

Brief Filed in Litigation Challenging the NLRB's Final Rule Requiring All Employers to Post Notice of Employee Rights Under the NLRA

November 16, 2011

On August 25, the National Labor Relations Board (NLRB or Board) issued a Final Rule (Rule) that requires all employers subject to the Board's jurisdiction—i.e., the vast majority of employers doing business in the United States—to post a notice in the workplace informing employees of their right, among other things, to “[o]rganize a union,” to “take action . . . to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government, and seeking help from a union,” and to “strike and picket.”

Under the Rule, the notice must be posted in the same place where other employment-related notices are posted, which may include the employer's intranet or Internet site if the employer customarily communicates with its employees by such means. Failure to post the notice could have three adverse effects: (1) it will be an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act (NLRA), (2) it could toll the six-month statute of limitations for filing unfair labor practices, and (3) it could be used as evidence of an employer's unlawful motive in unfair labor practice cases.

The Rule is scheduled to go into effect on January 31, 2012.

The Status of the Litigation Challenging the Rule

After the Rule was announced, three separate lawsuits were filed in federal court to block its implementation: two in Washington, D.C. (which were consolidated into one case) and one in South Carolina. The cases challenge, among other things, the NLRB's authority to issue the Rule.

Cross-motions for summary judgment were filed on October 26 in the District of Columbia action and on November 11 in the South Carolina action. On November 15, John Kline, the Chairman of the House of Representatives' Committee on Education and the Workforce, along with 35 other members of the House of Representatives, filed in both pending cases an amicus brief supporting the challenge to the Board's authority to issue the Rule.

The amicus brief was authored by Morgan Lewis attorneys, led by Philip Miscimarra and including former NLRB member Charles Cohen. “Our brief was filed on behalf of thirty-six members of Congress, including John Kline, Chairman of the House Committee on Education and the Workforce, many other members of that Committee, and additional House Members. Their interest in the litigation stems from the fact that legislative decisions are reserved for Congress. The Members we represent

believe the NLRB's creation of a notice-posting obligation—which Congress did not place into the National Labor Relations Act—is contrary to the NLRA and exceeds the NLRB's authority," Miscimarra said.

The brief highlights for the first time in either litigation important legislative history showing that the original version of the NLRA contained a notice provision and a specific unfair labor practice relating to the notice provision. Led by Senator Robert Wagner, the sponsor of the law, a unanimous Senate Labor Committee intentionally *eliminated* the notice provision before the NLRA became law. "As the legislative history makes clear, Senator Wagner himself, together with his colleagues, thought there should be no requirement for companies to provide notification to employees. It is time for the NLRB to honor those wishes and abandon its ill-fated notice requirement," said Cohen.

The amicus brief also discusses how Congress intentionally limited the NLRB's jurisdiction to actual parties in pending cases—a limitation that was deemed by Congress to be central to the NLRA's constitutionality. Finally, the amicus brief argues that the new NLRB-created notice obligation undermines important rights afforded by other statutes that explicitly provide for notice provisions. View a copy of the amicus brief at http://www.morganlewis.com/pubs/AmicusBriefUSHouseMembers_DC_15nov11.pdf. A decision regarding whether the NLRB had the authority to issue the Rule is expected before the current implementation date of January 31, 2012.

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