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MEMORANDUM

To: Tom Wenning
Greg Ferrara

From: Kara M. Maciel
Evan M. Rosen

Date: September 2, 2011

Re: NGA - NLRB Notice Posting Rule

Per your request, this memorandum discusses the new rule published by the National Labor Relations Board (the “Board”) that requires employers to post a notice notifying employees of their right to join or form a union. We have drafted it with the understanding that the content will be forwarded to your members.

I. Requirements For The Notice Posting Rule

As of November 14, 2011, private employers will have to post a notice informing employees of their rights under the NLRA. Employers may download a copy of the official notice on the Board’s webpage at www.nlr.gov.

The notice must be posted in conspicuous places, including all places where notices to employees are customarily posted. If a significant portion of an employer’s workforce is not proficient in English (meaning at least 20%), then the employer must either post two notices: one in English and an additional notice in the other language, or post only 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.

As for the content of the notice itself, the text notifies employees of their right to:

- Organize a union to negotiate with their employer concerning wages, hours, and other terms and conditions of employment;
- Form, joint or assist a union;
- Bargain collectively through a union

- Discuss wages, benefits and other terms and conditions of employment or union organizing with their co-workers;
- Take action with one or more co-workers to improve working conditions by raising complaints with their employer, a government agency, or a union;
- Strike and picket
- Choose not to do any of these activities, including not joining a union.

Most of these rights are self-explanatory, but note that the fourth bullet may require employers to revise their employee handbooks to the extent that they have policies prohibiting employees from discussing their wage rates with other employees.

The notice also informs employees of certain acts that are illegal for employers, including:

- Prohibit employees from talking about or soliciting for a union during non-work time (before, after work, or during breaks), or during non-work time in non-work areas (such as parking lots or break rooms);
- Question employees about their union support or activities;
- Fire, demote, transfer or reduce hours because of an employee's support of a union;
- Threaten to close the workplace if employees choose a union to represent them;
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support;
- Prohibit employees from wearing union paraphernalia (e.g. hats, buttons, t-shirts) except under special circumstances;
- Spy or videotape peaceful union activities.

Further, the notice lists certain acts that are illegal for unions, including:

- Threatening or coercing employees to join or support the union;
- Refuse to process a grievance because an employee has criticized a union official;

- Use or maintain discriminatory standards in making job referrals to a hiring call;
- Cause or attempt to cause an employer to discriminate against an employee because of his union-related activity;
- Take adverse action against an employee for choosing not to support a union.

The notice also informs employees that if they form a union, the employer and the union will be required to bargain in good faith in an effort to reach a written and binding agreement over the terms and conditions of employment. Additionally, if an employee believes his or her rights have been violated, the notice advises him or her to contact the Board promptly, and states that an unfair labor practice charge may be filed. Likewise, the notice provides the Board's website and a toll-free number to call.

II. Penalties For Non Compliance

An employer that fails or refuses to post the required notice of employee rights shall be considered in violation of Section 8(a)(1) of the NLRA. If a violation is found, the Board will order the employer to post the notice, as well as an additional notice of remedial action. A union or an employee could file an unfair labor practice charge against the employer for failure to post the notice.

Further, an employer's failure to post the notice may result in tolling the statute of limitations for other unfair labor practice charges. Under Section 10(b) of the NLRA, a complaint may not be based upon any unfair labor practice occurring more than six months prior to the filing of an unfair labor practice charge with the Board. But the six-month filing period does not begin to run until the charging party has actual or constructive notice of the allegedly unlawful conduct. Therefore, unless an employer can prove that an employee had actual or constructive knowledge of the conduct alleged to be unlawful (as well as actual or constructive knowledge that the conduct violated the NLRA), the Board will toll the statute of limitations for the period of time in which the notice was not posted. Note, however, that this only applies for unfair labor practice charges filed by employees. If an unfair labor practice charge is filed by a union, they will be deemed to have constructive knowledge of the unlawful character of the conduct since they routinely deal with issues under the NLRA.

If an employer knowingly and willfully fails or refuses to post the notice, it can be used as evidence of unlawful motive in an unfair labor practice proceeding in which motive is an issue. This means that if an employer has actual knowledge of the rule, and refuses to comply, it can be used against the employer in a separate unfair labor practice proceeding. Motive is typically an issue in unfair labor practice charges challenging an employer's actions during a union campaign, and where adverse personnel decisions have been made against union supporters. Importantly, an employer's willful failure to post the notice shall not create a

presumption of anti-union animus, but rather shall merely constitute evidence that could be considered, along with other evidence, in determining whether there was an unlawful motive.

The rule also prohibits employer retaliation against an employee who files a charge alleging that the employer did not post the required notice. Retaliation shall be considered an unfair labor practice under Section 8(a)(1) and 8(a)(4) of the NLRA.

III. Do's and Don'ts for Communicating With Employees About Unions

The notice posting requirement will likely result in renewed employee interest in unions. Employees may start discussing unions in the workplace, and may ask managers pointed questions. It is imperative that managers know how to respond in a way that (a) reduces employee interest in starting a union campaign, and (b) does not constitute an unfair labor practice charge.

Managers should thus be educated on the Do's and Don'ts for responding to employee questions about unions. We use the acronyms "FOE" and "TIPS" to remember these rules.

"FOE" is the acronym describing what managers may communicate to employees. It stands for facts, opinions, and experiences. A manager may always provide facts about the union (*e.g.*, if you become a member of a union, you will have to pay union dues; unions sometimes require employees to go on strike and if that happens you can be permanently replaced). Likewise, a manager can feel free to provide employees with his opinion about unions. For example, a manager may state that a union is not needed in the workplace and that he does not want an outside third-party to interfere in the relationship he has with the employees. Finally, managers may discuss their experiences or other person's experiences with unions. For example, a manager may state that he previously worked at a facility represented by a union and it created a lot of division among the staff.

"TIPS" is the acronym describing what managers may not communicate to employees. It stands for threats, interrogations, promises, and spying. A manager cannot threaten an employee, for example, that he will lose his job, suffer a reduction in pay, or suffer any other adverse employment action for supporting the union. Likewise, a manager may not ask questions to employees about whether and why they support the union, or the identity of other supporters. Further, managers may not make promises to employees in order to dissuade them from supporting a union. For instance, a manager may not promise an employee a pay raise, a better shift, a promotion, or even something as simple as a better parking spot. Finally, managers may not spy on employees who they believe are trying to form a union. This means that managers may not secretly attend union meetings, install video cameras for the purpose of learning about union activity, or otherwise spy on employees. Please see the attached documents that provide a more extensive list of examples of Do's and Don'ts.

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In light of the new posting requirement, we recommend that, in addition to the Do's and Don'ts, employers train their managers on union avoidance strategies and prepare ahead of time to thwart a union organizing attempt. Please let us know if N.G.A. can be of any assistance going forward as your company addresses these issues.

Best regards.