COALITION FOR A
DEMOCRATIC WORKPLACE

Comments on the Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act

Submitted by

The Coalition for a Democratic Workplace

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I. INTRODUCTION

On December 22, 2010, the National Labor Relations Board ("NLRB" or the "Board") published in the Federal Register "Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act." 75 Fed. Reg. 80,410 (Dec. 22, 2010). The proposed rules would, for the first time in the seventy-five year history of the National Labor Relations Act ("NLRA" or the "Act"), require all employers covered by the Act to post notices describing employees' rights under the Act. This is a massive and unprecedented assertion of the Board's jurisdiction in millions of workplaces where employees have not elected to be represented by a union and where there is no allegation of any unfair labor practice. The Board acknowledges that nearly six million businesses will be affected by the proposed rules,[1] yet there were a total of only 23,381 unfair labor practice charges and 3,402 representation petitions filed with the NLRB in 2010.[2] Even if it is assumed that each unfair labor practice charge related to a different employer, the Board's statutory jurisdiction to remedy unfair labor practices was invoked at only 0.4% of the approximately six million businesses covered by the Act (23,381 ÷ 6,000,000 = 0.004). And as for representation cases, the Board's jurisdiction extended to just 0.05% of American businesses in 2010 (3,204 ÷ 6,000,000 = 0.0005).

The proposed rules would, in the absence of any allegation of an unfair labor practice or representation petition, impose a notice-posting obligation on *the other 99.6% of private-sector employers* covered by the NLRA. In addition, the proposed rules would impose significant penalties on employers who fail to post this notice, including a finding that a failure to post the notice will constitute an independent unfair labor practice and result in an indefinite tolling of the

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1 75 Fed. Reg. 80,415.

2 National Labor Relations Board, Office of the General Counsel, *Memorandum GC 11-03* at 2 (Jan. 10, 2011), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2011/GC%2011-03%20Summary%20of%20Operations%20FY%2010.pdf.

statute of limitations for filing any other unfair labor practice charge.[3] The Board simply does not have authority to impose these obligations and penalties against an employer when there has been no finding (or even an allegation) of an unfair labor practice.

II. THE INTERESTS OF THE COALITION FOR A DEMOCRATIC WORKPLACE

The Coalition for a Democratic Workplace ("CDW" or the "Coalition") represents millions of businesses of all sizes from every industry and every region of the country. Its membership includes hundreds of employer associations as well as individual employers and other organizations. As representatives of employers that are subject to the jurisdiction of the National Labor Relations Board, the Coalition has a profound interest in the Board's administration of the Act within the confines of its statutory authority.

III. THE COALITION'S COMMENTS ON THE PROPOSED RULES

A. CONGRESS DID NOT AUTHORIZE THE BOARD TO REQUIRE A WORKPLACE NOTICE IN THE ABSENCE OF A REPRESENTATION PETITION OR UNFAIR LABOR PRACTICE CHARGE.

The Board is without statutory authority to require up to six million private-sector businesses, *regardless of whether they have committed an unfair labor practice*, to post a workplace notice detailing employees' rights under the NLRA. The Board cites Section 6 of the NLRA as authority for the proposed rules, but Section 6 only authorizes the Board to promulgate "rules and regulations *as may be necessary* to carry out the provisions of this Act." 29 U.S.C. § 156 (emphasis added). Of course, the Board's authority to administer the Act begins only when a representation petition or unfair labor practice charge is filed.[4] Section 6 says nothing about

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[3] 75 Fed.Reg. 80,414. The proposed rules also state that an employer's failure to post the notice could be used as evidence of an unlawful, anti-union motive in adjudicating subsequent unfair labor practice allegations. *Id.* at 80,414-15.

[4] *See* 29 U.S.C. § 159(c)(1) ("Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board…."); 29 U.S.C. § 160(b) ("Whenever it

asserting jurisdiction against an employer in the absence of a representation petition or unfair labor practice charge.

The Board recognizes that the NLRA "is almost unique among major Federal labor laws in not including an express statutory provision requiring employers routinely to post notices at their workplaces informing employees of their statutory rights."[5] The specific statutory authority in the Railway Labor Act,[6] Title VII,[7] the Age Discrimination in Employment Act,[8] the Occupational Safety and Health Act,[9] the Americans with Disabilities Act,[10] the Family and

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is charged that any person has engaged in or is engaging in any such unfair labor practice…."). The Board's General Counsel clearly recognizes this limitation on the agency's enforcement authority: "The NLRB's processes can be invoked only by the filing of an unfair labor practice charge or a representation petition by a member of the public. The Agency has no authority to initiate proceedings on its own." National Labor Relations Board, Office of the General Counsel, *Memorandum GC 11-03* at 2 (Jan. 10, 2011), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2011/ GC%2011-03%20Summary%20of%20Operations%20FY%2010.pdf.

5 75 Fed. Reg. 80,415.

6 45 U.S.C. § 152 Eighth ("Every carrier shall notify its employees by printed notices . . . that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter . . . .").

7 42 U.S.C. § 2000e-10 ("Every employer . . . shall post and keep posted in conspicuous places upon its premises where notices to employees . . . are customarily posted a notice to be prepared or approved by the Commission . . . .").

8 29 U.S.C. § 627 ("Every employer . . . shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission . . . .").

9 29 U.S.C. § 657(c) ("The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this chapter . . . .").

10 42 U.S.C. § 12115 ("Every employer . . . shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter . . . .").

Medical Leave Act,[11] and the Uniformed Service Employment and Reemployment Rights Act[12] stands in sharp contrast to the general rulemaking authority in Section 6 of the NLRA.[13]

The fact that Congress did not include a similarly specific notice-posting requirement in the NLRA is a strong indication that the NLRB does not have authority to require such a notice by regulation. Indeed, in 1934, just one year before the NLRA was enacted, Congress amended the Railway Labor Act ("RLA") to include an express notice posting requirement. 45 U.S.C. § 152 Eighth; Pub. L. No. 73-442, 48 Stat. 1185, 1188 (1934). Even though the drafters of the NLRA drew heavily from the RLA,[14] they choose not to include a similar notice posting provision in the NLRA, either in 1935 or in any of the subsequent amendments to the Act. Therefore, if a general workplace notice is to be required under the NLRA, the Act must be amended in a manner similar to the RLA and the host of other federal labor and employment laws cited above.

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11 29 U.S.C. § 2619(a) ("Each employer shall post and keep posted . . . a notice, to be prepared or approved by the Secretary . . . .").

12 38 U.S.C. § 4334(a) ("Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter.").

13 Although the Fair Labor Standards Act ("FLSA") does not contain a specific statutory provision on workplace postings, the Department of Labor invoked the recordkeeping provisions in Section 11 of the FLSA, 29 U.S.C. § 211(c), which compel employers to "make, keep, and preserve such records" and to "make such reports" as required by the Department of Labor. See 27 Fed. Reg. 525 (Jan. 18, 1962). No similar recordkeeping requirement exists in the NLRA.

14 *See NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 266 (1938) ("Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was 'an amplification and further clarification of the principles' of the latter." (quoting Report of the House Committee on Labor, H.R. 1147, 74th Cong., 1st Sess., p. 3)).

B. THE PROPOSED RULES CONFLICT WITH LONGSTANDING BOARD PRECEDENT CONCERNING REMEDIAL NOTICES.

The notice that would be required in the proposed rules would far exceed the scope of the notice required by the Board when there is a finding of an actual unfair labor practice. This notice would be the same notice described in the Department of Labor's final rule applicable to federal contractors, 29 C.F.R. Part 471, which contains a "detailed description of employee rights derived from Board and court decisions implementing those rights."[15] The detailed description of rights in the Department of Labor notice far exceeds the short and plain description of rights contained in the Board's remedial notices – a description that the Board found was sufficient to "clearly and effectively inform[] employees of their rights under the Act."[16] The Department of Labor notice also exceeds what is required to be posted in the pre-election context.

The proposed rules acknowledge that, unlike the Department of Labor notice, the pre-election and remedial notices contain "only summary descriptions of employee rights" yet argue that a more detailed and pointed description is necessary in the absence of a representation petition or unfair labor practice finding.[17] The proposed rules assert that "[i]n the pre-election context, however, at least one union is on the scene and presumably will enlighten employees about their NLRA rights to some extent."[18] And in the unfair labor practice context, the proposed rules assert that "the purpose of the remedial notices is chiefly to inform employees of

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15 75 Fed.Reg. 80,412.

16 *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 177 (2001). In addition, the Board in *Ishikawa Gasket* approved, for use in remedial notices, a simple and neutral description of the functions of the Board, the location of the applicable Regional Office, and a link to the Board's website. *Id.*

17 75 Fed.Reg. 80,412 n.19.

18 *Id.*

what employers and/or unions have done to violate their NLRA rights, and less to inform them of their rights in general."[19]

These arguments miss the critical point. There is no reason to believe that employees need a reminder from their employer about the existence of the NLRA or their right to join a union. The NLRA is a law that has existed for over 75 years. Information on the NLRA is freely accessible through the Board's own website, union websites, and the websites of numerous other organizations. While it is true that union density in the private sector economy has declined over time, certainly the Board should not be supporting partisan efforts to reverse that decline. The Board has historically, and wisely, remained neutral with respect to employee and union-lead efforts to organize American businesses. Even a seemingly neutral Board document such as a workplace notice can be used to mislead employees into believing that the Board favors a particular party in an organizing campaign.[20] For this reason, the Board in 1993 modified its pre-election notice to "proclaim[] the Board's neutrality in the election process" and, more recently, revised the sample ballot that appears on its pre-election notice in order to "accomplish the principal objective of ensuring that employees clearly understand that the Board does not endorse any choice in elections."[21]

In the absence of an election petition or a finding of an unfair labor practice, the Board simply does not have authority to require employers to post *any* notice, and certainly not a notice that is far more detailed and pointed than the notices required when the Board's jurisdiction is properly invoked. Furthermore, unlike the proposed notice, which would be permanently

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19 *Id.*

20 *See Ryder Memorial Hospital*, 351 NLRB 214, 215 (2007) (finding that "parties have continued to use unattributed altered sample ballots as campaign propaganda").

21 *See id.* at 215 & 216.

mandated at all workplaces regardless of whether there has been any allegation or finding of an unfair labor practice, the Board's remedial notice postings are traditionally limited to the specific facility or location where unfair labor practices actually occurred, and only for 60 days.[22] The Board has been careful not to extend these notice posting requirements to other employer sites or locations. In fact, notice posting requirements at multiple facilities, or employer-wide, have only been issued based on a specific finding of "a pattern or practice of unlawful conduct."[23] Otherwise, broad notice requirements have been found simply "inappropriate."[24]

C. THE PROPOSED PENALTY OF TOLLING THE STATUTE OF LIMITATIONS CONFLICTS WITH SECTION 10(B) OF THE ACT.

The proposed rules also exceed the scope of the Board's statutory authority insofar as it would toll the statute of limitations for filing an unfair labor practice charge as a penalty for failure to post the notice.[25] Section 10(b) is quite clear – "no complaint shall issue based upon any unfair labor practice occurring more than sixth months prior to the filing of the charge with the Board . . . ."[26] The only exception contemplated in the statute is for delay caused by an employee's service in the armed forces. The statute makes no reference to any other exception that would toll the statute of limitations.

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22 *Consol. Edison Co. of New York, Inc.*, 323 NLRB 910, 911-12 (1997).

23 *Id.*

24 *Rose-Terminix Exterminator Co.*, 315 NLRB 1283, 1289 (1995). *See also Hickmott Foods, Inc.*, 242 NLRB 1357, 1357 (1979) (finding that broad notices are "warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights").

25 75 Fed. Reg. 80,414.

26 29 U.S.C. § 160(b).

The Board has crafted an administrative exception to the six-month statute of limitations based on "fraudulent concealment" of the statutory violations at issue.[27] This exception accounts for the potential that a charging party may lack knowledge *of the facts* constituting a violation based on the employer's or union's prevarication or concealment of the unfair labor practice.[28] The limited exception, however, cannot be extended to a situation where an employee lacks knowledge *about the NLRA itself,* which has nothing to do with the employer's behavior. Basic ignorance of the law, even after an employee has had six months after the alleged violation in which to seek advice, learn about the law, and file an unfair labor practice charge with the Board, is not reason to toll the statute of limitations. The purpose of the statute of limitations is to "bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused."[29] Section 10(b) "reflect[ed] a policy judgment that it is better for these relationships (and for industrial peace in general) to bring the disputes to a head in fairly short order rather than to have an extended period in which to vindicate a statutory right."[30]

Thus, the proposed remedy of tolling the statute of limitations is inconsistent with the terms of Section 10(b) and the policy judgments made by Congress in establishing the six-month limitations period.

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27 *See, e.g.*, *Don Lee Distributor, Inc.*, 322 NLRB 470, 471 (1996); *Danzansky-Goldberg Mem. Chapels, Inc.*, 264 NLRB 840, 843 (1982).

28 *Kanakis*, 293 NLRB at 438.

29 *Kanakis Co., Inc.*, 293 NLRB 435, 438 (1989) (citing to the Taft-Hartley Act's legislative history).

30 *Id.*

IV. CONCLUSION

For all of the foregoing reasons, the Coalition respectfully submits that the Board does not have authority to issue the proposed rules. The NLRB is a neutral administrative agency that lacks the statutory power to require up to six million businesses to post a new – and apparently permanent – workplace notice in the absence of a representation petition or unfair labor practice violation.

Respectfully submitted,

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