

Akerman Practice Update

LABOR & EMPLOYMENT

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NLRB Issues Final Rule Requiring Employers to Post Notice of Employee Rights

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On December 22, 2010, the National Labor Relations Board (the “Board”) issued a proposed rule requiring employers subject to the National Labor Relations Act (the “NLRA”), which is the overwhelming majority of private sector businesses, to post a notice in conspicuous places, informing their employees of rights under the NLRA, together with NLRB contact information and basic enforcement procedure information. Thereafter, the 60-day period for public comments to the proposed rule was extended until March 23, 2011, with the Board deciding to accept all comments that it received by that date. The Board received more than 7,000 comments. The Board issued, on August 25th, a final rule requiring the posting. The rule is to be included in the Federal Register on August 30th. It takes effect 75 days later.

Therefore, employers, both union and non-union, must begin posting the required notice on November 14, 2011. Federal contractors will be deemed to have complied with this requirement by posting the notice of employee NLRA rights that is already required by the Department of Labor under 29 CFR Part 471.

The notice to employees must be at least 11 inches by 17 inches in size. The notice must be posted in all places where notices to employees concerning personnel rules or policies are customarily posted. Copies of the notice will be available on the NLRB website and from NLRB regional offices by November 1, 2011.



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Translated versions will be available in the same manner and must be posted in another language at workplaces where at least 20% of employees are not proficient in English and speak the other language. Helpful questions and answers on the Rule may be found at www.nlrb.gov/news-media/fact-sheets/final-rule-notification-employee-rights.

The final rule largely tracks the language of the proposal, with some changes suggested by commenters. The most significant change in the final rule is the deletion of the requirement that employers distribute the notice via email, voice mail, text messaging or related electronic communications if they customarily communicate with their employees in that manner. Other significant changes include: clarifications of the employee notice detailing employee rights protected by the NLRA and unlawful conduct on the part of unions; clarification of the rule's requirements for posting notices in foreign languages; and allowing employers to post notices in black and white, as well as in color.

Non-union employees also have rights under the NLRA. Accordingly, the notice tells employees that they have the right to: 1. organize a union; 2. form, join or assist a union; 3. bargain collectively through a representative to set wages, benefits, hours, and other working conditions; 4. discuss terms and conditions of employment or union organizing with co-workers or unions; 5. take action with one or more co-workers to improve working conditions by raising complaints with the employer or with a government agency; 6. strike and picket; and 7. to not do any of these things.

In addition, the notice states that it is illegal for an employer to: 1. prohibit employees from talking about or soliciting for a union during non-work time and from distributing union literature during non-work time in non-work areas; 2. question employees about union support or activities in a manner that discourages such activity; 3. take or threaten adverse action against employees based on union or other protected activity or a refusal to engage in any such activity; 4. threaten to close the workplace if workers choose a union; 5. promise or grant benefits to encourage or discourage union support; 6. prohibit union hats, buttons, t-shirts, and pins except in special circumstances; and 7. spy on or videotape peaceful union activities and gatherings or pretend to do so. The notice also provides a summary of illegal union conduct under the NLRA.

Finally, the notice tells employees that, if they select a union, the employer and union must bargain in good faith to reach an agreement and the union must fairly represent them, that employees have 6 months to contact the NLRB after they believe unlawful activity has occurred, and that employees may obtain

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reinstatement, lost wages and lost benefits for unfair labor practices. The notice concludes by providing NLRB contact information to make inquiries or charges.

All employers subject to the rule, who customarily post notices to employees regarding personnel rules or policies on an internet or intranet site, will be required to post the Board’s notice on those sites, as well as physically posting the required notice. The employer must also post the notice on internet or intranet sites in a language other than English for each group of employees constituting 20 percent or more of the employer’s workforce who speak another language.

The rule states that a failure to post is an unfair labor practice and that, upon a failure to post, the Board may order the employer to post a notice, post a remedial notice, toll the statute of limitations for unfair labor practice charges, and consider knowing and willful failure as evidence of unlawful motive in unfair labor practice proceedings. However, the Board may not impose a fine.

The required notice represents the latest move in response to the apparent legislative defeat of the Employee Free Choice Act. In June 2011, the Board issued another proposed rule that would significantly shorten the time between union petitions and elections. Because unions typically lose support during an election campaign, this rule would most likely increase the percentage of union victories. Also in June 2011, the Department of Labor issued a proposed rule that would expand employer and consultant reporting requirements for so-called “persuader activity.”

It is certainly time for employers to take action to implement effective union avoidance strategies. Waiting to react until a union enters the scene should no longer be an option.

For more information, please contact a member of our Labor & Employment practice.

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