

## NLRB retreat on aggressive posting rule favors business

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Guest Column  
William E. O'Gara  
1/27/14

In a surprise announcement, the National Labor Relations Board walked away from its high-profile effort to mandate that private employers display a poster summarizing the rights of employees to engage in union activities.

The rule had been announced with great fanfare by the NLRB in August 2011 and applied to approximately 6 million employers and required the poster be displayed by the employer in a conspicuous place.

While the requirement that an employer post information is hardly novel, the content of the NLRB's mandated poster was controversial because it provided an incomplete recitation of employee rights. The poster advised employees that they had the right to join a union, strike, picket and engage in other union activities.

Notably absent from the poster was the fact that employees also have the legal right not to engage in these activities and to even decertify a union if they are dissatisfied with its representation.

Under the rule, the failure to post would cause the employer to be in violation of law and subject to enforcement action by the NLRB. The failure would also be "considered evidence of unlawful motive."

For employers, the poster was Exhibit A that the NLRB had abandoned its traditional role of arbiter of labor disputes and had become a partisan with an agenda to support organized labor. The NLRB dates back to 1933, and had historically played the role of a referee for collective bargaining disputes.

The tasks it performs run the gamut from conducting secret-ballot elections to investigating charges that an employer has terminated an employee for union activities. While not loved by employers, the NLRB was considered to be relatively evenhanded.

The poster requirement was viewed as particularly objectionable, because the NLRB was essentially requiring private employers to provide an incomplete and one-sided summary of labor rights. This mandate, combined with the NLRB's recent efforts to require "quickie" representation elections and new board members with pro-union backgrounds, had generated suspicion on the part of the business community that the NLRB is biased in favor of labor.

The rule generated an immediate response from the business community and several lawsuits. Since 2011, two federal appeals courts ruled against the NLRB, reasoning that the requirement violated the employers' First Amendment rights because it essentially compelled them to post a one-sided and positive view of unionization.

The courts' willingness to accept the argument that the poster violated the employer's First Amendment rights was linked to the fact that the poster, unlike the poster in your business related to minimum wage or workers' compensation, is an incomplete summary of the law.

The other reason cited for striking down the rule was that Congress never granted the NLRB the legal authority to impose the mandate. Apparently convinced that it would lose before the United States Supreme Court, the NLRB decided earlier this month to give up.

For Rhode Island employers, the NLRB's retreat on this issue takes a very small issue off the table. They still must deal immediately with the recent expansion of Temporary Disability Insurance, new biweekly-payroll regulations, health care reform and a myriad of new issues that will surely surface in 2014. •

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*William E. O'Gara is a partner and founding member of Pannone Lopes Devereaux & West LLC.*