

**Matis, Jennifer A.**

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**From:** Flynn, Terence F.  
**Sent:** Tuesday, August 30, 2011 2:09 PM  
**To:** 'Peter Schaumber'  
**Subject:** RE: NoticePosting8-29.doc

Woops! That first sentence should be "recently implemented" rule not "recently proposed."

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**From:** Peter Schaumber [mailto:peter@schaumber.com]  
**Sent:** Tuesday, August 30, 2011 12:24 PM  
**To:** Flynn, Terence F.  
**Subject:** RE: NoticePosting8-29.doc

It is terrific. Thank you!

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**From:** Flynn, Terence F. [mailto:Terence.Flynn@nrb.gov]  
**Sent:** Tuesday, August 30, 2011 12:07 PM  
**To:** 'Peter Schaumber'  
**Subject:** NoticePosting8-29.doc

I have not spell checked. Good luck!

# The National Labor Relations Board Issues an Unlawful Rule

By Peter Schaumber

The National Labor Relations Board's (NLRB) recently implemented rule requiring virtually every employer in America to post a new notice describing employee rights under the National Labor Relations Act (Act) is reflective of two disturbing trends at the NLRB: first, a myopic and partisan focus on increasing unionization by whatever means, including bold exercises of authority not within the Agency's statutory mandate, and second, a concomitant disregard of protected employee rights to refrain from union activity.

The biggest regulatory salvo was launched a few weeks ago, when, seeking to achieve through rulemaking what the Congress declined to enact in EFCA, President Obama's political appointees at the Agency proposed to radically shorten the time it takes to conduct secret ballot elections for union representation. The proposed rule would limit, if not eviscerate, an employer's right to express its views on unionization to its employees, and would suppress employees' right to make an informed choice. Now, the same political appointees have again usurped Congressional authority and have claimed the regulatory power to create new unfair labor practices and to compel employers – an estimated 6 million in all – to post a Board-mandated notice in every workplace. Worse, the notice is a one-sided affair, crafted with a decidedly pro-union focus. So after proposing to cut off an employee's right to receive information from his or employer on unionization, the Board now proposes to advance that right with a partisan notice.

Under the NLRB's new rule, if the Board finds that the employer's failure to post was "knowing and willful," it may be deemed "evidence of unlawful motive." In other words, the absence of a notice posted in a prominent place constitutes presumptive evidence of an unfair labor practice, potentially converting legitimate management activity into a violation of federal law. Take for example an employer who disciplines a worker for repeatedly violating a rule. If the worker claims the discipline was imposed because he or she was a union member, and if the employer failed to post the notice, the Board can find a discriminatory motive for the discipline. In effect, this would require the employer to prove its innocence, rather than the Agency to prove the discipline was actually discriminatory. The proposed rule also provides that the failure to post the notice could toll the statute of limitations for filing a charge under the Act, undermining the express Congressional imposition of a six-month limitations period.

## The Board's action is not legitimate

The fundamental problem with the new notice posting rule is that the Board lacks the statutory authority to impose it. As the lone Republican Board member, Brian Hayes, eloquently expressed it in his dissent quoting from a Supreme Court decision on point: "Agencies may play the sorcerer's apprentice but not the sorcerer himself."

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The simple truth is that the NLRA, unlike a number of federal employment statutes, does not require the posting of a workplace notice. And it explicitly defines the conduct that constitutes an unfair labor practice. Yet despite the fact that Congress clearly knows how to include an express notice posting requirement when it wants one, the NLRB majority concluded that the absence of such a provision means that their power to do so was implied. Moreover, the express listing of unfair labor practices Congress deemed unlawful does not preclude them from inventing new ones. Now that truly is sorcerer's alchemy of the first order.

### The Board's view of the workplace is outdated and partisan

But even if the Board had the authority to mandate the notice-posting, the contents of the notice reflect an outdated and biased view of the workplace and employment relationship. While not without exception, most contemporary employers look on their employees as valued participants in a worthwhile enterprise—not as faceless numbers to be exploited.

Into this relationship now steps the NLRB with a notice telling employees they have the right to "organize a union...take action...rais[e] work-related complaints...strike and picket." While employees may have those rights, those rights are not unlimited and can carry serious consequences if exercised in the wrong way or at the wrong time. However, the NLRB's notice says nothing about that, or of the equally important rights of employees to refrain from union activities and to oust incumbent unions. As one friend suggested, it's a bit like requiring every married couple to post a notice in the hallway that each one has the right to fight bitterly, walk-out, separate, and divorce. True, yes, but the listing is inflammatory, decidedly incomplete, and probably not the best message to send to parties hoping to build a successful long-term relationship.

I have no qualms with educating employees of their rights under the law, and the Board, under both Democrat and Republican administrations has engaged in many outreach and education efforts, which is exactly as it should be. But until now, the Board has done so within the scope of the authority delegated to it by Congress. If the Board truly believed that, despite 75-years of effective functioning without one, a workplace notice was critical to the Agency's mission, the proper course would have been to petition Congress to amend the Act to include such a provision. Further, if the Board truly was concerned about educating employees about their rights and fostering stable labor relations, it would have issued a more balanced and complete notice, one that referenced both rights and obligations and was expressed in a manner that promotes harmony not discord.

### The Board ignored thousands of requests for revisions to the new rule

The Board received 7,034 comments to the rule, most of which addressed the contents of the proposed workplace notice. Many asked for revisions to achieve needed balance between the right to organize and a worker's freedom of association; some suggested changes to make the notice more easily understood by high school graduates and

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immigrants whom the Board identified as unfamiliar with the law necessitating the notice. The Board effectively rejected all but a handful of these comments. The statement of employee rights remains parsed in the legalese of the original 1935 statute and focuses exclusively on unionization and collective action. Despite multiple requests, the Board declined to emphasize that employees have the right to refrain from union organizing and other concerted activity. Similarly, the Board dismissed the idea of informing employees of their statutory right to organize opposition to and decertify an incumbent union. The Board offered no legitimate defense for its failure to fully inform employees they have a right not to pay for the union's political expenditures. Clearly, to this Board, the only rights that matter are those they deem likely to increase union density.

In short, the Board's new notice-posting rule represents an unwarranted usurpation of Congressional authority to achieve through partisan rulemaking what organized labor could not accomplish through the democratic legislative process. Moreover, the rule undermines the very purpose it purportedly serves: educating employees of their rights under the Act. Such regulatory sorcery diminishes the Agency in the eyes of the public and the reviewing courts.

- Peter Schaumber was a former chairman of the National Labor Relations Board.

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**Deleted:** And it refused to notify employees of their right to decertify a union they have grown tired of—a reality in the modern workplace. This is not surprising because for this Board, the only reality of consequence in the modern workplace is the loss of union density.

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same Board majority issued a final rule for which it had no statutory authority that makes it unlawful (an unfair labor practice) for any private employer subject to the Board's jurisdiction

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intended to inform employees of their rights under the National Labor Relations Act but which is

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The Board announced that it can toll the six-month statute of limitations period mandated by Congress for "any unfair labor practice," if an employer fails to post, leaving the Board's ability to prosecute an employer for this new violation of law open-ended. The Board majority must have reasoned that Congress could not have intended to apply the limitations period to an unfair labor practice it never intended to create.

And the rule adds further teeth to its mandate:

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, the Board could transform wholly legitimate employer action into

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captured the illegitimacy of the Board's action at the commencement of his dissent, when he

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Board's alchemy began with its disingenuous statement that the Act "does not *directly* address an employer's obligation to post a notice of its employees' rights under the Act or the consequences any employer may face for failing to do so." The Act does not address the issue directly or indirectly; it simply imposes no such obligation. The majority concedes as much when it says that the Act is "almost unique" among federal labor and employment laws in its failure to provide for routine posting of employees' rights. However, they describe this as simply a "gap" in the statute that they have legislative rule-making authority to fill—75 years after the Act was passed! The majority claims that the rule is "necessary" because it has been entrusted to adapt the Act "to changing patterns of industrial life" and the changing pattern it identified is the decline of union density in the private sector. But they gloss over the fact that unionization grew to 35% of the private workforce after the Act was passed in 1935—without the assistance of a poster.

Today, no one can legitimately argue against the principle of impartially informing employees of their legal rights in the workplace, and that was the message Big Labor promoted in prepared statements issued the day the rule was announced. The fact that the Board was without statutory authority to mandate the notice was ignored. Regrettably, for partisans on the left, it is the result that counts, not the lawfulness of how you get there.

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Page 2: [7] Deleted tfflynn 8/30/2011 11:42:00 AM  
A one size fits all rigid notice containing a rigid recitation of statutory rights driven by a one-sided view of the employment relationship can be damaging and is inappropriate.