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SEPTEMBER 2011

The NLRB Now Requires Employers to Post Notices Informing Employees of Unionization Rights

By
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The venerable National Labor Relations Act ("NLRA" or the "Act") has been in existence longer than almost any other federal labor or employment law in the United States. Since it was enacted in 1935, employers have never been required to post notices concerning employee rights under the NLRA except as part of a remedy when a violation of the Act has been found. Despite having operated for three-quarters of a century without requiring employers to engage in notice-posting in the absence of an unfair labor practice charge, the NLRB issued a rule on August 25, 2011, that requires private sector employers to post workplace notices informing employees of their unionization rights. Employee rights under the NLRA include the right to form or join a union, to bargain collectively with their employer for improved wages and working conditions, or, in the alternative, to refrain from engaging in such activities. These rights are known as Section 7 rights.

The NLRB's new rule requires posting of workplace notices by November 14, 2011 which inform employees of their Section 7 rights. In addition to listing Section 7 rights, the notices will instruct employees on how to reach the NLRB for further information or to register a complaint if they believe that their rights have been violated. The required notice must be at least 11" x 17" and in the type and style prepared by the NLRB. Like other employment notices, it must be posted in "conspicuous places where they are readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted." If the employer customarily communicates with employees about policies and procedures on the Internet or an intranet site, the NLRB notice must also be displayed prominently there in addition to the actual physical posting. The posters that employers are required to post can be obtained from the NLRB starting November 1. Employers are permitted to download the notice from the NLRB's web site and post it in black and white.

While the requirement to post a notice describing employees' statutory rights is not in itself unusual given the myriad of other, more recent, employment laws which require similar posting, this new requirement by the NLRB has generated much controversy. Many critics

observe that it appears to be part of a pattern favoring unions typical of the current NLRB members. When the NLRB first proposed the rule in December, more than 7,000 comments were received from concerned parties, the majority of whom opposed the rule. In response to some of the comments, the NLRB amended its proposed rule to, among other things, remove a requirement that employers distribute the workplace notice through email or other electronic means if the employer customarily communicates with its employees in that manner. Other changes to the rule included detailing unlawful conduct on the part of unions as well as employers, clarification of the rule's requirements for posting notices in foreign languages, and allowing employers to post notices in black and white as well as in color.

While the current version of the rule is more fairly balanced than the rule as originally announced, many employers continue to question the NLRB's authority to promulgate this rule. Indeed, NLRB member Brian Hayes dissented from the rule stating:

> The Board clearly lacks the authority to order affirmative notice posting action in the absence of an unfair labor practice charge filed by an outside party.

Employers who fail to post the notice as required by the NLRB's new rule will not be subject to fines or penalties as a result of that violation. The NLRB has, however, stated that employers who fail to post the notice will be subject to an unfair labor practice charge for this alone and that the remedy for failure to post the notice would include not only an affirmative order requiring the employer to post the notice but "other" unspecified remedies. An employer's failure to post the notice can also be used as evidence against the company in a subsequent unfair labor practice case to demonstrate disregard for employees' statutory rights and possibly serve as evidence of anti-union animus. The Board has also indicated that failure to post the notice could result in tolling of the limitations periods for filing unfair labor practice charges. The statute of limitations under the NLRA for filing an unfair labor practice charge is six months from the date of the alleged violation. Accordingly, an employer's failure to post the notice could result in employees having longer than six months to file a charge.

The labor lawyers at Weston Hurd agree with Member Hayes that the NLRB does not have the authority to issue this notice-posting rule. But the cost of non-compliance could be significant. We therefore do not recommend that employers subject to the NLRA ignore the rule unless they are prepared to litigate the issue of the NLRB's authority to promulgate the rule.

If you have any questions, comments or concerns about this Client Alert, please contact your Weston Hurd lawyer.

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