

Employee Rights Notice Must Be Posted Under the National Labor Relations Act

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On August 30, 2011, the National Labor Relations Board (NLRB or the Board) published a Final Rule (the Rule) that requires private sector employers to post a notice of employee rights under the National Labor Relations Act (the Act). Most private sector employers are subject to the NLRB's authority—even those that are not unionized. The Rule goes into effect on January 31, 2012. (The Board initially set November 14, 2011 as the date by which employers had to comply, but recently announced an extension.)

Background

Under the Act, employees have the right to "form, join, or assist" unions; to bargain collectively; to engage in concerted activities for their mutual aid or protection; and to refrain from such activities. These protections extend to union and nonunion employees alike. Until recently, the NLRB, which is charged with administering the Act, did not require employers to inform their employees of their rights under the Act. According to the NLRB, this was a fundamental deficiency in the law because "the workplace itself is the most appropriate place for communicating with employees about their basic statutory rights as employees." Member Brian Hayes was the sole dissenting member of the Board. He argued that the NLRB lacked statutory authority to issue the Rule.

Coverage

The Rule applies to most private sector employers, including labor unions (when

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acting as employers). Small employers (those that conduct less than \$50,000 worth of business across state lines) and agricultural, railroad and airline employers, are excluded. Posting Requirements The new rule is modeled on President Obama's Executive Order 13496, which requires federal contractors and subcontractors to post a notice of employee rights under the Act. The NLRB adopted the general framework from Executive Order 13496 and now requires that all private employers inform employees of their right to do the following:

- Organize a union to negotiate with their employers concerning wages, hours, and other terms and conditions of employment.
- Form, join, or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract setting wages, benefits, hours, and other working conditions.
- Discuss 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 working conditions by, among other means, raising work-related complaints directly with an 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.
- Choose not to do any of these activities, including joining or remaining a member of a union.

In addition, the notice must state that it is illegal for employers to do the following:

- 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 non-work 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 an employee, or reduce an employee's hours or change an employee's shift, or otherwise take adverse action against an

employee, or threaten to take any of these actions, because an employee joins or supports a union, or because an employee engages in concerted activity for mutual aid and protection, or because an employee chooses not to engage in any such activity.

- Threaten to close the workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit employees from wearing union hats, buttons, T-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings, or pretend to do so.

The required notice will also contain a shorter list of activities by unions that are also illegal under the Act. Among other things, it is illegal for unions to:

- Threaten or coerce an employee to gain support for the union.
- Cause or attempt to cause an employer to discriminate against an employee because of the employee's union-related activity.
- Take adverse action against an employee because the employee has not joined or does not support the union.

A poster meeting the requirements of the Rule may be downloaded from the NLRB's website starting in November or obtained from one of the NLRB's regional offices. The poster must be at least 11 inches by 17 inches in size and must be posted in "conspicuous" places in the workplace, including those places where similar notices are normally posted. Any workplace in which 20% or more of the employees speak a language other than English must also post the notice in that language. If the employer customarily communicates its policies through an intranet or its internet webpage, the employer must post the notice there as well. The electronic posting must be an exact replica of the NLRB's poster or a link to the NLRB's website containing the poster. The link to the NLRB website must read, "Employee Rights under the National Labor Relations Act."



Penalties for Noncompliance

Failure to post the notice is an unfair labor practice under Section 8(a)(1) of the Act, which may be prosecuted by the NLRB. In addition, the NLRB is empowered to set aside the six-month statute of limitations period that normally applies to unfair labor practice claims. Finally, failure to post is evidence of "unlawful motive" in unfair labor practice cases in which motive is an issue.

Challenge to the Rule

The National Association of Manufacturers (NAM) and the United States Chamber of Commerce have both sued the Board to stop it from requiring employers to post the notice. The legal challenge has not halted implementation of the Rule, and so employers should still plan to comply with the posting requirement by January 31, 2012.

Conclusion

Through issuance of the Rule the Board hopes to promote greater awareness of the Act "in order to better enable the exercise of rights under" the Act by employees. According to the Board, most private sector employees do not exercise their rights because of "the comparatively small percentage of private-sector employees who are represented by unions." Employers—union and non-union alike—must be aware of the new posting requirements, and any other changes implemented by the Board, to avoid the penalties associated with violations of the Act.

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