

NLRB to Issue Final Rule Requiring All Employers (Even Nonunion Employers) to Post Notice of Employee Rights Under the NLRA

August 25, 2011

On August 25, the National Labor Relations Board (NLRB or Board) announced that it would issue a Final Rule, to be effective on November 14, 2011, that would require 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,” “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.”

The Board announced its intention to implement a rule in December 2010, and accepted comments on the Proposed Rule until March 2011. Although the Board received approximately 7,000 comments, the vast majority of which opposed the Proposed Rule, the Board made few changes from the Proposed Rule to the Final Rule.

Background

The National Labor Relations Act (the NLRA) gives employees the right to “form, join, or assist” unions, to bargain collectively with their employer, or to refrain from engaging in such activities. Although fewer than 7% of private sector employees are represented by unions, some of the NLRA's protections extend to nonunion employees in addition to union-represented employees.

A number of federal laws relating to employees—including Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act—include express statutory provisions requiring employers to post notices of their rights under those laws in the workplace. The NLRA contains no such provision. However, on January 30, 2009, President Obama issued Executive Order 13496, which required federal contractors and subcontractors to post notices of employees' NLRA rights. The NLRB's final rule extends this obligation to all employers covered by the NLRA, even if they are not government contractors or subcontractors.

The Board's Final Rule

The required notice adopts the language of the notice now required by federal contractors pursuant to Executive Order 13496. Specifically, the required notice would state that employees have the right to, among other things, do the following:

- Organize a union to negotiate with their employers concerning their wages, hours, and other terms and conditions of employment
- Form, join, or assist a union
- Discuss the terms and conditions of their employment or union organizing with their co-workers or a union
- Take action with one or more co-workers to improve their working conditions by, among other means, raising work-related complaints directly with their employers or with a government agency, and seeking help from a union
- Strike and picket

The required notice also would inform employees that it is illegal for an employer to, among other things, do the following:

- Prohibit employees from soliciting for a union during nonwork time . . . or from distributing union literature during nonwork time, in nonwork areas
- Question employees about their union support or activities in a manner that discourages them from engaging in that activity
- Fire, demote, or transfer employees . . . because they join or support a union
- Prohibit employees from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances

The required notice also states that if an employee believes that an employer has engaged in unlawful contact, he or she should contact the NLRB within six months of the unlawful activity (the NLRA statute of limitations). The notice also lists NLRB contact information.

Under the Final Rule, the required notice must be posted in the same place that other notices are posted. However, the Final Rule also requires that the notice be posted on an employer's intranet or internet site, if the employer customarily communicates with its employees by such means. A provision in the Proposed Rule to require email distribution as well was dropped. If 20% or more of an employer's workforce speaks a language other than English, the employer must provide the required notice in the language that the employees speak.

Finally, the Final Rule provides that failure to post the NLRA notice could have three adverse affects. First, it will be considered an unfair labor practice under Section 8(a)(1) of the NLRA. Second, failure to post the required notice could toll the six-month statute of limitations for filing unfair labor practices. Third, the NLRB could use the failure to post the notice as evidence of an employer's unlawful motive in unfair labor practice cases.

Board Member Brian Hayes dissented from the issuance of the Final Rule, arguing that the Board lacks the authority to issue the Final Rule, and that even if the Board had the authority to issue the Final Rule, the Board's actions in proposing and issuing the Final Rule were arbitrary and capricious, and therefore invalid. It is likely that employers or employer groups will quickly make these challenges in litigation to prevent the Final Rule from taking effect.

Conclusion

Although fewer than 7% of private sector employees are currently unionized, the Final Rule requires that the vast majority of private employers—including those that employ the 93% of private sector employees that are nonunion workers—publicize the NLRA in their work places through the required

notice. The required notice also represents the latest move by the Obama administration designed to improve the atmosphere for union organizing. In June 2011, in response to the apparent legislative demise of the Employee Free Choice Act, the Board issued another Proposed Rule that would significantly shorten the time between union petitions and elections.¹ Also in June 2011, the Department of Labor issued a Proposed Rule that if enacted would result in a sweeping expansion of employer and consultant reporting requirements for so-called “persuader activity.”² Together, these three rules will significantly tilt the playing field toward unions in union election campaigns and other day-to-day union-management interactions.

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1. See our June 22, 2011 LawFlash on that Proposed Rule, “NLRB Proposes New Rules to Significantly Expedite the Union Election Process and Limit Employer Participation,” available online at http://www.morganlewis.com/pubs/LEPG_LF_NewRulesExpediteUnionElectionProcess_22june11.pdf. In addition, see the comments we submitted on behalf of the Coalition for a Democratic Workplace, available online at http://www.morganlewis.com/pubs/CDWComments_NLRBProposedElectionRule_22aug11.pdf.

2. See our June 21, 2011 LawFlash on that Proposed Rule, “OLMS Proposes Significantly Expanded Employer and Consultant Reporting for Employee-Related ‘Persuader Activities,’” available online at http://www.morganlewis.com/pubs/LEPG_SignificantlyExpandedEmployerAndConsultantReporting_LF_21jun11.pdf.

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