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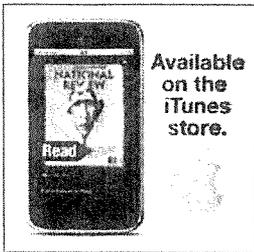
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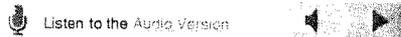
## PETER SCHAUERNER

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SEPTEMBER 2, 2011 4:00 A.M.

### The NLRB's Unlawful Rule

Congress never authorized the NLRB to require workplace notices.



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

Under the new rule — enacted just a few weeks after the board proposed to radically shorten the time it takes to conduct elections for union representation, so as to limit employees' ability to express their views about unionization to their employees — an estimated 6 million employers will be required to post a notice in every workplace. Further, if the board finds that an employer's failure to post the notice was "knowing and willful," this fact may be deemed presumptive evidence of an "unfair labor practice," or violation of the NLRA.

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**New NLRA Poster Rule**

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To see how this could play out in practice, 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 is 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.

In addition, an employer's failure to post the notice could stop the clock on the statute of limitations for employees to file charges under the NLRA, even though the law imposes a six-month limitation period.

The fundamental problem with the new rule is that the board lacks the statutory authority to impose it. As the lone Republican board member, Brian Hayes, wrote in his dissent, quoting from an eloquent Supreme Court decision: "Agencies may play the sorcerer's apprentice but not the sorcerer himself."

The simple truth is that the NLRA, unlike a number of other 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.

Further, the contents of the proposed notice reflect an outdated and biased view of the workplace. Most, though not all, 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

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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. The NLRB’s notice says nothing about that, or about the equally important rights of employees to refrain from union activities and to oust incumbent unions. As one friend of mine 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.

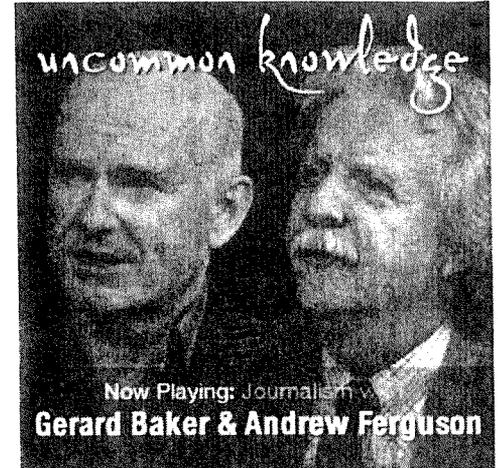
I have no qualms about educating employees about their rights under the law, and the board, under both Democratic and Republican administrations, has engaged in many outreach and education efforts. But until now, the board has done so within the scope of the authority delegated to it by Congress. If the board had truly believed that workplace notices were critical to its mission, despite 75 years of functioning without one, the proper course would have been to petition Congress to amend the NLRA to include such a provision. Further, if the board truly had been 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 promoted harmony.

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 balance between the right to organize and a worker’s freedom of association; some suggested changes that would have made the notice more easily understood by high-school graduates and 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 a union, or of their right not to pay for a union’s political expenditures. Clearly, to this board, the only rights that matter are those they deem likely to increase unionization.

In short, the board’s new notice-posting rule represents an unwarranted usurpation of congressional authority to achieve through partisan

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rulemaking what organized labor could not accomplish through the democratic legislative process. Moreover, the rule undermines the very purpose it purportedly serves: educating employees about their rights under the National Labor Relations Act. Such regulatory sorcery diminishes the agency in the eyes of the public and the reviewing courts.

— *Peter Schaumber is a former chairman of the National Labor Relations Board.*

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