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New Rule Requires Employers to Notify Employees of Their Rights Under the National Labor Relations Act

Yesterday the National Labor Relations Board announced that as of November 14, 2011, employers across the country will be required to inform their employees that they have the right to unionize. Under its newly promulgated rule, virtually all private sector employers—both unionized and non-unionized—that are subject to the National Labor Relations Act will have to post notices and take other measures advising their employees of their rights under the Act. An employer that fails to comply with this new rule may be charged with engaging in an unfair labor practice under the NLRA.

The Board issued the rule based upon its belief “that many employees protected by the NLRA are unaware of their rights under the statute and that the rule will increase knowledge of the NLRA among employees, in order to better enable the exercise of rights under the statute.” The Board proposed the rule in December 2010 and received more than 7000 comments during the comment period, the majority of which opposed the rule or certain aspects of it. However, despite the overwhelming opposition and a dissent from NLRB Member Brian Hayes, the rule will become effective on November 14, 2011. As a result, employers should take steps to understand the rule, its requirements, and the potential consequences of noncompliance.

Content, Size, and Form of the Notice

The rule specifies the text of the notice (which is similar to one required by the U.S. Department of Labor for federal contractors), and states that employees have certain rights under the Act, including the right to:

- 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;
- Bargain collectively through representatives of the employees’ own choosing for a contract with their employer setting wages, benefits, hours, and other working conditions;
- Discuss employee wages and benefits and other terms and conditions of employment or union organizing with 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 employer or with a government agency, and seeking help from a union;
- Strike and picket, depending on the purpose or means of the strike or the picketing; or
- Choose not to do any of these activities, including joining or remaining a member of a union.

Many of the rights listed are vague and have the potential to cause confusion among employees as to what activities are actually protected versus when they are not protected under the Act. The notice also informs employees that it is illegal for an employer to take certain actions, such as:

- Prohibit employees from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in nonwork areas, such as parking lots or break rooms;
- Question employees about their union support or activities in a manner that discourages them from engaging in that activity;
- Fire, demote, or transfer, or reduce hours or change shift, or otherwise take adverse action against employees, or threaten to take any of these actions, because they join or support a union, or because they engage in concerted activity for mutual aid and protection, or because they choose not to engage in any such activity; or
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

This list also contains vague terms that may result in more employees attempting to challenge employer actions as illegal. The notice also instructs employees on how to contact the NLRB with questions or complaints. The rule requires the notice to be at least 11 inches by 17 inches in size. Copies of the notice, including translations, will eventually be available from the NLRB's regional offices by at least November 1, 2011, and presumably for download from the NLRB's website prior to that date. The postings may be in color or black and white.

Employers are required to post the notice "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." Also, employers who customarily communicate with their employees about personnel rules or policies on an intranet or internet site are required to post the notice on those sites or provide a link to the NLRB's website posting. Where the link is located and how it is to be entitled is also controlled by the regulations. The notice must also be posted in one or more other languages to the extent that 20 percent, or more, of the employer's workforce is not proficient in English and speaks a language other than English.

Although the rule does not require employers to maintain records or submit reports regarding compliance, a compliance record is advisable in light of the possible consequences of noncompliance.

Consequences of Failing to Post the Notice

Although the NLRB does not have the authority to impose a fine, other significant consequences can occur as a result of an employer's failure to post the notice. An employer may be charged with engaging in an unfair labor practice under Section 8(a)(1) of the NLRA, which prohibits employers from unlawful interference, restraint, or coercion of employees in the exercise of their rights guaranteed under the Act. Failure to post the notice may also toll the six-month statute of limitations that applies to employees filing an unfair labor practice charge. Another potential consequence is that the Board may view "a knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue." Stated alternatively, the NLRB may 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.

If you have any questions regarding the requirements of this regulation or the National Labor Relations Act in general,

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