

Client Alert

LABOR, EMPLOYMENT AND BENEFITS PRACTICE GROUP | SEPTEMBER 2011

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NLRB Issues Final Rule Requiring Notification to Employees of their Rights Under the National Labor Relations Act

The National Labor Relations Board (“NLRB”) recently issued a controversial Final Rule requiring that private-sector employers subject to the NLRB’s jurisdiction post a notice informing employees of their rights under the National Labor Relations Act (“NLRA”). The notice, which must be posted by November 14, 2011, is similar to one already required by the U.S. Department of Labor (“DOL”) for federal contractors and includes information on how employees can unionize, file representation petitions and unfair labor practice charges, and contact the NLRB for assistance.

Employers can obtain hard copies of the 11 x 17 inch notice at no cost from the NLRB’s headquarters, or its regional, sub-regional or resident offices on or before November 1, 2011. The notice will also be available for download from the NLRB’s website (<https://www.nlr.gov>) around the same time. Once obtained, the notice must be posted in a prominent location on the employer’s premises where it will be readily seen by employees and where other job-related notices are posted, including on internet and intranet sites used by the employer for such purposes. Employers are not required to distribute the notice by email or by other electronic means even if they use electronic methods to distribute personnel-related notices generally.

The Final Rule provides that if 20% of an employer’s employees are not proficient in English and speak another language, the notice must be posted in the other language as well as in English; and, if the workforce includes two or more groups comprising 20% who speak different languages, the employer must provide the notice in each such language. The NLRB will make translations in various languages commonly used in the United States available to employers, also at no charge.

Under the Final Rule, the NLRB enjoys significant discretion to determine an appropriate remedy for an employer’s violation of these posting requirements. The NLRB can find the violation to be an unfair labor practice and require a separate 60-day notice posting wherein the employer promises to post the notice and comply with the terms of the NLRA. It can also extend the usual six-month statute of limitations for filing unfair labor practice charges against the employer, regardless of whether the charge bears any relation to the failure to post, such as charges alleging that an employee was terminated because of his/her union activities. Further, the NLRB can use a “knowing and willful” failure to post as evidence of anti-union animus in an unrelated NLRB case.

While the final format of the notice is still being developed by the NLRB, the content has been published and can be viewed at http://image.exct.net/lib/fe1676726604/d/1/OM%2011_77%20Attachment%202%20_Text%20of%20Employee%20Notice.pdf. Additionally, the NLRB has developed answers to frequently asked questions about the posting requirements, and they can be viewed at http://image.exct.net/lib/fe1676726604/d/1/OM%2011_77%20Attachment%201%20_%20Frequently%20Asked%20Questions.pdf

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Promulgating this Final Rule was a controversial move by the NLRB. Many commentators believe it will undermine the NLRB's role as a neutral governmental agency in labor matters, while others praise the move as an essential measure for advising employees of their rights under the NLRA. Other recent NLRB actions seen as pro-union include a proposed rule that would shorten the union election process and a decision changing existing law regarding appropriate voting units in a union election in a manner that greatly favors union organizing. Additionally, the DOL, in what appears to be a move coordinated with the NLRB, recently revised its existing rule on so-called "persuaders" that seeks to limit the scope of advice that lawyers can give to employers faced with a union organizing campaign.

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