*ORAL ARGUMENT NOT YET SCHEDULED*
NO. 12-5068
[Consolidated with No. 12-5138]

**UNITED STATES COURT OF APPEALS**
**DISTRICT OF COLUMBIA CIRCUIT**

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al*,
Appellants/Cross-Appellees,
vs.
NATIONAL LABOR RELATIONS BOARD, *et al*,
Appellees/Cross-Appellants.

ON CROSS APPEALS FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
C.A. No. 11-cv-01629-ABJ

# INITIAL OPENING BRIEF OF APPELLANTS/CROSS-APPELLEES

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## CORPORATE DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

Pursuant to Circuit Rule 26.1, Appellants/Cross-Appellees certify that no publicly held company owns ten percent or more of any of them, and they have no parent companies as defined in the Circuit Rule. Appellants/Cross-Appellees are trade associations representing hundreds of thousands of employers, along with two individual employer businesses, and a legal defense foundation that provides free legal aid to individual employees.

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

Pursuant to Circuit Rule 28(a)(1), the Plaintiff Employers hereby submit this Certificate as to Parties, Rulings, and Related Cases.

### A. Parties:

#### 1. Appellants/Cross-Appellees:

Appellants/Cross-Appellees in this case are the National Association of Manufacturers, the Coalition for a Democratic Workplace, the National Right to Work Legal Defense and Education Foundation, Inc., the National Federation of Independent Business, Southeast Sealing, Inc., and Racquetball Centers, Inc. d/b/a Lehigh Valley Racquet & 24-7 Fitness Clubs. For ease of reference, they will be referred to hereafter in this brief as the "Plaintiff Employers."

**2. Appellees/Cross-Appellants:**

Appellees in this case are the National Labor Relations Board, a federal agency, and individual members of the Board and its General Counsel, who are named in their official capacities. For ease of reference, they will be referred to hereafter in this brief as the "NLRB" or the "Board".

**3. *Amici*:**

In the case below, *amicus curiae* briefs were filed in support of the Appellants by a group of 36 Congressmen led by Rep. John Kline, Chairman of the House Committee on Education and the Workforce, and by the Motor Vehicle Equipment Dealers Association. Professor Charles Morris, an individual, participated as an *amicus* in support of the Appellees.

**B. Rulings Under Review:**

The Plaintiff Employers seek review of the final Order entered by Judge Amy Berman Jackson in Civil Action No. 11-cv-1629, granting partial summary judgment to Appellees. The Judge's Order would allow into effect a Final Rule of the Appellee NLRB, published at 76 Fed. Reg. 54,006 (Aug. 30, 2011), which the Plaintiff Employers have challenged under the Administrative Procedure Act. [1]

[1] The Parties have agreed to utilize the deferred appendix procedure set forth in F.R.App.P. 30(c).

**C. Related Cases:**

The NLRB has filed a cross-appeal from the district court's partial injunction against the Rule's enforcement provisions. Docket No. 12-5138. The cross-appeal has been consolidated by the Court with the Plaintiff Employers' appeal. In addition, the agency rule that is being challenged in the present case was also the subject of a challenge in a case filed in the U.S. District Court for the District of South Carolina. *Chamber of Commerce of the United States v. NLRB*, 2012 U.S. Dist. LEXIS 52419 (D. S.C.). On April 17, 2012, Chief Judge David Norton entered summary judgment in favor of the Plaintiff Chamber of Commerce and against the NLRB in that case, finding that "the Board lacks the authority to promulgate the notice-posting rule." *Id*. at Doc. No. 50. As of this date, no appeal from the summary judgment has been filed by the NLRB.

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## GLOSSARY

APA – Administrative Procedure Act

NLRB - National Labor Relations Board or "the Board"

NLRA - National Labor Relations Act or "the Act"

## JURISDICTION

This is a direct appeal from a decision of a United States district court over which this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court had federal question jurisdiction over the Plaintiff Employers' challenge to the NLRB's rulemaking pursuant to 28 U.S.C. § 1331 and Sections 702, 703 and 706 of the Administrative Procedure Act, 5 U.S.C. §§702, 703, and 706.

## ISSUES PRESENTED

1. Whether the NLRB lacked statutory authority to issue the challenged Rule under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq*.

2. Whether, upon finding that certain enforcement provisions of the challenged Rule violated the NLRA, the district court erred in severing the offending provisions from the Rule and allowing the remainder of the Rule to stand.

3. Whether the challenged Rule unlawfully interferes with rights protected by the First Amendment to the U.S. Constitution and/or Section 8(c) of the NLRA, 29 U.S.C. §158(c).[2]

[2] In order to allow the Court to focus its attention on the foregoing issues, the Plaintiff Employers no longer seek review of their district court arguments that the NLRB adopted the challenged Rule in an arbitrary and capricious manner and that the pleadings should be amended to address recent questions as to the validity of the appointments of the current Board members.

## STATEMENT OF THE CASE AND FACTS

This case tests an unprecedented assertion of authority by the NLRB in promulgating a rule that purports to exercise jurisdiction over *six million employers* who have engaged in no conduct otherwise subject to the Board's limited jurisdiction under the NLRA. Specifically, the challenged Rule for the first time requires all six million employers covered by the Act to post a Notice of Employee Rights on their private property, regardless of whether such employers have committed any violation of the NLRA and regardless of whether such employers are the subjects of representation petitions before the Board. Failure to post the newly-required Notice exposes employers to findings of committing an unfair labor practice, possible tolling of statutes of limitations for unrelated unfair labor practices, and findings of anti-union animus which weigh against such employers in unrelated unfair labor practice proceedings before the Board.

### 1. Procedural History

The Board promulgated the challenged Rule on August 30, 2011, after publishing a Notice of Proposed Rulemaking and receiving over 7000 public comments. Final Rule, "Notification of Employee Rights under the National Labor Relations Act," 76 Fed. Reg. 54,006 (Aug. 30, 2011); *see also* Notice of Proposed Rulemaking, 75 Fed. Reg. 80,410 (Dec. 22, 2010). Board Member Brian Hayes

dissented from both the Notice of Proposed Rulemaking and from the Final Rule on the ground that "the Board clearly lacks the statutory authority to order affirmative notice-posting in the absence of an unfair labor practice charge filed by an outside party." *Id*. at 80415. *See also* 76 Fed. Reg. 54,037-42.

The Plaintiff Employers filed two complaints challenging the Rule in the district court in September, 2011. Dist. Ct. Case No. 11-1629, Dkt. #1, 11; Case No. 11-1683, Dkt. ##1, 8. The complaints were later consolidated (Dist. Ct. Dkt. #16), and cross-motions for summary judgment were filed. Following a December 19, 2011 hearing and supplemental briefing on several issues including severability, Judge Jackson upheld the Board's authority to promulgate the Rule but enjoined two of the Rule's enforcement provisions. The district court held that the offensive provisions were severable from the rest of the Rule and that the Rule did not otherwise conflict with the NLRA, the APA, or the First Amendment. Dist. Ct. Dkt. #59, Mem. Opinion and Order dated March 2, 2012. The Plaintiff Employers filed this appeal on March 5, 2012 and filed an Emergency Motion for Injunction Pending Appeal on March 12.

On April 13, 2012, in a case filed against the NLRB challenging the same Rule by the United States Chamber of Commerce, the Chief Judge of the U.S. District Court in South Carolina granted summary judgment against the NLRB,

declaring that the Board lacked statutory authority to promulgate the challenged Rule. *Chamber of Commerce v. NLRB*, 2012 U.S. Dist. LEXIS 52419 (D. S.C. Apr. 13, 2012). On April 17, a panel of this Court granted The Plaintiff Employers' Emergency Motion for Injunction Pending Appeal.

### 2. Background Information Regarding The NLRB's Statutory Authority Under The NLRA.

The NLRA, enacted in 1935, created the NLRB and gave it limited functions. *See* 29 U.S.C. § 151, *et seq.*, Pub. L. No. 74-198, 49 Stat. 449 (1935). President Roosevelt described the Board's limited functions upon signing the Act as follows: "[The Act] establishes a National Labor Relations Board to hear and determine cases in which it is charged [that the] legal right [to self-organization] is abridged or denied, and to hold fair elections to ascertain who are the chosen representatives of employees." Presidential Statement on Signing the NLRA, reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 3269 (1935) (hereafter "Leg. Hist.")

Though Congress amended the Act in 1947, 1959, and 1974,[3] the statutorily limited functions of the Board have remained essentially unchanged for the past 77 years. Thus, as described by the Board itself on its website, the NLRA still limits

[3] Pub. L. No. 80-101, 61 Stat. 136 (1947); Pub. L. No. 86-257, 73 Stat. 519 (1959); Pub. L. No. 93-360, 88 Stat. 395 (1974).

the Board to "two main functions: to conduct representation elections and certify the results, and to prevent employers and unions from engaging in unfair labor practices…. In both kinds of cases the processes of the NLRB are begun only when requested." NLRB, Basic Guide to the National Labor Relations Act 33 (1997), http://www.nlrb.gov. As the NLRB further acknowledged in the preamble to the challenged Rule, the agency lacks "roving investigatory powers" and instead has traditionally functioned as a "reactive" agency. 76 Fed. Reg. at 54,010. *See Chamber of Commerce*, 2012 U.S. Dist. LEXIS at 52419, at *8. *See also* NLRB, 2011 FY Performance and Accountability Report 12, quoted in *Chamber of Commerce* ("The NLRB acts only on those cases brought before it, and does not initiate cases. All proceedings originate with the filing of charges or petitions by labor unions, private employers, and other private parties.").

The statutory limits on the functions of the Board are expressly set forth in Sections 8, 9 and 10 of the Act, as follows: [4]

First, Section 8 spells out the specific actions of employers and labor organizations that are deemed by Congress to be unfair labor practices. The Supreme Court has made clear over many decades that the Board's enforcement responsibility under this section is limited to remedying the specific unfair labor

[4] All pertinent sections of the NLRA are reprinted in the Statutory Addendum attached to this Brief pursuant to Circuit rule 28(a)(5).

practices contained in the Act, and that the Board is not authorized to create new unfair labor practices on its own or to engage in punitive measures intended to deter future noncompliance with the Act by employers or unions. *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961)("Where … Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme."); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) ("The Board's authority to remedy unfair labor practices is expressly limited…."); *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (holding that Board may not justify an order solely on grounds that it will deter future violations of the Act); *NLRB v. Fant Milling Co.*, 360 U.S. 301, 306-09 (1959) (holding that Board lacks independent power to find an unfair labor practice in the absence of a charge filed by a private party). [5]

[5] The Board has for many decades imposed notice posting requirements solely as a remedial measure to correct identified unfair labor practices under Section 8, or in order to facilitate petitioned-for elections under Section 9. Such postings have always been limited in duration. *See Consol. Edison Co. of New York, Inc*., 323 NLRB 910, 911-12 (1997). Moreover, notice posting requirements that have extended beyond a single facility where wrongful conduct occurred have been generally deemed to be "inappropriate." *Rose Terminix Exterminator Co*., 315 NLRB 1283, 1288-89 (1995); *Hickmott Foods, Inc*., 242 NLRB 1357, 1357 (1979).

Also relevant to this case is Section 8(c) of the Act, added in the Taft-Hartley Amendments of 1947, in which Congress expressly declared that "the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). The Supreme Court recently held in *Chamber of Commerce v. Brown*, 550 U.S. 60 (2008), that this provision forbids "both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended 'be unregulated because left "to be controlled by the free play of economic forces.'" *Id*. at 65 (quoting *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976)).

With respect to representation petitions, § 9 (c) of the Act states:

> (1) *Whenever a petition shall have been filed,* in accordance with such regulations as may be prescribed by the Board –
>
> (A) by an employee or group of employees or any individual or labor organization …; or
> (B) by an employer…
>
> the Board shall investigate such petition and if it has reasonable cause to believe a question of representation exists shall provide for an appropriate hearing upon due notice…. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c) (emphasis added). There is no authority granted to the Board to take any action in connection with representation issues in the absence of a petition being filed by employees, a union or an employer.

Congress further circumscribed the parameters of the Board's power in Section 10 of the Act, which provides:

> (a) Powers of Board generally
>
> The Board is empowered, *as hereinafter provided*, to prevent any person from engaging in any unfair labor practice. (listed in section 158 of this title) affecting commerce …
>
> (b) … *Whenever it is charged* that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, *shall have the power* to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency … Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board

29 U.S.C. § 160 (emphasis added). Section 10(c) further identifies when the Board's jurisdiction ceases. That Section provides that if the Board determines that no unfair labor practice has been committed, "then the Board shall state its findings of fact *and shall issue an order dismissing the said complaint.*…" *Id.* (emphasis added).

Additional statutory provisions in the Act confirm the Board's limited authority. For example, Section 10(j), which permits the Board to seek preliminary

injunctive relief in unfair labor practice cases, specifically states that "[t]he Board shall have the power, upon issuance of a complaint as provided in subsection (b)…to petition any United States district court [for preliminary injunctive relief.]" 29 U.S.C. § 160(j). The Board's power in this context only begins upon the issuance of a complaint, which can be issued only *after a charge is filed*. *See NLRB v. Fant Milling*, 360 US. at 306-309. In the area of jurisdictional disputes, § 10(k) provides that the Board is "empowered" to resolve such disputes only *after an unfair labor practice charge is filed.* 29 U.S.C. § 160(k). The same is true with respect to secondary boycotts. Section 10(c) obligates the Board to seek preliminary injunctive relief in the case of secondary boycotts but only *after the filing of a charge*. 29 U.S.C. § 160(l).

Section 11 of the Act further illustrates the very defined limits of the Board's statutory authority:

> For purposes of *all* hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title[.] –

29 U.S.C. § 161. This preamble to the Board's authority to receive documentary evidence, issue subpoenas and serve process, again reinforces that the Board's powers are only those enumerated in Sections 9 and 10 of the Act. In this regard, it must be noted that Congress saw fit to explicitly limit the Board's subpoena power

in § 11 by providing that "the Board *shall* revoke" any subpoena seeking evidence which "does not relate to any matter under investigation…." *Id.* (emphasis added).

Other sections of the Act relied on by the district court in the present case include Sections 1 and 7 of the Act. 29 U.S.C. §§ 151, 157. Section 1 is accurately described by Judge Norton in the *Chamber of Commerce* case as containing only "aspirational" provisions underlying the Act, while Section 7 contains the "core labor rights of employees" that are enforced by the Board through the authority exclusively set forth in Sections 8, 9 and 10. *See* 2012 U.S. Dist. LEXIS 52419, at **5-7. Until the present case, no court had previously held that either Section 1 or Section 7 of the Act authorized the Board to exercise jurisdiction over any employers or employees except as prescribed in Sections 8, 9 and 10, or to compel them to take any specific actions in the workplace, in the absence of an unfair labor practice complaint or a representation petition.

### 3. Background Information Regarding the Board's Rulemaking Authority.

Section 6 of the Act, 29 U.S.C. § 156, confers rulemaking authority on the Board as follows: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. The Board has never previously exercised this authority to

promulgate rules for any purpose other than to aid in its statutory functions described above in Sections 8, 9, and 10 of the Act, which are the sole means by which the Board "carries out the provisions of the Act." *See Chamber of Commerce v. NLRB*, 2012 U.S. Dist. LEXIS 54219 at **32-33. Within those parameters, the Board has published detailed rules and regulations covering all aspects of the process by which it handles unfair labor practice charges and representation case petitions brought before it, and other related matters. *See* 29 C.F.R. Parts 100-103.

One such rule, promulgated in 1987, established appropriate bargaining units in acute care hospitals, one of the Board's functions expressly authorized by the NLRA in Section 9(b). Though the rule was challenged by the American Hospital Association on the ground that it conflicted with the statutory requirement that bargaining unit determinations be made by the Board "in each case," no party to that litigation disputed the statutory authority of the Board to make bargaining unit determinations. The Supreme Court upheld the Board's authority to use its rulemaking power to make such determinations as are necessary to carry out the provisions of Section 9(b). *Amer. Hosp. Assn. v. NLRB*, 499 U.S. 606 (1991).

**4. Background Information Regarding The Statutory Authority To Require Employers To Post Notices To Employees Under The NLRA.**

The NLRA contains no express requirement that employers post any notices of employee rights. This is a notable contrast with the provisions of numerous other labor and employment laws passed by Congress over the past 77 years. The first such statutory notice requirement appeared as an amendment to the Railway Labor Act in 1934. *See* 45 U.S.C. § 152, Pub. L. No. 73-442, 48 Stat. 1185, 1188 (1934). The very next year, with many of the same Congressmen voting, the NLRA was enacted without including any notice posting requirement.

Indeed, Congress expressly considered and rejected a specific notice requirement prior to passing the NLRA. Such a provision was contained in the original version of the Wagner Act. Thus, when the Act was originally introduced in 1934, the bill contained express provisions requiring employers to provide notice to employees that any term of a labor agreement that conflicted with the (Wagner) Act was invalid. Since most contracts at that time contained such conflicting provisions, most employers would have been required to provide the required notice. In addition, the bill provided that an employer's failure to provide the notice to employees constituted an unfair labor practice. S. 2926 § 304(b), 1 Leg. Hist. 14 and H.R. 8434 § 304(b), 1 Leg. Hist. 1140; S. 2926 § 5(5), 1 Leg. Hist. 3 and H.R. 8434 § 5(5), 1 Leg. Hist. 1130 (1934).

The foregoing provision was excised from the Wagner Act after Congress debated and adduced testimony on the provisions. S. 1958 74th Cong., 2 Leg. Hist. 3032 (1935). The final version of the Wagner Act contained no notice provision. Again, as noted above, this action followed by only one year the Congressional decision to incorporate into the Railway Labor Act a general notice requirement in 1934.

Since the passage of the NLRA, Congress has included statutory notice requirements in the following labor and employment laws, without ever amending the NLRA to include a similar requirement: Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-10, the Age Discrimination and Employment Act, 29 U.S.C. § 627, the Occupational Safety and Health Act, 29 U.S.C. § 657(c), the Americans With Disabilities Act, 42 U.S.C. § 12115, the Family and Medical Leave Act, 29 U.S.C. § 2619(a) and the Uniform Service Employment and Re-employment Rights Act, 38 U.S.C. 4334(a).

**5. The Challenged Rule**.

The rulemaking proceeding that led to the challenged Rule began in 1993, when Professor Charles Morris petitioned the Board to issue a broad rule requiring employers and unions to post notices advising employees of their rights and duties under the NLRA. *See* 75 Fed. Reg. 80,411. For seventeen years thereafter, the

Board declined to act on the Morris petition, apparently because a majority of the Board's members believed that the Board lacked authority to impose such a requirement under the NLRA and/or that such a notice requirement was contrary to public policy.

Nevertheless, as noted above, the Board issued its Notice of Proposed Rulemaking in December 2010, leading to public comments and promulgation of the final Rule in August 2011. Notice of Proposed Rulemaking, 75 Fed. Reg. 80,410 (Dec. 22, 2010); Final Rule, "Notification of Employee Rights under the National Labor Relations Act," 76 Fed. Reg. 54,006 (Aug. 30, 2011).

Subpart A of the challenged Rule requires "[a]ll employers subject to the NLRA [to] post notices to employees, in conspicuous places, informing them of their NLRA rights, together with board contact information concerning basic enforcement procedures." 29 C.F.R. § 104.202(a). Employers who customarily communicate with employees electronically on an intranet or internet site must also post the notice through those mediums. *Id.*§ 104.202(f).

The poster that employers must post pursuant to Subpart A notifies employees of some, but not all, of their rights under the Act. They are thus informed of their right to form, join, or assist a union; to negotiate with an employer through a union; to bargain collectively through representatives of employees' own choosing; to discuss wages, benefits, and other terms and

conditions of employment with co-workers or a union; to take action to improve working conditions; to strike and picket; or to choose not to do any of these activities. The poster does not inform employees, among other rights, of their right to decertify a union, to refuse to pay dues to a union in a right-to-work state, and their right to object to payment of dues beyond the amounts required for representational purposes. *See Communications Workers v. Beck*, 487 U.S. 735 (1988).

Subpart B of the Rule states that an employer's failure to post the notice "may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, …in violation of NLRA Section 8(a)(1)…." 29 C.F.R. § 104.210. According to this Subpart, if the Board determines an employer not to be in compliance, the employer "will be ordered to cease and desist from the unlawful conduct and post the required employee notice, as well as a remedial notice." *Id*. at § 104.213(1). The Rule also gives the Board discretion to suspend the Section 10(b) six-month statute of limitations for filing even unrelated unfair labor practice charges, "unless the employee has received actual or constructive notice that the conduct complained of is unlawful." *Id*. at § 104.214(a). The Rule also allows the Board to consider an employer's "knowing and willful refusal to comply with the requirement to post the employee notice as

evidence of unlawful motive in a case in which motive is an issue." *Id.* § 104.214(b).

The Board chose not to include a severability provision in the Rule. 76 Fed. Reg. 56,006. Instead, the Board expressly stated that it had considered and rejected publication of the Rule as a voluntary compliance effort, as follows:

> [T]he Board has decided not to rely on voluntary compliance. Instead the final rule provides that failing to post the notice may be found to be an unfair labor practice and may also, in appropriate circumstances, be grounds for tolling the statute of limitations. In addition, a knowing and willful failure to post employee notices may be found to be evidence of unlawful motive in an unfair labor practice case. These provisions have two purposes: to ensure that any violations of the notice-posting requirement that occur may be remedied where necessary, and to describe how violations of the notice-posting requirement may affect other Board proceedings.

*Id*. at 54031. The Board further rejected numerous suggestions for less onerous enforcement of the Rule "because they would create unnecessary obstacles to effective enforcement of the notice requirement." *Id.* at 54031, 54034, 54036.

Board Member Hayes dissented from both the Proposed Rule and the Final Rule. He contended that the Board lacked statutory authority to promulgate the Rule based upon the plain language and limited functions assigned to the Board by the Act and the history of Congressional enactments of statutory notice posting requirements in other labor legislation to the exclusion of the NLRA. Hayes also

questioned the asserted need for the Rule and challenged the provisions creating a new unfair labor practice, the tolling of the statute of limitations, and apparent infringement on employer free speech under both the Act and the Constitution. *Id*. at 54038.

**6. The District Courts' Conflicting Decisions**

Judge Amy Berman Jackson of the District Court for the District of Columbia issued her ruling on March 2, 2012, upholding the Rule's notice posting requirement while striking down its principal enforcement provisions. Judge Jackson specifically found that Section 6 of the Act provided all the statutory authorization needed for the Board's new notice posting requirement. *Id*. at 12. Applying the two-step analysis set forth in *Chevron U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837 (1984), the district court held that the new Rule was "necessary to carry out the provisions" of Sections 1 and 7 of the Act. The court rejected The Plaintiff Employers' arguments from the Act's express limitations on the Board's authority, legislative history, and comparisons with other laws.[6]

[6] "[T]he Court cannot find that in enacting the NLRA, Congress unambiguously intended to preclude the Board from promulgating a rule that requires employers to post a notice informing employees of their rights under the Act. Neither the text of the statute nor any binding precedent supports plaintiffs' narrow reading of a broad, express grant of rulemaking authority." *Id*. at 19.

The district court nevertheless struck down Section 104.210 of the Final Rule because "the agency lacked the authority to deem a failure to post to be an unfair labor practice under the Act." *Id*. at 27. Citing Sections 8(a)(1) and 8(c) of the Act, the court declared that these statutory provisions preclude the Board from making a "blanket advance determination that a failure to post will always constitute an unfair labor practice." *Id*. at 30-31. At the same time, the district court undercut that ruling by holding that "nothing in this decision prevents the Board from finding that a failure to post constitutes an unfair labor practice in any individual case brought before it." *Id*. at 31.

Similarly, the district court struck down Section 104.214(a) of the challenged Rule, which purports to toll the statute of limitations for filing unfair labor practices in any workplace where the Notice is not posted. The court held that "the NLRA does not authorize the Board to enact a rule which permits it to toll the statute of limitations in any future unfair labor practice action involving a job site where the notice was not posted." *Id*. at 33. Again, however, the court declared that "this does not prevent the Board from considering an employer's failure to post the employee rights notice in evaluating a plaintiff's equitable tolling defense in an individual case before it." *Id*. at 37 n.21.

The district court then found that the remainder of the Rule was enforceable under the First Amendment to the Constitution as well as Section 8(c) of the NLRA, notwithstanding the Plaintiff Employers' arguments to the contrary. The court declared that the required Notice constituted "government speech" which is not subject to scrutiny under either the Constitution or the Act. *Id*. at 37-42.

Finally, having found some provisions of the Rule to be valid and others invalid, the district court determined that the valid parts were severable from the offensive provisions. *Id*. at 42-45. In this regard, the court declined to find that there was "substantial doubt" that the agency would have adopted the severed portion on its own. The district court made this finding notwithstanding the failure of the agency to express any desire to allow severability and despite the Board's own assertions that the enforcement provisions were intertwined with the remaining sections of the challenged Rule. *Id*. at 42.

As noted above, Chief Judge Norton of the District Court for the District of South Carolina reached a different result in *Chamber of Commerce v. NLRB*, *supra*, 2012 U.S. Dist. LEXIS at 52419. In direct contradiction to Judge Jackson's opinion, Judge Norton held under *Chevron* step one that Congress did not delegate authority to the Board to regulate all employers in the manner called for by the challenged Rule. The South Carolina district court expressly found that "the plain

language and structure of the Act compel a finding that the Board lacks authority under Section 6 to promulgate the rule" and that the "Board's rule is not 'necessary to carry out' any provision of the Act." *Id*. at **28-29. Continuing, Judge Norton held that "[f]inding that the challenged rule is 'necessary' to carry out other provisions of the Act would require the Court to ignore 'the statutory language as a whole.'" *Id*. at *30. In particular, Judge Norton held that Section 6 must be read in the context of the otherwise "reactive" role that the Board has been delegated by Congress. *Id*. at *31.

Judge Norton further rejected the Board's claim that the Rule was necessary to fill a statutory "gap" left by Congress in the NLRA. The court found that Congressional intent to the contrary was made clear by considering "the overall statutory scheme, legislative history, the history of evolving congressional regulation in the area, and…other relevant statutes." *Id*. at *38. Having found no statutory authority for the NLRB to issue the challenged Rule, the South Carolina district court found it unnecessary to address the enforcement provisions of the Act or the plaintiffs' challenge under the First Amendment and the Regulatory Flexibility Act. *Id*. at *52 n.20.

## SUMMARY OF ARGUMENT

Contrary to the district court's opinion, the overall structure, language, and longstanding interpretation of the Act conflicts with the Board's unprecedented assertion of authority over millions of employers in the challenged Rule. Congress expressly limited the Board's exercise of authority over employers to two sets of circumstances: when a private party has filed an unfair labor practice charge and/or when a private party files a representation petition asking the Board to conduct a secret ballot election. As the district court in South Carolina found, the Board lacks authority to regulate employers beyond these settled boundaries. *Chamber of Commerce v. NLRB*, 2012 U.S. Dist. LEXIS 52419 (D. S.C. Apr. 13, 2012).

The district court erred in the present case in finding that the Act's general grant of rulemaking authority in Section 6 somehow authorizes the Board to expand the scope of its jurisdiction over employers beyond the limits established elsewhere in the Act. The principal case relied on by Judge Jackson, *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991), does not stand for any such proposition. The district court's reliance on Sections 1 and 7 of the Act as authorization for the presently challenged Rule is also completely misplaced, as Judge Norton properly found. *Chamber of Commerce* at **29-30.

The district court here also gave short shrift to the legislative history of the Act in which Congress clearly expressed its intention not to authorize the Board to impose notice requirements on employers outside the context of unfair labor practice remedies and representation proceedings. As Judge Norton found, again contrary to Judge Jackson's view, it is highly significant that Congress expressly included notice posting requirements in labor laws passed immediately before and repeatedly after the passage of the NLRA, while failing ever to include such a requirement in the Act itself. Also contrary to the district court's opinion, it is significant that Congress rejected an express notice posting amendment to the legislation that became the NLRA. *See* S.2926, and H.R. 8423, 73d Cong. (1934), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act*, 1935, at 3, 14, 1140 (1935).

The district court improperly presumed a statutory delegation of authority to the Board to promulgate the Rule, in direct contradiction to this Court's holdings in *American Bar Ass'n v. FTC*, 430 F. 3d 457 (D.C. Cir. 2005) and *Railway Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F. 3d 655, 671 (D.C. Cir. 1994) (*en banc*). In each of these cases, this Court held that statutory silence does not give an agency license to exercise regulatory authority, without proof that Congress intended to grant such authority.

The district court also erred in failing to find that the Board's challenged Rule violates both Section 8(c) and the First Amendment rights of employers. In particular, the district court failed to address the Supreme Court's holdings in *Chamber of Commerce v. Brown*, 550 U.S. 60 (2008), and *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The district court improperly relied on *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("FAIR")*, 547 U.S. 47, 62 (2006), in which the offending message was communicated by a government agent, not by a private party.

Finally, though the district court properly found unlawful two enforcement provisions of the Rule, 104.210 and 104.214(a), the court undermined its own holdings as to these sections, and committed further error, by stating that the Board remained free to enforce the Rule via unfair labor practice and/or tolling provisions on a case by case basis. The district court further erred by failing to recognize that its injunction against the foregoing sections of the challenged Rule required invalidation of the entire Rule. The district court's ruling on severability directly contradicts this Court's holding in *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F. 3d 732, 734 (D.C. Cir. 2001) and other related cases.

## ARGUMENT

### I. THE STANDARD OF REVIEW

The challenged Rule is subject to *de novo* review in this Court under the standards set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). A *Chevron* analysis involves a two-step process. Under *Chevron* Step I, the Court asks "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *see also Public Citizen, Inc. v. HHS*, 332 F.3d 654, 659 (D.C. Cir. 2003). If Congress has spoken, then that is the end of the analysis, and the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843; *see also Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (*quoting Chevron*). No deference is shown to the Defendants under this Step. *See Shays v. FEC*, 508 F. Supp.2d 10, 30 (D.D.C. 2007).

Under *Chevron* Step II, the Court may defer to the Defendants' application of the statute, but only if it is a permissible and reasonable construction of the statute. *Chevron*, 467 U.S. at 844; *Public Citizen*, 332 F.3d at 659; *Southern Cal. Edison Co. v. FERC*, 116 F.3d 507, 511 (D.C. Cir. 1997) (deference is owed to an agency only if its construction is "reasonable" in light of the statutory text, history, and purpose).

This Court has further held that Congressional silence as to a particular delegation of power does not allow a court to "presume a delegation of power" to a federal agency. *American Bar Ass'n v. FTC*, 430 F. 3d 457 (D.C. Cir. 2005); *Railway Lab. Executives Assn. v. National Mediation Board*, 29 F. 3d 655 (D.C. Cir. 1994 (*en banc*) (warning that such a presumption poses the danger of vesting agencies with "limitless" authority).

## II. THE STRUCTURE, LANGUAGE, AND LEGISLATIVE HISTORY OF THE ACT ALL ESTABLISH THAT CONGRESS HAS NOT DELEGATED AUTHORITY TO THE NLRB TO PROMULGATE THE CHALLENGED RULE.

As explained above and in Judge Norton's opinion in *Chamber of Commerce v. NLRB*, 2012 U.S. Dist. LEXIS 52419 at *31, Congress has since the enactment of the NLRA limited the functions of the NLRB to the "reactive" handling of unfair labor practice charges and representation petitions. From President Roosevelt's signing statement to the present day admissions contained on the Board's public website, the government itself has repeatedly recognized that the Board has no "roving commission" to impose its will on employers who have done nothing to invoke the Board's jurisdiction.[7]

[7] *See* references quoted above at pp. 4-5: Presidential Statement on Signing the NLRA, Leg. Hist. at 3269 (1935); NLRB, Basic Guide to the National Labor Relations Act 33 (1997), http://www.nlrb.gov; NLRB, 2011 FY Performance and

### A. The challenged Rule is contrary to the plain language and structure of the Act.

The express limits as to the Board's statutory functions are set forth in the plain language of the Act, cited at length above at pp. 5-10 and in Judge Norton's opinion. *Chamber of Commerce v. NLRB*, 2012 U.S. LEXIS 52419 at **29-40. Thus, Section 8 restricts the Board to the finding of specifically designated unfair labor practices against employers (and unions), which must be brought before the Board in the first instance by private parties pursuant to the charge filing and complaint processes explicitly detailed in Section 10. Section 9 likewise limits the Board in the representation process to the handling of petitions filed by private parties, again enforceable only through the restrictive provisions of Sections 9 and 10.

As further noted above at p. 6, the Supreme Court has struck down numerous Board attempts to expand its regulatory jurisdiction under the Act, repeatedly declaring that the Board is restricted by statute exclusively to those actions necessary to remedy defined unfair labor practices committed by the parties brought before it via complaint, or to process representation petitions. The Board is not permitted to establish affirmative action obligations on the part of employers

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Accountability Report 12. *See also Chamber of Commerce v. NLRB*, 2012 U.S. Dist. LEXIS at 52419; and the preamble to the challenged Rule, 76 Fed. Reg. at 54,010.

or indeed to impose any duty on employers except as a remedy for violations of the Act's express statutory requirements. *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. at 675; *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 900; *Republic Steel Corp. v. NLRB, supra*, 311 U.S. at 7; *NLRB v. Fant Milling Co.*, 360 U.S. at 306-09 (1959). *See also Consolidated Edison Co. of N.Y., Inc. v. NLRB*, 305 U.S. 197 (1938) ("The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation…."); *NLRB v. Financial Services Employees*, 475 U.S. 192, 202 ("Deference to the Board 'cannot be allowed to slip into an inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'" (ellipsis in the original).

For this reason, as noted above, the Board has for decades imposed notice posting requirements solely as a remedial measure to correct identified unfair labor practices under Section 8, or in order to facilitate petitioned-for elections under Section 9. Such postings have always been limited in duration, location, and scope. *See, e.g., Consol. Edison Co. of New York, Inc*., 323 NLRB 910, 911-12 (1997). *Rose Terminix Exterminator Co*., 315 NLRB 1283, 1288-89 (1995); *Hickmott Foods, Inc*., 242 NLRB 1357, 1357 (1979). In the challenged Rule, on the other hand, the required notices are not limited as to their duration, location or

scope and are thus inconsistent with the longstanding remedial notice limitations previously adhered to by the Board. There is no explanation for this inconsistency.

The case of *Local 357, International Brotherhood of Teamsters v. NLRB*, *supra*, 365 U.S. 667, is particularly relevant here because it involved an attempt by the Board to impose a new notice requirement not authorized by the Act. In that case, the Board found a hiring hall agreement unlawfully discriminatory because it did not include a provision for posting certain anti-discrimination notices that the Board believed to be necessary to inform employees of their rights under the Act. *Id*. at 672. The Supreme Court disagreed, stating:

> [W]here Congress has adopted a selective system for dealing with evils, the Board is confined to that system. Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.

*Id*. at 676 (citation omitted).

Similarly, the Supreme Court declared in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) that Congress intended employers' communications with their employees to be unregulated by the Board (or by state governments) and left to be controlled by the "free play of economic forces." *Id.* at 65, *citing Machinists v. Wisconsin Employment Commission*, 427 U.S. 132 (1976). Contrary to the district court, and as discussed above at p. 7, the Supreme Court in *Brown* held that

Section 8(c) "expressly precludes regulation of speech about unionization," a restriction that the Court found to be both "explicit and implicit." 554 U.S. at 68.

Judge Jackson improperly ignored or sought to limit the above holdings to the context of adjudications. Mem. Op. at 17-18. There is no basis for so limiting the Supreme Court's repeated and consistent interpretation of the Act's plain language, however. Indeed, the Supreme Court has long held that the Board's adjudicatory process in appropriate circumstances may be tantamount to rulemaking, indicating that policies announced via rulemaking should be reviewed under the same standards as those issued via adjudications. *See NLRB v. Bell Aerospace Co*., 416 U.S. 267, 294-95 (1974) ("[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and …the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."). Until now, there has been no case in which a federal court has declared the Board's little used rulemaking authority to be *broader* in scope than the policymaking authority traditionally exercised by the Board in its adjudications. Thus, the district court plainly erred in discounting decades of Supreme Court holdings on the limited nature of the Board's authority.

Ignoring Congress's express limitations on the Board's jurisdiction and the above referenced Supreme Court authority, Judge Jackson's opinion put

considerably too much weight on the Act's general grant of rulemaking authority. Contrary to the district court's view, Section 6 merely authorizes the Board to make such rules as may be necessary to "carry out" the Act's provisions. As Judge Norton found, the only means by which the Board is authorized by Congress to carry out the Act's provisions is via the unfair labor practice and representation proceedings previously discussed. Nothing in Section 6 evidences Congressional intent to allow the Board to impose obligations on all employers that are totally outside the confines of the Board's heretofore limited delegation of authority to remedy unfair labor practices and conduct representation proceedings.

The only case cited by the district court in support of the court's novel theory that Section 6 of the Act expands the Board's authority to exercise jurisdiction over employers, *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991), does not stand for any such proposition.[8] The NLRB rule at issue in that case was indisputably promulgated in furtherance of the Board's duty to determine appropriate bargaining units in representation cases. 29 U.S.C. Sec. 159(b). In that limited context, the Supreme Court found that the health care bargaining unit rule was "necessary to carry out one of the Board's existing duties under the Act. *See Chamber of Commerce v. NLRB*, 2012 U.S. Dist. LEXIS 52419, at *28. Nothing

[8] The *AHA* Court expressly held only that the Act authorized "the rule at issue in this case." 499 U.S. at 609.

in that opinion invested the Board with authority under Section 6 to promulgate rules that place affirmative obligations on employers above and beyond the limited functions of the Board specified in the Act. *Id*.[9]

For similar reasons, the district court's reliance on Sections 1 and 7 of the Act as authorization for the presently challenged Rule is completely misplaced. Mem. Op. at 16-17. These provisions have been in the Act for 77 years, but they have never before given license to the Board to impose obligations on employers who were not already before the Board in the unfair labor practice or representation proceeding context. The fact that the Board is now seeking to expand its authority via rulemaking rather than via adjudication should be irrelevant; neither is permissible under the Act. Indeed, by untethering the Board's rulemaking authority from the historical statutory and judicial limits that have been placed on the Board's adjudicatory policy-making powers, Judge Jackson's decision raises serious questions as to how such unconfined rulemaking authority can be limited at all.

[9] The district court (Mem. Op. at 16-17) makes considerably too much of the subpoena provision in the Act (29 U.S.C. Sec. 161) which serves an entirely different purpose from the rulemaking authorization in Section 6.

### B. The District Court improperly presumed Congressional delegation of statutory authority to the NLRB in a manner contrary to this Court's holdings.

The district court's seemingly limitless grant of authority to the Board under its rulemaking power, based solely upon the absence of an express prohibition against a notice posting requirement, squarely conflicts with this Court's decisions in *American Bar Ass'n v. FTC*, 430 F. 3d 457 (D.C. Cir. 2005) and *Railway Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F. 3d 655, 671 (D.C. Cir. 1994) (*en banc*), which warned against *presuming* statutory delegation of authority from the mere absence of an express prohibition. As this Court stated in *Railway Labor Exec. Ass'n v. Nat'l Mediation Bd., supra*, 29 F. 3d at 671:

> To suggest, as the [agency] effectively does, that *Chevron* deference is required any time a statute does not expressly negate the existence of a claimed administrative power * * *, is both flatly unfaithful to the principles of administrative law * * * and refuted by precedent. (citations omitted) * * * Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

*Accord, American Bar Ass'n v. FTC*, 430 F. 3d at 369 (striking down the FTC's attempt to exercise jurisdiction over attorneys, notwithstanding the absence of an express statutory prohibition against such regulation).

The district court failed to address the *Railway Labor Exec. Ass'n* decision at all, and was unsuccessful in attempting to distinguish the *American Bar Ass'n* case.

Thus, Judge Jackson argued that the NLRB in its challenged Rule is not "attempting to regulate entities or individuals other than those that Congress expressly authorized it to regulate, and it is not extending its reach to cover activities that do not fall within the ambit of the Act." (Mem. Op. at 14). But in fact the Board is doing *exactly* what the FTC attempted to do in *ABA*, and what this Court struck down: The Board is plainly attempting for the first time in its history to regulate millions of employers who have done nothing to give the Board jurisdiction over them. The district court's presumption in favor of such unlimited authority is contrary to this Court's holdings and should be reversed.[10]

**C. The challenged Rule is contrary to the Act's legislative history.**

The district court also erred by giving short shrift to the legislative history of the Act, in which Congress clearly expressed its intention not to authorize the Board to impose notice requirements on employers outside the context of unfair labor practice remedies and representation proceedings. (Mem. Op. at 16-17 n.8). Contrary to the district court, it is highly significant that Congress expressly

[10] The case primarily relied on by the district court in support of such a presumption, *Serono Laboratories v. Shalala*, 158 F. 3d 1313 (D.C. Cir. 1998), is readily distinguishable. In that case, there was no issue regarding the statutory authority of the FDA to regulate and approve generic drugs under the governing statute. The only issue was what information could be gathered by the agency to determine whether certain active ingredients in the drugs were "the same." This non-jurisdictional determination was clearly within the agency's discretion. *Id*. at 1319.

included a notice posting requirement in the Railway Labor Act only a year prior to passage of the NLRA, but then failed to include such a requirement in the Act itself. *Chamber of Commerce, supra*, at **43-46. Equally significant is Congress's decision to include statutory notice requirements in numerous other employment laws after passage of the NLRA, without amending the Act to include the same requirements, even though Congress amended the Act repeatedly for other reasons. *Id*; *see also* discussion above at pp. 12-13.

The district court's failure to acknowledge the impact of the foregoing legislative history directly conflicts with this Court's holding in *Alcoa Steamship Co. v. Fed. Maritime Comm'n.*, 348 F.2d 756, 758 (D.C. Cir. 1965). There, the agency adopted a rule asserting the power to inspect corporate documents under Section 21 of the Shipping Act, which was silent on the issue. This Court observed that the absence of such authority in the governing statute contrasted with the fact that "such authority is expressly conferred both in the prior Interstate Commerce Act and in subsequent acts regulating motor carriers, water carriers, air carriers, and carriers by pipeline and electric transmission." *Id*. The Court held that this history revealed that "Congress intended fewer … powers for the [Commission] than were possessed by other regulators…." As the Court further held: "Where Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power." The district

court failed to address this holding, which mirrors exactly the circumstances surrounding the NLRA's omission of any notice posting requirements. *See also FDA v. Brown & Williamson Tobacco Co*., 529 U.S. 120, 153 (U.S. 2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

Also contrary to the district court's opinion (Mem. Op. at 17 n.8), it is very significant that Congress rejected an express notice posting amendment to the legislation that became the NLRA.[11] The district court missed the point that if Congress would not even allow a narrow, individualized notice requirement to be ordered by the Board, then this rejection clearly indicated legislative intent not to allow the much broader notice requirement that is now at issue.

For all of the above reasons, the district court in the present case fundamentally misconstrued the Act in finding that Congress somehow granted authority to the NLRB to promulgate the challenged Rule. The Act's plain language and structure limiting the Board's functions, the contrasting history compared to other statutes with express notice provisions, and the Act's "explicit

[11] See S.2926, and H.R. 8423, 73d Cong. (1934), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act*, 1935, at 3, 14, 1140 (1935), discussed above at p.12.

and implicit" restriction on the Board's regulation of speech, all compel the conclusion that the NLRB lacked authority to issue the Rule.[12]

## III. THE CHALLENGED RULE VIOLATES BOTH THE CONSTITUTION AND SECTION 8(c) OF THE ACT.

As noted above, the Supreme Court declared in *Chamber of Commerce v. Brown* that regulation of employer communications with employees is expressly and implicitly prohibited by Section 8(c) of the Act. While ignoring that holding altogether, the district court erroneously found that the Board's Rule was permissible under the both 8(c) and the First Amendment because the Notice mandated by the Rule constitutes only "government speech." (Mem. Op. at 37-42). This finding is in direct conflict with the Supreme Court's holding in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). There as here, the government attempted to force private parties to post on their own private property (an automobile in that case) a statement mandated by the government ("Live free or die"). Notwithstanding that the license plate in *Wooley* was even more closely identified with the government than is the currently challenged NLRB notice, the Supreme

[12] It is unnecessary to reach *Chevron* Step II due to the challenged Rule's failure to pass the foregoing Step I analysis, but the district court erred in contending that the Plaintiff Employers had failed to challenge the reasonableness of the Board's interpretation of the Act. (Mem. Op. at 21-22). *See, e.g.*, NRTW Mot. For Summary Judgment at 7-9 (Dist. Ct. Dckt. # 32).

Court held that private individuals could not be required to communicate the government's speech.

Since its decision in *Wooley*, the Court has repeatedly reiterated this rule. *See, e.g., United States v. United Food, Inc.*, 533 U.S. 405, 410 (2001) (citing *Wooley*, 430 U.S. at 714 ("Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views."); *Pacific Gas & Elect. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16 (1986).

In upholding the challenged Rule, the district court erroneously relied on *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("FAIR")*, 547 U.S. 47, 62 (2006). (Mem. Op. at 39). In that case, however, the offending message was communicated by a government agent (an army recruiter), not by private parties at all. Here millions of private employers are being compelled to post a notice on their private property in order to communicate a governmentally mandated message. Such a requirement is prohibited by the First Amendment and by Section 8(c). [13]

[13] The district court mistakenly treated Section 8(c) as merely implementing the First Amendment, as opposed to creating independent employer rights of free speech. (Mem. Op. at 42 n.25). This holding was again inconsistent with the Supreme Court's holding in *Chamber of Commerce v. Brown*, 554 U.S. at 65.

Also contrary to the district court, the notice poster is not at all "neutral" in its character but instead omits important statements of employee rights that are not "pro-union" in character. As noted above at p. 15, the Board-mandated Notice fails to notify employees, *inter alia*, of their rights to decertify a union, to refuse to pay dues to a union in a right-to-work state, and to object to payment of dues in excess of the amounts required for representational purposes. The district court therefore overlooked the pro-union message that the challenged Rule would require millions of employers to post in their private workplaces, in a manner directly contrary to both the First Amendment and Section 8(c).

## IV. THE DISTRICT COURT ERRED BY ONLY PARTIALLY INVALIDATING THE ENFORCEMENT PROVISIONS OF THE RULE.

The district court properly found unlawful two provisions of the Rule: Sections 104.210 (which declares the failure to post the required notice to be a violation of section 8(a)(1) of the Act) and 104.214(a) (which declares the failure to post the required notice to be a ground for tolling the statute of limitations expressly set forth in the Act).[14] However, the district court undermined its own

[14] As to Section 104.210, the district correctly acknowledged that the Act "has been interpreted as limiting the unfair labor practices that the Board may prohibit to only those enumerated under Section 158." (Mem. Op. at 28, *citing Teamsters Local 357*, 365 U.S. at 676). The court further recognized that Section 8(a)(1) "prohibits employers…from doing something that impedes or hampers an employee's exercise of the rights guaranteed by Section 157 of the statute. It does

holdings as to these sections, and committed further error, by stating that "nothing in this decision prevents the Board from finding that a failure to post constitutes an unfair labor practice in any individual case brought before it" (Mem. Op. at 31); and by further stating that the decision "does not prevent the Board from considering an employer's failure to post the employee rights notice in evaluating a plaintiff's equitable tolling defense in an individual case before it." (Mem. Op. at 37 n.21). These conclusions are incompatible with *Teamsters Local 357*, 365 U.S. at 675, which held that the Board lacks authority to find unlawful the failure of employers and unions to post Board-created notices regarding referral practices.

In any event, the result of the district court's holdings on the unfair labor practice and statute of limitations issues is that employers are left with no guidance at all as to when a failure to post will be found to violate the Act or when such a failure will be grounds for tolling the statute of limitations.[15] Once the district

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not prohibit a mere failure to facilitate the exercise of those rights." (Mem. Op. at 29). As to Section 104.214, the court properly found that the NLRA "does not authorize the Board to enact a rule which permits it to toll the statute of limitations in any future unfair labor practice action involving a job site where the notice was not posted." (Mem. Op. at 33, citing Section 10(b) of the Act).

[15] The district court apparently believes that it is sufficient to state that the Board "may only sanction employers for failure to post if it finds that the employer's action in a particular case 'interferes with, restrains or coerces employees….'" (March 7 Order at 3). But this formulation offers employers no guidance at all, in light of the district court's earlier (correct) holding that a mere failure to post cannot be said to "interfere" with employee rights in the first place. (Mem. Op. at 29-30).

court found that Section 8(a)(1) and 10(b) prohibited the Board from enforcing the notice posting requirement under all circumstances, the court was required to find that the notice posting requirement cannot be enforced as an unfair labor practice under *any* circumstances. The district court also erred in holding that the Board was entitled to enforce the Notice requirement by finding employers guilty of harboring anti-union animus in unrelated proceedings and drawing adverse inferences from such findings. (Mem. Op. at 44-45 & n.26).

## V. THE DISTRICT COURT ERRED IN ALLOWING SEVERANCE OF THE RULE.

Finally, the district court improperly failed to recognize that its injunction against Sections 104.210 and 104.214(a) of the challenged Rule required invalidation of the entire challenged Rule. (Mem. Op. at 42-45). This is so, contrary to the district judge's opinion, because the Board did not express its intent to allow severance of any provisions of the Rule, and indeed expressed the intent not to allow such severability; and because the remainder of the regulation will not function sensibly without the stricken provisions.

The district court thus violated the standard for severability articulated by this Court in *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F. 3d 13, 22 (D.C. Cir.), *reh'g denied w/ opinion*, 253 F. 3d 732 (D.C. Cir. 2001), as follows: "Whether the offending portion of a regulation is severable depends upon the intent of the

agency and upon whether the remainder of the regulation could function sensibly without the stricken provision." *See also Financial Planning v. SEC*, 482 F. 3d 481 (D.C. Cir. 2007); *National Treasury Employees Union v. Chertoff*, 394 F. Supp. 2d 137 (D. D.C. 2005) ("Severance and affirmance of a portion of an administrative regulation is improper if there is "substantial doubt" that the agency would have adopted the severed portion on its own."). In each of these cited cases, courts in this Circuit have found challenged regulations not to be severable because they failed one or both of the tests set forth above.

In *MD/DC/DE, supra*, this Court struck down an entire EEO rule of the Federal Communications Commission because one of two options for compliance with the rule was invalid. The Court refused to sever the offending option from the remainder of the rule even though the FCC had expressly included a severability clause in its Final Rule (which the NLRB has not included in the challenged rule in the present case). The D.C. Circuit found it "clear that severing one of the two options and thereby making the other mandatory would create a rule … which, according to the Commission's own analysis in the course of rulemaking, would not have accomplished the Commission's goals as it described them." 253 F. 3d at 736. In this regard, it should be noted that the Court refused to consider representations by the Commission's attorneys as to the Commission's rulemaking goals, finding instead that the Commission's rulemaking orders alone could speak

to this issue. *Id*. at 735. *See also Financial Planning Assn. v. SEC, supra*, 482 F. 3d at 493 (D.C. Cir. 2007) (rejecting severability because the agency's rule did not contain a severability clause, and the offending provisions were "expressly tied" to the remaining provisions that were sought to be upheld separately); *NTEU v. Chertoff, supra,* 394 F. Supp. 2d at 144 (again finding no severability where the agency had "said nothing regarding severability in adopting the regulations.")

In the present case, the district court disregarded the fact that the NLRB chose not to include a severability provision in the Final Rule. 76 Fed. Reg. 56,006 (Aug. 30, 2011). Moreover, the Board expressly stated that it had considered and rejected publication of the Notice Posting Rule as a voluntary compliance effort, as follows:

> [T]he Board has decided not to rely on voluntary compliance. Instead the final rule provides that failing to post the notice may be found to be an unfair labor practice and may also, in appropriate circumstances, be grounds for tolling the statute of limitations. In addition, a knowing and willful failure to post employee notices may be found to be evidence of unlawful motive in an unfair labor practice case. These provisions have two purposes: to ensure that any violations of the notice-posting requirement that occur may be remedied where necessary, and to describe how violations of the notice-posting requirement may affect other Board proceedings.

*Id*. at 54031. The Board also rejected numerous suggestions for less onerous enforcement "because they would create unnecessary obstacles to effective enforcement of the notice requirement." *Id*.

Likewise with regard to equitable tolling of the statutory limitations period under Section 10(b) of the Act, the NLRB declared its belief that such tolling was inextricably linked to the enforcement of the rule itself:

> To bar an employee who is excusably unaware of the NLRA from seeking a remedy for a violation of NLRA rights because he or she failed to file an unfair labor practice charge within the 10(b) period, when the employer did not post the required notice, would unfairly deprive the employee of the protection of the Act because of the employer's failure to comply with its legal responsibilities.

*Id*. at 54034. In addition, according to the Board's published Rule, the equitable tolling provision is not only linked to the notice posting requirement, but is also linked to the unfair labor practice component of enforcement of the rule. *Id*. at n. 149.

By each of the above statements, contrary to the district court's view, the NLRB expressed its intention in the Final Rule not to sever the enforcement provisions. At a minimum, there is "substantial doubt" regarding the NLRB's intent to permit severance of any provisions found to be unlawful, which is all that this Court's precedent requires for a determination that severance cannot be allowed. *See Davis County Solid Waste Mgmt. v. U.S. EPA*, 108 F. 3d 1454, 1459 (D.C. Cir. 1997). In any

event, the Board's own statements in the Rule establish that the Rule cannot "function sensibly without the stricken provisions." *See MD/DC/DE Broadcasters, supra*, 236 F. 3d at 22, and 253 F. 3d at 732. For each of these reasons, the entire Rule must be declared invalid.

## CONCLUSION

For each of the reasons set forth above, the challenged Rule should be struck down and a permanent injunction issued against its implementation.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,173 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in Times New Roman, Font 14.

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## CERTIFICATE OF SERVICE

I hereby certify that copies of The Plaintiff Employers' Reply, filed this 22d day of May, 2012, were served electronically on the following counsel for Appellees, all of whom have consented to electronic service:

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**ADDENDUM OF STATUTES AND REGULATIONS**

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# ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
    - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
    - (B) contrary to constitutional right, power, privilege, or immunity;
    - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
    - (D) without observance of procedure required by law;
    - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
    - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**NATIONAL LABOR RELATIONS ACT**

29 U.S.C. §§ 151-169

Section 1.[§151.] The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

Sec. 6. [§ 156. Rules and regulations] The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [by subchapter II of chapter 5 of title 5], such rules and regulations as may be necessary to carry out the provisions of this Act [subchapter].

* * *

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for

believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

* * *

(c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

Sec. 9 [§ 159.] (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) [Determination of bargaining unit by Board] The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is

affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) [Hearings on questions affecting commerce; rules and regulations] (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) [Secret ballot; limitation of elections] (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3) [section 158(a)(3) of this title], of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve- month period, a valid election shall have been held.

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended

complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

* * *

(j) [Injunctions] The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon

shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) [Hearings on jurisdictional strikes] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) [section 158(b) of this title], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

* * *

INVESTIGATORY POWERS

Sec. 11. [§ 161.] For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 [sections 159 and 160 of this title]--

(1) [Documentary evidence; summoning witnesses and taking testimony] The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) [Court aid in compelling production of evidence and attendance of witnesses] In case on contumacy or refusal to obey a subpoena issued to any person, any United States district court or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Repealed.

(4) [Process, service and return; fees of witnesses] Complaints, orders and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefore when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) [Process, where served] All process of any court to which application may be made under this Act [subchapter] may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) [Information and assistance from departments] The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

* * *

Sec. 14. [§ 164. Construction of provisions] (a) [Supervisors as union members] Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act [subchapter] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) [Agreements requiring union membership in violation of State law] Nothing in this Act [subchapter] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

* * *

## TITLE VII, CIVIL RIGHTS ACT

42 U.S.C. § 2000e-10. Posting of notices; penalties

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this title [42 USCS §§ 2000e et seq.] and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $ 100 for each separate offense.

## AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. § 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Act [29 USCS §§ 621 et seq.].

## AMERICANS WITH DISABILITIES ACT

29 U.S.C. § 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

## EMPLOYEE POLYGRAPH PROTECTION

29 USCS § 2003

Notice of protection

The Secretary shall prepare, have printed, and distribute a notice setting forth excerpts from, or summaries of, the pertinent provisions of this Act. Each employer shall post and maintain such notice in conspicuous places on its premises where notices to employees and applicants to employment are customarily posted.

**OCCUPATIONAL SAFETY AND HEALTH ACT**

29 USCS § 657

(c) Maintenance, preservation, and availability of records; issuance of regulations; scope of records; periodic inspections by employer; posting of notices by employer; notification of employee of corrective action.
(1) Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health, Education, and Welfare, such records regarding his activities relating to this Act as the Secretary, in cooperation with the Secretary of Health, Education, and Welfare, may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this paragraph such regulations may include provisions requiring employers to conduct periodic inspections. 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 Act, including the provisions of applicable standards.

**MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION**

29 USCS § 1821

(b) Posting requirements imposed upon employers. Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall, at the place of employment, post in a conspicuous place a poster provided by the Secretary setting forth the rights and protections afforded such workers under this Act, including the right of a migrant agricultural worker to have, upon request, a written statement provided by the farm labor contractor, agricultural employer, or agricultural association, of the information described in subsection (a). Such employer shall provide upon request, a written statement of the information described in subsection (a).

**FAMILY AND MEDICAL LEAVE**

29 USCS § 2619

Notice

(a) In general. Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title [29 USCS §§ 2611 et seq.] and information pertaining to the filing of a charge.

(b) Penalty. Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $ 100 for each separate offense.

**EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES**

38 USCS § 4334

Notice of rights and duties

(a) Requirement to provide notice. 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. The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.

(b) Content of notice. The Secretary shall provide to employers the text of the notice to be provided under this section.

## FINAL RULE, 29 CFR PART 104:

### § 104.201 What definitions apply to this part?

Employee includes any employee, and is not limited to the employees of a particular employer, unless the NLRA explicitly states otherwise. The term includes anyone whose work has ceased because of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. However, it does not include agricultural laborers, supervisors, or independent contractors, or anyone employed in the domestic service of any family or person at his home, or by his parent or spouse, or by an employer subject to the Railway Labor Act (45 U.S.C. 151 et seq.), or by any other person who is not an employer as defined in the NLRA. 29 U.S.C. 152(3).Show citation box

Employee notice means the notice set forth in the Appendix to Subpart A of this part that employers subject to the NLRA must post pursuant to this part.Show citation box

Employer includes any person acting as an agent of an employer, directly or indirectly. The term does not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. 152(2). Further, the term "employer" does not include entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.Show citation box

Labor organization means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. 152(5).Show citation box

National Labor Relations Board (Board) means the National Labor Relations Board provided for in section 3 of the National Labor Relations Act, 29 U.S.C. 153. 29 U.S.C. 152(10).Show citation box

Person includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers. 29 U.S.C. 152(1).Show citation box

Rules, regulations, and orders, as used in § 104.202, means rules, regulations, and relevant orders issued by the Board pursuant to this part.Show citation box

Supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to

recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. 152(11).Show citation box

Unfair labor practice means any unfair labor practice listed in section 8 of the National Labor Relations Act, 29 U.S.C. 158. 29 U.S.C. 152(8).Show citation box

Union means a labor organization as defined above.Show citation box

**§ 104.202 What employee notice must employers subject to the NLRA post in the workplace?**

(a) Posting of employee notice. All employers subject to the NLRA must post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this part.Show citation box

(b) Size and form requirements. The notice to employees shall be at least 11 inches by 17 inches in size, and in such format, type size, and style as the Board shall prescribe. If an employer chooses to print the notice after downloading it from the Board's Web site, the printed notice shall be at least 11 inches by 17 inches in size.Show citation box

(c) Adaptation of language. The National Labor Relations Board may find that an Act of Congress, clarification of existing law by the courts or the Board, or other circumstances make modification of the employee notice necessary to achieve the purposes of this part. In such circumstances, the Board will promptly issue rules, regulations, or orders as are needed to ensure that all future employee notices contain appropriate language to achieve the purposes of this part.Show citation box

(d) Physical posting of employee notice. The employee notice must be posted in conspicuous places where they are readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted. Where 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must post the notice in the language employees speak. 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 either physically post the notice in each of those languages or, at the employer's option, post the notice in the language spoken by the largest group of employees and provide each employee in each of the other language groups a copy of the notice in the appropriate language. If an employer requests from the Board a notice in a language in which it is not available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language. An employer must take reasonable steps to ensure that the notice is not altered, defaced, covered by any other material, or otherwise rendered unreadable.Show citation box

(e) Obtaining a poster with the employee notice. A poster with the required employee notice, including a poster with the employee notice translated into languages other than English, will be

printed by the Board, and may be obtained from the Board's office, 1099 14th Street, NW., Washington, DC 20570, or from any of the Board's regional, subregional, or resident offices. Addresses and telephone numbers of those offices may be found on the Board's Web site at http://www.nlrb.gov. A copy of the poster in English and in languages other than English may also be downloaded from the Board's Web site at http://www.nlrb.gov. Employers also may reproduce and use copies of the Board's official poster, provided that the copies duplicate the official poster in size, content, format, and size and style of type. In addition, employers may use commercial services to provide the employee notice poster consolidated onto one poster 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 type of the poster provided by the Board.Show citation box

(f) Electronic posting of employee notice. (1) In addition to posting the required notice physically, an employer must also post the required notice on an intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means. An employer that customarily posts notices to employees about personnel rules or policies on an intranet or internet site will satisfy the electronic posting requirement by displaying prominently—i.e., no less prominently than other notices to employees—on such a site either an exact copy of the poster, downloaded from the Board's Web site, or a link to the Board's Web site that contains the poster. The link to the Board's Web site must read, “Employee Rights under the National Labor Relations Act.”Show citation box

(2) Where 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must provide notice as required in paragraph (f)(1) of this section in the language the employees speak. 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. The Board will provide translations of the link to the Board's Web site for any employer that must or wishes to display the link on its Web site. If an employer requests from the Board a notice in a language in which it is not available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language.Show citation box

**§ 104.203 Are Federal contractors covered under this part?**

Yes, Federal contractors are covered. However, contractors may comply with the provisions of this part by posting the notices to employees required under the Department of Labor's notice-posting rule, 29 CFR part 471.Show citation box

**§ 104.204 What entities are not subject to this part?**

(a) The following entities are excluded from the definition of “employer” under the National Labor Relations Act and are not subject to the requirements of this part:Show citation box

(1) The United States or any wholly owned Government corporation;Show citation box

(2) Any Federal Reserve Bank;

(3) Any State or political subdivision thereof;

(4) Any person subject to the Railway Labor Act;

(5) Any labor organization (other than when acting as an employer); or

(6) Anyone acting in the capacity of officer or agent of such labor organization.

(b) In addition, employers employing exclusively workers who are excluded from the definition of "employee" under § 104.201 are not covered by the requirements of this part.

(c) This part does not apply to entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

(d)(1) This part does not apply to entities whose impact on interstate commerce, although more than de minimis, is so slight that they do not meet the Board's discretionary jurisdiction standards. The most commonly applicable standards are:

(i) The retail standard, which applies to employers in retail businesses, including home construction. The Board will take jurisdiction over any such employer that has a gross annual volume of business of $500,000 or more.

(ii) The nonretail standard, which applies to most other employers. It is based either on the amount of goods sold or services provided by the employer out of state (called "outflow") or goods or services purchased by the employer from out of state (called "inflow"). The Board will take jurisdiction over any employer with an annual inflow or outflow of at least $50,000. Outflow can be either direct—to out-of-state purchasers—or indirect—to purchasers that meet other jurisdictional standards. Inflow can also be direct—purchased directly from out of state—or indirect—purchased from sellers within the state that purchased them from out-of-state sellers.

(2) There are other standards for miscellaneous categories of employers. These standards are based on the employer's gross annual volume of business unless stated otherwise. These standards are listed in the Table to this section.

**Table to § 104.204**

| Employer category | Jurisdictional standard |
|---|---|
| Amusement industry | $500,000. |
| Apartment houses, condominiums, cooperatives | $500,000. |
| Architects | Nonretail standard. |
| Art museums, cultural centers, libraries | $1 million. |
| Bandleaders | Retail/nonretail (depends on customer). |

**Table to § 104.204**

| Employer category | Jurisdictional standard |
|---|---|
| Cemeteries | $500,000. |
| Colleges, universities, other private schools | $1 million. |
| Communications (radio, TV, cable, telephone, telegraph) | $100,000. |
| Credit unions | Either retail or nonretail standard. |
| Day care centers | $250,000. |
| Gaming industry | $500,000. |
| Health care institutions: | |
| Nursing homes, visiting nurses associations | $100,000. |
| Hospitals, blood banks, other health care facilities (including doctors' and dentists' offices) | $250,000. |
| Hotels and motels | $500,000. |
| Instrumentalities of interstate commerce | $50,000. |
| Labor organizations (as employers) | Nonretail standard. |
| Law firms; legal service organizations | $250,000. |
| Newspapers (with interstate contacts) | $200,000. |
| Nonprofit charitable institutions | Depends on the entity's substantive purpose. |
| Office buildings; shopping centers | $100,000. |
| Private clubs | $500,000. |
| Public utilities | $250,000 or nonretail standard. |
| Restaurants | $500,000. |
| Social services organizations | $250,000. |
| Symphony orchestras | $1 million. |
| Taxicabs | $500,000. |
| Transit systems | $250,000. |

(3) If an employer can be classified under more than one category, the Board will assert jurisdiction if the employer meets the jurisdictional standard of any of those categories.

(4) There are a few employer categories without specific jurisdictional standards:

(i) Enterprises whose operations have a substantial effect on national defense or that receive large amounts of Federal funds

(ii) Enterprises in the District of Columbia

(iii) Financial information organizations and accounting firms

(iv) Professional sports

(v) Stock brokerage firms

(vi) U. S. Postal Service

(5) A more complete discussion of the Board's jurisdictional standards may be found in An Outline of Law and Procedure in Representation Cases, Chapter 1, found on the Board's Web site, http://www.nlrb.gov.

(e) This part does not apply to the United States Postal Service.

Appendix to Subpart A—Text of Employee Notice

**A. "EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT"**

The National Labor Relations Act (NLRA) guarantees the right of employees 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 activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

"Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing. Choose not to do any of these activities, including joining or remaining a member of a union.

"Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

“Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:Show citation box

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

“If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

“Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: http://www.nlrb.gov.

You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

"*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

"This is an official Government Notice and must not be defaced by anyone." Subpart B—General Enforcement and Complaint Procedures

**§ 104.210 How will the Board determine whether an employer is in compliance with this part?**

The Board has determined that employees must be aware of their NLRA rights in order to exercise those rights effectively. Employers subject to this rule are required to post the employee notice to inform employees of their rights. Failure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1).

Normally, the Board will determine whether an employer is in compliance when a person files an unfair labor practice charge alleging that the employer has failed to post the employee notice required under this part. Filing a charge sets in motion the Board's procedures for investigating and adjudicating alleged unfair labor practices, and for remedying conduct that the Board finds to be unlawful. See NLRA Sections 10-11, 29 U.S.C. 160-61, and 29 CFR part 102, subpart B.

**§ 104.211 What are the procedures for filing a charge?**

(a) Filing charges. Any person (other than Board personnel) may file a charge with the Board alleging that an employer has failed to post the employee notice as required by this part. A charge should be filed with the Regional Director of the Region in which the alleged failure to post the required notice is occurring.

(b) Contents of charges. The charge must be in writing and signed, and must be sworn to before a Board agent, notary public, or other person authorized to administer oaths or take acknowledgements, or contain a declaration by the person signing it, under penalty of perjury, that its contents are true and correct. The charge must include:

(1) The charging party's full name and address;

(2) If the charge is filed by a union, the full name and address of any national or international union of which it is an affiliate or constituent unit;

(3) The full name and address of the employer alleged to have violated this part; and

(4) A clear and concise statement of the facts constituting the alleged unfair labor practice.

**§ 104.212 What are the procedures to be followed when a charge is filed alleging that an employer has failed to post the required employee notice?**

(a) When a charge is filed with the Board under this section, the Regional Director will investigate the allegations of the charge. If it appears that the allegations are true, the Regional Director will make reasonable efforts to persuade the respondent employer to post the required employee notice expeditiously. If the employer does so, the Board expects that there will rarely be a need for further administrative proceedings.

(b) If an alleged violation cannot be resolved informally, the Regional Director may issue a formal complaint against the respondent employer, alleging a violation of the notice-posting requirement and scheduling a hearing before an administrative law judge. After a complaint issues, the matter will be adjudicated in keeping with the Board's customary procedures. See NLRA Sections 10 and 11, 29 U.S.C. 160, 161; 29 CFR part 102, subpart B.

**§ 104.213 What remedies are available to cure a failure to post the employee notice?**

(a) If the Board finds that the respondent employer has failed to post the required employee notices as alleged, the respondent will be ordered to cease and desist from the unlawful conduct and post the required employee notice, as well as a remedial notice. In some instances additional remedies may be appropriately invoked in keeping with the Board's remedial authority.Show citation box

(b) Any employer that threatens or retaliates against an employee for filing charges or testifying at a hearing concerning alleged violations of the notice-posting requirement may be found to have committed an unfair labor practice. See NLRA Section 8(a)(1) and 8(a)(4), 29 U.S.C. 158(a)(1), (4).Show citation box

**§ 104.214 How might other Board proceedings be affected by failure to post the employee notice?**

(a) Tolling of statute of limitations. When an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful. See NLRA Section 10(b), 29 U.S.C. 160(b).

(b) Noncompliance as evidence of unlawful motive. The Board may consider a knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue.

## II. SUBPART C—ANCILLARY MATTERS

**§ 104.220 What other provisions apply to this part?**

(a) The regulations in this part do not modify or affect the interpretation of any other NLRB regulations or policy.

(b)(1) This subpart does not impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof;

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart must be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This part creates no right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Signed in Washington, DC, August 22, 2011.

Wilma B. Liebman,

Chairman.