

NATIONAL LABOR RELATIONS ACT

## NLRB notice-posting rule requires little of employers but sparks firestorm of controversy

Last month, the National Labor Relations Board (NLRB) issued a final rule that will require employers to notify employees of their rights under the National Labor Relations Act (NLRA) and that makes a failure to post the notice an unfair labor practice. The Board has made the required notice available free of charge on its website. The final rule takes effect on November 14, 2011.

In less partisan times, such a requirement might draw little attention. But in the currently supercharged labor environment, the seemingly innocuous rule has already prompted a series of lawsuits and a repeal effort.

If timing is everything, critics may be justified in wondering why, after three-quarters of a century, would the Board now decide to implement such a rule. Some would argue that the rule reflects the efforts of a labor-friendly Board majority attempting to smooth the way for organized labor. On the other hand, those who are less pessimistic view the new rule as requiring no more than is already required of businesses in

conjunction with other federal statutes – what’s so onerous about letting workers know their federal rights?

In an effort to understand some of the sharply contrasting views about the new notice posting requirement and to ascertain what employers should do in conjunction with the new rule, CCH reached out to Employment Law Daily Advisory Board Member and Sherman & Howard attorney W.V. Bernie Siebert and his law partner, Patrick Scully, as well Labor and Employment Law Advisory Board Member and George Washington University Law School Professor Charles B. Craver.

### What does the new notice-posting rule actually require?

Under the NLRB’s final rule, nearly all private-sector employers (including labor organizations) will be required to post an NLRA employee rights notice in a location where the employer typically posts other workplace notices. Agricultural, railroad and airline employers are excluded from this requirement. The rule also requires employers who as a matter of custom post notices to employees regarding personnel rules or policies on an internet or intranet site to post the Board’s notice on those sites.

The notice, which is similar to the notice that the Department of Labor requires federal contractors to use, states that employees have the right to organize, form, join or assist a union, to bargain collectively to improve wages and working conditions, to discuss terms and conditions of employment with fellow employees, to take action with those fellow employees to improve working conditions, and to strike and picket. It also informs workers that they have the right to refrain from any of these activities.

In addition, the notice offers examples of unlawful employer and union conduct and instructs employees how to contact the NLRB with questions or complaints. The nonexhaustive list of employer unfair labor practices includes prohibiting employees from using nonworking time to solicit for, or distribute materials on behalf of, a union in nonworking areas such as parking lots or break rooms; interrogation about union activities; discipline based upon union activity or support; and threats to close a workplace over a decision to unionize. Among the union unfair labor practices listed in the final rule

### Inside

The National Labor Relation Board’s final rule requiring that employers post a notice informing employees of their rights under the National Labor Relations Act is the subject of comments by:

- **W.V. Bernie Siebert**, partner in the Denver office of Sherman & Howard, where he practices labor and employment law, exclusively representing management;
- **Patrick Scully**, Member in the Labor & Employment Department of Sherman & Howard’s Denver office, and former NLRB attorney; and
- **Charles B. Craver**, Freda H. Alverson Professor, George Washington University Law School.

are threats to job security for employees who choose not to join a union; refusals to process grievances of union critics or nonmembers; and coercing employer discrimination against nonunion members.

**Failure to post the notice.** Employers who fail to post the notice will be found to have committed an unfair labor practice under Section 8(a)(1) of the Act, specifically interfering with, or attempting to restrain or coerce employees in, the exercise of their rights under the Act. An employer that threatens or retaliates against an employee for filing charges or testifying at a hearing about alleged violations of the notice-posting requirement may also be found to have committed an unfair labor practice.

**Available remedies.** If the Board finds that a violation of the notice-posting requirement has occurred, the employer will be ordered to cease and desist from the unlawful conduct and post the notice, as well as a remedial notice, according to the final rule. In some cases, additional remedies may be invoked in keeping with the Board's remedial authority.

In its preamble to the final rule, the Board said it anticipates that most employers that fail to post the notice of rights will do so merely because they were unaware of the rule, and when the failure is called to their attention, they will comply without necessitating any formal administrative action or litigation.

**Impact of violations on other proceedings.** The failure to post the required notice of rights may also impact other proceedings. The final rule provides that when an employee files an unfair labor practice charge, the Board may toll the requirement that charges be filed within six months after the allegedly unlawful conduct occurred if the employer has failed to post the required notice, unless the employee has received actual or constructive notice that the complained-of conduct is unlawful.

In cases in which the employer's motive is an issue, the Board may also consider a "knowing and willful refusal to comply" with the notice-posting requirement as evidence of unlawful motive.

**Impetus for the notice requirement.** In its preamble to the rule, the Board explained the reason underlying the notice requirement. It noted that too many employees are unaware of their rights, based on the "comparatively small percentage" of unionized private-sector employees, the "high percentage of immigrants" who are "likely to be unfamiliar" with U.S. workplace rights, and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights. Ultimately, in deciding to issue the final rule, the Board found that "the potential benefit of a notice posting requirement outweighs the modest cost to employers." The Board further reasoned that the workplace would constitute the most appropriate place for communicating to workers their basic rights as employees.

## Controversial rulemaking

**Why has such a seemingly innocuous rule sparked so much controversy?** Siebert and Scully pointed out that since

the inception of the NLRA, there has never been a requirement that any form of notice of rights be posted in the workplace. The new notice-posting rule has generated controversy because it is generally viewed as an unnecessary measure for most employees and therefore merely a burden on employers, according to the Sherman & Howard attorneys.

"There was no empirical evidence suggesting American workers fail to comprehend their Section 7 rights," Siebert and Scully said. "Many employers and their representatives see the rule as an attempt by the Board to expand its role and organized labor's opportunities in the workplace." The two attorneys explained that "many employers view the rule as just another way to assist labor unions with their organizing efforts."

Professor Craver had a slightly different take on the source of the controversy. He noted that the NLRA "does not specifically authorize the posting of such notices," but he said the new rule appears to be "consistent with the Labor Board's general authority to issue rules to carry out its functions." Craver said employers "are especially opposed to the new rule because they do not want their employees to understand the collective rights they enjoy under that statute."

Although many comments favored it, the majority of comments received by the Board opposed the rule, including criticism that the NLRA does not specifically call for the posting of a rights notice. The Board acknowledged the lack of such a statutory requirement but noted that nothing in the legislative history of the NLRA indicated that Congress did not want to allow such a notice.

**Was the Board pursuing a legitimate goal?** According to Siebert and Scully, the goal of informing employees of their NLRA rights "considered in isolation, is reasonable, but for the fact that there is no evidence of any lack of knowledge and the rule goes far beyond merely advising employees of their rights." To the extent the NLRB is promoting itself or organized labor, they said, neither aim is a legitimate or reasonable goal for rulemaking.

In contrast, Craver believes the Board was "clearly" pursuing a legitimate goal. "The Board appreciates the fact that most

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**W.V. BERNIE  
SIEBERT AND  
PATRICK SCULLY**

## Labor Law Reports *Insight*

EDITOR: Pamela Wolf, JD

*The Board appreciates the fact that most covered employees have no knowledge of their rights under the NLRA.*

**CHARLES B. CRAVER**

covered employees have no knowledge of their rights under the NLRA,” he said. Craver also observed that a number of other federal laws require employers to post such notices,” citing for example, wage and hour laws and civil rights statutes. “The NLRB simply decided that employees should be apprised of their rights under the NLRA.”

**Expansion of authority.** Siebert and Scully believe the final notice-posting rule stretches the Board’s authority beyond that authorized by statute. “The

Rule has the effect of imposing new unfair labor practice liability and *expanding without limit the statute of limitations*, which are not only expansions of the Board’s statutory authority, but exceed the Board’s authority,” they note.

Craver reached the opposite conclusion. He said the final rule doesn’t really expand the Board’s authority. “It merely informs private sector employees of their NLRA rights,” the law professor said.

**Authority to implement the rule.** Siebert and Scully also said that the Board was without authority to implement the notice-posting rule and asserted that the rule violates the NLRA in several respects. In addition to the expansion of authority discussed above, “there appears to be no provision comparable to those in the other federal employment statutes from which posting rules have been promulgated,” they observed. “There is nothing in the statute or any regulations that give the Board the authority to require such a posting,” according to Siebert and Scully. Moreover, they added, “the notice itself goes well beyond a mere description of employees’ Section 7 rights.” According to the two attorneys, there would likely be far less controversy if the notice-posting rule had merely provided a statement of employee rights.

Craver, on the other hand, pointed to the NLRB’s “fundamental right to adopt rules implementing its power to enforce the NLRA.” He said that while the Labor Board “has rarely used its general rulemaking authority, it clearly has the power to adopt appropriate rules.” According to Craver, the new notice-posting rule “seems to be consistent with the Board’s general rulemaking authority.”

**Does the final rule go too far?** The new notice-posting rule “goes too far and is unnecessary in any event,” as far as the Sherman & Howard attorneys are concerned. “A purportedly neutral arbiter of employment relations should not be promoting employee complaints or advocating the selection of a union as a bargaining representative,” they said. Siebert and Scully noted that earlier this year, the NLRB posted an advertisement on Google encouraging employees to contact

the Board to form a union at work. “These efforts suggest the federal government prefers private workforces to be unionized, a suggestion plainly at odds with Section 7 of the NLRA,” they said. “Moreover, the rule far exceeds the statutory authority of the Board,” they added.

In contrast, Craver thought the rule was long overdue. He also noted that the rule merely apprises workers of the rights they enjoy under the NLRA. “I am personally shocked that it took the NLRB this long to require the posting of such general notices,” he said. “By prior Board decisions, unions with union security clauses have been obliged to notify unit members each year of their right to only tender the required dues instead of becoming formal union members and of their *Beck* right to challenge expenditures having no reasonable relationship to the union’s representational duties,” he pointed out. “I don’t know why the Board did not simply require a general notice by employers (and even unions) apprising employees of all of their NLRA rights,” he said.

### Historical context colors the rule’s impact

Placing the Board’s promulgation of the new notice-posting rule in historical context, the Sherman & Howard attorneys observed that the Board “has issued many decisions that appear to be attempts to expand its jurisdiction and make it easier for unions to obtain and retain representational rights. They pointed out that the NLRB “has not only overturned decisions from the Bush Board, but has revisited and, in some cases, reversed precedents that have stood in previous Democratic administrations.”

Siebert and Scully said that among other issues, the Board “appears to be relaxing the standard for what constitutes ‘concerted’ activity, seeking to contradict the U.S. Supreme Court on class waivers in arbitration agreements, prohibiting so-called ‘preemptive strikes’ by employers, expanding the statutory definition of ‘employee,’ and reconsidering long-standing rules regarding access to property.” There is also currently pending, “again through rule making, an attempt to eliminate employer speech in election campaigns by regulating ‘quickie’ (15-20 day) elections,” they added.

The new notice-posting rule “is undoubtedly viewed as pro-labor since it apprises employees of their right to seek collective representation, and many private sector employees have no knowledge of their rights in this regard,” according to Craver. “On the other hand, the required notice tells them of their right to engage in collective action *and* their right to refrain from such activity,” the law professor stressed. “It simply informs employees of their basic Section 7 rights under the statute,” he said.

### Challenges to the new rule

Siebert, Scully and Craver all agreed that the Board’s new notice-posting rule will likely be challenged. Craver expected that some groups would challenge the new rule as beyond the NLRB’s authority. “But I would be surprised if any court were

to reject the Board's general statutory authority to adopt such a rule in furtherance of its duty to enforce the act," he said.

**At least three lawsuits filed already.** Indeed, as the Sherman & Howard attorneys pointed out, the National Association of Manufacturers (NAM) has already filed a suit challenging the rule on several grounds, including that the rulemaking exceeded the Board's statutory authority. In a lawsuit filed in U.S. District Court for the District of Columbia, NAM hopes to stop the NLRB from enforcing the new rule. The Association contends that the Board has acted outside its jurisdiction.

On September 19, the National Federation of Independent Business, the nation's largest advocacy organization for small businesses, also filed a lawsuit seeking to end the new notice-posting requirement. The Federation contends that in the absence of an election petition or a finding of an unfair labor practice, the Board lacks authority to require employers to post a notice, especially one that is far more detailed than those required when the agency's jurisdiction is properly invoked. The group also takes issue with the likely reach of the requirement, contending that it could impact as many as six million private-sector businesses around the country.

The U.S. Chamber of Commerce and the South Carolina Chamber of Commerce have similarly filed a lawsuit, which alleges that the final rule violates the NLRA because the Board lacked jurisdiction under the Act to issue the rule and because the rule allows for complaints filed more than six months after an alleged unfair labor practice. The Chamber also contends that the rule violates the Administrative Procedure Act because it "arbitrarily and capriciously excludes" a notice of employee rights to be free of "compulsory union membership and compulsory union dues;" violates the Regulatory Flexibility Act in that the Board failed to properly assess the economic impact of the rule on small businesses; and violates the First Amendment by forcing employers to post the NLRB's ideological views on unionizing.

**Repeal effort.** On the legislative front, a bill that would repeal the new notice-posting requirement was introduced in the U.S. House of Representatives on September 2. The Employee Workplace Freedom Act, HR 2833, would repeal the NLRB's final rule and would prohibit the NLRB from ever again either promulgating, or enforcing rules requiring employers to post notices relating to the NLRA.

## Practical implications

### Does the new rule place a substantial burden on employers?

The burden placed on covered employers by the new rule does not appear to be unreasonable. Siebert and Scully noted that while many smaller employers may not be knowledgeable of their obligations under the new rule, "most employers should be able to comply with the new Rule." However, "that does not render it an appropriate action by a purportedly neutral agency," they urged.

The burden on employers "is truly minimal," according to Craver. "They are required to post notices explaining employee rights under other federal statutes and under applicable state

laws, and the NLRB's new rule merely obliges them to post similar notices informing employees of their rights under the NLRA," he explained.

**Impact on employers.** According to Siebert and Scully, the "physical" and electronic posting requirements are "not as significant as the repercussions for employers who may innocently delay or neglect to post." The most prominent repercussion is the designation of non-posting as an unfair labor practice, they said.

According to Craver, the new rule is unlikely to have a major impact. "Even though over 85 percent of employees surveyed by Professors Richard Freeman and Joel Rogers indicated that they would like a collective voice at work, most indicated that they are afraid to support unions due to their fear of reprisal by their employers," he explained. "With the economy in terrible shape and the inequality of wealth expanding to where it was just before the Great Depression, many workers have become dissatisfied with their situations," he added. "By telling them of their statutory right to seek collective representation, more may decide to support union organizing drives," he said.

### Will the new rule provide more protection for workers?

The rule itself will offer no additional protection for employees, according to Siebert and Scully. "It will however, provide employees with information concerning the NLRA and employee rights under the NLRA," they said.

The notice-posting rule "does not expand the statutory protection workers enjoy under the NLRA, but it does inform them of the protections available to them," Professor Craver observed. "When employers engage in coercive actions designed to discourage unionization, the adversely affected workers will now appreciate the fact that they can go to the regional office of the NLRB to seek relief," he said.

**NLRA complaints.** Siebert and Scully anticipate that as a result of the new notice-posting requirement there will be a significant uptick in NLRA complaints. Craver, on the other hand, assumes "there will be a slight increase in ULP charges, but most employees will continue to be afraid to file such charges thinking that they may be terminated if they do so."

**Best practices.** What steps should employers take in regard to the new notice posting requirement? "Employers, especially employers in industries that are hot targets for union organizing, should make sure they comply with the requirement on November 14th, according to Siebert and Scully. "Unions will seize upon the posting requirement much in the same way they tend to seize on allegedly unlawful employer policies to create leverage in organizing campaigns," the attorneys explained. However, they also noted that implementation may be delayed pending the outcome of the NAM civil action.

Craver suggested that employers go ahead and post the required notices. "They will appear with the other employment law notices which are now posted, and there is a good chance that most employees will not read them carefully," he predicted. ■