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Labor Alert Update: NLRB Posting of Employee Rights Requirement

Recently, the National Labor Relations Board (NLRB) promulgated its final rule that will require many private-sector employers to post a notice describing employees' rights under the National Labor Relations Act (NLRA). For more information regarding this final rule, please refer to Honigman's earlier Labor Alert regarding the matter by [clicking here](#).

Although the final rule was originally to take effect on November 14, 2011, the NLRB's final rule has drawn heavy criticism by business organizations. As a result, the NLRB recently delayed implementation until January 31, 2012 in order to allow for "enhanced education and outreach" to small and medium sized businesses.

The delay further takes into account three separate lawsuits that have been filed seeking to enjoin the NLRB from enforcing the posting requirement. These suits seek a declaration that the NLRB's final rule is invalid under the Administrative Procedure Act, which is the act governing the ability of federal agencies, such as the NLRB, to issue rules and regulations interpreting their statutory authority. All three suits particularly take exception to the final rule's: (1) general posting requirement, (2) creation of employer liability for failing to post, and (3) extension of the NLRA's six-month statute of limitations for an employee to bring an unfair labor practice charge where an employer fails to post. The pending lawsuits include:

- *Nat'l Ass'n of Mfrs. v. NLRB*, No. 11-cv-01629-ABJ (D.D.C. Sept. 8, 2011). Filed by the National Association of Manufacturers in the United States District Court for the District of Columbia.
- *Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. NLRB*, No. 11-cv-1683 (D.D.C. Sept. 16, 2011). Filed by the National Right to Work Legal Defense and Education Foundation, the National Federation of Independent Business, and two small businesses in the United States District Court for the District of Columbia. This lawsuit further argues a violation of the plaintiffs' Constitutional right to free speech – specifically their right to refrain from speaking – by requiring them to post the notice. Both this lawsuit and the above lawsuit have been consolidated for a hearing to take place on December 19, 2011.

- *Chamber of Commerce v. NLRB*, No. 2:11-cv-02516-PMD (D.S.C. Sept. 19, 2011). Filed by the Chamber of Commerce of the United States of America and the South Carolina Chamber of Commerce in the United States District Court for the District of South Carolina. This lawsuit also argues the final rule constitutes a violation of the plaintiffs' right to free speech under the First Amendment.

These lawsuits come amid increasing pressure by Republican lawmakers to limit the NLRB's recent proactive agenda. In fact, a House bill introduced by Rep. John Kline (R-Minn.) on October 5, 2011, titled the Workforce Democracy and Fairness Act, would revise union election procedures under the NLRA, and further would block recent proposed rule changes by the NLRB that aim to (1) increase the amount of employee information provided to unions, and (2) speed-up the union election process.

Unless any of the above-referenced lawsuits are successful in enjoining the NLRB from enforcing its final rule, employers will be required to post the notice of employee rights beginning January 31, 2012.

The labor and employment attorneys at Honigman will stay abreast of these cases as they unfold. A future update to this alert will be issued indicating what, if anything, will be required of employers starting on January 31, 2012.