



Labor: Political controversy surrounds the NLRB

Critics fear the agency is overstepping its authority

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In a political environment mired in controversy, the National Labor Relations Board (NLRB) is one of the federal agencies receiving more than the usual dose of criticism. Much of this criticism stems from several of the [NLRB's recent pro-union decisions](#). In some instances, members of Congress have joined the business community to express outrage over the degree to which the NLRB appears to have acted beyond the scope of its authority. Multiple lawsuits already have been filed concerning one of these decisions, and it is expected that more lawsuits will follow.

One of the decisions sparking controversy is the Aug. 30, 2011 [final rule](#) issued by the NLRB that alters employers' posting requirements. The new rule requires employers to post notices regarding employees' bargaining rights, regardless of whether any employees are represented by a union. An employer's failure to post the notice could be deemed an unfair labor practice which could have the effect of tolling the applicable statute of limitations for the filing of other unfair labor practice charges. Moreover, an employer's "knowing" or "willful" failure to post the notice could be considered evidence of an unlawful motive if unfair labor practice charges are filed regarding other

alleged violations of the National Labor Relations Act (NLRA).

The new posting regulation marks the first time the NLRB has issued regulations requiring employers to post notices about employees' rights under the NLRA. Opponents argue that the regulation is outside the scope of the NLRB's rulemaking authority.

Several lawsuits have been filed challenging the regulation; the court in one case recently heard arguments on the parties' cross-motions for summary judgments and a decision is pending. As a result of the pending litigation, the NLRB [recently announced](#) it would postpone the effective date of the posting requirement to April 30.

Controversy also surrounds the NLRB's plans to issue regulations that would expedite the union election process. The NLRB issued a final rule on Dec. 22, 2011 that, among other things, would limit pre-election hearings to resolving only the issue of whether "a question of representation exists." The importance of this resolution is that disputes over voter eligibility would be resolved only after elections have occurred. The new regulations also would eliminate the rights of parties, prior to an election, to seek NLRB review of a regional

director's pre-election rulings and would instead require that such review be sought in a post-election appeal.

Critics argue that the regulations, which were approved 2-1, are unprecedented because they defy a decades-old practice of the NLRB of not taking action that changes existing law without the affirmative vote of at least three members. It is expected that legal challenges to the rule will occur.

The controversy surrounding the posting requirements and the election-related regulations are just two examples of the growing political tensions surrounding the NLRB. Several members of Congress have threatened to take actions that would curb the ability of the NLRB to function. These steps include reducing or eliminating the agency's budget, and refusing to confirm additional NLRB members appointed by President Obama. Politics, not just the courts, will undoubtedly play a role in the outcome of these issues.