

(Update) New NLRB Rule Requires Posting of Notice Regarding Employee Rights

On October 5, 2011, the NLRB announced that it is postponing the implementation date for the posting of the notice from November 14, 2011 to January 31, 2012.

In December 2010, the National Labor Relations Board (NLRB) used its long dormant rulemaking power and proposed a rule that would require private sector employers to post a notice advising employees of their right to join a union under the National Labor Relations Act (NLRA). After receiving over 7,000 comments, on August 25 the NLRB adopted the Final Rule by a 3 to 1 vote, with Member Hayes dissenting. The Final Rule was published in the Federal Register on August 30 and initially was scheduled to go into effect on November 14, 2011. On October 5, 2011, the NLRB announced that it is postponing the implementation date for the posting of the notice from November 14, 2011 to January 31, 2012. The Final Rule applies to all private sector employers that are subject to the NLRB's jurisdiction.

The NLRB has justified the notice requirement as necessary based on a presumption that most employees are unaware of their rights under the NLRA to engage in protected concerted activities and form unions. This presumption is based on the following factors: (1) the small percentage of private sector employees represented by unions; (2) the high percentage of immigrants in the U.S. labor force who are likely not familiar with U.S. labor laws; (3) employees are generally uninformed of labor laws; and (4) there is an absence of a requirement that employees must be informed of their rights under the NLRA. Accordingly, the NLRB believes that requiring a notice posting will inform employees of their rights and will also dissuade employers from engaging in unfair labor practices under the NLRA.

The notice will be an 11x17 inch poster detailing the following employee rights under the NLRA:

- Organize a union to negotiate with the employer concerning 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 the employer setting wages, benefits, hours, and other working conditions.
- Discuss wages and benefits and other terms and conditions of employment or union organizing with co-workers or a union.
- Take action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the 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.

In a very small victory for management, and in an effort to provide a "balanced and neutral statement of rights," the NLRB listened to a number of comments and included a provision in the Final Rule regarding an employee's right to refrain from union activity, which was glaringly absent from the proposed rule. Interestingly, however, the NLRB specifically rejected commenters' proposals to include information in the notice regarding the rights of employees who do not belong to a union but are covered by a union security provision or information concerning dues objections by non-members.

The notice provides seven examples of unlawful employer conduct, including: (1) prohibiting discussion of unions during non-work time; (2) questioning employees about union activity; (3) taking adverse employment action because of union activity; (4) threatening to close if a union is chosen to represent them; (5) promising benefits to encourage or discourage union support; (6) prohibiting union hats, buttons or other union insignia; and (7) spying or videotaping peaceful union activity. The notice also includes five examples of unlawful union activity: (1) threatening or coercing an individual into joining a union; (2) refusing to process grievances based on membership in a union; (3) using or maintaining discriminatory hiring hall practices; (4) causing an employer to discriminate because of union activity; and (5) taking adverse action for not supporting or joining a union.

The NLRB's contact information is detailed in the notice in the event an employee believes there has been a violation of the NLRA.

The Final Rule sets forth three possible remedies for failure or refusal to post a notice. First, such failure may be grounds for an unfair labor practice charge under Section 8(a)(1) of the NLRA, which prohibits employers from interfering with, restraining, or coercing employees in the exercise of rights granted under the NLRA. Second, the six-month statute of limitations period for filing an unfair labor practice regarding alleged unlawful employer conduct may be extended, unless there is evidence the employee had actual or constructive notice that the conduct alleged in the charge was unlawful. Third, where the NLRB finds a knowing and willful failure to post a notice, it may use the failure to post as evidence of unlawful motive in an unfair labor practice case. Initially, however, the NLRB has indicated that its focus will be on compliance, assuming that most employers who do not post a notice are simply unaware of the rule. In those circumstances, once the notice is posted, the case will be closed.

Employers must post the notice by January 31, 2012 both in a conspicuous place where other personnel rules or policies are customarily posted, and electronically on an internet or intranet site, if the employer customarily uses such websites to communicate with employees about company rules and policies. Notably, the NLRB did not include in the Final Rule a provision of the proposed rule which required employers to send the notices via email, text message, voice mail or any related electronic communication, if the employer customarily uses such means to communicate with employees.

Employers may get a copy of the notice poster, at no charge, from the NLRB's office in Washington, D.C., and from any of the regional, subregional or resident offices. The notice may also be downloaded and printed from the NLRB's website at www.nlrb.gov.

Additionally, for employers where 20% of the employees are not proficient in English, a translated version must be posted. Translated versions will also be available from the NLRB. If an employer requests a translated notice from the NLRB and the notice is not available in the language needed, the employer will not be required to post a translated version until the notice becomes available in that language.

Finally, any Federal contractors or subcontractors that post notices as required by the U.S. Department of Labor's notice posting rules will be deemed to be in compliance with the NLRB's rule without posting a new notice.

If you have any questions about your obligations under the NLRB's Final Rule on the posting of a notice, please contact:

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