CLIENT ALERT: National Labor Relations Board Continues Shift to More Pro-Union Agenda

Shortly before the end of 2010, the National Labor Relations Board (the "Board") announced several initiatives which advance a decidedly more pro-union agenda. This continues the shift noted in MBJ's November 4, 2010 client alert entitled, *NLRB Signals Shift Towards a More Pro-Union Agenda*.

On December 22, 2010, the Board announced a proposed rule which would require every employer subject to the National Labor Relations Act (the "Act") to post a notice informing employees of their rights under the Act. Additionally, electronic distribution of the notice would be required of employers who customarily communicate with their employees in that way. Parties currently have sixty (60) days to comment on the proposed rule.

Employers subject to the Act include almost all private sector employers except for those subject to the Railway Labor Act and those whose impact on interstate commerce is *de minimis* or so slight as to not meet the Board's discretionary jurisdictional standards.

Under the proposed rule, any employer that does not fulfill the notice requirement has violated Section 8(a)(1) of the Act. Additionally, a failure to post the required notice could toll the six (6) month statute of limitations for the filing of an unfair labor practice charge. Finally, an employer's knowing failure to post the required notice could be considered evidence of that employer's unlawful motive in unfair labor practice cases where the employer's motive for taking certain actions may be at issue.

In a separate action, the Acting General Counsel of the Board (its chief prosecutor of alleged violations of the Act) issued a memorandum announcing that additional remedies would be sought when seeking injunctive relief for alleged unfair labor practices during organizational campaigns. Among the additional remedies which may be sought in these "nip-in-the-bud organizing cases" are the following:

- Notice reading – a responsible management official would be required to read a notice of wrong doing to assembled employees or, at the employer's option, have a Board Agent read the notice in the presence of a responsible management official;
- Allow the union access to the employer's bulletin board to communicate with employees in cases where the employer unlawfully interferes with communications between employees or between employees and the union;
- Provide the union with the names and addresses of employees in cases where the employer unlawfully interferes with communications between employees or between employees and the union; and
- In more egregious cases, the Acting General Counsel's memorandum suggests the possibility of additional remedies, including granting a union access to non-work areas of the employer's facilities during employees' non-work time; giving a union equal time and facilities to respond to any speech made by the employer; and affording the union the right to deliver a speech to employees at an appropriate time prior to a Board election.

While each of the above remedies has been approved by the courts in certain cases, the Acting General Counsel's memorandum makes obvious that the Board will be seeking these expansive remedies in many more cases where the Board finds an employer to have committed unfair labor practices during an organizational campaign.

With this continuing shift to a more pro-union agenda, employers must continue to exercise caution when making decisions in the context of possible union organizing efforts. Consultation with labor

counsel before making decisions should be one aspect of that caution.

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