

More Changes from the NLRB: A Major Enforcement Initiative and Proposed Rule to Require Posting of NLRA Rights Notice

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The swirl of activity from the NLRB continues, with two important developments. First, NLRB Acting General Counsel Lafe Solomon announced a further initiative to enhance penalties for employer unfair labor practices that occur during union organizing campaigns. Second, the Board announced the publication of proposed rules requiring the posting of an NLRA rights notice in all workplaces subject to the act.

Earlier this year, in Memorandum GC 10-07, the Acting General Counsel announced an overhaul of the processes for obtaining a Section 10(j) injunction for “nip-in-the-bud” discharge cases during union organizing drives, in an effort to speed up the Board’s internal processes and more efficiently obtain reinstatement and backpay. Now, in Memorandum GC 11-01, the Acting General Counsel has announced that the Agency will seek enhanced reading and access remedies.

Ordinarily, employers found to have committed unfair labor practices, or who have settled charges, are required to post a “Notice to Employees” detailing the allegations as part of the remedy. The Acting General Counsel seeks to enhance this remedy by securing an order requiring that, in addition to posting a remedial notice, an employer representative, or a Board representative in the presence of an employer representative, read the remedial notice to the assembled employees. In the past this remedy has been seen as extraordinary. Under the Acting General Counsel’s initiative, it will now be sought in every “nip-in-the-bud” discharge case, and also be sought routinely in other serious unfair labor practice cases arising during union organizing campaigns.

Similarly, the Acting General Counsel seeks to enhance “access” remedies, where a union is allowed access to an employer’s property or information. Such remedies were formerly deemed extraordinary. The access remedies proposed by the Acting General Counsel embody two major components. One is union access to employer maintained bulletin boards. The other is access to the names and addresses of employees. However, two statements in the GC Memorandum announcing the initiative demonstrate that access sought under the initiative could be much broader.

For example, in footnote 26, the regional offices are instructed that “[w]here an employer customarily uses electronic means, such as an electronic bulletin board, e-mail, or intranet postings to communicate with employees, regions should submit the case to the Division of Advice on whether to seek a remedy including union access to those electronic means of communication.” Presumably, this could result in a union having the right to post its material on an employer’s web site, if the web site were used to communicate with employees.

Elsewhere, at pages 10-11, the GC Memorandum states that in appropriate cases, such as “where an employer makes multiple unlawful captive audience speeches or where the employer is a recidivist and has shown a proclivity to violate the Act.,” the region, with the approval of the Division of Advice, may seek greater access, including “granting a union access to nonwork areas during employees’ nonwork time; giving a union notice of, and equal time and facilities for the union to respond to, any address made by the company regarding the issue of presentation; and affording the union the right to deliver a speech to employees at an appropriate time prior to any board election.”

These directives offer important guidance into how the regional offices of the NLRB are going to handle unfair labor practice cases going forward, particularly those arising out of union organizing drives.

Meanwhile, the day following the Acting General Counsel’s announcement of his enforcement initiative, the Board announced its intention to publish in the *Federal Register* proposed rules requiring the posting of an NLRA rights notice in all workplaces covered by the act. The Board’s action comes in a response to a request that it do so filed in 1993 by Professor Charles Morris.

The Board's action also follows President Obama's 2009 Executive Order No. 13496, directing the U.S. Department of Labor to require federal contractors to post NLRA rights notices, with the resulting oddity of the Labor Department administering and enforcing the obligation of contractors to post the notices containing rights enforced by the NLRB.

The public will be given the opportunity to comment on the proposed rule. A number of issues undoubtedly will invite comments, including whether the Board's general rule making authority is sufficiently broad to include requiring the posting of the proposed notices (a point raised by dissenting Board member Hayes); what should be contained in the notice; how the Board will enforce the obligation to post the notices; whether failure to post the notices will constitute an unfair labor practice; how many notices must be posted in a workplace that is multi-lingual; and whether electronic posting will be required?

Employers with concerns about the proposed posting requirement should seriously consider filing comments, which are due within 60 days of the publication of the proposed rule in the *Federal Register*. Comments may be submitted, either electronically to www.regulations.gov, or by mail or hand-delivery to Lester Heltzer, Executive Secretary, NLRB, 1099 14th Street NW, Washington, DC 20570.

To review the [proposed rules, click here](#). To review the [Board's proposed rule fact sheet, click here](#).

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