

Yesterday the National Labor Relations Board (NLRB) issued a press release announcing its final rule on Notification of Employee Rights under the National Labor Relations Act (NLRA). The proposed rule had been pending since December of last year.

The final rule was issued by a 3-1 vote. The rule takes effect on November 14, 2011, 75 days from the date of its publication in the *Federal Register*, when the NLRB's notice must be posted in the workplace.

The final rule requires employers that are subject to the NLRA to post and maintain the NLRB notice in conspicuous places, including all places where notices to employees are customarily posted, and to take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material, or otherwise rendered unreadable. Employers have the right to post their own notice as well. In the final rule, the NLRB addressed the issue of whether employers may post their own notices informing employees of the company's position. It wrote:

Finally, as discussed above, NLRA Section 8(c) protects employers' right to express any "views, argument, or opinion" "if such expression contains no threat of reprisal or force or promise of benefit." The rule does not affect this right. Therefore, if an employer is concerned that employees will get the wrong impression, it may legally express its opinion regarding unionization as long as it does so in a non coercive manner.

For the most part, the final rule is the same as the initial proposed rule in the Notice of Proposed Rulemaking (NPRM), with only very minor changes. The most significant change is that the final rule deletes the requirement that employers must distribute the notice via email, voice mail, text messaging or related electronic communications unless they customarily communicate with their employees in that manner. Other significant changes include clarifications of the employee notice detailing employee rights protected by the NLRA and unlawful conduct on the part of unions; clarification of the rule's requirements for posting notices in foreign languages; allowing employers to post notices in black and white as well as in color; and exemption of the U.S. Postal Service from coverage of the rule.

The final rule lists a number of exemptions from the notice posting requirement (including state or political subdivisions and labor organizations). In addition, the final rule states that federal contractors may comply with the provisions of the NLRB's posting requirement by posting the notices to employees required under the U.S. Department of Labor's notice posting rule, 29 CFR Part 471, and will not have to post a second notice.

The NLRB dismissed arguments that the Board lacked the statutory or legal authority to require a general notice to be posted in the workplace by citing, and continuing to rely on, Section 6 of the NLRA, which provides that "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this Act."

In the event that an employer fails to post the notice, the final rule imposes three sanctions. An employer's failure to post the notice may be treated as an unfair labor practice under the NLRA. The final rule clarifies that an unfair labor practice case will typically be closed without further action if an employer was unaware of the rule and complies when requested. Additionally, the Board may extend the six-month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer. If an employer knowingly and willfully fails to post the notice, the failure may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

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