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Client Alert
A Report for clients and friends of the Firm

John R. LaBar
Attorney at Law

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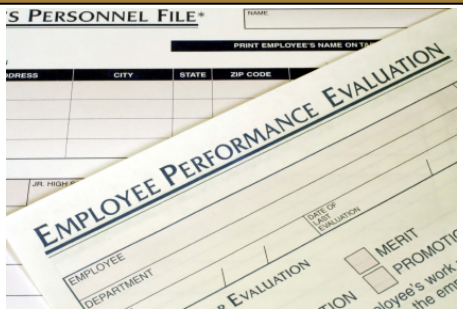

NLRB ISSUES PROPOSED RULEMAKING REQUIRING EMPLOYERS TO POST NOTICE OF EMPLOYEE RIGHTS UNDER NLRA

On December 22, 2010, the National Labor Relations Board ("NLRB") published in the Federal Register a Notice of Proposed Rulemaking requiring employers subject to the National Labor Relations Act ("NLRA") to post notices informing their employees of their rights as employees pursuant to the NLRA.

The proposed rulemaking solicits comments from employers and interested persons. Comments regarding this proposed rule must be received by the NLRB on or before February 22, 2011.

The NLRB in issuing the proposed rulemaking stated that the purpose of the new rule was that many employees protected by the NLRA are unaware of their rights under the Act and that the intended effects of the action are to increase knowledge of the National Labor Relations Act among employees in order for employees to be better able to the exercise their rights under the statute, and to promote statutory compliance by employers and unions.

The NLRA is the Federal statute that regulates most private sector labor-management relations in the United States (Labor-Management relations in the railroad and airline industries are governed by the Railway Labor Act, 45 U.S.C. § 151 et. seq.). Specifically, Section 7 of the NLRA, guarantees that employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

The rulemaking advanced by the Board proposes to require that all employers subject to the NLRA inform all employees of their NLRA rights at the workplace. The Board in setting forth its rationale for the proposed rulemaking states that:

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> "After due consideration, the Board now proposes to require that employees of all employers subject to the NLRA be informed of their NLRA rights, as they are of other rights at the workplace. Informing employees of their statutory rights is central to advancing the NLRA's promise of "full freedom of association, self-organization, and designation of representatives of their own choosing."
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> And that:
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> "It is fundamental to employees' exercise of their rights that the employees know both their basic rights and where they can go to seek help in understanding those rights. Notice of the right of self-organization, to form, join, or assist labor organizations, to bargain collectively, to engage in other concerted activities, and to refrain from such activities, and information pertaining to the Board's role in protecting statutory rights serves the public interest."

However, in its proposed rulemaking, the Board declined to require that the proposed notice to employees include specifically the right of employees who are not union members and who are covered by a contractual union-security clause to refuse to pay union dues and fees for any purpose other than collective bargaining, contract administration, or grievance adjustment.

In applying the proposed rulemaking to Government Contractors, the Board found it unnecessary, for purposes of the proposed rulemaking, to modify the language of the notice in the Department of Labor's final rule governing Government Contractors. Because the notice of employee rights under the proposed rulemaking would be the same as that required by the Department of Labor's Final Rule governing Government Contractors, Government Contractors that have posted the Department of Labor's required notice will be deemed to have complied with the Board's proposed rule and, so long as that notice is posted, would not have to post a second notice.

As to the size and form requirements of the proposed notice, the Board proposes that the notice to employees shall be at least 11 inches by 17 inches in size, and in such colors and type size and style as the Board shall prescribe. Employers that choose to print the notice after downloading it from the Board's website must print the notice in color and in a size of at least 11 inches by 17 inches in size.

The posting requirements set forth in the proposed rulemaking require all covered employers to post the employee notice physically "in conspicuous places, including all places where notices to employees are customarily posted."

The proposed rule applies only to employers that are subject to the NLRA. Excluded from the definition of "employer" are the United States government, any wholly owned government corporation, any Federal Reserve Bank, any State or political subdivision, and any person subject to the Railway Labor Act. As such, under the proposed rule, such excluded entities are not required to post the notice of employee rights. The proposed rule also does not apply to entities that employ only individuals who are not considered "employees" under the NLRA.

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Employee is defined in the NLRA to include "any employee, and is not limited to the employees of a particular employer, unless the NLRA explicitly states otherwise. The term "employee" includes anyone whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." The proposed rulemaking also does not apply to entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

Finally, the proposed rulemaking does not apply to entities whose impact on interstate commerce, although more than de minimis, is so slight that they do not meet the Board's discretionary jurisdiction standards. The most commonly applicable standards are:

(i) The "retail" standard, which applies to employers in retail businesses, including home construction. The Board will take jurisdiction over any such employer that has a gross annual volume of business of $500,000 or more.

(ii) The "nonretail" standard, which applies to most other employers. It is based either on the amount of goods sold or services provided by the employer out of state (called "outflow") or goods or services purchased by the employer from out of state (called "inflow"). The Board will take jurisdiction over any employer with an annual inflow or outflow of at least $50,000. Outflow can be either direct – to out-of-state purchasers – or indirect – to purchasers that meet other jurisdictional standards. Inflow can also be direct – purchased directly from out of state – or indirect – purchased from sellers within the state that purchased them from out-of-state sellers.

There are also other standards for miscellaneous categories of employers. These standards are based on the employer's gross annual volume of business unless stated otherwise.

In the proposed rulemaking, the Board proposes the following sanctions for failure or refusal to post the required employee notices: (1) finding the failure to post the required notices to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notices; and (3) considering the knowing failure to post the notices as evidence of unlawful motive in unfair labor practice cases. In setting forth these proposed sanctions, the Board is explicitly stating that noncompliance will be an unfair labor practice.

As an additional sanction that may be imposed for noncompliance, the proposed rulemaking states that the Board may consider such knowing noncompliance as evidence of unlawful motive. The Board states in the proposed rule that:

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> "An employer that is aware, or should be aware, of the requirement to post the notice of employee rights and fails to do so is knowingly preventing employees from learning of their NLRA rights. Therefore, when it is adjudicating cases in which unlawful motive is an element of one or more alleged violations, the Board may consider knowing noncompliance with the posting requirement in determining whether unlawful motive has been established."

In conclusion, the proposed rulemaking set forth by the NLRB creates a new posting requirement and possible human resource hazard for employers who may be subject to the new rulemaking.

In that the information set forth in this article is a review of a proposed rulemaking by the NLRB, the notice requirements (and other provisions and requirements) may change when the final rule is published.

If you wish to discuss business or any employment law related issues with respect to your company, Henry & McCord would be happy to provide such advice. You may contact John R. LaBar at (931) 455-9301 to schedule an appointment.