

Employers Need to Know Employment Law Alerts from Ober|Kaler's Employment Group



New Required Poster Informs Employees of Union Rights and Forbidden Employer Practices and Gives Employers Right to Post Information on Pitfalls of Unionization

On January 31, 2012, private employers – with or without unions - must post a notice advising employees of their rights under the National Labor Relations Act (NLRA). This poster was drafted by the National Labor Relations Board (NLRB) and informs employees, for example, of their right to form, join or assist a union, take action with co-workers to improve working conditions and discuss wages and working conditions with co-workers.

As will be more fully discussed below, employers are permitted to and should post information which informs employees of why union representation may be bad for them.

In addition to listing specific employee rights, the poster, which is directed at employees, states that employers cannot:

- Prohibit employees from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question employees about union support or activities in a manner that discourages them from engaging in that activity.

- Fire, demote, or transfer employees, or reduce hours or change shifts, or otherwise take adverse action against employees, or threaten to take any of these actions, because an employee joins or supports a union, or because he/she engages in concerted activity for mutual aid and protection, or because he/she choose not to engage in any such activity.
- Threaten to close an employer's workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefit to discourage or encourage union support.
- Prohibit employees from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

The NLRB's 11 by 17 inch poster is currently available at www.nlrb.gov/poster. It must be conspicuously posted where other employee notices are posted, this includes electronic posting for employers who customarily post other notices this way. If 20% or more of an employer's workforce is not proficient in English and speaks another language, the poster must be posted in that language. The NLRB will provide translated posters. All private employers, except certain federal agencies and religious institutions, if exemption is affirmatively proven, must post this notice.

The NLRB does not have the ability to fine employers for non-compliance alone. Any noncompliance brought to the attention of the NLRB will be via an unfair labor practice charge. The NLRB hopes that then asking the employer to comply will solve the problem and result in a closed case. However, for those employers that willfully do not post, the NLRB can use failure to post as evidence of an unlawful motive in an unfair labor practice case that involves other NLRA violations.

What Should Employers Do Now?

The January 31, 2012, deadline postponed employer compliance from the original deadline of November 14, 2011, to "allow for enhanced education and outreach to employers, particularly those who operate small and medium sized businesses" according to the NLRB. Employers should take advantage of this extra time by preparing for compliance. First, employers can and should prepare counter-posters to fill in important information on the NLRA that the NLRB poster does not cover. At the very least, the poster should make clear that:

- Even if a union is voted in, the NLRA does not require that a union and the employer reach an agreement regarding wages.
- A union results in loss of a direct, one-on-one relationship between the employer and employee.

Second, employers should take time to train management to answer questions about the NLRB required poster and also how not to violate any provisions of the NLRA when opposing a union. Finally, employers should review any current policies, as the NLRB has recently found that social media policies that restrict certain communication can violate the NLRA. See www.ober.com/publications/1517-facebook-postings-found-be-protected-concerted-activity-under-nlra.

The January 31, 2011 Posting Deadline May Again be Delayed

In September 2011, a number of organizations, such as the National Federation of Independent Business and the U.S. Chamber of Commerce, challenged the NLRB's authority to require this poster in court. The challenge is based upon the NLRB's statutory authority to enforce the provisions of the NLRA, and interestingly that authority may not include the ability to require employers to generally post NLRA notices. Therefore, the deadline for posting may be delayed again based on the status of these challenges. The case is still pending, but is scheduled for a summary judgment hearing on December 19, 2011.

Another Pro-Union Initiative by the NLRB

On November 30, 2011, the NLRB approved a resolution to draft final rules that would dramatically shorten the union election process. The resolution, for example, would rescind the current regulations that delay an election by 25 to 30 days from when an election is directed. As a result, the time period that employers have to educate employees about unions would be reduced to as little as 15 days in some cases.

However, in October, the Workforce Democracy and Fairness Act was introduced and then passed by the House of Representatives. The bill, among other things, sets a 35-day minimum time period before the NLRB may conduct an election. The Senate has yet to consider the bill.

Ober|Kaler will keep you informed of any extension of the November deadline. In the meantime, please contact [Jerald Oppel](#) of [Ober|Kaler's Employment Group](#) for information on how to draft your own counter-poster and whether your institution is excluded from this notice requirement.

About Ober|Kaler

Ober|Kaler is a national law firm that provides integrated regulatory, transaction and litigation services to financial, health care, construction and other business organizations. The firm has more than 130 attorneys in offices in Baltimore, MD, Washington, DC and Falls Church, VA. For more information, visit www.ober.com.

This publication contains only a general overview of the matters discussed herein and should not be construed as providing legal advice.

Copyright© 2011, Ober, Kaler, Grimes & Shriver