



EMPLOYMENT AND LABOR UPDATE

NLRB POSTING REQUIREMENT CREATES NEW OBLIGATION FOR PRIVATE SECTOR EMPLOYERS—UNIONIZED OR NOT

On August 25, 2011, the National Labor Relations Board (“NLRB”) announced a new rule requiring all private-sector employers subject to the National Labor Relations Act to post a notice notifying employees of their rights under the National Labor Relations Act. This requirement will extend to all covered employers, whether or not they currently have a union. The rule is scheduled to take effect on November 14, 2011.

Modeled after similar notices concerning other federal workplace rights, such as the minimum wage and rights concerning discrimination, the NLRB’s required notice states, according to an NLRB press release, “that employees have the right to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and to refrain from any of these activities.” The notice also “provides examples of unlawful employer and union conduct and instructs employees how to contact the NLRB with questions or complaints.” Thus, the notice states, for example:

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

- Prohibit you from talking about or 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.

Copies of the notice will be available free of charge from the NLRB beginning on or before November 1, 2011. They can also be downloaded from the Board's website, www.nlr.gov. They then must be posted both physically, in a conspicuous location where other such notices to employees are located, and on the employer's internet or intranet site, if the employer customarily posts personnel rules and policies there.

Despite the objections of many employer groups (and the dissent of one Board Member), the NLRB states that this new rule is an appropriate exercise of its rulemaking authority, because in its view, "requiring notice of employee rights is necessary to carry out the provisions of the NLRA." The Board justifies the imposition of the posting requirement—even though it is not in the National Labor Relations Act itself and has never been required throughout the NLRA's 76-year history—by explaining that today, with the decline in the number of private sector employees who are represented by unions and thus have ready access to information about the NLRA, the high percentage of immigrants in the workforce, and the number of high school students graduating into the workforce without knowledge of labor law, "many employees are unaware of their NLRA rights and therefore cannot effectively exercise those rights." For employees to fully exercise their NLRA rights, the Board argues, "they must know that those rights exist and that the Board protects those rights."

Others are less sanguine about the Board's motives, as Board Member Brian Hayes asserted in his dissent when the rule was first announced that the posting requirement is but another attempt by the Board majority to "reverse the steady downward trend in union density among private sector employees in the non-agricultural American workforce." It is perhaps notable that the Board announced the Final Rule on August 25, 2011, two days prior to the departure of Board Chair Wilma Liebman, traditionally a union ally, whose term expired at midnight on August 27.

Failure to post the notice as required will be an unfair labor practice. Although not punishable by a fine, a violation may extend the six-month statute of limitations for the filing of charges regarding other unfair labor practice allegations against the employer. The Board states that it may also consider an employer's knowing and willful failure to post the notice as evidence of the employer's anti-union animus and unlawful motive in other unfair labor practice cases.

For further information and assistance regarding compliance with the Board's new notice requirement and any other employment or labor questions, please contact us.

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