A Timely Analysis of Legal Developments

ASAP®

In This Issue:

August 2011

The NLRB has issued its final rule requiring private sector employers to post a notice informing employees of their rights under the NLRA. All covered employers must take affirmative steps to comply.

NLRB Issues Final Rule Requiring Employers to Post a Notice Informing Employees of Their Rights Under the NLRA

By Gavin Appleby and Tracy Stott Pyles

On August 25, 2011, the National Labor Relations Board (NLRB or "the Board") issued a final rule entitled *Notification of Employee Rights under the National Labor Relations Act*. The rule mandates that private sector employers subject to the National Labor Relations Act (NLRA) post a notice informing employees of their rights under the NLRA in a "conspicuous place" readily seen by employees and penalizes employers for non-compliance. This new obligation applies to virtually all private sector employers, regardless of whether or not their workforces are unionized and regardless of whether they are federal contractors. The rule was published in the Federal Register on August 30, 2011 and will be effective 75 days later, on January 31, 2012 (*updated effective date*).

As part of the rule-making process, the Board previously posted a proposed rule for comment by outside organizations. In total, the Board accepted 7,034 comments, the majority of which opposed the proposed rule. In response to the many comments, the Board made limited modifications to the proposed rule, but left most provisions unchanged. Board Chairman Wilma Liebman and Members Mark Gaston Pearce and Craig Becker approved the final rule. Member Brian Hayes dissented and ended his written dissent by expressing his opinion that "a reviewing court will soon rescue the Board from itself and restore the law to where it was before the sorcerer's apprentice sent it askew." Whether or not the Board has the authority to issue a rule requiring employers to affirmatively post a notice and to penalize employers who fail to do so, when the NLRA itself provides no such posting requirement or authority, will certainly be the subject of future litigation.

For now, however, employers should prepare to comply with the final rule, which sets forth specific requirements for the size, color, content and posting of the notice (including electronic posting), and enforcement mechanisms, penalties and complaint procedures for non-complying employers. The required notice is similar to one required by the United States Department of Labor for federal contractors, covered in detail in a June 2010 Littler ASAP.

Required Content of Notice

The final rule requires employers to post a specific form notice that begins with the

following preamble:

> The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

The required notice also informs employees of specific rights afforded them under the NLRA, such as the right to:

- Organize a union to negotiate with their employer concerning your 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 with the employer 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 the 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, there is a section in the required notice advising that employers cannot do any of the following under the NLRA:

- 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 union support or activities in a manner that discourages employees from engaging in that activity.
- Fire, demote, or transfer employees, or reduce hours or change shifts, or otherwise take adverse action against employees, or threaten to take any of these actions, because employees 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.
- Threaten to close a 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 also explains that unions and their representatives cannot do any of the following under the NLRA:

- Threaten or coerce employees in order to gain support for the union.
- Refuse to process a grievance because an employee criticized union officials or because he or she is not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against an employee because of his or her union-related activity.
- Take adverse action against employees because they have not joined or do not support the union.

The required notice then contains a section that explains the concept of collective bargaining, as follows:

> If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

The notice also provides employees with information for reporting violations, including the NLRB's website and telephone numbers. The final section of the required notice explains the types of employees who are excluded from the NLRA's coverage, such as public sector employees, independent contractors, agricultural and domestic workers and employees of air and rail carriers covered by the Railway Labor Act.

Who Must Post the Notice?

Virtually all private sector employers subject to the NLRA are required to post the notice, regardless of whether their workforces are unionized, partially unionized or non-unionized. Employers who are excluded from the NLRA's jurisdictional coverage are not required to post the notice. By further explanation, small employers "in retail businesses, including home construction" must comply with the posting notice if they have a gross annual volume of business of $500,000 or more, and the business has more than *de minimis* involvement in interstate commerce. The rule also includes a table identifying specific "miscellaneous" employer categories and sets various gross annual volume of business requirements (for instance, $250,000 for day care centers, $100,000 for nursing homes, $250,000 for law firms and $250,000 for hospitals, to name a few). Non-retail small employers must comply with the posting notice if there is an outflow of goods or services provided by the employer out of state, or an inflow of goods or services purchased by the employer from out of state, of at least $50,000. In addition, employers who only employ individuals excluded from the NLRA's "employee" definition (*e.g.*, agricultural and domestic workers) and organizations who are not "employers" under the NLRA (*e.g.*, railroad and airline employers) are excepted from the posting requirement. For now the Board has agreed to exclude the U.S. Postal Service from the rule's coverage, but has indicated that it may promulgate a similar rule for the USPS with a notice tailored to the Postal Reorganization Act of 1970. The final rule also applies to federal contractors who already are required by the Department of Labor (DOL) to post a similar notice of employee rights (Executive Order 13496). However, a contractor who is in compliance with the DOL's posting requirement will be deemed in compliance with the Board's notice posting.

When Must the Notice Be Posted?

The final rule takes effect 75 days after publication in the Federal Register – November 14, 2011. We recommend that employers obtain the required notice poster in advance to ensure they are ready to promptly display the poster beginning on November 14, 2011.

Required Form and Where to Get the Notice

Beginning on or after November 1, 2011, the Board will provide black and white 11 x 17 inch posters of the required employee notice to employers at no cost. The posters can be obtained from the Board's headquarters, 1099 14th Street, NW, Washington, DC 20570, or any of its regional, sub-regional or resident offices. The telephone numbers and addresses for the Board's offices can be found at http://www.nlrb.gov. In addition, a copy of the poster can be downloaded from the Board's website at http://www.nlrb.gov. Employers will have two formatting options: they can download a one-page 11 x 17 inch version or a two-page 8½ x 11 inch version, which must be printed in landscape format and taped together to form the 11 x 17 inch poster.

Employers can reproduce and use copies of the Board's official poster. However, the copies must duplicate the official poster in size, content, format, and size and style of typeface. It is also permissible for employers to use commercial services to provide a poster consolidating the Board's notice with other federally mandated labor and employment notices, so long as the consolidation does not alter the size, content, format, or size and style of typeface of the Board's poster.

The poster must be posted in English. In addition, when 20% or more of an employer's on-site workforce is not proficient in English, the employer must post the notice in the language(s) the employees speak. The rule does not define "proficient."

The rule requires employers to take reasonable steps to ensure that the "notice is not altered, defaced, covered by any other material, or otherwise rendered unreadable."

Physical and Electronic Posting Requirements

Physically displaying the poster is always a requirement, although displaying one copy of the notice in a break room may not be enough. Specifically, the rule requires employers to post the notice in a conspicuous place that is readily seen by employees, including *all* places where other notices to employees are posted. In addition to physical posting, the rule requires employers to post the notice on the employer's internet or intranet site if the employer customarily posts notices to employees about personnel rules or policies on those sites. Employers comply with the electronic posting requirement if they prominently display on their internet or intranet sites an exact copy of the Board's poster, or a link to the Board's website that contains the poster. The link must be titled, "Employee Rights under the National Labor Relations Act." Employers are not required to distribute the notice via email or text messaging, even if the employer customarily communicates with employees in that manner. Electronic posting is *in addition* to the physical posting requirements.

Enforcement and Penalties

The Board considered, but rejected, voluntary compliance with the rule as an enforcement mechanism. Instead, failure to post the notice may be found to be an unfair labor practice and can be grounds for tolling the 6-month statute of limitations for filing an unfair labor practice charge against the employer. The Board anticipates that, usually, an employer who fails to post the notice is unaware of the requirement and that compliance will occur when the Board informs the employer of the oversight. In such cases, the unfair labor practice charge will typically be closed without further action. However, even in such cases, the statute of limitations may be tolled – although not automatically. First, tolling only applies to unfair labor practice charges filed by an individual, and not those filed by a union. Second, if the employer establishes that the employee had actual or constructive knowledge that the alleged conduct was unlawful, there will be no tolling.

In addition, if an employer's failure to post the notice is knowing and willful, *i.e.*, the employer had actual (as opposed to constructive) knowledge of the rule and still failed to post the notice, such refusal can be used as evidence of unlawful motive in an unfair labor practice case alleging other violations of the NLRA. The Board's General Counsel will have the burden of proving that the employer's failure to post the notice was willful. If an employer is found to have violated the NLRA, the Board may order the employer to cease and desist, to post the notice and to post a remedial notice. The rule also reserves the Board's authority to invoke additional undefined remedies, although the Board does not have authority to levy fines.

Labor Relations Implications and Strategies

The impact of this new rule will vary from employer to employer. For some employers (particularly federal contractors, but employers with existing unions as well), the new rule may be of little consequence. For others, compliance may be a significant undertaking, including adding posters to several workspaces, potentially in multiple languages, and electronically posting the notice.

All employers should consider what steps to take to prepare for and comply with the rule. For instance, it is likely that some employees will have questions about the notice, such as "why was it posted?" and "what does it mean?" Consequently, employers should provide information and training to managers and supervisors in anticipation of employee questions about the notice. That the posting was made pursuant to a federal government requirement is the best answer, but employers may also want to consider providing management staff with more proactive substantive training regarding the concept of unionization and its causes.

The Board's rule does not alter employers' rights under the NLRA, including an employer's right to free speech under Section 8(c) (which includes "[t]he expressing of any views, argument or opinion," provided that "such expression contains no threat of reprisal or force or promise of benefit"). Thus, employers still retain the right to speak to their employees about union representation within the confines of the NLRA.

The required posting may cause some employees to discuss and explore unionization, and posting could well increase employee-driven (as opposed to union-initiated) campaigns. As a result, employers may want to consider taking a more proactive approach to the notice requirements, including conducting the supervisor training mentioned above and undertaking a strategic analysis of the workplace and potential vulnerabilities.

Gavin Appleby is a Shareholder in Littler Mendelson's Atlanta office, and Tracy Stott Pyles is an Associate in the Columbus office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Appleby at gappleby@littler.com, or Ms. Pyles at tpyles@littler.com.