

Labor and Employment E-news

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National Labor Relations Board Proposes Regulation To Require Private Sector Employers To Post A Notice Informing Their Employees About Their Rights Under Federal Labor Law, Including The Right To Unionize

On December 22, 2010, the National Labor Relations Board published, in the Federal Register, "[Proposed Rules Governing Notification of Employee Rights under the National Labor Relations Act.](#)" For 60 days following December 22nd, members of the public may submit comments about these proposed rules to the NLRB.

These Proposed Rules confirm that the current NLRB will act aggressively to help labor unions.

The Proposed Rules would require all employers that are subject to the National Labor Relations Act - both unionized and non-unionized - to post a notice advising employees of their rights under the NLRB, including their right to unionize, and providing information about the enforcement of those rights. Almost all private sector employers, except ones covered by the Railway Labor Act, are subject to the NLRA and would be required to post this NLRB notice.

The notice, in brief, will require employers to educate their employees about the employees' right to unionize, what employer conduct is illegal, and how the employees can enforce their rights by contacting the NLRB.

The notice will have to be physically posted "in conspicuous places, including all places where notices to employees are customarily posted." The prescribed size of the notice will be 11" x 17." The content of the notice will be the same as the notice that the Department of Labor adopted for federal contractors. (A federal contractor that has posted the DOL notice will not also have to post the NLRB notice). Employers that have "significant numbers of employees who are not proficient in English" will have to post the notice "in the language or languages spoken by significant numbers of those employees." The NLRB will "make available posters containing the necessary translations."

In addition to the physical posting, if an employer "customarily communicates with its employees" by electronic means - "such as email, posting on an intranet or an internet site, and/or other electronic means" - the employer will have to distribute the notice electronically. For intranet and internet site posting, the NLRB notice must be displayed "prominently" - "no less prominently than other notices to employees."

The NLRB proposes the following sanctions for an employer's failure or refusal to post the notice:

- The failure to post the notice will be an "unfair labor practice." It will violate Section 8(a)(1) of the NLRA as a form of unlawful interference, restraint, or coercion of employees "in the exercise of the rights guaranteed in Section 7" of the NLRA.
- The tolling of the 6-month statute of limitations for the filing of any unfair labor practice charge by an employee: if an employer has failed to post the notice, then an employee may be excused from complying with the statutory requirement that an unfair labor practice must be filed within 6 months after the occurrence of the allegedly unlawful conduct, "unless the employee has received actual or constructive notice that the conduct complained of is unlawful." This tolling of the 6-month statute of limitations would not apply only to claims that the employer failed to post the notice; it would apply to "any" unfair labor practice charge filed by an employee.
- If an employer knowingly fails to comply with the posting requirement, the NLRB "may consider" that "knowing noncompliance" in "determining whether unlawful motive has been established" in an unfair labor practice case against the employer in which "unlawful motive is an element of one or more alleged violations." Stated alternatively, the NLRB will use the failure to post the notice as proof that the employer had an unlawful motive to discriminate or retaliate against an employee in a case in which the employer is accused of illegal activity against an employee.

Failure to post the required notice, however, would not result in fines. Nor, under the Proposed Rules, would employers be required to maintain records or submit reports to the NLRB about their compliance with the posting requirement.

NLRB Member Brian Hayes dissented from the NLRB's issuance of the Proposed Rules. His position was that the NLRB "lacks the statutory authority to promulgate or enforce" the proposed notice requirement. Member Hayes also objected to the imposition of "unfair labor practice liability for any failure to post a notice" and to the suspension of the 6-month statute of limitations period "for any unfair labor practice charge against a noncompliant employer" as "going far beyond" the DOL's posting requirement for federal contractors.

After the end of the 60-day comment period, the NLRB will review the comments and then issue a final rule. Until a final rule is issued, no employer has to post the NLRB's proposed notice. However, the NLRB presumably will issue the final rule at some time in 2011, and employers will then have to comply with that final rule by posting the prescribed notice.

For additional information, please contact your Butzel Long attorney or the author of this E-news Bulletin.

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