

September 9, 2011

NLRB Developments Impact Non-Union Workplaces

Non-union and union employers alike should take notice of two new developments from the National Labor Relations Board (NLRB). Recently, the NLRB issued a rule requiring that all employees be informed of their National Labor Relations Act (NLRA) rights, and published a memorandum analyzing when discipline for employee social media conduct violates the NLRA. Here is an overview of what employers should know about these developments.

New Notice Requirement

The NLRB has finalized a rule requiring employers to post a new workplace notice by November 14, 2011, informing employees of their rights under the NLRA. The poster informs employees that the NLRA guarantees their right to organize, to form, join or assist a union, to bargain collectively, and to engage in other protected concerted activity. It also provides examples of employee rights and employer and union misconduct and includes information on how employees can contact the NLRB.

The posting requirement applies to private-sector union and non-union employers, with the exception of agricultural, railroad and airline employers. Federal contractors are covered by the rule but will be deemed in compliance if they post the existing U.S. Department of Labor notice required by Executive Order 13496 ("Employee Rights Under the National Labor Relations Act").

The NLRB notice must be physically posted in a conspicuous area where it can easily be seen and read by employees. In addition, an employer must electronically post the notice if it typically communicates personnel rules and policies to employees electronically, whether via the internet or an intranet. The employer can electronically display an exact copy of the poster or provide a link labeled "Employee Rights under the National Labor Relations Act" to the NLRB's web site.

The notice must be posted in English, and where 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must post the notice in that other language. If two or more groups comprising at

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least 20 percent of the workforce speak different languages, the employer must either physically post the notice in each of those languages or post the notice in the language spoken by the largest group of employees and provide a copy in the other language(s) to each of the other employees.

The NLRB says that it will make the poster available in early November, in time for the November 14, 2011 posting deadline. The poster can be downloaded from the [NLRB's website](#) and must be displayed on 11x17 inch paper or on two 8x11 inch pages taped together. It can be in color or black and white. Employers can also order hard copies from the NLRB or a commercial poster service.

Failure to post the notice may constitute an unfair labor practice under the NLRA. The NLRB will not initiate an enforcement action on its own for a failure to post, but could investigate cases based on complaints by employees or other parties. On a final note, legal challenges to the new rule are expected, questioning the NLRB's authority to issue an employee notice rule. But in the meantime, employers should be ready to comply with the notice requirement come November.

The new poster could trigger increased interest in union organizing, as well as an increase in complaints from non-union employees about work rules that may run afoul of the NLRA according to the information on the poster. As a proactive measure, employers should review their workplace policies and procedures on matters such as solicitation, distribution, and confidentiality to ensure, to the extent possible, that they are not in conflict with the NLRA.

More information about the poster is available on the [NLRB's website](#).

Report on Discipline for Social Media Activity

In other developments, the NLRB has issued a memorandum discussing the resolution of cases handled by the agency's Division of Advice concerning the application of the NLRA to employee Facebook, Twitter, and other social media activity -- a topic that has been making headlines all year. The report looks at whether employees who were disciplined for social media postings were engaging in protected concerted activity -- as opposed to airing individual gripes -- such that the discipline interfered with the workers' NLRA rights.

The report also identifies social media policy terms that the agency may consider overbroad absent policy language making clear that the provisions do not apply to activity protected by the NLRA.

The [full report](#), which is available on the NLRB's website, is recommended reading for companies looking to implement or revise their social media policies.

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