

NLRB PROPOSES POSTING REQUIREMENT TO INFORM EMPLOYEES OF RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT

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On Wednesday, December 22, 2010, the National Labor Relations Board (NLRB) published a Notice of Proposed Rulemaking (NPR) in the Federal Register requesting comments on a proposed requirement that all private sector employers subject to the National Labor Relations Act (NLRA) post a notice informing employees of their rights under the Act. See 75 Fed.Reg. 80410 (Dec. 22, 2010). Comments on the proposed rule are due on or before February 22, 2011.

The proposed rule would adopt and prescribe the same text adopted by the Department of Labor in response to President Obama's Executive Order 13496, which mandated that all federal contractors and subcontractors post a notice informing employees of their rights under the NLRA. According to the NPR, sufficient notice of employee rights requires more than a quotation or even summary of the general statement of employee rights found in Section 7 of the Act. Instead, "the notice should include a more detailed description of employee rights derived from Board and court decisions implementing those rights."

The Board also intends to adopt the Department of Labor's decision to include "examples, again derived from Board and court decisions, of conduct that violates the NLRA." However, like the Department of Labor, the Board's proposed rule would not include a requirement that a notice of employee rights include any mention of nonunion members' rights under *Communication Workers v. Beck* to refuse to subsidize union political activities or otherwise pay union dues and fees for any purpose other than collective bargaining, contract administration, or grievance-related activities.

The Board's proposed rule also goes beyond a simple notice-posting requirement, and proposes specific penalties

for noncompliance. Among the proposed penalties for failure to comply with the posting requirement are: (1) a finding of an unfair labor practice, accompanied by a cease and desist order; (2) tolling of the six-month statute of limitations under Section 10(b) of the Act for filing unfair labor practice charges, unless the employee filing the charge otherwise has "actual or constructive notice that the conduct in question is unlawful"; and (3) treating a willful refusal to post the notice as evidence of an unlawful motive in other unfair labor practice cases where motive is an issue.

Member Brian E. Hayes dissented from the decision to proceed with the rulemaking on the grounds that the Board lacks statutory authority to impose the notice requirement, as evidenced by the absence of any such requirement in the statutory text of the NLRA (which distinguishes it from the numerous other federal statutes, including Title VII, cited in the Supplementary Information for the proposed rule). Moreover, Member Hayes strongly disagreed that the Board has the statutory authority to impose the proposed penalties for noncompliance. According to Member Hayes: "it is essential to have a broader basis for enacting such a rule than the opinions of my colleagues and the treatises of the party requesting rulemaking, Professor Charles Morris."

Because the proposed rule would affect all private businesses subject to the NLRA, and not just those with unionized workforces, the NLRB needs to hear from members of the business community concerning their reactions to all aspects of the proposed rule. Comments are being accepted until February 22, 2011. Cozen O'Connor's Labor and Employment lawyers can assist employers in making their views known to the Board.