THE TKD

LABOR & EMPLOYMENT ALERT

IMPORTANT!
NEW NOTICE POSTING REQUIREMENT

AS OF NOVEMBER 14, 2011 THE NATIONAL LABOR RELATIONS BOARD WILL REQUIRE EMPLOYERS TO POST A NOTICE ALERTING EMPLOYEES TO THE RIGHTS AND PROTECTIONS AVAILABLE UNDER THE NATIONAL LABOR RELATIONS ACT

Effective November 14, 2011, employers covered by the National Labor Relations Act ("the Act"), the vast majority of businesses, will be required to post a notice in the workplace informing their employees of the rights and protections available to employees under the Act. This posting requirement comes to you from the National Labor Relations Board ("Board").

Employers whose employees are not unionized are unlikely to have ever dealt with the Board. This new posting requirement may change that, as the requirement applies to non-unionized employers as well.

The notice will inform employees of their right to form or join a labor union, to bargain collectively, or to refrain from doing so, all without fear of reprisal by the employer. Most significantly, the notice will also alert employees of their right to act collectively for purposes of improving wages and working conditions. It is this last point that may prove most problematic to employers, because the notice will inform employees that, even without a labor union, they can enjoy the protections of the Act if they approach their employer as a group – such as to seek pay increases or to complain about working conditions.

Examples of this that have hit the mainstream media are cases where an employee has been terminated for posting negative comments about his/her employer on a Facebook page, and other employees offer supporting posts in response. The Board has held in these cases that the posting of negative comments was the functional equivalent of "water cooler" chat and, therefore, was a protected activity. The employees were required to be reinstated with full back pay and benefits. Where back pay is awarded, the Board now requires payment of interest compounded daily.

While a discussion of the aggressive approach now being taken by the Board is beyond the scope of this writing, our labor and employment law group anticipates an increase in litigation before the Board, prompted by complaints initiated by non-unionized employees. It should be kept in mind that an employee can file an unfair labor practice charge with the Board at no cost and without an attorney. The Board acts on behalf of the employee to enforce the Act.

Copies of the notice that must be posted are to be printed on 11x17-inch paper and can be printed in black and white. Employers also can use a commercial poster service as long as the notice maintains the same size, color, and content. The Board says that sample copies of the notice will be available on its web site by November 1, 2011.

The notice must be posted in conspicuous places, including all places where notices to employees are customarily posted. The employer must take reasonable steps to ensure that the notices are not altered, defaced, covered by any other material or otherwise rendered unreadable.

Employers who maintain Internet or Intranet sites where they customarily post or communicate personnel rules or policies to employees must post the notice electronically as well. The employer can either post the actual notice or provide a link to the notice on the Board's website (www.nlrb.gov).

Employers also must provide non-English-speaking employees with a language-specific copy of the notice if that employee group constitutes as least 20 percent of the employer's workforce. Employers can meet this obligation by providing the notice to the individual employees or posting the notice in the required languages. Employers can obtain translated notices from the Board and can request that the

Board translate the notice into languages not already available.

In addition to remedies and penalties for violation of the Act itself, serious repercussions are possible simply by failing to post the notice. Among other things, failing to post the notice could lead to a tolling (suspension) of the six-month statute of limitations for the filing of unfair labor practice charges, and could be used as evidence of "unlawful motive" in litigation brought by the Board against employers.
Government contractors and subcontractors who are already posting the Department of Labor notice required by Executive Order 13496 do not have post the notice.

Employers are well advised to recognize that the collective actions of their employees pose a new cause for concern under the Act, and to seek legal counsel for guidance.

If you have any questions regarding this issue, please contact Laurent Drogin (Ldrogin@tarterkrinsky.com), Richard Steer (Rsteer@tarterkrinsky.com) or Eric Su (Esu@tarterkrinsky.com) of our Labor and Employment Practice Group.

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