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NLRB Notice-Posting Rule Dies, Labor Challenges Remain

Law360, New York (February 06, 2014, 6:05 PM ET) -- Over two years ago, the National Labor Relations Board issued a final rule that would have required all private employers subject to the National Labor Relations Act to display a poster about employees' rights under the act. This notice-posting rule was met with much resistance from employers, in part because of its controversial content that some believed was pro-union.

The proposed regulation was quickly challenged in federal court by a number of business advocacy groups, such as the U.S. Chamber of Commerce and the National Association of Manufacturers. After several adverse judicial decisions by federal Courts of Appeals, the NLRB recently chose not to appeal the matter to the U.S. Supreme Court. However, this victory for employers might be short-lived if the NLRB and U.S. Department of Labor proceed as scheduled with their agenda. This article will discuss the legal challenges that led to the invalidation of the NLRB's notice-posting rule and preview 2014 initiatives from the NLRB and DOL that could negatively affect employers.

The Notice-Posting Rule

Under NLRB Chairman Mark Gaston Pearce's direction, the board launched a website in 2012, devoted to informing nonunion workers about protected concerted activities and the cases adjudicated by the NLRB involving such activities. In a June 2012, announcement regarding the website, Pearce publicly announced as one of the NLRB's primary goals informing nonunion employees of their rights under the NLRA. Pearce said, "A right only has value when people know it exists ... Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers."

Consistent with its outreach initiative, the NLRB in the waning months of 2011, issued a notice-posting rule that would have required all private employers subject to the NLRA to display an 11- by 17 inch poster (or, alternatively, combining two 8.5- by 11 inch pages) throughout the workplace and on the employer's intranet or Internet website.

The poster was based on a notice developed by the DOL regarding employee rights under the NLRA that federal contractors must physically and electronically display. The poster informed employees of rights afforded to them to form, join or assist labor organizations, bargain collectively with their employer and to strike and picket. It also listed many actions that if taken by employers or unions would be illegal under the NLRA, such as discharging an employee for supporting a union. However, the poster did not include employees' right to decertify a union, not to pay union dues in right-to-work states or to object to dues unrelated to representation.

The notice-posting rule also provided for unconventional remedies should an employer be unwilling to

display the poster, including: (1) tolling of the statute of limitations for the filing of unfair labor practice charges against the employer (on any topic, not just the poster) and (2) the creation of an inference that an employer's refusal to display the poster is evidence of an unlawful motive in other unfair labor practice charges involving that employer.

Employer Associations Challenge The Notice-Posting Rule

Shortly after the NLRB issued its final version of the notice-posting rule, the National Association of Manufacturers, the U.S. Chamber of Commerce and others filed lawsuits alleging the rule was impermissible and seeking to enjoin its enforcement. These legal challenges led to two separate United States Courts of Appeals declaring the rule unlawful, but for different reasons.

The first appellate court to invalidate the NLRB's rule was the U.S. Court of Appeals for the District of Columbia in National Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013). Prior to deciding the case on the merits, the D.C. Circuit entered an injunction preventing the NLRB from implementing the rule until such time as the court could consider the merits.

Following the injunction order, the NLRB suspended its implementation of the rule. The D.C. Circuit then heard the arguments from the National Association of Manufacturers and several other organizations that claimed that the rule violated employers' free speech rights by forcing them to disseminate the NLRB's speech. They also claimed that the rule's remedies exceeded the NLRB's authority. The court agreed, finding the rule violated Section 8(c) of the NLRA. The court also held that the NLRB could not toll the statutory time limit for filing an unfair labor practice charge because such tolling was not recognized when the limitations period was legislatively enacted in 1947.

Section 8(c) of the NLRA reads in part: "The expressing of any views, argument, or opinion, or the dissemination thereof ... shall not constitute evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit."

According to the D.C. Circuit, employers have the right to refuse to disseminate another's speech — even if this speech comes from the NLRB. As such, the NLRB's rule contravened Section 8(c) because it treated an employer's refusal to disseminate the poster as evidence of an unfair labor practice.

Moreover, Section 10(b) of the NLRA establishes the six month limitations period for filing unfair labor practice charges with the NLRB. The court held the NLRB could not overrule Congress' legislated limitations period unless doing so was an acceptable reason for tolling when Section 10(b) became law in 1947. Because such tolling was not recognized in 1947, the court held that the NLRB's rule impermissibly tolled the statute of limitations. Based upon the foregoing, the court vacated the notice-posting rule.

Following the D.C. Circuit's lead, the U.S. Court of Appeals for the Fourth Circuit in Chamber of Commerce of U.S. v. NLRB, 721 F.3d 152 (4th Cir. 2013) also invalidated the notice-posting rule, but for different reasons. The U.S. Chamber of Commerce and the South Carolina Chamber of Commerce claimed that the NLRB lacked authority under the NRLA to promulgate its notice-posting rule because its regulatory authority extends only to fashioning remedies for violations of the NLRA that already occurred. By contrast, the NLRB argued that Section 6 of the NLRA, which authorizes the board to promulgate rules "necessary to carry out the provisions of" the law, allowed it to promulgate the notice-posting rule.

However, the Fourth Circuit found that the NLRA's rulemaking provision "only empowers the [NLRB] to carry out its statutorily defined reactive roles in addressing unfair labor practice charges and conducting representation elections upon request." According to the court, nowhere does the NLRA authorize the NLRB to promulgate a proactive rule requiring all employers to display a poster delineating select rights under the law. The court's decision was further supported by the NLRA's legislative history and Congress' decision to expressly permit such notice-posting rules in other legislation. Because the NLRB did not have authority under the NLRA to issue its notice-posting rule, the Fourth Circuit invalidated the rule.

Current Status of the Notice-Posting Rule

These successive decisions, from separate federal appellate courts, that independently invalidated the NLRB's rule on different grounds struck a deadly blow to the notice-posting rule. The NLRB could have sought the Supreme Court's review of these decisions. Instead, the NLRB announced on Jan. 6, 2014, that it would not appeal. Although the NLRB did not provide a rationale for its decision, it stated that it "will continue its national outreach program to educate the American public about the [NLRA]." Thus, for the time being, the NLRB's notice-posting rule is dead.

What Could Be On The Horizon In 2014

For approximately a decade the NLRB had operated with less than five Senate-confirmed members. This changed in August 2013, when the Senate confirmed all five of President Obama's nominations to the NLRB. These confirmations replaced the controversial recess appointments the president made in January 2012 — the legality of which the Supreme Court will ultimately decide this term in NLRB v. Noel Canning.

Now that the NLRB is operating with a full contingent of properly confirmed members, it is possible that in 2014 the NLRB will reissue a notice-posting rule that has a better chance of being judicially upheld. In the interim, the NLRB continues to maintain copies of the poster on its website for employers to use voluntarily.

The NLRB's notice-posting rule is not the only regulation the board may revive in 2014. The NLRB has announced that it will revise its election rules, and many employer groups are concerned that these revisions will make it easier for unions to organize workers.

The NLRB first proposed changes to its election rules in 2011, but later withdrew them amidst legal challenges related to the NLRB's lack of a quorum. On Feb. 4, 2014, the NLRB announced that it is again issuing proposed changes to its election process — and that its proposed changes mirror what was initially proposed in 2011. Among other changes, the revisions would significantly shorten the time between the filing of an election petition and an election, to a period as short as fourteen days, limit the evidence considered during pre-election hearings, and consolidate issues typically resolved pre-election into one post-election procedure, such as who is a supervisor.

The public is invited to comment on the proposed changes and the deadline for comments is April 7. In addition, the NLRB will hold a public hearing on the matter during the week of April 7.

The DOL has also announced that it will issue in March 2014, a significant revision of the "advice exception" to the persuader rule in the Labor-Management Reporting Disclosure Act.

Under current DOL rules, employers must report to the DOL engagements with third parties whenever that engagement results in reportable “persuader activity,” like campaigning for the employer during an election through direct contact with employees. Among other reporting obligations, those third parties who engage in persuader activities must report their engagement with employers as well as all income and arrangements from all clients for all labor-relations services, even if unrelated to persuader activity.

But the current rules do not require reporting if an outside attorney gives an employer advice (i.e., the “advice exception”). The advice exception has historically been interpreted by the DOL to include such things as an attorney’s drafting and reviewing of letters, speeches and other communications to be given to employees, and supervisor training on union avoidance subjects.

However, the proposed changes will narrow the “advice exception” to include only advising employers on what is, and is not, lawful. Importantly, the advice exception would no longer cover union-avoidance training, drafting employee communications or the development of an employer’s union-free policies and practices.

This means that attorneys and law firms would either need to refrain from any nonadvice engagements with employers or report to the DOL what is now nonpublic information. Although many expect that there will be immediate legal challenges to the DOL’s reinterpretation of the advice exception, commentators are also projecting that many law firms will choose not to offer such services should the DOL follow-through with narrowing the advice exception.

In addition to rule changes, the NLRB’s docket of cases will also provide ample opportunity for the board to advance what management advocates fear will be a pro-union agenda. Commentators believe the NLRB will breathe new life to issues previously decided by board, such as providing nonunion employees with the right to have a representative present during workplace investigations, narrowing the standards used to evaluate who is, and who is not, a supervisor under the NLRA and deciding whether employers may continue to prohibit employees from using company email for “nonjob related solicitations.”

Steps Employers Should Take Right Now

In light of what could be a difficult 2014 in labor relations matters for nonunion employers, there are many steps employers can and should take now to put them in the best position to remain union free.

Audits

Employers should periodically audit their workforce to determine employees’ level of satisfaction with their working conditions. In addition, the audit should include a candid evaluation of the effectiveness of front-line supervisors and the employer’s compensation and benefits structure to ensure that they are competitive with other companies in their industry in the market, especially unionized companies.

Union-Free Policy

Nonunion employers should consider developing a policy expressing their nonunion philosophy and educating their employees about this philosophy. The education process should start the moment someone joins the company and continue on an annual basis so that employees are armed with the facts that demonstrate why remaining nonunion is in their, and the employer’s, best interests.

Communicate and Solicit Feedback

Nonunion employees are less likely to seek the support of a labor organization if their employer regularly communicates with them and seeks their input and feedback. For this reason, employers should consider implementing interactive supervisor meetings, monthly facility updates and quarterly "state of the business" communications.

Employers should also communicate policy and procedure changes to employees before they occur and give them a chance to provide feedback on the proposed changes. Finally, employers should maintain an "open door policy," hold periodic roundtable group meetings, implement a suggestion box and even distribute an annual "how are we doing" survey.

Develop Union-Avoidance Materials With Counsel

Experienced labor counsel can help employers with their preparation to remain union-free, but the availability of highly-qualified labor attorneys to prepare and develop union-avoidance materials will likely be diminished substantially if the DOL implements its revisions to the persuader rules' advice exception.

Similarly, if the revised election rules become final, they will shorten the time in which representation elections are held so employers might not have the necessary time during an organizing drive to prepare thoughtful communications to employees regarding the facts about organized labor.

Accordingly, employers should work with labor counsel now to develop materials that can be used on short notice during an organizing drive, like union campaign calendars and communications that provide factual and beneficial information about collective bargaining, strikes, union plant closures, the payment of dues and all of the "extras" employees receive from the company without a union.

Conclusion

When all is said and done, this year could prove to be a very good one for unions. Employers concerned about remaining union-free should implement a practical employee relations strategy now, before additional regulations and/or case law significantly changes the legal landscape in favor of organized labor.

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