



LABOR & EMPLOYMENT DEPARTMENT

ALERT

NLRB PROPOSES RULE REQUIRING COVERED PRIVATE SECTOR EMPLOYERS TO POST EMPLOYEES' RIGHTS UNDER THE NLRA

By Andrez S. Carberry and Jennifer DaCosta

On December 22, 2010, the National Labor Relations Board (the Board) published a Notice of Proposed Rulemaking in the *Federal Register*. The proposed rule would require private sector employers subject to the National Labor Relations Act (NLRA) to post a notice informing employees of their rights under the NLRA. The proposed rule adopts the language of the U.S. Department of Labor's (DOL) final rule published on May 20, 2010, that requires covered federal contractors to notify employees of their rights under the NLRA. (See [Fox Rothschild's previous alerts on that rule](#).) Citing various studies, the Board stated this proposed rule is necessary as American workers are largely unaware of their rights under the NLRA and are therefore unable to exercise them.

This proposed rule does **not** apply to:

- U.S. government or any wholly owned government corporation;
- Federal reserve banks;
- State or political subdivisions;
- Any person subject to the Railway Labor Act;
- Labor organizations (unless acting as an employer);
- Anyone acting in the capacity of an officer or agent of such labor organizations;
- Employers that employ individuals excluded from the NLRA's definition of an "employee;"

- Certain small businesses with an impact on interstate commerce that is *de minimis* (i.e., retail businesses and home construction that have a gross annual volume of business of less than \$500,000); and
- Entities over which the Board has decided not to assert jurisdiction.

Posting Requirements

The rule prescribes the size (at least 11 by 17 inches), color and type size of the notice and requires employers to post and maintain the notice in conspicuous places, including all places where notices to employees are customarily posted. If an employer customarily communicates with its employees electronically, the employer will also have to distribute the notice electronically. This may be accomplished by posting the notice (or a link to the notice on the Board's web site) on the employer's Internet/Intranet site or by sending employees an e-mail containing the link to the notice on the Board's web site. The link must read, "Important Notice About Employee Rights to Organize and Bargain Collectively with Their Employers," and must contain the prescribed language from the notice. If a significant number of employees do not speak English, the employer will be required to post the notice in the language(s) spoken by the employees. The Board will make the notice available to employers in English and several other languages.

Federal contractors and subcontractors that comply with the DOL's NLRA notice requirement will be in compliance with this proposed rule.

Enforcement and Penalties

Compliance with this proposed rule will be mandatory. An employer that violates the notice requirements will be subject to unfair labor practice (ULP) charges pursuant to Section 8(a)(1) of the NLRA. The Board acknowledged most employers charged with violating this rule will have done so because they were unaware of the requirement. Thus, the Board expects most incidents of noncompliance will be remedied by informing the employer of the need to post the notice or issuing a cease and desist order requiring the posting of the notice as well as a remedial notice.

However, if an employer knowingly violates the notice requirement, the Board, pursuant to a ULP charge, may sanction the offending employer by:

- Tolling the statute of limitations for filing other ULP charges against the employer that are unrelated to the violation of the notice requirement; and
- Considering the knowing failure to post the notice as evidence of unlawful motive in other ULP cases against the employer where motive is at issue.

What This Means for Employers Subject To the NLRA

This is a proposed rule, and therefore interested parties must advise the Board of their respective views on this rule by February 22, 2011.

If the proposed rule is adopted in its current form, private employers subject to the NLRA should expect more union-related activities in the workplace, including a potential spike in ULP charges. At a minimum, covered employers should anticipate increased inquiries from employees (union and nonunion) regarding their rights under the NLRA. Employers should work with their labor counsel to determine whether they are subject to the NLRA. Employers subject to the NLRA should train their human resource professionals, executives and supervisors on how to address and respond to employee inquiries about their rights under the NLRA and other union-related activities in the workplace.

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