

# Client Alert **Employment & Labor**

## ***Revitalized NLRB Takes on Vigorous Agenda Including Reissued Quickie Union Election Rules And Greater Employee Handbook Scrutiny***

The National Labor Relations Board (“NLRB” or the “Board”) has been notably active in the first quarter of 2014.

As addressed in our [March 2013 Alert](#), the Board faced uncertainty regarding its power to act following the January 23, 2013 decision in *Noel Canning v. NLRB* by the U.S. Court of Appeals for the District of Columbia Circuit. *Noel Canning* held that President Obama’s three recess appointments to the Board, made on January 4, 2012, were unconstitutional. Then, in August 2013, the NLRB received a full complement of five Senate-confirmed members.

While it has taken a few months for the Board to ramp up after the new members were sworn in, the newly invigorated NLRB is quickly making up for that time. For instance, the Board issued 19 decisions in January 2014 alone.

Below are summaries of certain significant NLRB developments from the first quarter of 2014:

» **NLRB Proposes Quickie Election Rules Again – Will Help Unions to Organize**

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On February 5, 2014, the Board reissued proposed amendments to its existing rules governing union election procedures, new rules which it first proposed in

March  
**2014**

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2011. These rules will make union organizing easier by dramatically expediting the Union election process. In May 2012, the United States District Court for the District of Columbia had blocked the prior rules, holding that the NLRB lacked a quorum when it adopted those rules.

The new proposed rules, which the Board issued with a full quorum, would make several significant changes that would greatly benefit unions. The proposed rules would:

- speed up union elections by ending the current practice of scheduling pre-election hearings within fourteen days from the petition filing and instead requiring hearings to be held within seven days of the filing;
- substantially reduce an employer's right to litigate whether employees are eligible to vote prior to an election, by automatically deferring such issues until after the election; and
- require employers to provide union organizers with the names, addresses, email addresses and phone numbers of employees once a petition has been filed.

The NLRB is accepting public comments on the proposal until April 7, 2014. In addition, the Board will hold a public hearing on the proposed rules during the week of April 7, 2014.

» **NLRB Employee Handbook Scrutiny** \_\_\_\_\_

The Board has been more closely examining provisions in companies' employee handbooks. This increased scrutiny impacts employers in both union and non-union workplaces.

As noted in our April 2013 Alert, several of the Board's prominent decisions over the past few years have addressed social media policies. Recently, the NLRB has expanded its focus to other aspects of employer handbook policies, such as those policies pertaining to confidentiality, dispute resolution, at-will employment statements, and non-union statements.

A recent example is a decision issued by an NLRB Administrative Law Judge ("ALJ") that partially invalidated an employer's dress code. *Boch Imports, Inc.*, NLRB, No. 1-CA-83551 (Jan. 13, 2014).

In *Boch*, the ALJ found that a dress code provision in a Honda dealer's employee handbook that prohibited employees who have contact with the public from

wearing pins, insignia, or other message clothing violated section 8(a)(1) of the National Labor Relations Act (“NLRA” or the “Act”) (which prohibits employers from interfering with employees as they engage in protected concerted activity). Although the dress code rule applied to all pins, insignia, or other message clothing, the ALJ found that the rule violated an employee’s presumptive right to display a union insignia in the workplace.

» **Notice Posting Rule Abandoned – But New Emphasis on Digital Media to Publicize NLRA’s Protections in Union and Non-Union Workplaces**

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The Board has decided not to seek U.S. Supreme Court review of two U.S. Court of Appeals decisions which held that the NLRB’s Notice Posting Rule was invalid. The Notice Posting Rule would have required private employers to post a notice in the workplace of employee rights under the Act.

The Board has issued an update on its website stating that the NLRB remains committed to making sure that “workers, businesses and labor organization are informed of their rights and obligations under the National Labor Relations Act.” According to that update, the workplace poster is available on the NLRB website and may be disseminated voluntarily. The Board has also established a free mobile app for iPhone and Android users, which provides information about the NLRA.

Although the NLRB chose to abandon its proposed Notice Posting Rule, the Board’s subsequent statements and its use of digital media to disseminate information about the Act demonstrate a commitment to remain relevant, modernize, and seek to influence employees in both unionized and non-unionized workplaces.

**Employer Take Aways**

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- Employees must prepare for the new quickie election rules. Management must promote positive employee relations before union organizing occurs. Employers will no longer have the time to campaign fully against unionization once a labor organization files a petition.
- Employers must be very mindful of the Board’s increased focus on non-union workplaces, including its scrutiny of employee handbook and social media policies.

- The NLRA applies to virtually all private sector employers, whether unionized or not unionized. If the NLRB finds that a policy violates the NLRA, the Board may order that the employer rescind that policy and may also require management to post a notice to employees stating that the employer will not violate the Act. The NLRB may also invalidate any discipline or termination that the employer based on that policy and can require the reinstatement, with back pay, of any discharged employee.
- The U.S. Supreme Court is still considering the Board's appeal of *Noel Canning*, which may require the Board to revisit certain prior rulings. In the meantime, the NLRB is moving forward with its vigorous agenda.

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For assistance in drafting revised policies, training management on the requirements of such policies, and maintaining union-free status, please contact one of the following Sills Cummis & Gross labor and employment attorneys:

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