



LABOR, IMMIGRATION &
EMPLOYEE BENEFITS DIVISION

U.S. CHAMBER OF COMMERCE

Issues Raised by the NLRB's Proposed Rules Governing Notification of Employee Rights

On December 22, 2010, the National Labor Relations Board (NLRB) proposed a new regulation that would require virtually every employer in the United States to post a notice of labor rights both in hard copy and electronically. The proposed notice is biased and does not describe labor rights in a balanced manner. It also appears that the NLRB has exceeded its statutory authority in drafting the proposal. Numerous practical problems would also be created should the proposal be implemented. This paper summarizes the issues raised by the proposal and provides information that employers can use to comment on the proposal.

If Not EFCA.... Organized labor failed in its attempt to have Congress enact radical reform of the National Labor Relations Act. However, it is no secret that government agencies are now busy crafting pro-labor initiatives that could impact every facet of the workplace. In particular, the NLRB has issued numerous decisions affecting dozens of technical rules impacting the ability of unions to organize and labor-management relations. Generally, when the NLRB acts, there is little ability for public participation. However, the Board has chosen to make this policy change through the rulemaking process, which allows anyone who is interested a chance to comment. It is important that all those concerned with the direction that the Board is heading use this opportunity to express that concern.

The Notice Is Biased. Supporters of the proposal say the notice is no different from other workplace notices that employers are required to post, such as that indicating the minimum wage. Yet the minimum wage is one discrete, objective fact. By contrast, the proposed notice of labor rights is long and detailed. And biased. For example, the proposed notice does not advise employees that they have the right to object to paying a union dues or fees for political purposes. Likewise, the proposal does not inform employees of the consequences of unionization, such as loss of the right to bargain directly with management. Further, there is no mention of how employees might decertify an unwanted union.

Exceeds Statutory Authority and Invents New Penalties. The NLRA is a remedial statute, meaning that the Board does not have the authority to impose punishment, only to correct violations of the statute. Yet its proposal would create an entirely new "unfair labor practice" for employers who failed to comply with the proposed posting requirement. If a well-intentioned employer has not violated any employee rights, it is hard to see how the Board would have the authority to force the employer to do anything. Nevertheless, the Board purports that it not only has the authority to require the notice posting, but also the ability to find employers guilty of an unfair labor practice for failing to comply.

For more information, please contact Michael Eastman in the Chamber's Labor, Immigration, and Employee Benefits Division at 202-463-5522 or meastman@uschamber.com.

Ignores Statute of Limitations. Section 10(b) of the NLRA requires that allegations of violations of the law be filed within six months. If they are not, the Board does not have the power to issue a complaint, except in narrow circumstances. Yet the proposed rule purports to do away with this statutory requirement where employers have not complied with the proposed posting requirements. In other words, unions would be free to file charges based on alleged violations that occurred years or decades ago if they came across an employer who had not posted the notice properly, increasing leverage during union campaigns or bargaining.

Electronic Posting Requirements Present Practical Problems. The proposal would require the notice to be posted electronically “such as by e-mail, posting on an intranet or internet site, and/or by other electronic means, if the employer customarily communicates with its employees by such means.” For some employers, this may be straight forward, but for many it will invite confusion. What type of employer communication would trigger this requirement? For example, if an employer only used electronic communication to verify to which client site an employee should report before his or her shift, would this be sufficient to trigger the requirement? Would some use of electronic communication for workplace policy be required? How robust must the technology be? If the employer engaged in text messaging, the use of Twitter, or some other technology where the length of the message was limited, how could it comply?

Safe Harbor for Federal Contractors. In fairness, it should be noted that if there must be a notice posting requirement, then the proposal does contain one important and necessary provision. Because federal contractors are already required to post a similar notice under Labor Department regulations, the proposal provides a safe harbor so that if contractors comply with that requirement, they will be considered in compliance with the proposed NLRB regulation. If there is to be a notice posting requirement, it is critical that employers be able to comply by adhering with either the NLRB proposal or the DOL proposal, but that they not be in violation for technical differences between the two.

Comments Due February 22, 2011. If you wish to file comments, you may use the attached template as a guide. If you decide to draft your own comments, please be sure to include the Regulation Identification Number (RIN) on the comments. The RIN for this proposal is 3142-AA07. If you wish to review the proposal before sending comments, it is available here: <http://edocket.access.gpo.gov/2010/pdf/2010-32019.pdf>.

Comments may be filed electronically through <http://www.regulations.gov>. If you choose to file electronically, you can find the proposal and the link to submit comments by searching using the RIN.

If you wish to file comments by mail, you should send comments early enough to reach the Board by February 22, taking into account delays due to security procedures. Comments should be sent to:

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

Template for Drafting Comments to the NLRB

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

RE: RIN 3142-AA07, Proposed Rules Governing Notification of Employee Rights

Dear Mr. Heltzer:

I am writing to comment on the Board's proposal, published in the *Federal Register* on December 22, 2010, to require nearly every employer in America to post a notice of labor rights under the National Labor Relations Act (NLRA). The Board's proposal is biased, appears to conflict with law, and would present numerous practical problems. I urge the Board to reconsider its proposal.

The contents of the notice are long and detailed. However, they are not complete and present a biased interpretation of the NLRA. While the notice discussed the right to form, join, or assist a union and engage in collective bargaining, it does not describe any of consequences of exercising these rights, such as giving up the right to deal directly with the employer. It also does not mention the important right to object and refuse to pay union dues or fees for political purposes, nor does it describe the right to decertify or leave a union.

I am also concerned that the Board does not appear to have the statutory authority for its proposal. Absent employer misconduct, I am not aware of any provision of the NLRA that authorizes the Board to require an employer to post any notice whatsoever. In addition, it is not clear how the Board believes it has the authority to create a new unfair labor practice or suspend the statute of limitations.

In addition, the electronic notice requirements are confusing and present practical concerns. Employers today utilize a wide variety of technology to communicate with employees. Yet, the notice does not appear to differentiate. If an employer occasionally sends text messages to its employees or some other short communication, how would it comply since space limitations would seem to make it impossible?

While I do not support the Board's proposal, if it is promulgated, the Board should maintain the safe harbor for federal contractors. An employer complying with the Labor

Department's requirements should not be held in violation of the Board's just because of technical differences in the rules.

Finally, I want to express my concern that the Board, through its actions over the past year, seems to be tilting the rules too far in favor of organized labor. Congress rejected radical overhaul of labor law when it refused to pass the Employee Free Choice Act and card check. Many union leaders would like the Board to overhaul as much as possible through regulatory and other administrative action. But the Board should resist this temptation and instead focus on maintaining the proper balance among employee, union, and employer rights.

Sincerely,