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NATIONAL LABOR RELATIONS BOARD REQUIRES EMPLOYEE NOTIFICATION OF UNION ORGANIZING RIGHTS

Following up on its announcement on December 21, 2010, in late August 2011, the NLRB issued a final rule which will require private-sector employers to notify employees of their rights guaranteed under the National Labor Relations Act (“NLRA”). According to the Board, most private-sector employees are unaware of their rights under the Act and employee understanding of those rights is essential. Federal contractors are already required to post a similar notice in their workplaces by virtue of an Executive Order signed by President Obama on January 30, 2009.

The new rule will require most private-sector employers to post a notice of employee rights where other workplace notices are normally maintained. The posting provides information relative to employee rights under the NLRA including, rights: (i) to organize a union to negotiate with employers concerning wages, hours and other terms and conditions of employment; (ii) form, join or assist a union; (iii) bargain collectively through representatives of employees’ choosing; (iv) discuss wages and benefits and terms and conditions of employment with co-workers or a union; (v) take action with other employees to improve working conditions by raising work related complaints with their employer, government agency or union; (vi) strike and picket; and (vii) choose not to join or remain a member of a union. The notice also discusses illegal conduct on the part of employers in terms of prohibiting discussion of unions or distribution of union literature during non-work hours; questioning about union support to discourage employees from engaging in union activities; retaliatory conduct; threatening employees for engaging in unionizing activities; promising promotions, pay increases or other benefits to discourage union support; and spying or videotaping peaceful union activities and gatherings. The posting also instructs employees who believe their rights or the rights of others have been violated to contact the NLRB to file an unfair labor practice charge. Employers who fail to comply with the notification may be subject to an unfair labor practice charge and possible legal action by the Board.

The Board based the rule on other requirements for notification of employee rights in the workplace. The Board has developed an 11 x 17 poster similar to the NLRA rights that federal contractors must currently display. Copies of the poster will be made available from NLRB regional offices or may be downloaded from the NLRB website.

The rule was originally scheduled to take effect on November 14, 2011. However, on October 5 2011, the Board extended the implementation deadline to January 31, 2012. The stated reason for the extension, according to the Board, is to “allow for enhanced education and outreach to employers, particularly those who operate small and medium sized businesses.” The Board noted confusion over which businesses fall within the NLRA’s jurisdiction. Unlike other federal employment laws such as Title VII, FMLA or ADEA, coverage under the NLRA does not depend upon a minimum number of employees, but the extent to which a company engages in interstate commerce. These thresholds are generally defined in terms of gross volume of business for varying industries and are minimal. Thus, almost all private-sector employers are subject to the Act.

The most glaring deficiency of the new posting is what it does not provide. Employers are entitled to certain so-called “free speech” rights in terms of union organizing. This includes informing employees about facts and opinions. The Board’s mandate fails to advise employees that employers have such rights. It also fails to inform employees of other important aspects of their daily interactions with their employers such as an employee’s ability to deal directly with their employer to resolve grievances. More importantly, employees should be aware that they have a right to oppose union, to refuse to sign union cards and should understand that union organizers will not provide the “full story” when approaching employees.

In anticipation of the January 31, 2012 implementation date, employers should prepare for how to handle issues related to union organizing in their businesses and how to recognize aspects of an organizing campaign before it’s too late. An important aspect is management training. Your managers and supervisors will serve as your primary source of information in terms of any organizing activity taking place in the workplace. Proper training on how to recognize the signs of union organizing will go a long way to protecting the direct relationship you have with your employees. Another recommendation that has been suggested is to post all similar workplace notifications in 11 x 17 format in order to lessen the prominence of the NLRB posting. Further, the Board’s announcement does not preclude employers from posting a “counter poster” which addresses the information conveniently missing from the Board’s required posting and provides an employer views, argument and opinion in a non-coercive manner.

For the time being, employers need to take the necessary steps to prepare for the January 31, 2012 implementation date and direct any questions to qualified legal counsel.

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