Morgan Lewis

labor and employment lawflash alert

www.morganlewis.com

NLRB Final Rule Requiring All Employers (Even Nonunion Employers) to Post Notice of Employee Rights Under the NLRA Delayed Until January 31, 2012

October 5, 2011

On October 5, the National Labor Relations Board (NLRB or Board) announced that it would delay the effective date, until **January 31, 2012**, of its Final Rule requiring all employers subject to the Board's jurisdiction—i.e., the vast majority of employers doing business in the United States—to post a notice in the workplace informing employees of their right, among other things, to "[o]rganize a union," to "take action . . . to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government, and seeking help from a union," and to "strike and picket."

The Board's Final Rule was originally to be effective on November 14, 2011. According to the Board, the delay will "allow for enhanced education and outreach to employers, particularly those who operate small and medium sized businesses." No changes to the form or content of the notice were made. The Board did not announce any specific plans for "enhanced education" or "outreach to employers."

Background

The National Labor Relations Act (NLRA) gives employees the right to "form, join, or assist" unions, to bargain collectively with their employers, or to refrain from engaging in such activities. Although fewer than 7% of private-sector employees are represented by unions, some of the NLRA's protections extend to nonunion employees as well as union-represented employees.

A number of federal laws relating to employees—including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act—include express statutory provisions requiring employers to post notices of employees' rights under those laws in the workplace. The NLRA contains no such provision. However, on January 30, 2009, President Obama issued Executive Order 13496, which required federal contractors and subcontractors to post notices of employees' NLRA rights. The NLRB's Final Rule extends this obligation to employers covered by the NLRA, even if they are not government contractors or subcontractors.

Under the Final Rule, the required notice must be posted in the same place where other work notices are posted. However, the Final Rule also requires that the notice be posted on an employer's intranet or Internet site if the employer customarily communicates with its employees by such means. Failure to post the notice could have three adverse affects. First, it will be an unfair labor practice under Section

8(a)(1) of the NLRA. Second, failure to post the required notice could toll the six-month statute of limitations for filing unfair labor practices. Third, the NLRB could use the failure to post the notice as evidence of an employer's unlawful motive in unfair labor practice cases.

Three Lawsuits Pending to Overturn the Final Rule

There are currently pending three lawsuits that challenge, among other things, the Board's authority to issue the Final Rule requiring the notice. The delay in implementation of the Final Rule will allow more time for the judges in those cases to review the merits of the Final Rule. If the plaintiffs in those cases are successful, the Final Rule could be blocked before implementation.

Conclusion

Although less than 7% of private-sector employees are currently unionized, the Final Rule requires that the vast majority of private employers—including those that employ that 93% of nonunion workers—publicize the NLRA in their workplaces through the required notice. The required notice, along with a proposed Board rule to allow "quickie" elections and recent case decisions covering corporate transactions, voluntary recognition, and "micro" bargaining units, represents the latest (but certainly not the last) Obama-controlled Board action making the atmosphere for union organizing more favorable.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.

Charles I. Cohen	202.739.5710	ccohen@morganlewis.com
Joseph E. Santucci	202.739.5398	jsantucci@morganlewis.com
Jonathan C. Fritts	202.739.5867	jfritts@morganlewis.com
John F. Ring	202.739.5096	jring@morganlewis.com

Chicago

Philip A. Miscimarra	312.324.1165	pmiscimarra@morganlewis.com
Ross H. Friedman	312.324.1172	rfriedman@morganlewis.com

Houston

A. John Harper II	713.890.5199	aharper@morganlewis.com

Los Angeles

Clifford D. Sethness	213.612.1080	csethness@morganlewis.com

New York

Doreen S. Davis	215.963.5376	dsdavis@morganlewis.com

Philadelphia

Joseph C. Ragaglia	215.963.5365	jragaglia@morganlewis.com

About Morgan Lewis's Labor and Employment Practice

Morgan Lewis's Labor and Employment Practice includes more than 265 lawyers and legal professionals and is listed in the highest tier for National Labor and Employment Practice in *Chambers USA 2011*. We represent clients across the United States in a full spectrum of workplace issues,

including drafting employment policies and providing guidance with respect to employment-related issues, complex employment litigation, ERISA litigation, wage and hour litigation and compliance, whistleblower claims, labor-management relations, immigration, occupational safety and health matters, and workforce change issues. Our international Labor and Employment Practice serves clients worldwide on the complete range of often complex matters within the employment law subject area, including high-level sophisticated employment litigation, plant closures and executive terminations, managing difficult HR matters in transactions and outsourcings, the full spectrum of contentious and collective matters, workplace investigations, data protection and cross-border compliance, and pensions and benefits.

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.