



A Small Poster Could Have A Big Impact

EMPLOYERS MUST DISPLAY NLRB NOTICE ADVISING WORKERS OF RIGHTS

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The Obama Administration has vowed to help unions since before the 2008 election. The next pro-labor initiative will begin in a few months. As of Jan. 31, 2012, most employers will be required to post a notice in their workplace informing employees about their rights to unionize. The National Labor Relations Board originally opened its proposed rule to public comment in December 2010. After receiving more than 7,000 comments, the board adopted the final rule this past August. The poster was originally mandated for Nov. 14, but has been delayed until January.

All employers who are covered by the National Labor Relations Act, which is practically everyone, will have to display this poster wherever they normally post notices to employees. The poster must be 11-by-17 inches, or you may print it on two 8-by-11.5-inch pages and tape them together. You can find a free downloadable version on the board's web site.

If more than 20 percent of employees are not proficient in English, employers must also post the notice in the language spoken by the employees. In addition to posting it in the workplace, if an employer normally posts information to employees on an internet or intranet site, the notice must be placed there as well.

What Poster Says

In the opening paragraph, the notice instructs employees to contact the National

Labor Relations Board "if you have any questions about specific rights that may apply in your particular workplace." Next, the notice lists various rights employees have under the NLRA, including 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."
- "Take action with one or more co-workers to improve your working conditions by . . . seeking help from a union."

Further, the notice warns employees about seven different types of possible illegal conduct by their employer. The notice concludes by instructing employees who feel their rights (or the rights of other employees) have been violated to promptly contact the Board. The notice contains the Board's web site and toll-free 800 number.

Poster Challenges

Three groups representing the interests of employers filed lawsuits against the Board, claiming the board exceeded its authority in creating this new rule. The National Federation of Independent Business, National Association of Manufacturers and U.S. Chamber of Commerce each filed separate suits in different federal courts asking for an injunction stopping the implementation



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of the rule. The Chamber's lawsuit is representative of the arguments made by the other groups. First, the Chamber argues the Board does not have the statutory authority to promulgate or enforce a rule requiring workplace notices.

Next, the Chamber argues the NLRB did not properly consider the impact this rule will have on small businesses. Under federal law, the agency is supposed to analyze the impact a new law will have on small businesses. According to the Chamber, the board relied on old studies and anecdotal evidence in confirming the rule will not have a disproportionate impact on small businesses. The board said the burden on small businesses will only total two hours of time. However, the board failed to consider small businesses' lack of compliance staff, the time it will take to train human resources professionals and managers, educate employees, ask and get answers to questions regarding the poster, and monitor the poster over time. All this time put together represents a significant burden. Failure to take these steps, or inadvertent non-compliance with the rule could result in costly litigation and penalties.

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Finally, the Chamber argues the National Labor Relations Board also failed to balance the rights of employers with the rights of employees in drafting the language of the poster. Specifically, there is nothing on the poster telling employees in Right to Work states that they have the right not to join a union.

The Chamber argues this demonstrates a bias in drafting the poster. According to the Chamber, compelling employers to post this notice violates an employer's right to free speech because the poster contains ideological viewpoints that may be antithetical to the employer.

Employer Sanctions

Failure to post the notice is an unfair labor practice by the employer. Also, the board may toll the statute of limitations for filing other unfair labor practice charges during the time period the notice is not posted. If the board finds the employer willfully failed

to post the notice, it may use this as evidence of the employer's anti-union motivation pertaining to other alleged violations of the National Labor Relations Act. This small poster can have a big impact.

Over the years, the board has outlined what policies are considered legal and illegal under the NLRA. Unfortunately, most employers are unaware of these cases. As a result, many employers would be surprised to find their no solicitation policies, no-access policies and social media policies may violate the NLRA. With employees becoming more aware of their rights under the NLRA, it is much more likely your common policies will come under attack. Employers should be sure their policy falls within the current board guidelines, so they do not become yet another report on the news.

It is possible employees will heed the Board's invitation to contact them with all kinds of complaints. Worse yet, there may be an increase in discrimination and retali-

ation claims under the NLRA. Finally, the poster's mere existence may give employees the impression that unions are gaining strength in the workplace and encourage more and successful union organizing. Employers must be ready to address all of this.

The NLRA sets forth what employers and their supervisors can and cannot say about unions. The line between legal and illegal can often times be blurry. Between now and January, employers should train their supervisors on how to discuss union issues with employees. Every supervisor needs to know what they can and cannot say to employees about unions and how to respond to inquiries about this new poster. By discussing the possible effects of unionization supervisors may sway employees who otherwise might turn to a union for support.

Hopefully if this poster is required, it will not foster an increase in litigation against employers or union activity, but employers need to be prepared. ■