JONES DAY

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NLRB ISSUES RULE MANDATING NOTICES INFORMING EMPLOYEES ABOUT RIGHTS TO ORGANIZE

On August 30, 2011, the National Labor Relations Board ("NLRB" or "Board") published a final rule requiring employers subject to the National Labor Relations Act ("NLRA" or "the Act") to post notices informing their employees of their rights under the NLRA. Member Brian E. Hayes dissented from the final rule.

The final rule, which will be published in a new part 104 of 29 C.F.R. chapter 1, applies to all employers subject to the Act, regardless whether their employees are organized by any labor organization. Private, nonagricultural employers are subject to the NLRA if they are engaged in interstate commerce. The rule does not cover the railroad and aviation industries (which are regulated by the Railway Labor Act). It also does not apply to agricultural employers or to public entities such as states, counties, or municipal governments. Member Hayes's dissent estimates that the proposed rule will cover nearly six million private employers.

The rule requires "[a]ll employers subject to the NLRA [to] post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures." The notice, which must be at least 11 inches by 17 inches, may be obtained from the Board's web site. The required posting details numerous protected statutory rights, including:

- The right to join or assist a labor union.
- The right to engage in collective bargaining with respect to wages, benefits, hours, and working conditions.
- The right to discuss wages, benefits, and other working conditions with coworkers or union representatives.
- The right to raise work-related complaints directly with an employer or a governmental agency regarding their working conditions.
- The right to engage in strikes or picketing.
- The right to refrain from engaging in such activities.

Employers are required to physically post the notice at all of their physical workplaces as well as to post the notice on intranet or internet sites if the employer customarily communicates with its employees about personnel rules or policies by such means. The notice that must be posted is included as Appendix A to the final rule, which can be obtained through the Board's web site, www.nlrb.gov.

If 20 percent or more of an employer's workforce is not "proficient" in English, the employer must post the notice in the language spoken by the employees. The rule does not provide any criteria for determining whether an employee is or is not "proficient" in English. If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must either physically post the notice in each of those languages, or, at the employer's option, it may post the notice in the language spoken by the largest group and provide copies to each other group in their respective languages.

In the final rule, the NLRB majority indicates that noncompliance with the posting requirement will result in both unfair labor practice liability and/or waiver of defenses in unfair labor practice proceedings before the agency. Specifically, the Board indicates that employers who fail to post the mandatory notice commit an unfair labor practice. The NLRB's final rule explains that "[f]ailure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1)." The Board cannot impose fines or monetary penalties for failing to post the notice. It could, however, order an employer to post the notice along with a further notice concerning the employer's violation of the Act. Further, in situations where an employer is charged with other unfair labor practices, the failure to post a notice may result in an adverse inference against the employer. For example, if an employer is charged with discharging an employee based upon union activity, the failure to post the notice may be used as evidence of anti-union animus. The commentary to the final rule specifies that "the Board may consider a knowing and willful refusal to comply [with the posting requirement] as evidence of [an] unlawful motive."

Further, the Board proposed that the statute of limitations period for unfair labor practice charges (six months) may be tolled for charges filed against employers who failed to post the notice. The final rule provides that "[w]hen an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful."

In light of the final rule, all employers covered by the NLRA—regardless of whether their employees are organized—must comply with the compulsory posting requirement by November 14, 2011. Federal contractors who already posted the notice required by Executive Order 13496 will not be required to post an additional notice. In order to comply, employers must determine whether physical posting will be sufficient or whether additional electronic posting is also required. Additionally, employers must assess the English proficiency of the workforce to determine whether multiple posters are required. Finally, employers may consider implementing practices to monitor, on a regular basis, that the notices remain posted and unaltered, as well as periodic reviews of the workforce's language proficiency to ensure that the employer remains in compliance with the final rule.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Willis K. Goldsmith
New York
+1.212.326.3649
wgoldsmith@jonesday.com

F. Curt Kirschner, Jr.
San Francisco
+1.415.875.5769
ckirschner@jonesday.com

Stanley Weiner
Cleveland
+1.216.586.7763
sweiner@jonesday.com

Lawrence C. DiNardo
Chicago
+1.312.269.4306
lcdinardo@jonesday.com

Andrew M. Kramer
Washington
+1.202.879.4660
akramer@jonesday.com

Brian W. Easley
Chicago
+1.312.269.4230
beasley@jonesday.com

Richard F. Shaw
Pittsburgh
+1.412.394.7962
rfshaw@jonesday.com

George S. Howard, Jr.
San Diego
+1.858.314.1166
gshoward@jonesday.com

G. Roger King
Columbus
+1.614.281.3874
rking@jonesday.com

Donald J. Munro
Washington
+1.202.879.3922
dmunro@jonesday.com