

NLRB Proposes Rule to Require Employers to Post Notice Informing Employees of Their Right to Join a Union and Strike

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On December 21, the National Labor Relations Board (Board) announced a new proposed rule that would require all employers subject to the Board’s jurisdiction—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 [their] working conditions by, among other means, raising work-related complaints directly with [their] employer or with a government, and seeking help from a union,” and to “strike and picket.”

The proposed rule was printed in the December 22, 2010 version of the *Federal Register*. The Board will accept comments on the proposed rule until February 22, 2011. A final rule likely will be issued some time in the spring of 2011. Barring congressional action or litigation, the new rule likely will take effect in the late spring or summer of 2011.

Background

The National Labor Relations Act (the 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 less than 8% of private-sector employees are represented by unions, some of the NLRA’s protections for union-represented employees extend to nonunion employees as well.

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 their 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 include in their government contracts specific provisions requiring them to post notices of employees’ NLRA rights.

The Board’s Proposed Rule

Although it has used the power only sparingly (and not since 1989), Section 6 of the NLRA gives the Board the power to make rules and regulations “necessary to carry out the provisions” of the NLRA. Stating that “the NLRA stands out as an exception to the widespread notice-posting practice that has long been common in the workplace,” the proposed rule would require that *all* employees of employers

subject to the NLRA be informed of their rights through a notice posting (NLRA Notice).

The proposed NLRA Notice would adopt most of the language of the notice now required for federal contractors pursuant to Executive Order 13496. Specifically, the NLRA Notice would state that, among other things, employees have the right to do the following:

- Organize a union to negotiate with their employers concerning their wages, hours, and other terms and conditions of employment
- Form, join, or assist a union
- Discuss the terms and conditions of their employment or union organizing with their co-workers or with a union
- Take action with one or more co-workers to improve their working conditions by, among other means, raising work-related complaints directly with their employers or with a government agency, or by seeking help from a union
- Strike and picket

The proposed NLRA Notice also would inform employees that it is illegal for an employer to, among other things, do the following:

- Prohibit employees from soliciting for a union during nonwork time or from distributing union literature during nonwork time, in nonwork areas
- Question employees about their union support or activities in a manner that discourages them from engaging in such activities
- Fire, demote, or transfer employees because they join or support a union
- Prohibit employees from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances

The proposed NLRA Notice also states that if an employee believes that his or her employer has engaged in unlawful conduct, he or she should contact the NLRB within six months (the statute of limitations under the NLRA) using the NLRB contact information listed on the notice.

Under the proposed rule, the new NLRA Notice must be posted in the same place where other notices are posted. However, the proposed rule also requires that the NLRA Notice be distributed electronically, “such as by e-mail, posting on an intranet or internet site, and/or by any other electronic means, if the employer customarily communicates with its employees by such means.” The proposed rule also requires that if a “significant portion” of an employer’s workforce does not speak English, the employer must provide the NLRA Notice in the language that the employees speak.

Finally, the new rule provides that failure to post the NLRA Notice could have three main effects: (i) it could be considered an unfair labor practice under Section 8(a)(1) of the NLRA; (ii) it could toll the six-month statute of limitations for filing unfair labor practice charges; and (iii) it could be used by the NLRB as evidence of an employer’s unlawful motive in unfair labor practice cases.

Conclusion

The proposed NLRA Notice represents the latest (but certainly not the last) action by the Obama-controlled Board making the atmosphere for union organizing more favorable. In addition, although less than 8% of private-sector employees are currently unionized, the proposed rule requires that the vast majority of private-sector employers—including those that employ the 92% of workers not represented by a union—insert the NLRA into their workplace through the NLRA Notice. Finally, the proposed rule may also represent a “test run” for further Board rulemaking, as many observers have predicted that the apparent legislative demise of the Employee Free Choice Act may be mitigated through Board rulemaking that would make it easier for unions to organize and/or significantly reduce the period of time from the filing of an election petition to the holding of an election.

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