

NLRB PRO UNION POSTING REQUIREMENT POSTPONED

On December 23, 2011, the National Labor Relations Board (the "Board") postponed until *April 30, 2012*, the effective date of its employee rights notice-posting rule.

This new posting requirement has elicited strong opposition from many business groups, who have all filed lawsuits against the Board challenging the validity of the Board's posting requirement. The NLRB's most recent postponement responds to a recommendation made by the federal court judge hearing the challenge to the poster requirement.

Unless the effective date of the new rule is further delayed or the rule itself is overturned by the court, most private sector employers may soon be required to post the 11-by-17 inch notice, describing employee rights under the National Labor Relations Act ("NLRA"). The rule applies regardless of whether or not the workforce is unionized or the employer is a federal contractor. The rule provides that a federal contractor who is in compliance with similar Department of Labor's ("DOL") posting requirements will be deemed in compliance with the Board's notice posting rule.

The poster explains employees' rights to "organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activities." It also provides a comprehensive list of employer and union conduct prohibited by the NLRA. More precisely, the notice identifies many types of conduct *the Board* considers prohibited, although not necessarily so stated in the act. The notice advises employees to contact the Board if they believe their rights have been violated.

The new rule, in effect, requires employers to adopt, as standard practice, the posting of notices informing employees of their rights under the NLRA and prohibited employer actions. Previously, such a posting was only required as a sanction to *remedy* unfair labor practice charges.

The notice must be posted in a conspicuous place, where other notifications of workplace rights and employer rules and policies are posted. Employers also must publish a link to the notice on any internal or external website where other personnel policies or workplace notices are posted.

Failure to post the notice may constitute an unfair labor practice and be grounds for tolling the 6-month statute of limitations for filing an unfair labor practice charge against the employer. However, the tolling of the statute of limitations will not be automatic. First, tolling only applies to unfair labor practice charges filed by an individual, and not those filed by a union. Second, if the employer proves the employee had actual or constructive knowledge that the alleged conduct was unlawful, there will be no tolling.

If an employer's failure to post the notice is knowing and willful, the non-compliance can be used as evidence of unlawful motive in an unfair labor practice case alleging other violations of the NLRA. In such a case, the Board may order the employer to cease and desist, to post the notice and to also post a remedial notice.

The posters can be obtained from the Board's headquarters, or the Region 24 office in Puerto Rico. In addition, English and Spanish versions of

the poster can be downloaded from the Board's website at <https://www.nlr.gov/poster>. Employers will have two formatting options: they can download a one-page 11 x 17 inch version or a two-page 8½ x 11 inch version, which must be printed in landscape format and taped together to form the poster.

Employers can reproduce and use copies of the Board's official poster. However, the copies must duplicate the official poster in size, content, format, and size and style of typeface. Employers may also use commercial services to provide a poster consolidating the Board's notice with other federally mandated labor and employment notices, so long as the consolidation does not alter the size, content, format, or size and style of typeface of the Board's poster.

The poster must be posted in English. However, when 20% or more of the workforce at a site is not proficient in English, the employer must also post the notice in the language(s) the employees speak. The rule does not define "proficient," nor does it provide guidance on determining the level of required proficiency. Further, if an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must provide the notice in each such language. How should this be handled in Puerto Rico where Spanish is the predominate language of the general population, but worksites have significantly different levels of English proficiency?

In our opinion, if the rule is ultimately sustained, it would appear employers in Puerto Rico probably will satisfy the new mandate by only posting the Spanish version of the poster. However, if over 20% of the non-supervisory workforce is not proficient in Spanish, then another poster, in the "minority" language, will need to be posted. Curiously, said language spoken by a minority in the Puerto Rico workforce generally will be English!

What should employers do? O'NEILL & BORGES recommends that, except for federal contractors who are already subject to a similar posting requirement, employers affected by the new rule closely monitor the pending litigation.

Although affected employers may even commence locating or purchasing copies of the posters, given the potential impact of this rule, we do not recommend the actual posting, until the validity of the rule is settled. As the April 30, 2012 deadline approaches, if the issue remains unresolved, an individualized assessment with knowledgeable legal counsel should be pursued. O'NEILL & BORGES can assist you in this assessment.

If and when a decision to post the notice is made, the employer should develop a communication and training program for supervisors. The program needs to explain the reason for the posting; what the text actually means; explain the employer's view on unionization and the benefits of a "union-free" work environment within permissible legal parameters; and provide guidance on how to respond to any questions from employees.

Administrative Exemption Remains Hot Topic

The U.S. Court of Appeals for the First Circuit recently issued a decision, finding that sales managers for a hotel banquet facility were not entitled to overtime pay under the Fair Labor Standards Act's ("FLSA") administrative employee exemption. The court reached this conclusion even though the banquet sales managers were bound by a price schedule established by their employer and therefore had virtually no authority to make financial decisions.

Hines v. State Room, Inc., 2011 U.S. App. LEXIS 23680 (1st Cir. 2011).

The First Circuit determined that the plaintiffs' job functions – which included working with clients to design customized weddings and other events and securing contracts for those events – were properly considered administrative because they were ancillary

to the employer's principal business function of actually providing banquet services. The court also found the job involved the exercise of independent judgment and discretion because acting as the face of the company and "engaging potential clients and assisting them in selecting from various options from the employers' offerings" required "invention, imagination and talent."

The First Circuit's approach to the exemption issue seems to distance the court from the more restrictive position adopted in 2010 by the U.S. Department of Labor and some courts, which contend that performing sales work places an employee on the non-exempt side of the so called "production vs. administrative" or "ancillary" dichotomy of the administrative exemption.

This decision promises to support the administrative employee exempt classification, even when a position has a sales-related component. Further, the more flexible analysis of the "discretion and independent judgment" requirement for application of the administrative exemption, should help to shield employers operating under the First Circuit's jurisdiction from the DOL's more restrictive application of the law.

Hines further serves to remind employers that the U. S. Supreme Court is expected to soon "weigh in" on the interpretation of the administrative exemption in the context of positions with sales or promotional components, while addressing when a pharmaceutical sales representative may qualify as exempt under the FLSA. *Christopher v. SmithKline Beecham Corp.*, 2011 U.S. LEXIS 8505.

While the *Christopher* case may ultimately only shed light as to the "outside sales" exemption, a restrictive interpretation of said exemption may then require the Supreme Court to examine the lower courts' alternate basis for exemption, under the administrative employee category.

In sum, these developments highlight that the boundaries that serve to identify exempt and non-exempt employees are not always well defined. In fact, they may move, from time to time, based on policy changes within the enforcement agency (here the DOL) and the courts. Accordingly, employers are

well advised to monitor these developments and periodically audit the positions that have been classified as exempt. O'NEILL & BORGES recommends such audits be conducted under the direction of appropriate legal counsel.

Amnesty For Workers Compensation Debts

The Governor of Puerto Rico has signed Senate Bill 2378, which permits employers to **obtain a 50% discount** upon payment of the entire outstanding debt with the Corporation of the State Insurance Fund ("CSIF"), corresponding to debts or events arising *prior to* fiscal year 2010-2011. The discount will apply to the original debt, interest, penalties and surcharges. Apart from debts arising from unpaid premiums, the dischargeable debt will also include those final debts arising from accidents when the employer was uninsured.

This "debt payment incentive program" will enter into effect once the CSIF issues an Administrative Order implementing its provisions. The CSIF has indicated it expects to issue the Order soon. Upon its issuance, employers will only have a *6 month window of opportunity* to request and pay the discounted invoices.

In order to benefit from this "debt payment incentive program" employers will need to comply with several requirements, the more significant of which are the following:

- The employer must have filed the annual payroll statement;
- The employer must have paid the premiums for the fiscal years, 2011-2012 and 2010-2011, and any other debt with the CSIF corresponding to these fiscal years;
- If the employer previously has not obtained the mandatory workers comp insurance, it must formalize a policy and pay all premiums for the current and prior fiscal year and pay all debts arising from such two years of non-payment.

- *The employer must pay 50% of the entire amount of the remaining debt, up to a maximum of 15 years.* No payment plans will be authorized. However, if the employer is presently on a payment plan, the incentive program can be used to satisfy the outstanding balance.
- The request must be accompanied by certified statements of all outstanding debts.
- The debt to be discharged must not have been previously established or confirmed by a court or agency final judgment or resolution. Unfortunately, the discount program does not extend to such debts.

Finally, the law provides that, with regard to employers who make use of this debt payment incentive program, the CSIF will write off from its records any outstanding debt over 15 years old.

LEGISLATIVE WATCH

Are employers required to provide employees written notice of the reasons for their discharge?- The answer to this question will be “yes,” if the Puerto Rico Legislature approves House Bill 1491.

This Bill would amend Puerto Rico Wrongful Discharge Act (Law No. 80 of May 30, 1976, as amended), to deem *unjustified* the discharge of any covered employee if the employer fails to provide a written explanation of the reasons justifying the discharge, upon receiving such a request from the employee, unless the employer pays the statutory discharge indemnity.

Further, the failure to provide the requested written explanation at the moment of the discharge triggers an automatic right to the Law No. 80 discharge indemnity, plus an additional amount equal to said indemnity, up to a maximum of \$2,000.

House Bill 1491 had remained dormant until it was surprisingly recommended by the House

Committees for Labor Affairs, Judiciary and Ethics in August 2011. Without holding public hearings, the bill was unanimously approved by the House on October 10, 2011. Thereafter, again without public hearings, on November 10, 2011 the Senate Labor Committee recommended its approval.

Several business groups have rallied against the Senate approval of this bill. Should you wish to monitor, participate in or otherwise support this effort, you may contact O'NEILL & BORGES.

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Note: Because of the general nature of this newsletter, nothing herein should be considered as legal advice or a legal opinion. For further information, please contact our labor and employment lawyers.

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