New Workplace Posting Requirements

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Most private sector employers will have to post a notice informing employees of their rights under the National Labor Relations Act ("NLRA"), according to a new National Labor Relations Board ("NLRB") rule published today in the Federal Register.[1]

The new rule, which takes effect on November 14, 2011, requires employers to post an 11-by-17-inch notice in all places where other personnel notices are typically posted. In addition, employers who customarily communicate with employees about personnel rules or policies on intranet or internet sites must also post the required notice on those sites. The rule sets forth the content of the required notice, including information about employees' rights to form, join, or assist a union; to bargain collectively; to join in other concerted activities; and to refrain from such activities. The notice must be posted in a foreign language where 20 percent or more of an employer's workforce is not proficient in English. Copies of the official notice will be available from NLRB regional offices and from the NLRB website, http://www.nlrb.gov.

Rule Applies to Most Private Sector Employers

The posting requirements are NOT limited to employers with unionized workforces. The new rule applies to all employers subject to the NLRA, which includes most private sector employers. The posting will also cover topics that many employers, particularly smaller employers, do not recognize as implicating NLRA rights in non-unionized settings. The posting will notify employees that they have the right to discuss their wages, benefits and other terms and conditions of employment with co-workers and the right to take action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints. The posting will also notify employees that it is unlawful for an employer to terminate, discipline or take other adverse action against employees who exercise these rights.

The new rule does not apply, however, to employers specifically exempt from NLRA coverage (such as state and local governments), or to employers with annual revenues below certain jurisdictional standards set forth in the rule.[2] Some federal contractors and subcontractors are already required to post notices

[1] *See* Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (to be codified at 29 C.F.R. §§ 104.201*et seq.*).

[2] Generally, the NLRA covers most private sector employers that engage in interstate commerce above certain *de minimis* levels. The NLRB has set revenue-based jurisdictional limits that vary among categories of employers' industries. These limits include, for example, $100,000 for office buildings and shopping centers, $250,000 for law firms, and $1 million for

informing employees of their rights under the NLRA pursuant to 29 C.F.R. Part 471. To the extent they already post notices required under Part 471, such contractors are deemed to be in compliance with the new rule.

Failure to post the required notice may be considered interference with employees' rights under the NLRA and thus, even in the absence of other violations, can serve as the basis for an unfair labor practice charge. In practice, the penalty for failure to post the notice may in itself be minor, provided that the missing poster is the employer's sole violation and that, upon NLRB investigation of the unfair labor practice charge, the employer posts the required employee notice "expeditiously." In those circumstances, the regulation states that the "Board expects that there will rarely be a need for further administrative proceedings." If, however, an employee alleges other unfair labor practices, the effect of failing to post the required notice may be more significant, as such failure may toll the six-month statute of limitations that ordinarily applies to charges of NLRA violations. In addition, an employer may not retaliate against any employee for filing a charge with the NLRB or testifying at a hearing concerning an alleged violation of the notice-posting requirement. As a result, an employer's failure to post the required notice could be used as a means to gain protected status by savvy employees who anticipate disciplinary action or termination, because, once an employee files a charge, the employee could claim that any adverse action that followed was illegal retaliation.

Employers with non-unionized workplaces should not feel free to disregard the posting requirement, under the mistaken belief that unfair labor charges arise only in the context of union elections or unionized environments. Employers in non-unionized workplaces may still be subject to an unfair labor practice charge. The NLRB has been especially active in recent months in bringing unfair labor practices enforcement actions against non-unionized employers that have either disciplined employees or adopted policies curtailing employees' rights to engage in "concerted activity" protected by the NLRA. The NLRB's Office of General Counsel recently released a summary of fourteen cases involving social media, in which the Board investigated the lawfulness of employer social media policies or disciplinary actions based employees' Facebook and Twitter postings, in many instances finding that the policies or adverse actions violated the employees' rights under the NLRA.[3]

Relationship to Other Posting Requirements

The NLRB's new required posting adds to a host of existing notice posting requirements with which employers must comply. For example, the Fair Labor Standards Act, the Family and Medical Leave Act, federal anti-discrimination statutes, and federal workplace safety statutes all include mandatory posting requirements by employers regarding employee rights.[4] In addition to these federal posting requirements, employers should also ensure that they have posted additional notices mandated by state or local laws.

colleges, universities, and other private schools (the highest revenue limit listed in the jurisdictional standards). If no specific revenue-based jurisdictional standard is listed in the regulation, the NLRB generally applies a $50,000 threshold before asserting jurisdiction over an entity engaged in interstate commerce. In addition, there are several employer categories over which the NLRB asserts jurisdiction regardless of revenue levels, including, notably, enterprises in the District of Columbia, financial information organizations, accounting firms, professional sports, and stock brokerage firms.

[3] National Labor Relations Board, Office of the General Counsel, Memorandum OM 11-74 (Aug. 18, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458056e743.

[4] The U.S. Department of Labor, Office of Small and Disadvantaged Business Utilization, maintains a listing of notices required by federal statutes and regulations enforced by agencies within the department. *See* Poster Page: Workplace Poster Requirements for Small Businesses and Other Employers, *available at* http://www.dol.gov/oasam/programs/osdbu/sbrefa/poster/matrix.htm.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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