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NLRB'S RESCUE PLAN FOR UNIONS – PART ONE

EMPLOYERS REQUIRED TO POST NOTICE OF EMPLOYEES' RIGHTS TO UNIONIZE

Under a new rule published by the National Labor Relations Board (NLRB or Board), most private sector employers will be required to post a workplace notice of employee rights under the National Labor Relations Act (NLRA) starting November 14, 2011. In essence, the notice informs employees that they have the right to form and join unions, bargain collectively with their employers, and to engage in other protected concerted activities, or to refrain from engaging in any of those activities. Specific rights are outlined, as well as prohibited conduct by employers and unions.

The 11" x 17" poster will be provided at no charge by regional NLRB offices or can be downloaded from the NLRB's website beginning November 1, 2011. Translated versions also will be available, and must be posted at workplaces where at least 20 percent of employees are not proficient in English. Employers also must post the notice on an internet or intranet site if personnel rules and policies customarily are posted there. The notice is similar in content and design to the one employers who are federal contractors are required to post under a rule published by the U.S. Department of Labor (DOL) last year. Under the NLRB's new posting rule, employers who post the DOL notice required for federal contractors will be considered to be in compliance with the new NLRB posting rule.

The United States government and wholly-owned government corporations, federal reserve banks, states and their political subdivisions, the U.S. Postal Service, and agricultural, railroad, and airline employers are exempt from the new posting requirement. So are small employers that don't meet the annual volume of business thresholds required for NLRB jurisdiction. The threshold for retail employers is a gross annual volume of business of $500,000 or more. For non-retail employers, the Board generally has jurisdiction if the employer's annual inflow or outflow to other states is at least $50,000.

The NLRB will not inspect employers for compliance. However, non-compliance will be considered an unfair labor practice, and employees may file unfair labor practice charges against employers who do not post the notice. Employers found not to be in compliance will be ordered to cease and desist from the unlawful conduct and to post the notice as well as a remedial notice. There are no fines or penalties.

The new NLRB posting rule is the latest, and likely not the last, in a series of union-friendly regulatory actions taken, at least in part, due to the failure of the so-called Employee Free Choice Act (EFCA) to pass Congress. EFCA would have made it easier for unions to organize employers by bypassing the NLRB secret ballot election process. Faced with dwindling membership numbers, Organized Labor began pressuring the Administration, after the failure of EFCA, to implement as much as it could of what EFCA would have provided through regulatory action. The first step was the DOL's requirement that federal contractors notify their employers of their rights to unionize. The second step is the new NLRB rule, which expands the posting requirement to most other private sector employers. Next up are the NLRB's proposed new representation election rules, which are designed to give unions a leg up and to limit the ability of employers to oppose union election campaigns. Among other things, the proposed new election rules, which will be the subject of Part II of this series, would mandate so-called "quickie" elections and leave employers very little time to mount

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an effective opposition campaign. The new election rules also would give unions easier access to employees by requiring employers to include employee phone numbers and e-mail addresses on eligible voter lists provided to union organizers. The current rules require employers to disclose only names and home addresses of their employees.

In recent years, union organizing activity has slacked off considerably as unions have awaited the fate of EFCA and lobbied for regulations more favorable to their organizing efforts and more detrimental to employers. That could be about to change given these new pro-union developments. So now is the time to begin preparing and training your supervisors and managers to deal with the likely onslaught of union organizing activity to come. Your management team needs to be prepared to recognize the warning signs of union organizing and to address effectively and lawfully employee concerns about what having a union might mean for them and your workplace. Even a slight misstep by a supervisor could lead to an unfair labor practice charge. Therefore, employers are encouraged to contact their labor attorneys to begin preparing an effective program to reduce their risks of being targeted for unionization and to deal effectively with organizing when and if it occurs. You cannot afford to wait until after organizing starts to take action to protect your business. The unions are counting on you to make that mistake because by then, under the new rules of the game, it may be too late.

—*Sidney F. Lewis, V and H. Mark Adams*

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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