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EMPLOYMENT AND LABOR
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New Notice Rule Reaches Out to Union and Non-Union Employers Alike

September 2, 2011

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August 22, 2011, the National Labor Relations Board ("NLRB" or "Board") issued a final rule that will require most employers to prominently post an 11" x 17" notice in the workplace informing employees of their rights under the National Labor Relations Act ("NLRA"). The NLRA is commonly known as the law that guarantees employees the right to join a union and collectively bargain with their employer over the terms and conditions of their employment. The NLRA, however, is not limited to unionized workplaces. It guarantees other rights regardless of union affiliation, such as the right for employees to discuss wages and benefits with their co-workers or to raise work-related complaints with their coworkers, employer, the government, or a union without reprisal. Each of these points, along with several others, are included in the language of the notice.

The Board initially proposed this rule and sought public comment on it in December 2010. The Board received thousands of responses, most of which came from employers and industry groups opposed to the rule. Despite these comments, the Board's final rule was largely unchanged from what was initially proposed last December. The most substantive change to the proposed language, which was perhaps just as a means of "throwing a bone" to those opposed to the rule, was to add statements within the notice that employees were also free to choose not to engage in any activities that the NLRA would otherwise protect.

Even with this change, the notice remains heavily focused on activities that most employers would equate with promoting a unionized workplace. In justifying the need for the notice, the Board found that most employees were unaware of their rights under the NLRA and thus could not effectively exercise those rights. This justification is not surprising given the composition of the Board that approved the rule. The rule was passed by a 3 to 1 vote, with each member of the three-person majority having legal backgrounds working for organized labor.

The final rule spells out the language that must be included in the notice and other requirements regarding how it must be posted. For example, employers that utilize an electronic bulletin board or intranet to provide notices to employees must also post the notice via the same mechanism and in a manner

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that is no less prominent than other electronic notices. Additionally, if more than 20 percent of an employer's workforce is not proficient in English, the employer must also provide the notice in the foreign language(s). Free copies of the notice can be obtained upon request from local NLRB offices or through the Board's website (www.nlrb.gov). These will be available no later than November 1, 2011, to meet the notice implementation deadline of November 14, 2011.

Although a failure to post the notice will not result in any monetary fines, the Board's enforcement mechanisms are not without some teeth. First, the failure to post the notice would form the basis for an unfair labor practice finding by the NLRB. Such a finding would likely result in the employer being required to post a separate NLRB notice, not to mention the soft costs stemming from the time and productivity lost through a government investigation. In addition, if the Board is addressing other alleged unfair labor practices, such as whether the employer discriminated against an employee because of union activity, the Board could potentially use the failure to post the notice as evidence of anti-union motivations. The most troublesome sanction, however, is the potential extension of the statute of limitations for unfair labor practice charges. These are governed by a relatively short six-month statute of limitations. This means that if an employee files a charge about conduct that is more than six months old, the Board has traditionally dismissed the charge even if the underlying claims are valid. However, if the notice isn't posted as required, the Board may use that as a basis for excusing the untimely filing if the employee can show that he or she was not aware of his or her NLRA rights. Such a finding would eliminate a potentially strong defense available to the employer.

While there will almost certainly be litigation over whether the Board has the necessary authority to issue a rule like this, unless a federal court steps in and stays the implementation date, employers should plan to be in compliance by the November 14, 2011, deadline.

Whether you have a unionized workplace or not, the requirements of the NLRA can significantly impact your business. If you have any questions about the notice requirements or the NLRA in general and you do not have regular counsel for labor matters, Foulston Siefkin LLP would welcome the opportunity to help answer your questions or otherwise help you meet your business needs in this changing labor environment.

For Further Information

If you have questions or want more information regarding this issue, you should contact your legal counsel. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. Forrest Rhodes is available to assist you with this issue, or with any general employment or labor law issues. You may contact him at **frhodes@foulston.com** or by calling 316.291.9555. You may also contact Jay Rector, Foulston Siefkin's Employment and Labor Practice Group Leader, at 316.291.9722 or **jrector@foulston.com**. For more information on the firm, please visit our website at **www.foulston.com**.

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