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CLIENT BULLETIN

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A PARTING GIFT FROM THE LIEBMAN BOARD: Employers Must Post Notice of Organizing Rights Starting November 14

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As a parting "gift" for employers during Wilma Liebman's last days as Chair, the National Labor Relations Board announced its final rule on Notification of Employee Rights under the National Labor Relations Act. The rule passed the Board by a 3-1 vote, with Member Brian Hayes dissenting. The rule will take effect on November 14, 2011, 75 days from the date of its publication in the *Federal Register*.

The rule mandates that employers covered by the NLRA (which includes non-union employers) must post a notice to employees informing them of their right to act together to improve wages and working conditions, to form and join a union, to bargain collectively, or to choose not to do any of these things. Employers can request copies of the notice from the NLRB or download them from the **NLRB's website**. Downloaded copies must be printed on 11x17-inch paper but can be printed in black and white. Employers also can use a commercial poster service as long as the notice maintains the same size, color, and content. The NLRB says that copies of the notice will be available by November 1.

According to the rule, the notice must be posted in conspicuous places, including all places where notices to employees are customarily posted. The employer must take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material, or otherwise rendered unreadable.

Employers who maintain internet or intranet sites where they "customarily" post or communicate personnel rules or policies to employees must post the notice electronically as well. The employer can either post the actual notice or provide a link to the notice on the NLRB's website.

Employers also must provide non-English-speaking employees with a language-specific copy of the notice if that employee group constitutes as least 20 percent of the employer's workforce. Employers can meet this obligation by providing the notice to the individual employees or posting the notice in the required languages. Employers can obtain translated notices from the NLRB and can request that the NLRB translate the notice into languages not already available.

Most significant for employers are the repercussions if an employer *does not* post

the notice. The rule imposes three possible penalties for an employer's failure to post the notice. First, an unfair labor practice charge may result, although the rule clarifies that in the majority of circumstances, the unfair labor practice will be closed and not pursued further if the employer was unaware of the rule and posts the notice when requested. Second, failing to post the notice could lead to a tolling (delay) of the six-month statute of limitations for the filing of unfair labor practice charges. Third, an employer's knowing and willful failure to post the notice could be used as evidence of unlawful motive in a separate unfair labor practice charge.

Government contractors and subcontractors who are already posting the Department of Labor notice required by **Executive Order 13496** do not have post the NLRB's notice because the language is the same.

In scant good news for employers, the final rule does not include the requirement that employers distribute the notice via email, voice mail, text message, or other electronic communication such as Twitter.

The rule also leaves open the possibility for an employer to post a separate notice on its stance regarding unions. The NLRB acknowledged an employer's right to "express views, arguments, and opinions" on unionization so long as the employer's expression "contains no threat of reprisal or force or promise of benefit." Before posting such a counter-notice, we recommend that you consult with your Constangy attorney of choice.

About Constangy, Brooks & Smith, LLP

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