

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

PRESIDENT

Bettina B. Plevan
Phone: (212) 382-6700
Fax: (212) 768-8116
bplevan@nycbar.org
www.nycbar.org

October 18, 2005

Honorable Elaine L. Chao
Secretary of Labor
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Waiver of Executive Order 11246 Requirements

Dear Secretary Chao:

I write on behalf of the Association of the Bar of the City of New York (the “Association”), a professional association of over 22,000 attorneys, to urge you to rescind the ninety-day waiver of the affirmative action requirements of Executive Order 11246 that the Deputy Assistant Secretary granted on September 9 to companies awarded federal contracts for Hurricane Katrina relief activities.

Founded in 1870, the Association has long been committed to promoting, preserving and protecting human rights and dignity. The Association through the work of its standing committees, including the Committees on Civil Rights and Labor and Employment, has promoted the use of the law to guard against racial, gender and other forms of invidious discrimination and against employment-related bias.

As you know, 41 C.F.R. § 60-741.4(b)(1) provides that the Secretary may waive the affirmative action provisions of the Executive Order “when he or she deems that special

circumstances in the national interest so require.” (emphasis supplied) We recognize that determining whether such a waiver is required in the national interest involves exercise of the Secretary’s discretion. Here, however, we believe that the waiver was both an unsound and an unwise exercise of that discretion and is strikingly counterproductive to the government’s efforts to ameliorate the economic crisis that Katrina visited so disproportionately on people of color and the disadvantaged.

The affirmative action provisions of Executive Order 11246 have been in place for forty years. Three months before signing that Executive Order into law, President Johnson described generally the purpose of affirmative action in words that are specifically applicable to the Executive Order:

You do not take a man who, for years, has been hobbled by chains, liberate him, bring him to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair. . . . This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity.¹

Executive Order 11246 thus furthers the essential goals of providing employment opportunities for minorities and women while giving federal officials a head start in ensuring that government dollars are not spent to promote discrimination.² The affirmative action provisions also help contractors to monitor their own records of hiring and promoting members of historically disadvantaged groups.

¹ Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965), *available at* <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

² Pursuant to regulations of the Office of Federal Contract Compliance Programs, a non-construction contractor performs a workforce analysis of the utilization of people of color and women in various job categories and analyzes whether those groups are under-represented in comparison to their availability in the relevant labor market. 41 C.F.R. §§ 60-2.10-2.15. The contractor then develops goals for recruiting and promoting individuals in the categories in which they are underutilized, although the regulations specify that, “Placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.” 41 C.F.R. § 60-2.16(e)(3).

These requirements are so important, and the circumstances that have justified their waiver so rare, that there have been only four contracts accorded exemptions during the past forty years. How Not to Get the Job Done, N.Y. Times, Oct. 1, 2005, at A14. The four contracts for which the affirmative action requirements have been waived were highly specialized, short-term, and limited in scope – nothing like the impending Katrina relief effort, which President Bush described in his September 15, 2005 speech in Jackson Square, New Orleans as “one of the largest reconstruction efforts the world has ever seen.”³ A special waiver of these essential obligations in the hundreds of contracts that will be required for the Gulf Coast recovery is both unnecessary and unwise.

The obligation on firms that do business with the federal government to prepare an affirmative action plan will not, in fact, present an obstacle to the speedy accomplishment of hurricane relief. The Executive Order is carefully tailored so that compliance will not unduly burden contractors. First, the affirmative action obligations will have no effect on small, local firms that participate in reconstruction because the requirement to develop a written affirmative action plan applies only to non-construction contractors with 50 or more employees and contracts in excess of \$50,000.⁴ Second, the Executive Order will not delay any firms from bidding on contracts or entering into them because a firm entering into such a contract has 120 days to complete the affirmative action plan from the date the contract is commenced.⁵ Third, the Executive Order does not require firms to hire or promote any individual; the contractors simply must submit their affirmative action plan and take steps to implement it. Thus, contractors earning federal dollars in Katrina-related activities have both the means and the time

³ Press Release, The White House, President Discusses Hurricane Relief in Address to Nation (Sept. 15, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html>.

⁴ 41 C.F.R. § 60-2.1(b)(1).

⁵ 41 C.F.R. § 60-2.1(c).

to ensure compliance with legal obligations that have been in place for decades and with which they are, presumably, already complying in their other governmental contracts.

This is also one of the worst times imaginable to exempt new contractors from their obligation to make special efforts to provide opportunities to people of color, women, Vietnam era veterans and individuals with disabilities.⁶ Beyond serving no useful purpose, the waiver threatens to exacerbate the striking racial and economic disparities that became apparent in the wake of Hurricane Katrina. Employment for returning residents is, together with housing and health care, among the most urgent needs that must be fulfilled not only to rebuild New Orleans and other Gulf Coast communities, but to provide a meaningful chance for hundreds of thousands of people, a striking percentage of whom are members of minority groups, to rebuild their lives. Without jobs, families who have lost virtually all of their possessions, whose homes were uninsurable, and who now have little or no savings, will be entirely dependent on public assistance or short-term private charity. To bypass affirmative action plans in these circumstances is among the most counterproductive actions that federal officials can take in the effort to help victims rebuild their lives and help the nation recover from Katrina's devastation. The waiver sends the unfortunate message that eliminating the continuing vestiges of discrimination is somewhat inconsistent with rebuilding this devastated area, when to the contrary, affirmatively overcoming the stark consequences of past discrimination is essential if the Gulf Coast recovery is to succeed.

Immediate repeal of the exemption is no less important because it is currently limited to 90 days. A waiver for even this period is enough to do damage to the important goals of

⁶ The waiver also suspends the requirements of the regulations implementing Section 503 of the Rehabilitation Act that mandate that all contractors with 50 or more employees and contracts in excess of \$50,000 develop such plans for people with disabilities. 29 U.S.C. § 793(a) (2005); 41 C.F.R. § 60-741.40. In addition, it suspends the regulations implementing the Vietnam Era Veterans Readjustment Assistance Act that require the same for Vietnam Era veterans and certain disabled veterans. 38 U.S.C. § 4212(a)(1) (2005); 41 C.F.R. § 60-250.40. The mandate that contractors conform with these statutes with respect to such individuals is neither unduly burdensome nor does the waiver serve any useful purpose, but only punishes groups that Congress has already recognized as historically disadvantaged.

eliminating and preventing discrimination, emphasizing the government's commitment to equal employment opportunity, and helping victims get back on their feet. Moreover, the exemption is subject to renewal and the same faulty reasoning that found the procedures unduly burdensome could well be extended to longer periods of time.

We understand that in the shock and devastation visited upon our fellow Americans by Hurricane Katrina, the initial reaction might be to remove any potential obstacle to a rapid recovery. However, the Executive Order goes to the heart of some of the very problems which President Bush himself has acknowledged caused the devastation to be so disproportionately visited upon people of color and the disadvantaged. The recovery from this disaster should not be permitted to become a second blow to already suffering people. Compliance with the Executive Order is indispensable to a proper recovery in that region.

For the foregoing reasons, the Association calls upon you to immediately rescind the exemption from affirmative action requirements for federal contracts for Katrina-related relief activities.

Sincerely,



Bettina B. Plevan

cc:
President George W. Bush
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500
fax (202) 456-2461

Senator Arlen Specter
Chairman of the Senate Judiciary Committee
SH-711 Hart Senate Office Building
Washington DC 20510
fax (202) 228-1229
arlen_specter@specter.senate.gov

Senator Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510
senator_leahy@leahy.senate.gov

Representative James Sensenbrenner
Chairman of the House Judiciary Committee
2449 Rayburn House Office Building
Washington DC 20515
fax (202) 225-3190
sensenbrenner@mail.house.gov

Representative John Conyers, Jr.
Ranking Member of the House Judiciary Committee
2426 Rayburn Building
Washington, D.C. 20515
fax (202) 225-0072
john.conyers@mail.house.gov

Senator Sam Brownback
Chairman
United States Senate Committee on the Judiciary
Subcommittee on The Constitution, Civil Rights and Property Rights
303 Hart Senate Office Building
Washington, D.C. 20510
fax (202) 228-1265

Senator Russell D. Feingold
Ranking Member
United States Senate Committee on the Judiciary
Subcommittee on The Constitution, Civil Rights and Property Rights
506 Hart Senate Office Building
Washington, DC 20510
fax (202) 224-2725

Representative Melvin L. Watt
Chairman
Congressional Black Caucus
2236 Rayburn House
Washington, D.C. 20515
fax (202) 225-1512

Representative Elijah E. Cummings
Congressional Black Caucus
2235 Rayburn H.O.B.
Washington, D.C. 20515
fax (202) 225-3178

Senator Mike Enzi
Chairman
U.S. Senate Committee on Health, Education,
Labor, & Pensions
428 Dirksen Senate Office Building
Washington, DC 20510
Fax: (202) 224-1975

Senator Edward Kennedy
Ranking Member
U.S. Senate Committee on Health, Education,
Labor, & Pensions
317 Russell Senate Office Building
Washington, DC 20510
Fax (202) 224-2417

Senator Charles E. Schumer
313 Hart Senate Building
Washington, D.C. 20510
fax (202) 228-3027

Senator Hillary Clinton
SR-476 Russell Senate Office Building
Washington DC 20510
fax (202) 224-0282

Representative Gary Ackerman
2243 Rayburn House Office Building
Washington DC 20515
fax (202) 225-1589
gary_ackerman@mail.house.gov

Representative Gregory Meeks
1710 Longworth House Office Building
Washington DC 20515
fax (202) 226-4169

Representative Anthony Weiner
1122 Longworth House Office Building
Washington DC 20515
fax (202) 226-7253
weiner@mail.house.gov

Representative Edolphus Towns
2232 Rayburn House Office Building
Washington DC 20515
fax (202) 225-1018
congressmantowns@mail.house.gov

Representative Major R Owens
2309 Rayburn House Office Building
Washington DC 20515
fax (202) 226-0112
major.owens@mail.house.gov

Representative Nydia Velazquez
2241 Rayburn House Office Building
Washington DC 20515
fax (202) 226-0327
nydia.velazquz@mail.house.gov

Representative Vito Fossella
1239 Longworth House Office Building
Washington DC 20515
fax (202) 226-1272
vito.fossella@mail.house.gov

Representative Carolyn Maloney
2331 Rayburn House Office Building
Washington DC 20515
fax (202) 225-4709
Representativecarolyn.maloney@mail.house.gov

Representative Charles Rangel
2354 Rayburn House Office Building
Washington DC 20515
fax (202) 225-0816
rangel@mail.house.gov

Representative Jose Serrano
2227 Rayburn House Office Building
Washington DC 20515
fax (202) 225-6001
jserrano@mail.house.gov

Representative Eliot Engel
2264 Rayburn House Office Building
Washington DC 20515
fax (202) 225-5513

Attorney General Alberto Gonzales
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
askdoj@usdoj.gov

Bradley J. Schlozman
Acting Assistant Attorney General
Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
(fax) (202) 514-0293