February 22, 2011

Attn: Mr. Lester Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14th Street, NW  
Washington, D.C. 20570


The Society for Human Resource Management (SHRM) welcomes the opportunity to submit comments in response to the December 22, 2010 Notice of Proposed Rulemaking (NPRM), Notification of Employee Rights Under the National Labor Relations Act.

SHRM is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

SHRM recognizes the inherent rights of employees to form, join, assist in or refrain from joining a union. Further, SHRM believes that HR professionals have a responsibility to understand, support and champion employment-related actions that are in the best interests of their organizations and their employees regarding third-party representation by unions. Employee NLRA rights to form, join, assist in or refrain from joining a union without threats, interrogation, promises of benefits, or coercion by employers or unions must be protected.

As HR professionals, SHRM members have substantial knowledge and experience working with both union-represented and non-union workforces. SHRM is concerned, however, with the National Labor Relations Board’s (NLRB) proposed rule for a number of reasons. First, SHRM believes that the NLRB lacks the statutory authority to require such a notice. Second, the NLRB is without the statutory authority to create unfair labor practices and penalties necessarily resulting from the absence of the required notice posting. Third, the proposed notice, as drafted, is not consistent with the statute or existing NLRB statements regarding the NLRA. Accordingly, the proposed notice does not provide adequately balanced information. Fourth,
SHRM suggests that only one Federal entity should promulgate rules under the statute. For these reasons, SHRM urges the NLRB to withdraw the proposed rule. If the rule is not withdrawn and the NLRB goes forward with the rulemaking, SHRM recommends that the notice as proposed in the NPRM be redrafted to specifically, precisely, and neutrally state statutory rights and prohibitions that are consistent with the NLRA.

Background of the NPRM and the Proposed Notice

The December 22, 2010, NPRM enumerated the exact text of a notice to be posted by covered employers:

**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. 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 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 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:
• Threaten you that you will lose your job unless you support 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 other adverse action against you based on whether you have joined or 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 website: 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.

* 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. 75 FR at 80418-80419.

1. **The NLRB Lacks Statutory Authority To Require Such Notice**

SHRM believes that the NLRB lacks the statutory authority to promulgate or enforce a rule expressly requiring the posting of individual rights notices. As the NLRB majority noted in the December 22, 2010, Notice of Proposed Rulemaking:

The NLRA is almost unique among major Federal labor laws in *not* including an express statutory provision requiring employers routinely to post notices at their workplaces informing employees of their statutory rights. Such postings are required under the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Occupational Safety and Health Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Uniformed Services Employment and Reemployment Rights Act, the Railway Labor Act, the Employee Polygraph Protection Act, the Migrant and Seasonal Agricultural Workers Protection Act, and other Federal statutes. 75 FR at 80411 (emphasis added).

For its entire 76 years, the NLRB has not required a notice posting of the NLRA or of redacted statutory language or of any NLRB public advisories. The NLRB, however, provides, and has provided for many years, a variety of public information resources:

- **Text of the NLRA:**
  [www.nlrb.gov/about_us/overview/national_labor_relations_act.aspx](http://www.nlrb.gov/about_us/overview/national_labor_relations_act.aspx)

- **Outreach brochure:**

- **Basic guide to the NLRA and its administration:**
• List of employee rights under the NLRA:
  www.nlrb.gov/workplace_rights/employee_rights.aspx

• Explanation, including examples, of actions of employers and labor organizations, that violate the NLRA:
  www.nlrb.gov/workplace_rights/nlra_violations.aspx

Given the statute’s silence, SHRM urges the NLRB to refrain from rule-making. It is the role of Congress to legislate a required notice as underscored by the specific evidence of Federal labor laws noted by the NLRB. It is SHRM’s opinion that without a Congressional mandate, the NLRB should not proceed with current rule-making and should not require notice posting, imposing unfair labor practice liability for failure to post such a notice, and suspending the NLRA’s Section 10(b) limitations period for any unfair labor practice charge against a noncompliant employer. 29 U.S.C. §160(b); 75 FR at 80419 and proposed 29 CFR 104.210 – 104.214; Member Hayes dissent, 75 FR at 80415.

2. The NLRB Lacks Statutory Authority to Create and Impose Penalties

The sanctions identified in the proposed rule, Section 104.214, lack an appropriate statutory basis. Under the proposed rule, the NLRB would empower itself to toll the law’s six-month statute of limitations for filing unfair labor practice charges under Section 10(b) of the Act. By doing so, the proposed rule effectively converts the failure to post a notice of employee rights to an unfair labor practice in waiting. In addition, the NLRB proposes to treat

“[k]nowing noncompliance as evidence of unlawful motive….If an employer has actual or constructive knowledge of the requirement to post the employee notice and fails or refuses to do so, the Board may consider such a willful refusal as evidence of unlawful motive in a case in which motive is an issue.” 75 FR 80420.

Not only does the Act not contain a notice posting requirement in contrast to other Federal labor statutes, Section 10(a) of the Act specifically limits the NLRB’s powers to preventing only the unfair labor practices listed in Section 8 of the Act. Section 8 is silent regarding any notice posting requirement. Essentially, by treating the failure to post a notice as evidence of unlawful motive, the NLRB would effectively create unfair labor practice findings and penalties. “The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.” American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965); see also NLRB v. Insurance Agents, 361 U.S. 477, 499 (1960). SHRM is of the opinion that the Board’s proposed rule exceeds its authority under the Act.
3. The Proposed Notice Conflicts with the NLRA

SHRM is concerned that the proposed notice misstates the rights and obligations enumerated by the NLRA. Federal labor law is neutral regarding an employee’s free choice to join or not join a union or to engage in concerted activities or not.

The proposed notice, however, does not reflect the statutory language. The proposed notice identifies seven items or categories of rights whereas section 7 of the Act lists five rights. Similarly, the proposed notice identifies seven categories of employer unfair labor practices where the statute lists only five. When identifying union unfair labor practices, however, the proposed notice lists only five despite the statute’s enumeration of seven categories on union unfair labor practices.

The declared purpose of the NPRM is to inform employees of their rights under federal labor laws. Not only does the proposed notice fail to accurately reflect the NLRA, it is incomplete. While the proposed notice speaks to rights of the unrepresented, it fails to inform represented employees of core rights under the NLRA. The proposed notice is silent regarding Federal labor law rights to decertify or withdraw from third-party union representation, to seek relief for a union’s failure to represent employees fairly, and/or to object to paying the portion of union dues or fees used to support activities unrelated to collective bargaining, contract administration, or grievance adjustment. Levitz Furniture Co. of the Pac., Inc., 333 NLRB 717 (2001); 29 U.S.C. §185; Communications Workers v. Beck, 487 U.S. 735 (1988).

For these reasons, SHRM concludes that the proposed notice is not neutral or a complete description regarding employee free choice and conflict with the NLRA. SHRM suggests the following notice text:

**EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT**

The National Labor Relations Act (NLRA) extends rights to many private-sector employees and protects employees from certain employer and union unfair labor practices.

**Examples of Your Rights As An Employee Under the NLRA Are:**

To self-organization;

To form, join, or assist labor organizations;

To bargain collectively through representatives of their own choosing;

To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;

To refrain from any or all of such activities except to extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.
Examples of Employer Conduct Which Violate the NLRA Are:

To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of the Act;

To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it provided, that an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

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 the Act shall preclude an employer from making an agreement with a labor organization 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;

To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act;

To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of the Act.

Examples of Labor Organization Conduct Which Violate the NLRA Are:

To restrain or coerce employees in the exercise of the rights guaranteed in section 7 of the Act or an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

To cause or attempt to cause an employer to discriminate against an employee or to discriminate against an employee with respect to whom membership in a labor organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required;

To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) of the Act;

To engage in, or to induce or encourage any individual employed by any person engaged in commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce where in either case an object thereof is forcing or requiring any employer or self-employed person to join any labor or employer organization forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring
any other employer to recognize or bargain with a labor organization as the representative of such employees unless certified as the representative under section 9 of the Act or forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative or forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class unless such employer is failing to conform to an order or certification of the Board;

To require employees covered by an agreement the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory;

To cause or attempt to cause an employer to pay or deliver any money or other thing of value for services which are not performed or not to be performed; and

To picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization or forcing or requiring the employees of an employer to accept or select such labor organization as their representative, unless such labor organization is currently certified as the representative where the employer has lawfully recognized any other labor organization and a question concerning representation may not appropriately be raised where within the preceding twelve months a valid election has been conducted or where such picketing has been conducted without a petition being filed.

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.

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4. Only One Federal Entity Should Promulgate Rules under the NLRA

Lastly, although the NPRM indicates that Federal contractors who have posted the Department of Labor’s required notice, under Executive Order 13496, will be deemed to have complied with the Board’s rule posting requirement, SHRM remains concerned about the confusion caused by having two separate federal authorities creating rules, differing notice language, language inconsistent with the statute, and different enforcement schemes for the same purpose. It is confusing for employers whether or not they are Federal contractors, to monitor two different Federal authorities to ensure they are in compliance with the basic organizing rights. SHRM members need consistency and knowledge of what agency is responsible for the interpretation of the NLRA.

Conclusion

In closing, SHRM finds that the NLRB lacks the statutory authority to promulgate a rule requiring employer notice posting. Second, the NLRB is without statutory authority to create penalties. Third, the proposed notice, as drafted, is not consistent with the statutory language of the NLRA. Fourth, only one Federal authority should promulgate and enforce rules under the NLRA. For these reasons, SHRM urges the NLRB to withdraw the proposed rule. If the rule is not withdrawn and the NLRB goes forward with the rulemaking, SHRM recommends that the notice as proposed in the NPRM be redrafted to specifically, precisely, and neutrally state statutory rights and prohibitions that are consistent with the NLRA.

Respectfully submitted,

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Society for Human Resource Management

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SHRM Alabama State Council
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SHRM-Topeka Chapter (Kansas)
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