



You Don't Need to Post that NLRB Poster Just Yet!

The NLRB delays the effective date once again!

By Jerry L. Brust

The National Labor Relations Board ("NLRB") has once again postponed the effective date of the requirement that employers post in almost all workplaces (union and non-union) an 11" by 17" poster describing employees' rights to form and join a union. The requirement, if implemented, would apply to all employers covered by the National Labor Relations Act, excluding states or political subdivisions not subject to NLRB jurisdiction. Employers would also be required to publish the notice on an intranet or internet site if the employer customarily used such media to communicate with employees about rules and policies.

The extremely controversial requirement was originally scheduled to take effect on November 14, 2011. However, on October 5, 2011, facing mounting opposition to the proposed requirement, the NLRB announced that the effective date would be delayed until January 31, 2012. The NLRB stated that the additional time was needed "in order to allow for enhanced education and outreach to employers."

On December 27, 2011, the NLRB announced a further postponement of the rule until April 30, 2012.

According to the NLRB's proposed requirement, an employer that fails or refuses to post the required notice would violate Section 8(a)(1) of the National Labor Relations Act ("NLRA") which prohibits employer action "to interfere with, restrain or coerce employees" in their exercise of rights guaranteed by the NLRA. The proposed requirement also provides that failure to post the notice may justify tolling or extending the NLRA's six-month limitation for filing unfair labor practice charges, while a willful refusal to post the notice may support a finding of unlawful motive in an unfair labor practice proceeding.

The proposed requirement has been challenged in several lawsuits. The National Association of Manufacturers, the National Federation of Independent Business and the National Right to Work Legal Defense and Education Foundation have filed lawsuits in the U.S. District Court for the District of Columbia. The U.S. Chamber of Commerce and the South Carolina Chamber of Commerce also filed a lawsuit in the U.S. District Court for the District of South Carolina.

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In a hearing in the U.S. District Court for the District of Columbia on December 19, 2011, Judge Amy Berman Jackson told NLRB lawyers that the legal issues in the lawsuits “deserve more time” than the January 31, 2012 effective date gave her. Just 8 days later, the NLRB extended the deadline until April 30, 2012.

The various lawsuits make a number of contentions including that the NLRA does not give the NLRB the authority to issue this type of rule; that the NLRB does not have the authority to establish a new category of unfair labor practices; and that the requirement to post the notice violates the U.S. Constitution. A new issue entered the situation when President Obama on January 4, 2012 made three “recess appointments” to the NLRB. Several parties are now contending that these appointments were “unconstitutional, null and void” and, thus, the appointments prevent the NLRB from implementing or enforcing the new proposed requirement.

In addition to the various legal challenges, several efforts have been initiated in the U.S. Congress to prevent the NLRB from spending any funds to implement or enforce the new requirement.

Stay tuned! This is likely to get interesting.

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