the federal government in excess of \$50,000 and are therefore covered by the Rule. Many, if not all, of Plaintiffs' members are eligible to bid on or otherwise seek to obtain federal contracts and, therefore, are potentially subject to the Rule. The Rule infringes upon the First Amendment freedoms of Plaintiffs' members covered by the Rule—including the right to be free from compelled speech with which Plaintiffs and Plaintiffs' members have ideological and viewpoint differences and which Plaintiffs and Plaintiffs' members would not otherwise make.

8. The interests at stake are germane to Plaintiffs' principles, because Plaintiffs are the leading advocates for manufacturers and assist manufacturers in competing in a global economy. To this end, Plaintiffs are vitally interested in ensuring that the constitutional rights of their members are not violated and that federal laws relating to employee relations are enforced reasonably and fairly so as not to impair the ability of manufacturers to compete in the world market.

9. The claims asserted and relief requested by Plaintiffs do not require the participation of Plaintiffs' individual members, because Plaintiffs' Complaint is a facial challenge to the Rule's violation of the United States Constitution and unlawful departure from and/or preemption by the statutory authority delegated by Congress. The Complaint is based entirely on principles of law and the Administrative Record and thus requires no individual contractor participation.

10. The DOL is an agency of the United States federal government and a proper defendant in this action for review of the decision of the DOL pursuant to 5 U.S.C. § 703. The DOL may be served at the Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, and by serving the U.S. Attorney of this district, pursuant to Fed.R.Civ.P. 4(i)(1)(A).

11. Defendant Thomas Perez, Secretary of the DOL (the "Secretary"), is a proper defendant in this action for review of the decision of the DOL pursuant to 5 U.S.C. § 703. Secretary Perez may be served at the Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, and by serving the U.S. Attorney of this district, pursuant to Fed.R.Civ.P. 4(i)(1)(A).

12. The OFCCP is an agency of the United States federal government and a proper defendant in this action for review of the decision of the Department of Labor and OFCCP pursuant to 5 U.S.C. § 703. The OFCCP may be served at the Department of Labor, Employment Standards Division, 200 Constitution Avenue, NW, Room C-3310, Washington, DC 20210, and by serving the U.S. Attorney of this district, pursuant to Fed.R.Civ.P. 4(i)(1)(A).

13. Defendant Patricia A. Shiu, Director of the OFCCP, DOL, is a proper defendant in this action for review of the decision of the DOL and OFCCP pursuant to 5 U.S.C. § 703. Director Shiu may be served at the Department of Labor, Employment Standards Division, 200

Constitution Avenue, NW, Room C-3310, Washington, DC 20210, and by serving the U.S. Attorney of this district, pursuant to Fed.R.Civ.P. 4(i)(1)(A).

14. Defendant Michael J. Hayes, Director of the Office of Labor-Management Standards, is a proper defendant in this action for review of the decision of the DOL and OLMS pursuant to 5 U.S.C. § 703. Director Hayes may be served at the Department of Labor, Office of Labor-Management Standards, 200 Constitution Avenue, NW, Room N-1519, Washington, D.C. 20210.

15. Defendant Office of Labor-Management Standards is an agency of the United States government and a proper defendant in this action for review of the decision of the DOL and OLMS pursuant to 5 U.S.C. § 703. The OLMS may be served at the Department of Labor, Office of Labor-Management Standards, 200 Constitution Avenue, NW, Room N-1519, Washington, D.C. 20210.

JURISDICTION AND VENUE

16. This Court has Federal Question jurisdiction in this action pursuant to 28 U.S.C. § 1331 (1993) because this action arises under the provisions of the First Amendment of the United States Constitution, Section 701 et seq. of the Administrative Procedure Act, and the Federal Property and Administrative Services Act, 40 U.S.C. § 101 (“Procurement Act”).

17. This Court has jurisdiction to review a final agency action by the OFCCP and/or the OLMS under the Administrative Procedure Act, 5 U.S.C. §§701-706, 5 U.S.C. §703 and 28 U.S.C. §§ 1331 and 1337.

18. Venue is proper in this district under 28 U.S.C. § 1391(e) because the OFCCP and OLMS are agencies of the United States, their headquarters are located in the District of Columbia, and a substantial part of the acts and omissions giving rise to the claims in this action

occurred at the OFCCP's and OLMS's headquarters. The NAM's principal office is also located in the District of Columbia.

19. This Court is authorized to award declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 701 – 706 and the Declaratory Judgment Act, 28 U.S.C. 2201- 2202.

FACTS

20. Many of Plaintiffs' member companies hold contracts with the federal government in excess of \$50,000. Plaintiffs' other members are interested in securing such contracts in the future. These member companies are subject to the requirements of Executive Order 13496 and its implementing regulations at Title 29, Part 471 of the Code of Federal Regulations ("Rule").

21. The OFCCP enforces (1) Executive Order 11246, 41 C.F.R. § 60-1.4; (2) Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, 60 C.F.R. § 60-741.5; (3) the affirmative action provisions of the Vietnam Veterans' Readjustment Assistance Act, 38 U.S.C. § 4212, 41 C.F.R. 60-250.5; and (4) shares enforcement responsibility for Executive Order 13496 and the Rule with OLMS.

22. The Rule requires non-exempt 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 under the Act.

23. The Rule requires federal contractors and subcontractors to post notices on their private property informing employees of their rights under the Act ("Notice").

24. The Rule requires federal contractors and subcontractors to (a) post the Notice conspicuously in and around their plants and offices; (b) post the Notice electronically if they

communicate with employees electronically; and (c) insert provisions in their subcontracts requiring their subcontractors to comply with the Notice posting requirements.

25. Contractors and subcontractors who violate the Rule's Notice posting requirement are subject to sanctions, including cancellation of their federal contracts or subcontracts and the suspension or debarment of the federal contractors or subcontractors from a renewal of their contracts or from receiving future federal contracts for a period of time.

26. On August 3, 2009, OLMS issued a Notice of Proposed Rulemaking stating therein an intention to impose the Notice posting requirement that ultimately became the Rule. 74 Fed. Reg. 38488. OLMS purported to act under the Procurement Act. There are, however, no provisions of the Procurement Act which are carried out by the Rule as issued by OLMS and enforced by OLMS and OFCCP, and the Procurement Act's provisions in fact do not authorize the Rule.

27. OLMS issued the Rule on May 20, 2010. The Rule was published on even date in the Federal Register at 75 Fed. Reg. 28368 (2010). The Rule is codified at 29 CFR Part 471. A copy of the Rule is attached hereto and incorporated by reference as Exhibit A.

28. The Rule constitutes a final agency action.

29. The effective date of the Rule was June 21, 2010.

FIRST CAUSE OF ACTION

30. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-29 as if fully rewritten herein.

31. The OLMS cites to Executive Order 13496 and the Procurement Act as authority for the Rule.

32. The OLMS's Rule specifically requires federal contractors and subcontractors to prominently post the Notice.

33. The Rule is directed at Plaintiffs' members who are required to comply with the Rule or risk investigation, audit, suspension or cancellation and/or debarment by Defendants.

34. Even if Defendants do not investigate, audit, cancel, suspend, or debar Plaintiffs' members pursuant to the Rule, the injury caused by the Rule is one of self-censorship—Plaintiffs' members will be forced to speak when they might not otherwise do so, and speak on matters with which they do not agree.

35. But for the Rule, Plaintiffs and many of their members would not choose to display the Notice to employees and applicants. Thus, the Rule compels speech in which Plaintiffs and many of their members who are federal contractors would not engage and with which they disagree.

36. The First Amendment of the United States Constitution protects not only the right to speak, but “the right to refrain from speaking.” *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211 (D.C. Cir. 2012); *See also Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

37. Plaintiffs' members possess First Amendment rights on their private property, including, but not limited to, electronic media.

38. The First Amendment protects corporations as it protects individual citizens.

39. The Rule is not narrowly tailored to serve a compelling governmental interest.

40. Accordingly, the Rule violates the First Amendment of the United States Constitution and the rights of Plaintiffs and Plaintiffs' members thereunder. The Rule must therefore be held unlawful and set aside under the Administrative Procedure Act, 5 U.S.C. § 706 (2)(B).

41. Unless implementation of the Rule is enjoined, Plaintiffs, their members, and all other employers subject to the OLMS's and OFCCP's jurisdiction will suffer immediate, irreparable harm for which no adequate remedy at law exists.

42. Enjoining the Rule is in the public interest and presents no harm to the OLMS or OFCCP.

SECOND CAUSE OF ACTION

43. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-42 as if fully rewritten herein.

44. The OLMS's purported authorities for the Rule are Executive Order 13496, and the Procurement Act.

45. The Procurement Act does not contain any specific provision granting the OLMS or OFCCP authority to compel federal contractors to post a notification of employee rights under the Act.

46. The Procurement Act does not contain any specific provision granting the OLMS or the OFCCP the authority to investigate, audit or debar federal contractors for failure to post a notification of employee rights under the Act.

47. Executive Order 13496 was signed by President Barack Obama on January 30, 2009. It is not an act of Congress.

48. The Rule, therefore, has been promulgated without Congressional authorization, in excess of the authority of any Executive Order delegation, and is arbitrary and capricious.

49. The Rule must therefore be held unlawful and set aside under the Administrative Procedure Act, 5 U.S.C. §§706(2)(A) and 706(2)(C).

50. Unless implementation and enforcement of the Rule is enjoined, Plaintiffs, their members, and all other employers subject to the OFCCP's and OLMS's jurisdiction will suffer immediate, irreparable harm for which no adequate remedy at law exists.

51. Enjoining the Rule is in the public interest and presents no harm to the OFCCP or OLMS.

THIRD CAUSE OF ACTION

52. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-51 as if fully rewritten herein.

53. The Act prescribes the legitimate rights of both employees and employers in their relations affecting commerce.

54. Section 8(c) of the Act, 29 U.S.C. § 158(c), specifically permits the expression of any views, arguments or opinion, or the dissemination thereof, by Plaintiffs and Plaintiffs' members under the jurisdiction of the Act if such expression contains no threats of reprisal or force or promise of benefit.

55. The Rule compels Plaintiffs' members, upon penalty of cancellation or suspension of current federal contracts and subcontracts and/or debarment from future contracts, to express views that promote unionization and are biased in favor of unionization.

56. The National Labor Relations Board ("Board") issued a rule on August 30, 2011 requiring employers subject to the Board's jurisdiction to post notices informing their employees of certain rights under the Act (the "Board Rule"). Save for the penalty provision, the Board Rule and its requirements are similar to the Rule in nearly all material respects.

57. The Board Rule was vacated as in violation of Section 8(c) of the Act in *National Association of Manufacturers v. National Labor Relations Board*, 717 F.3d 947 (D.C. Cir. May

7, 2013). The Board Rule was also held invalid as having been promulgated in excess of the Board's authority in *Chamber of Commerce of the United States v. National Labor Relations Board, et al.*, 721 F.3d 152 (4th Cir. June 4, 2013).

58. The Rule violates the rights of Plaintiffs and Plaintiffs' members under Section 8(c) of the Act.

59. The Rule is preempted by the Act.

60. Unless implementation of the Rule is enjoined, Plaintiffs, their members, and all other employers subject to the OFCCP's and OLMS's jurisdiction will suffer immediate irreparable harm for which no adequate remedy at law exists.

61. Enjoining the Rule is in the public interest and presents no harm to the OFCCP or OLMS.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court enter judgment against Defendant:

A. Declaring that the Rule violates Plaintiffs' and Plaintiffs' members' rights under the First Amendment of the United States Constitution;

B. Declaring that the Rule violates Plaintiffs and Plaintiffs' members' rights under Section 8(c) of the Act.

C. Declaring that the Rule is preempted by the Act.

D. Declaring that under the Administrative Procedure Act the Rule is null and void *ab initio* in its entirety and/or vacate the Rule;

E. Preliminarily and permanently enjoining the OLMS and OFCCP from enforcement and application of the Rule;

- F. Awarding Plaintiffs their attorney's fees and costs of this litigation; and
- G. Granting such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

/s/ Peter N. Kirsanow
PETER N. KIRSANOW (*Pro Hac Vice Pending*)
MAYNARD A. BUCK (*Pro Hac Vice Pending*)
PATRICK O. PETERS (*Pro Hac Vice Pending*)
CHRISTOPHER J. LALAK (*Pro Hac Vice Pending*)
Benesch Friedlander Coplan & Aronoff LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114
(216) 363-4500 (Telephone)
(216) 363-4588 (Telefax)
Emails: pkirsanow@beneschlaw.com
mbuck@beneschlaw.com
ppeters@beneschlaw.com
clalak@beneschlaw.com

/s/ Patrick Forrest
Patrick Forrest (D.C. Bar #489950)
10th Street NW, Suite 700
Washington, D.C. 20001
(202) 637-3061 (Telephone)
(202) 637-3182 (Telefax)
E-mail: PForrest@nam.org

/s/ Gregory F. Jacob
Gregory F. Jacob (D.C. Bar # 474639)
O'Melveny & Myers LLP
1625 Eye Street NW
Washington D.C. 20006
(202) 383-5110 (Telephone)
(202) 383-5414 (Telefax)
E-mail: gjacob@OMM.com

*Attorneys for Plaintiffs National Association of
Manufacturers and Virginia Manufacturers
Association*