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NLRB Adds Another Required Poster to Long List for Employers

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The National Labor Relations Board ("NLRB" or "Board") recently enacted a rule requiring private sector employers (whether unionized or union-free) subject to the National Labor Relations Act ("NLRA") to post a new notice designed to inform employees of their rights under the NLRA, including their right to unionize and bargain collectively.[1] This new notice is in addition to the already long list of mandatory postings required in U.S. workplaces. The rule was originally to go into effect on November 14, 2011, but after facing mounting criticism as well as lawsuits filed by the National Association of Manufacturers, the Coalition for a Democratic Workplace, the National Right to Work Legal Defense and Education Foundation, The U.S. Chamber of Commerce, and the National Federation of Independent Business, arguing that the NLRB has overstepped its statutory authority, the Board recently pushed back the effective date to January 31, 2012. While the NLRB announced that implementation of the rule is delayed to allow for enhanced education and outreach to employers, a federal judge's request that the NLRB delay implementation of the rule so that she could carefully consider arguments in one of the pending lawsuits may have played a role as well.

Opposition to the NLRB's recent actions has not been relegated solely to the courts. United States Representative John Kline, the chairman of the House Education and Workforce Committee, recently introduced the "Workforce Democracy and Fairness Act" (H.R. 3094), which would make significant changes to the NLRA's provisions for the resolution of questions regarding union representation and, among other proposals, would streamline representation proceedings and limit the NLRB's discretion in those proceedings. On the same day that Rep. Kline introduced the bill, the House Small Business Committee conducted a hearing in which many Republican committee members voiced strong opposition to what is perceived to be a "particularly activist agenda," in one Congressman's words, of the current Board.

In terms of the reasons for requiring the poster, the NLRB cites concern that many employees protected by the NLRA are unaware of their rights under the law and therefore cannot effectively exercise those rights. The NLRB states that the intended effect of the posting requirement is to increase knowledge of the NLRA among employees and to better enable the exercise of rights under the statute. The NLRB also hopes the notice will increase statutory compliance by employers and unions.

The notice, an 11x17 inch poster that can be obtained from the NLRB's website, must be posted in a conspicuous area so that it can be readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted. Employers who customarily

post notices to employees regarding personnel rules or policies on an internet or intranet site are required to post the notice on those sites as well.[2] The contents of the poster advise employees, among other things, of the following:

- Their right, under the NLRA, to form, join or assist a labor union to bargain collectively, engage in protected and concerted activities including striking and picketing in protest of employment conditions, and the right to refrain from engaging in such activities.

- The existence of "unfair labor practices," or actions by an employer that violate the law, including rules that unlawfully limit employees' rights under the NLRA, interrogating employees regarding union support or activities, and retaliating or discriminating against employees for engaging in protected activities.

- Contact information for the NLRB for the purposes of inquiries and/or reporting possible violations of the NLRA.

Under the new rule, an employer's failure to post the notice may be considered an unfair labor practice in violation of Section 8(a)(1) of the NLRA. Additionally, a "knowing" and "willful" failure to post the notice may be considered evidence of unlawful motive in an unfair labor practice case. In most cases, a failure to post the notice will simply result in a requirement that the notice be posted. If the employer's non-compliance is due to some reason other than mere ignorance of the new rule, the NLRB's customary procedures for investigating and adjudicating alleged unfair labor procedures may be invoked.

While the date for posting the new notice is not imminent, employers should start thinking about the following issues in advance of the January 31, 2012 effective date:

- Employers should know the primary languages spoken by their workforce. As some employers, notably in New York, are now required to provide information to new hires and annually to all employees in their primary language, employers should make sure that they are keeping track of the language(s) their employees speak for multiple purposes related to state and federal compliance.

- As the NLRB predicts, the posting of this new notice may indeed raise questions among a company's employees about unionization and collective bargaining. Employers should consider training managers regarding these notices as well as the company's stance on unionization, in general, so as to ensure that managers can effectively communicate the company's position regarding unionization in a lawful manner.

- Employers should not be surprised if the new posting requirement leads to an increase in union organizing activity and an increase in the amount of unfair labor practice charges filed with the NLRB. At the very least, employers should make sure that they have the required poster translated into as many languages necessary (and available) in advance of the January 31, 2012 deadline so as to minimize any unfair labor practice charges due to its absence.

- Employers also should consider posting or circulating a statement of its own highlighting the fact that employees have additional rights to refrain from joining a union or engaging in any concerted activities. Employers who already have a unionized workforce, however, must be careful so as to avoid any statements that foment employee opposition to an incumbent union.

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[1] On May 20, 2010, the Department of Labor published its own rule regarding almost identical notice requirements covering federal contractors and subcontractors. Federal contractors who have posted this earlier notice already comply with the NLRB's new notice requirement. A Paul Hastings Stay Current client alert from May 2010 addresses the requirements under the Department of Labor's rule.

[2] If at least twenty percent of a company's employees are not proficient in English, the company must post the notice in the language that group of employees speaks. If a company's workforce includes two or more groups, each constituting at least twenty percent of the workforce who speak different languages, the company must post the notice in the language spoken by the larger (or largest) group. The company may then either post the notice in the language(s) spoken by the other group(s) or, at the company's option, distribute copies of the notice to those employees in their language(s). If the company is also required to post the notice electronically, it must do so in each of those languages. The NLRB has stated that it will provide translations of the notice in advance of the effective date so as to allow employers time to obtain and post them.