

WSGR ALERT

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NLRB ENACTS RULE REQUIRING ALL EMPLOYERS TO POST RIGHT-TO-UNIONIZE NOTICE

Exercising a virtually unprecedented expansion of its rule-making authority, a divided National Labor Relations Board (NLRB) has adopted a regulation requiring all covered employers—unionized and non-unionized alike—to post notices to employees reminding them of their rights to organize, join unions, and bargain collectively with their employer for improved wages and working conditions.

Background

The NLRB first proposed the mandatory posting rule in December 2010, marking the board's first exercise of its rule-making authority since 2004. During the comment period, the NLRB received more than 7,000 comments on the proposed regulation—most of which opposed the rule. Despite the overwhelming opposition, and over the objection of the board's sole Republican member, the NLRB issued a final rule requiring covered employers to post the notice later this year.

What Does the Notice Say?

The required notice informs employees of their rights to organize, form, join, or assist a union in an effort to improve the wages, hours, and working conditions of their employment; bargain collectively with their employer; or choose not to do any of these activities. The notice also lists what conduct is prohibited by employers and unions under the National Labor Relations Act (NLRA). Lastly, it provides information on how to contact the NLRB with questions or complaints. While the text of the regulations

contains the specific language required in the official notice, the NLRB has not yet made the final posting available. However, a draft of the proposed regulations posted in December is available on the NLRB's website at http://www.dol.gov/olms/regs/compliance/employeerightsposter11x17_final.pdf. Beginning November 1, 2011, the official posting will be available at www.nlr.gov.

Under the new rule, all covered employers will be required to post an 11-by-17-inch poster in a conspicuous place, where notices to employees are customarily posted. In addition to the physical posting, the rule requires every covered employer to post the notice on an Internet or intranet site if personnel rules and policies are customarily posted there, although employers are not required to distribute the notice via email. Moreover, employers whose workforces are more than 20 percent non-English-speaking must post translations of the notice as they become available.

What Are the New Rule's Requirements?

The new regulations cover most employers, even if an employer's workforce is not unionized. In the past, applicable law required "union rights" postings only in advance of a scheduled union election or in response to an Unfair Labor Practice Charge. In contrast, under the new rule, all employers subject to the NLRA are subject to the posting requirement. The NLRA covers most private-sector employers that meet fairly minimal standards for involvement in interstate commerce. For instance, non-retail enterprises with gross inflows and outflows

of revenue in excess of \$50,000, and retail and manufacturing businesses with a gross business volume exceeding \$500,000 are covered by the NLRA, irrespective of their numbers of employees. Excluded from coverage are public-sector employers, agricultural and domestic employers, employers covered by the Railway Labor Act, and certain small businesses that are exempt based upon their annual volume of business. For many companies, this will be the first time they will be confronted with compliance with the NLRA.

What Does This New Rule Mean for Employers?

The NLRB is signaling its desire to increase employee interest in union activity. The posting requirement is just the latest salvo in the current board's attempts to jump-start union organizing in the private sector. For example, this board already has required certain employers with federal contracts to post similar union-rights notices. The board also is contemplating new rules designed to decrease the barriers to unionization, and it is taking a hard-line approach to employers disciplining employees for certain activities and speech relating to the terms and conditions of employment that occur outside of the traditional work environment (i.e., Facebook, Twitter, etc.).

Employers should educate themselves regarding the NLRA and consider communicating with supervisors. Given the board's renewed interest in unionization, employers should educate themselves on the

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requirements of the NLRA and what type of activities it both protects and prohibits. Furthermore, employers should be aware that employees may perceive this poster as pro-union; indeed, some employees may even see the notice as suggesting that the employer is encouraging unionization. Accordingly, employers should consider discussing with managers and supervisors what the poster says and lawful strategies on how to respond to employee questions and comments about union organizing. Occasionally untrained supervisors make anti- or pro-union comments to employees at work that can result in allegations of unfair labor practices under the NLRA.

What Happens if Employers Fail to Comply with the New Notice?

Failure to post the required notice may be considered an unfair labor practice under the NLRA. In the case of knowing violations, failure to post the notice may be considered evidence of unlawful motive and unlawful anti-union sentiment in NLRB proceedings in which the employer's motive is at issue. In addition, if an employee files an unfair labor practice charge and the employer has failed to post the required notice, the board may extend the six-month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer.

Wilson Sonsini Goodrich & Rosati will be hosting a webinar in the coming weeks on the proposed rule, the notice, and what companies should know about the NLRA. In the meantime, for more information, please contact a member of the firm's employment litigation practice.



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