LEGAL UPDATES

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NLRB Rule Requires Employers to Inform Employees About Rights Under the National Labor Relations Act

Services

Labor & Employment

Traditional Labor Relations

UPDATE - April 17, 2012

Hurry Up And Wait (Again): NLRB Notice-Posting Requirement Enjoined

The U.S. Court of Appeals on April 17, 2012, entered an order enjoining the National Labor Relations Board's (NLRB) rule requiring the posting of employee rights. The rule, which was scheduled to go into effect April 30, 2012, has been a hot-button issue both in and out of courtrooms. The District of Columbia Circuit entered the injunction based upon conflicting decisions at the district court level regarding the NLRB's authority to issue the rule. The NLRB has issued a statement indicating that its regional offices will not implement the rule until the issues before the court are resolved, mooting the prior April 30, 2012, date and leaving employers in limbo regarding when, or if, the rule will go into effect.

UPDATE - April 13, 2012

Federal Judge Strikes Down NLRB's Right to Establish New Notice-Posting Rule

On April 13, 2012, U.S. District Judge David C. Norton of the District of South Carolina ruled that the National Labor Relations Board (NLRB) exceeded its authority when it issued its rule mandating that employers post a notice about employees' right to unionize. The ruling, in response to cross-motions for

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summary judgment filed in November by the NLRB and the U.S. Chamber of Commerce, strikes another blow to the hotly debated notice-posting rule that was scheduled to go into effect April 30. The chamber argued that the NLRB exceeded its authority under the Administrative Procedure Act.

In holding that the NLRB so exceeded its authority, the opinion stated that "[t]he notice-posting rule proactively dictates employer conduct prior to the filing of any petition or charge, and such a rule is inconsistent with the board's reactive role under the Act. … Congress did not impose a notice-posting requirement on employers in the Act or commit this area of regulation to the Board."

The NLRB is expected to appeal the ruling. In any event, it would appear the notice-posting deadline of April 30 is no longer applicable. The NLRB is expected to provide guidelines for employers in the near future over the posting requirement given these litigation results. As soon as guidelines are issued, we will forward them on for review.

UPDATE - March 7, 2012

Federal Judge Upholds NLRB's Right to Establish New Notice-Posting Rule but Finds Unlawful Penalties for Failure to Post

U.S. District Judge Amy Berman Jackson of the District of Columbia on March 2, 2012, issued a *ruling* on the claims raised by the National Right to Work Defense Education Foundation and the National Association of Manufacturers, among other business associations, regarding the promulgation of the final rule titled "*Notification of Employee Rights Under the National Labor Relations Act*." The plaintiffs had alleged that the National Labor Relations Board (NLRB) exceeded its authority under the Administrative Procedure Act and that the rule violated employers' First Amendment rights. An earlier demand for a preliminary injunction regarding the effective date of the new rule was made moot by the NLRB'spostponement of its implementation until April of this year.

In sum, the court ruled in favor of the NLRB's authority to promulgate the rule but agreed with the plaintiffs that the penalties provisions were unlawful. Appeals by both parties are likely. This in turn may result in the board continuing to extend the effective date of the rule until all appeals have been exhausted, which will likely take several months, perhaps beyond the elections in November.

UPDATE - January 5, 2012

Faced with legal challenges to its proposed final rule requiring private employers to post notices advising employees of their rights under the National Labor Relations Act, the National Labor Relations Board (NLRB) again postponed the effective date — this time until April 30, 2012.

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Originally, the final rule required posting by November 14, 2011; however, the NLRB initially delayed the posting requirement until January 31, 2012, and now has further postponed the deadline until April 30.

An NLRB release stated the postponement was at the request of U.S. District Court for the District of Columbia in order to "facilitate the resolution of the legal challenges" filed with respect to the rule.

On August 25, 2011, the National Labor Relations Board (NLRB) issued its final rule requiring almost all private sector employers to post notices to its employees advising them of their rights under the National Labor Relations Act (NLRA) to act collectively to improve wages and working conditions; to form, join and assist unions; to bargain collectively with their employer; or to refrain from these activities if they choose to do so.

This rule was initially published as a proposed rule on December 22, 2010. During the comment period for the proposed rule, more than 7,000 comments were received from employers, employer groups, employees, unions and others. The final rule (a copy of the 194-page Notice of Final Rule with commentary is available here) was issued on August 25, 2011, and becomes effective on November 14, 2011. This final rule has the same content as the notice required for government contractors by the Department of Labor discussed in a previous client alert. Employers who have posted the Department of Labor notice are not required to post the notice mandated by this new rule.

There were few significant changes from the proposed rule. The most significant was the decision not to require employers to distribute the notice individually via email, voice mail, text messaging or other direct electronic communications customarily used to communicate with employees. However, posting is required on employer websites or intranet sites if other employee rules or notices are posted on those sites. Other changes involved clarification of the employee notice concerning employee rights and unlawful conduct by unions, and clarification for when employers are required to post the notice in languages other than English.

The 862-word notice, the text of which appears at the end of this alert, must be posted "in conspicuous places" which should include the places where other mandated postings, such as EEO, OSHA and Workers Compensation posters are posted, including on an intranet or internet site if the employer customarily communicates about personnel rules or policies in this manner, and must be displayed as prominently as other notices to employees. Where 20 percent or more of the workforce is not proficient in English, the employer must also post the notice in the other language(s) primarily used. Posters will be available from the NLRB, in English and other languages, from the NLRB's office in Washington, D.C. or any of its regional, subregional or resident offices or available for download from the NLRB's web site at http://www.nlrb.gov on or after November 1, 2011.

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Failure to post the notice could result in an unfair labor practice charge being filed against the employer and may result in a tolling of the six-month statute of limitations for the filing of an unfair labor practice charge. The NLRB may also consider refusal to comply with the posting requirement as evidence of an unlawful motive in a case where motive is an issue. The NLRB's Notice of the Final Rule, with background and related questions and answers about the rule, is available here.

What This Means to You

If your business is subject to NLRB jurisdiction and you are not a government contractor who has already posted a notice under the Department of Labor's posting requirements, you should take steps to ensure that the required posting is appropriately posted at every facility. The posting of these notices may well give rise to employee interest in organizing the workforce, so employers should undertake appropriate defensive measures now, rather than in reaction to a petition for representation.

Text of the Required Notice

> EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT
>
> The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.
>
> Under the NLRA, you have the right to:

Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

Form, join or assist a union.

Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.

Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.

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Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.

Strike and picket, depending on the purpose or means of the strike or the picketing.

Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

Question you about your union support or activities in a manner that discourages you from engaging in that activity.

Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

Threaten to close your workplace if workers choose a union to represent them.

Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.

Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

Threaten or coerce you in order to gain your support for the union.

Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.

Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.

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Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

Take adverse action against you because you have not joined or do not support the union.

> If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.
>
> Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: http://www.nlrb.gov.
>
> You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.
>
> If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.
>
> The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).
>
> This is an official Government Notice and must not be defaced by anyone.

Contact Info

Should you have questions about these changes, please contact your Husch Blackwell attorney.

Husch Blackwell LLP regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters, or request a printed copy.

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