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ALERT | Employment Law

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New NLRB Posting Rule On Hold Until Further Notice

The National Labor Relations Board (the “NLRB”) is becoming increasingly active in its efforts to address unionization. Last August, the NLRB issued a new rule that requires almost all employers – *even those without unions* – to post a notice about employees’ rights under the National Labor Relations Act (the “NLRA”). The posting requirement was supposed to take effect on April 30, 2012. However, due to several court decisions in mid-April that held that the NLRB does not have the authority to require employers to post notices about employee rights under the NLRA, the NLRB has decided not to implement the rule until further notice.

This delay in implementing the NLRB rule is good news for employers, since the posting requirement under the new rule will likely lead to the spread of unions and to increased allegations by employees about violations of the NLRB by their employers.

Here, in brief, are the main points that employers need to know about the posting requirement that would have gone into effect on April 30 and that may still go into effect, at least in some form, in the near future:

- (1) **Affected Employers.** If the NLRB rule goes into effect, almost all employers – including those without unions – must post the new notice. If you think you may be exempt from this requirement, we would be glad to advise you regarding this issue.
- (2) **Notice to Employees of NLRA Rights.** The notice informs employees of their rights under the NLRA, including the rights to do the following:
 - Organize a union to negotiate wages, hours, and other terms and conditions of employment;
 - Discuss wages and benefits and other terms and conditions of employment or union organizing with co-workers or a union;
 - Take action with one or more co-workers to improve working conditions by raising work-related complaints directly with the employer or with a government agency, and seeking help from a union;
 - Strike and picket; and
 - Choose not to do any of these activities, including joining or remaining a member of a union.

- (3) **Notice to Employees of What Employers Cannot Do.** The notice also informs employees of what employers are prohibited from doing under the NLRA, including the following:
- Prohibiting employees from talking about or soliciting for a union during non-work time or from distributing union literature during non-work time, in non-work areas;
 - Questioning employees about union support or activities in a manner that discourages employees from engaging in that activity;
 - Taking adverse actions, or threatening such actions, because employees join or support a union or engage in concerted activity for mutual aid and protection;
 - Prohibiting employees from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances; and
 - Spying on or videotaping peaceful union activities and gatherings or pretending to do so.
- (4) **Physical and Electronic Posting.** The notice must be posted on 11x17 paper in a conspicuous place (including the normal places where employment posters are located), to ensure that employees will see it. If the employer uses an internet or intranet site to communicate with employees, the notice must be posted there as well.
- (5) **How to Obtain the Notice.** Copies of the notice (in English and other languages) may be downloaded from the NLRB website (<http://nlrb.gov/>) or may be ordered from the NLRB.
- (6) **Foreign Language Posting.** If 20% or more of the workforce is not proficient in English and speaks a different language, then the notice must be posted in the language they speak. If multiple foreign languages, combined, add up to 20% or more of the workforce, the employer has two options:
- Post the notice in all such languages; or
 - Post the notice in the non-English language spoken by the largest percentage of employees and give individual copies to each employee in the other language group(s).
- (7) **Penalties for non-Compliance.** Although there are no fines or monetary penalties for failure to post the notice, employers that fail to comply with the posting requirement may be subject to the following:
- An NLRB finding that the employer has committed an Unfair Labor Practice based on the facts;
 - Possibility of tolling of the statute of limitations in an Unfair Labor Practice charge on a case specific situation; and/or
 - If the employer's motive is at issue in a future Unfair Labor Practice proceeding, then failure to post the notice can be used as evidence of anti-union bias.
- (8) **Steps for Employers to Consider.** Even though the new NLRB rule is not yet in effect, employers should consider taking the following steps due to the new NLRB rule:
- Review written policies – including solicitation and distribution policies – to ensure that they do not contradict the new notice or otherwise violate the NLRA;
 - Train supervisors and human resources personnel to answer questions about unionization, unions, and general labor issues; and
 - Communicate to employees (in a legally acceptable manner) about why, in the employer's opinion, employees should not unionize.

If you have questions about the new NLRB notice posting rule or its potential impact, please feel free to call Jim Spencer or Trinidad Galdean at (316) 267-2000.

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