

Joint Poultry Industry Human Resources Council



February 16, 2011

SUBMITTED ELECTRONICALLY

Mr. Lester Heltzer
Executive Secretary
NLRB
1099 14th Street NW
Washington DC 20570

Re: RIN 3142--AA07, Proposed Rules
Governing Notification of Employee Rights under
the National Labor Relations Act

Dear Mr. Heltzer:

The U. S. Poultry & Egg Association, the National Chicken Council and the National Turkey Federation are non-profit trade associations representing the producers and processors of chickens, turkeys, other poultry, eggs and affiliated industry suppliers. Our associations appreciate the opportunity to submit these comments on the proposed rule issued by the National Labor Relations Board ("NLRB" or "Board") and published in the Federal Register on December 22, 2010 to require employers to publish notice to employees of certain rights under the National Labor Relations Act ("NLRA").

For reasons discussed more fully below, our associations oppose the proposed regulation and respectfully request that the Board decline to adopt the proposed rule.

A. The Proposed Regulation Exceeds the NLRB's Statutory Authority

Consistent with the comments submitted by many others, the Associations' primary objection to the proposed regulation is that it exceeds the NLRB's statutory authority. The NLRB relies on Section 6 of the NLRA to support the implementation of this regulation. That provision gives the Board the authority to make rules and regulations "as may be necessary to carry out the provisions of the Act." 29 U.S.C. § 156 (emphasis added). This statutory grant of authority presents two obvious questions: First, is the proposed regulation necessary, and, if so, for which provisions of the NLRA is it necessary. Unfortunately, the proposed regulation fails to answer either of these questions.

Regarding the necessity of the proposed regulation, the proposal relies on only two law review articles, both written years ago, one by a union advocate, and another by the same person who first proposed the very regulation at issue, for the proposition that American workers today are no longer aware of their rights under the NLRA. Not only are these articles outdated, but they are also obviously biased. In its seventy-five year history, the NLRB has never found it “necessary” to require such a notice posting by employers. Given that the NLRA has remained substantially the same for the last sixty years, it is reasonable to ask, “why now?” Evidently, the NLRB believes that in this Internet age when the American people have greater access to news and information than they have ever had before, that they are somehow suddenly ignorant of their right to unionize. The Board has failed to offer an adequate justification for this additional regulation.

As for the second question, the Board fails to cite any provision of the NLRA to support the necessity of the proposed regulation. A plain reading of the statutory grant of authority suggests that to implement a new regulation it must be necessary to *carry out* some other portion of the NLRA. But there is no provision in the NLRA that makes this regulation necessary. If Congress had wanted the NLRB to inform employees of their rights under the NLRA it could have explicitly or even implicitly done so, but Congress failed to do either.

Significantly, when Congress has wanted an agency to require employers to inform employees of their rights it has made its intention clear in the statute. For example, regarding rights under Title VII, Congress included a statutory provision entitled “Posting of Notices; penalties” making clear its intention to require posting. 42 U.S.C. § 2000(e)-10. Congress did the same with the Age Discrimination in Employment Act (29 U.S.C. § 627), the Americans with Disabilities Act (42 U.S.C. § 12115), the Uniformed Services Employment and Reemployment Rights Act (38 U.S.C. § 4334), the Employee Polygraph Protection Act (29 U.S.C. § 2003), and even the Railway Labor Act (45 U.S.C. § 152). Even the Board recognized that the “NLRA is almost unique among major Federal labor laws in not including an express statutory provision requiring employers routinely to post notices.” 75 Fed. Reg. 80411 (Dec. 22, 2010). Congress’ failure to include a specific notice provision in the statute is much more than “unique.” It is, as dissenting Member Hayes noted, dispositive evidence that the Board is exceeding its statutory authority with this proposed regulation.

B. The Proposed Regulation is Inconsistent with the NLRA

In addition to violating the non-delegation doctrine, the proposed regulation is also inconsistent with the NLRA. The proposed regulation provides that noncompliance is an unfair labor practice. 75 Fed. Reg. 80414. In essence, the proposed regulation creates a new unfair labor practice. To justify its creation, the Board relies on the following language from the NLRA: “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.” 29 U.S.C. §158(a)(1). Section 7, by comparison gives employees the right to organize, form a union, and bargain collectively. 29 U.S.C. § 157. Read together, these sections make clear that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees who are exercising their rights to organize. Thus, by the plain statutory terms, failing to post a notice of rights under the NLRA is not an unfair labor practice.

In particular, failing to post does not interfere with any Section 7 rights because employees are still free to organize, join a union, or bargain collectively. Additionally, Section 8(a)(1) requires that an employer take *affirmative action* either by interfering with, restraining, or coercing an employee before it can be held liable for an unfair labor practice. Failing to post a notice is not an affirmative action. In

fact, there is no other unfair labor practice that is based on an employer's inaction. In short, the new unfair labor practice contradicts the terms of the NLRA.

Unfortunately, the proposal does not stop at the creation of a new unfair labor practice, but it goes on to actually toll the statute of limitations for this newly created practice. According to proposed § 104.214,

When an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that the 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.

In other words, if the employee does not know of his rights under the NLRA, the statute of limitations is tolled.

However, ignorance of the law has never been a basis for applying equitable tolling. *See, e.g., Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1012 (9th Cir. 2009) (“a pro se petitioner’s confusion or ignorance of the law is not, itself, a circumstance warranting equitable tolling.”); *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561-62 (6th Cir. 2000) (noting that ignorance of the law is insufficient to warrant equitable tolling and that allowing “an ignorance of the law excuse would encourage and reward indifference to the law”); *Whitt v. Stephens County*, 529 F.3d 278, 283 (5th Cir. 2008) (“neither ‘excusable neglect’ nor ignorance of the law is sufficient to justify equitable tolling of limitations”). Even for a death row inmate who only filed his complaint one day late, ignorance of the law was no excuse. *See Rouse v. Lee*, 339 F.3d 238, 250 (4th Cir. 2003) (noting that petitioner was not entitled to equitable tolling based on counsel’s ignorance). If ignorance of the law cannot save someone from death, how can it be evoked to give employees essentially limitless time to file claims against American businesses, like those in the poultry industry, that work hard every day to make sure that they are complying with the law?

Moreover, applying equitable tolling merely because an employer failed to post notice is inconsistent with the very meaning of equitable tolling as it has been interpreted by common law courts. Even when courts have applied equitable tolling to the NLRA’s statute of limitations, 29 U.S.C § 160(b), those courts have required that the defendant have taken some affirmative action to conceal the existence of a cause of action. *See, e.g., Barlow v. American Nat’l Can Co.*, 173 F.3d 640, 645 n.3 (8th Cir. 1999) (declining to apply equitable tolling because there was no evidence of “positive misconduct” by union); *Edwards v. International Union, United Plant Guard Workers*, 46 F.3d 1047, 1055 (10th Cir. 1995) (finding actions did not rise to level of “active deception” to warrant equitable tolling). Here, the NLRB would apply tolling even where employers did nothing to conceal an unfair labor practice claim. This has never been permitted during the NLRB’s seventy-five year history, and it makes little sense to start this practice now when, as noted, an employee’s access to information, including their rights under the NLRA is greater than ever.

For these reasons and for other reasons discussed in greater detail by other commentators, our associations respectfully request that the NLRB eliminate the tolling provision from the proposed regulation.

C. The Substance of the Notice Would Not Survive Arbitrary and Capricious Review

In addition to these legal deficiencies, our associations are greatly troubled by the substance of the notice itself.¹ Simply stated, the NLRB's proposed notice will not survive arbitrary and capricious review because it presents a slanted and incomplete view of an employee's rights under the NLRA. In particular, the notice reads more like a union manifesto than an unbiased explanation of an employee's rights because it fails to present a balanced explanation of the rights and obligations set forth in the NLRA. Perhaps most obviously, the notice fails to inform employees that union representation is exclusive and that once a union is recognized it will remain the exclusive bargaining agent for the employees unless the employees vote to decertify the union. Furthermore, noticeably absent from the notice is any explanation as to how to go about securing decertification. If employees are as ignorant as to how to join a union as the NLRB contends, then they are equally if not more ignorant of how to decertify a union that is already representing them.

The notice is wholly inadequate in explaining the rights and consequences of collective bargaining under Section 8(d) of the Act. In particular, the notice fails to inform employees that if a union is selected, they are bound by the union's bargaining decisions even if they vote against the union or do not join the union. Similarly, the notice fails to inform employees that once a union is recognized, they will no longer be permitted to bargain directly with their employer. *See Inland Tugs, Div. of American Commercial Barge Line Co. v. NLRB*, 918 F.2d 1299, 1310 (7th Cir. 1990) (“[T]he statutory representative is the one with whom [the employer] must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees.”). Moreover, the notice fails to inform employees that there is no guarantee that they will benefit from collective bargaining. “Voting for a union does not automatically guarantee an increase in wages and benefits because the employer does not have to agree to any union bargaining demand, and, in fact, an employer has as much a right to ask for wage and benefit reductions as the union has to ask for increases.” *The Developing Labor Law, Fourth Ed.* (2001) Vol. 1 at 134-25.²

In short, the biased nature of the notice fails to provide the “proper balance” that President Obama recently recognized in an editorial urging a move “Toward a 21st-Century Regulatory System.” *Wall Street Journal*, Tuesday, January 18, 2011 at A17. If the purpose of the notice is to inform employees of their rights under the NLRA, then the notice should be drafted to inform employees of all of those rights and not just those that promote unionization.

D. Conclusion

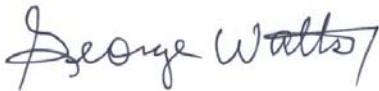
For these reasons and others addressed in other comments, the NLRB should not adopt the proposed rule. Because the notice posting requirement exceeds the Board's statutory authority, the U.S.

¹ As a preliminary matter, our associations believe that the proposed regulation is an invalid exercise of the NLRB's statutory authority. But even if the NLRA had given the Board express authority to draft a notice regulation, as Congress did with so many other employment laws, the notice itself will not withstand even arbitrary and capricious review.

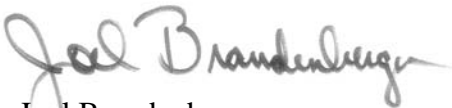
² This publication was edited for many years by Charles Morris, one of two authorities on whom the Board relies for this proposed regulation.

Poultry and Egg Association, the National Chicken Council and the National Turkey Federation ask that the Board withdraw the proposed rule altogether. Thank you for your consideration.

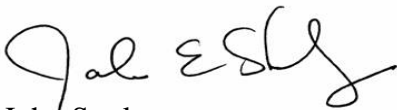
Respectfully submitted,



George Watts
President
National Chicken Council
1015 15th Street, NW, Suite 930
Washington, DC 20005-2622
(202) 296-2622



Joel Brandenberger
President
National Turkey Federation
1225 New York Avenue, NW, Suite 400
Washington, DC 20005
(202) 898-0100



John Starkey
President
U. S. Poultry & Egg Association
1530 Cooledge Road
Tucker, GA 30084
(770) 493-9401