ALERTS AND UPDATES

NLRB Issues Final Rule Requiring All Employers Subject to National Labor Relations Act to Post Notice of Employee Rights to Engage in Union Activity

September 22,2011

On August 22, 2011, the National Labor Relations Board (NLRB) issued a Final Rule that all employers subject to the National Labor Relations Act (generally, employers engaged in interstate commerce and not part of the rail or air transportation systems) will be required to post a notice by November 14, 2011, informing their employees of their right to engage in union and other concerted activity. With few changes, the NLRB has adopted the poster ordered by President Obama to be posted by all federal contractors (Executive Order 13496). Employers who are subject to the jurisdiction of the NLRB and a federal contractor will not be sanctioned by the NLRB if they continue to use the poster required by the Executive Order and will not be required to post a second poster.

The poster notifies all employees that they have the legally protected right to:

- Organize a union to negotiate with their employer concerning wages, hours and other terms and conditions of employment
- Form, join or assist a union
- Bargain collectively through a union for a contract that sets wages, benefits, hours and other working conditions
- Discuss their terms and conditions of employment or union organizing with co-workers or a union
- Take action with one or more of their co-workers to improve their working conditions by, among other means, raising complaints with their employer or government agency or seeking help from a union
- Strike or picket their employer to obtain improved terms of employment or working conditions
- Refrain from doing any of the above things

The poster also informs employees that the law prohibits their employer from interfering with the exercise of their rights or discriminating against them because they engage in or refuse to engage in union activity. Various types of violations, both employer and union, are listed in the poster. Employees are also given the necessary instructions for filing a charge with the NLRB alleging a violation of the Act and are informed that anyone, not just an employee, may file a charge. Posters must be posted in the place

where the employer posts other government notices (*e.g.*, FLSA, Title VII and similar types of notices). If 20 percent or more of an employer's employees communicate in the same language that is different from English and have difficulty understanding written English, the employer must obtain from the NLRB website a poster in that other language and post it in addition to the one that is in English.

Employers that customarily communicate personnel rules electronically by postings on an intranet or Internet page must post the poster in the same manner. The posting does not have to be done by email or other forms of electronic communications.

Employers who fail to post the poster will receive first a letter instructing them to post the notice. If the employer still fails to post the notice, it may be found to have violated Section 8(a)(1) of the National Labor Relations Act (interference with rights under the NLRA), subject to a cease and desist order, and required to post a notice indicating that the posting has been required by the National Labor Relations Board (which is also known as a remedial order). Employers who willfully and knowingly fail or refuse to post the poster will be found to be interfering with employee rights in violation of the NLRA, and the fact of the failure or refusal to post the poster will be considered negatively in any case where union animus may be a relevant consideration (*e.g.*, discharges, discipline). Furthermore, except in cases where an employee is found to have known that his rights under the NLRA had been violated and still did not file an unfair labor practice charge with the NLRB within six months of the violation, the failure to post the poster may toll the six-month statute of limitations for the filing of an unfair labor practice charge.

The new rule was published over the objection of member Brian E. Hayes. According to Hayes, the NLRB lacked the statutory authority to publish the rule and did not precede the Final Rule with an investigation and substantial factual analysis that concluded that the rule was factually necessary. As a result, according to Hayes, the rule was arbitrary and capricious. Hayes' objections were consistent with numerous comments filed by employers and employer groups when the rule was first proposed in December 2010, and are likely to be the substance of various injunctive actions that may be filed to prevent the Final Rule's implementation.

Regardless of whether court actions are successful in blocking the implementation of the Final Rule, employers should consider taking advantage of the time to get ahead of the curve by publishing or having ready for publication a statement about why the employer believes that employees need not seek the interference of a union in their workplace and identifying the policies it already has in place that make the cost of a union unnecessary for employees. In addition, employers should consider training supervisors now about how to respond to employee inquiries regarding unions and their perceived benefits.

Even if the implementation of the Final Rule is enjoined, the process of analyzing and putting into writing the reasons why an employer wishes to remain non-union may be helpful in the event of organizing. Also,

training to educate supervisors about unions and union organizing and to prepare them to respond effectively to employee inquiries about unions may be essential if the NLRB changes its internal rules and begins to shorten the time between representation petitions and elections, as the Board has indicated it is considering. If the Board shortens the election process, employers likely will not have sufficient time (as little as two weeks) to educate supervisors satisfactorily before they are expected to deal with an active union campaign. Well-trained and knowledgeable supervisors will be better able to detect the early signs of organizing and more capable of taking the actions necessary to potentially neutralize any interest some employees may have in third-party representation.

For Further Information

The Duane Morris Employment Law and Management Labor Relations Practice Group regularly assists employers who wish to remain free of unions, so we encourage employers to contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact if we can assist in addressing the issues raised in this *Alert*.