Employer
Legal Brief

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INJUNCTION ISSUED TO BLOCK THE NLRB'S NEW UNIONIZATION NOTICE

On April 17, 2012, a federal appeals court in Washington, D.C., blocked the National Labor Relations Board (NLRB) from requiring American businesses to post its NLRA Employee Rights Poster by April 30, issuing a temporary injunction to stop the mandate.

The injunction follows on the heels of a federal court's decision in South Carolina this past Friday that said the board lacks the authority to mandate the poster.

The U.S. Court of Appeals for the District of Columbia now says the poster cannot be required until certain legal issues are resolved. The NLRB had no immediate public response, though the ruling has been appealed.

According to the D.C. Circuit Court of Appeals Order, briefing of the appeal is expected to be completed by June 29, 2012, and oral argument is expected to be scheduled in September 2012.

Hours after the decision, NLRB Chairman Mark Gaston Pearce said of the recent rulings, "We continue to believe that requiring employers to post this notice is well within the board's authority, and that it provides a genuine service to employees who may not otherwise know their rights under our law." He also pledged that his agency would abide by the injunction.

Background and Purpose:

On December 22, 2010, the National Labor Relations Board (Board) issued a proposed rule requiring employers, including labor organizations in their capacity as employers, subject to the National Labor Relations Act (NLRA) to post notices informing their employees of their rights under the NLRA. This final rule sets forth the Board's review of and responses to comments on the proposal and incorporates any changes made to the rule in response to those comments.

The Board believes 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. An intended beneficial side effect may well be the promotion of statutory compliance by employers and unions.

The final rule establishes the size, form, and content of the notice, and sets forth provisions regarding the enforcement of the rule. Furthermore, it illustrates consequences for failure to meet the requirements of the final rule.

Who must comply with the Final Rule:

If the injunction is lifted, the Board's Employee Rights Posting requirements will affect most private sector employers that are subject to the NLRA, whether unionized or not. The final rule does not apply to businesses who do not have a substantial impact on interstate commerce. As illustrated below, the threshold is determined industry by industry, based on gross annual volume of business, unless otherwise stated. For example, the retail standard, which applies to employers in the retail industry, including home construction, is $500,000. Conversely, the non-retail standard, which applies to most other employers, is based on either the amount of goods sold, or services provided by the employer out-of-state (called "outflow"), or goods or services purchased by the employer from out-of-state (called "inflow"). The Board

EMPLOYER RECOMMENDATIONS

1. Create a work environment that maintains an open-door policy for fielding concerns, suggestions and ideas from individual employees.
2. Abide by the protections of employee rights as delineated in the NLRA.
3. Consider hiring attorneys to help resist a unionization effort if one is developing.
4. Periodically review policies and programs to ensure that they are providing a positive and effective environment.
5. Ensure fair treatment and compensation of employees based on individual merit.

will take jurisdiction over any employer with an annual inflow or outflow of at least $50,000. Outflow can be either direct (to out-of-state purchasers) or indirect (to purchasers that meet other jurisdictional standards). Inflow can also be direct (purchased directly from out of state) or indirect (purchased from sellers within the state that purchased them from out-of-state sellers). Some of the industries' standards are provided in the following table:

Table to § 104.204

Employer Category	Jurisdictional Standard
Amusement industry	$500,000.
Apartment houses, condominiums, cooperatives	$500,000.
Architects	Nonretail standard.
Art museums, cultural centers, libraries	$1 million.
Bandleaders	Retail/nonretail (depends on customer).
Cemeteries	$500,000.
Colleges, universities, other private schools	$1 million.
Communications (radio, TV, cable, telephone, telegraph)	$100,000.
Credit unions	Either retail or nonretail standard.
Day care centers	$250,000.
Gaming industry	$500,000.
Health care institutions: Nursing homes, visiting nurses associations	$100,000.
Hospitals, blood banks, other health care facilities (including doctors' and dentists' offices)	$250,000.
Hotels and motels	$500,000.
Instrumentalities of interstate commerce	$50,000.
Labor organizations (as employers)	Nonretail standard.
Law firms; legal service organizations	$250,000.
Newspapers (with interstate contacts)	$200,000.
Nonprofit charitable institutions	Depends on the entity's substantive purpose.
Office buildings; shopping centers	$100,000.
Private clubs	$500,000.
Public utilities	$250,000 or nonretail standard.
Restaurants	$500,000.
Social services organizations	$250,000.
Symphony orchestras	$1 million.
Taxicabs	$500,000.
Transit systems	$250,000.

Who is not Covered by the Final Rule:

Although the Board has broad discretion over many employers, its reach is not unlimited. The final rule does not apply to entities that do not meet the definition of employer under the NLRA. These entities are: The United States or any wholly owned Government corporation; any Federal Reserve Bank; any State or political subdivision thereof; any person subject to the Railway Labor Act; any labor organization (other than when acting as an employer); or anyone acting in the capacity of officer or agent of such labor organization.

Furthermore, the final rule does not cover employers employing only workers who do not meet the definition of "employee" under Section 104.201 of the rule, such as independent contractors. Section 104.201 defines "employee" as "any employee, and is not limited to the employees of a particular employer, unless the NLRA explicitly states otherwise. The term includes anyone whose work has ceased because of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." Section 104.201 goes on to exclude from the rule agricultural laborers, supervisors, and independent contractors, or anyone employed in the domestic service of any family or person at his home. Additionally, employers subject to the Railway Labor Act, or any other entity defined an employer by the NLRA. Finally, the final rule does not apply to entities over which the Board does not have jurisdiction from prior court rulings, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

Overview:

The final rule, which was set to take effect April 30, 2012, requires employers to notify employees of their rights under the NLRA and prohibits them from other conduct. The rule specifies requirements for physical and electronic posting of this notice to employees. There are certain size and format requirements, and additional information on how to deal with multiple languages. Finally, the final rule illustrates what will happen if an employer does not meet the notice requirements illustrated in the final rule.

Employee Rights Under the NLRA:

Under the NLRA, employees have the right to:

1. Organize a union to negotiate with the employer wages, hours, and other terms and conditions of employment.

2. Form, join or assist a union.
3. Bargain collectively through representatives of employees' own choosing for a contract with the employer setting wages, benefits, hours, and other working conditions.
4. Discuss wages and benefits and other terms and conditions of employment or union organizing with co-workers or a union.
5. Take action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, and seeking help from a union.
6. Strike and picket, depending on the purpose or means of the strike or the picketing.
7. Choose not to do any of these activities, including joining or remaining a member of a union.

Employer Prohibited Conduct:

Under the NLRA, employers cannot:

1. Prohibit you 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 non-work areas, such as parking lots or break rooms.
2. Question you about your union support or activities in a manner that discourages you from engaging in that activity.
3. Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
4. Threaten to close your workplace if workers choose a union to represent them.
5. Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
6. Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
7. Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Union Prohibited Conduct:

Similar to employers, unions also are prohibited from unfairly influencing employees. Unions cannot:

1. Threaten or coerce you in order to gain your support for the union.
2. Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
3. Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
4. Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
5. Take adverse action against you because you have not joined or do not support the union.

Posting of Employee Notice:

Section 104.202 sets forth the requirements for employers to give notice to their employees. It requires employers to post notices to their employees in conspicuous places, informing them of their NLRA rights, together with Board contact information. Additionally, the notice must be at least 11 inches by 17 inches in size, and in such format, type size, and style as the Board prescribes.

Physical Posting of the Employee Notice:

The final rule states, the employee notice 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. Where 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must post the notice in the language employees speak. If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must either physically post the notice in each of those languages or, at the employer's option, post the notice in the language spoken by the largest group of employees and provide each employee in each of the other language groups a copy of the notice in the appropriate language. If an employer requests a notice in a language in which it is not available from the Board, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language. An employer must take reasonable steps to ensure that the notice is not altered, defaced, covered by any other material, or otherwise rendered unreadable.

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Electronic Posting of the Employee Notice

In addition to the required physical posting, if an employer customarily communicates personnel rules and policies to employees through an Internet or intranet site, the employer will be required to post an electronic notice there. The rule states that the notice must be displayed prominently—i.e., no less prominently than other notices to employees—on such a site either an exact copy of the poster, downloaded from the Board's Web site, or a link to the Board's Web site that contains the poster. The link to the Board's Web site must read, "Employee Rights under the National Labor Relations Act."

Similar to the language requirement of the physical posting,

if 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer would be required to provide notice as required above in the language the employees speak. If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer will be required to provide the notice in each such language. The Board will provide translations of the link to the Board's Web site for any employer that must or wishes to display the link on its Web site. If an employer requests a notice in a language in which it is not available from the Board, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language.

Failure to Post the Employee Notice:

If the injunction is lifted and the posting requirement is reinstated, the final rule illustrates consequences to employers if the Board finds the employer has failed to post the required employee notices. The employer will be ordered to cease and desist from the unlawful conduct and post the required employee notice, as well as, a remedial notice. In some instances, additional remedies may be appropriately invoked in keeping with the Board's remedial authority.

Furthermore, if any employer who threatens or retaliates against an employee for filing charges or testifying at a hearing concerning alleged violations of the notice-posting requirement, may be found to have committed an unfair labor practice.

Union Avoidance Strategies:

The final rule creates yet another obstacle for employers to overcome when trying to combat unions. Although this required employee notice reinforces unionization, it is not without remedy. The employer has many options and tactics that can be used to stop unionization.

The easiest way to combat unions is creating a work environment where employees feel safe, comfortable and feel they are being compensated and treated fairly. If employees feel this way, there will be no reason for them to unionize because they are satisfied with their work environment. This can be achieved through direct and honest communication with employees, and clear, consistent promotion and discipline policies.

Although this is ideal, it is not always practical or possible. Different employees have different needs and wants; because of this diversity, other measures need to be taken. Additionally, union advocates may persuade employees to unionize, and with this new notice requirement, employees may be more vulnerable than ever to pro-union influences.

In response to this new requirement, employers should demonstrate the value of not being in a union, and explain honestly why a union is not in their best interest. If you do this, you MUST be honest and accurate during this communication. Failure to do this may lead to legal consequences.

In addition to verbal consultations, an employer may place a poster of the same size next to the required employee notice. There is nothing in the new rule that prohibits placing a pro-employer poster. This poster must not violate any of the rules illustrated in the "Employer Prohibited Actions." The poster should be pro-employer, not anti-union. If a poster is used, it MUST only contain honest and accurate statements, and not be misleading to employees.

Placing this poster is a fairly effective way to combat the Board's required notice. It provides employees with information about advantages and disadvantages of both being in a union and abstaining from union participation.

Finally, if your policy and handbooks have not been recently reviewed, it may be beneficial to have them reviewed by an attorney before the final rule becomes effective.

Conclusion:

Before the injunction was issued on April 17, 2012, the final rule requiring notice to employees was scheduled to go into effect April 30, 2012. The NLRB said its regional offices will not implement the rule until the appeal is decided. Furthermore, the labor board will appeal a part of the ruling that raised questions about the rule's enforcement mechanisms, as well as the ruling that said the agency did not have the legal authority to issue the rule. Until then, employers need to make sure they do not violate any of the provisions protecting employee rights under the NLRA. If there is ever any doubt into the legality of any action or potential action you may take, please consult an attorney. ◆

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