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Employee Rights: If Nobody Knows, Who Cares?

🕒 MARCH 10, 2014 BY [LEE HOWERY](#) 💬 0 COMMENTS

The average reader of this article most likely possesses a higher degree of education than the average American; yet, do *you* know who can unionize? Do you think the average American knows? If American workers knew the answer, would the wage rate of service sector workers parallel the inflation rate? Did you know the [federal minimum wage](#) has risen only once during the current presidency? The President, acting alone, [raised the minimum wage](#) of federal contract workers recently. In the current political climate, it is [unlikely Congress will follow](#) his lead anytime soon.

Under the [National Labor Relations Act](#) (NLRA), almost every worker earning wages has the right to form or join a union, or refrain from doing so. In the midst of the Great Depression, the [New Deal Congress passed](#) the NLRA in order to provide private employees across most industries the right to organize and collectively bargain with their employers. Under [section 7](#), employees were given the right to form, join, or assist a union and to discuss terms and conditions of employment with their co-workers. As a result, employers across the nation were forced to bargain with their employees to effectuate the improvement of working conditions. Armed with the knowledge that they were equal partners within [industrial democracy](#), workers sought fair compensation, which in turn was used to purchase the manufactured goods they made, which brought the entire economy back to life.

Today, we are a few years past the [end of the Great Recession](#), but unlike the earlier generation, the contemporary public is generally ignorant of their rights under the NLRA. This has resulted in an economy where corporate profits continue to rise, while regular compensation rates remain [stagnant in a majority of states, prompting massive protests](#). Employers autocratically decide employee wages, benefits, and working conditions, and most workers do not know they can bargain for better.

In order to protect employees' freedom of association and ability to collectively bargain, the New Deal Congress also created the National Labor Relations Board (NLRB or Board), an agency with jurisdictional oversight of private labor relations. [Section 6](#) of the NLRA provided the Board with the authority to create rules. Over many years, the Board has created a vast body of law by interpreting various provisions of the NLRA, with most of its close decisions promoting the legislative intent to foster collective bargaining, balancing worker freedom of association against employer property interests. Generally, as every matter has been decided upon its own facts on a case-by-case basis, the NLRB has found it unnecessary to promulgate regulations. Only twice in its history has the NLRB exercised its broad rulemaking authority.

The first time this authority was used was in 1989, after acute care hospitals came under Board jurisdiction. To save time, the NLRB created general guidelines for the appropriate bargaining units in hospitals, separating different classes of medical professionals into eight categories with an exception for extraordinary circumstances. Management immediately challenged the rule. In 1991, the case made it all the way to the Supreme Court as [American Hospital Association v. NLRB](#), where the hospital challenged the rule and lost. In a unanimous opinion, the Court held that the rules were developed to resolve common issues of general applicability, and deference should be given to NLRB interpretation. Although challenged in several cases since, the [Health Care Rule](#) has been upheld. This rulemaking authority, however, was not upheld during the [most recent attempt by the Board to promulgate rules](#).

Most recently, the NLRB attempted to establish compulsory notice-posting of employee rights in private workplaces. In 1993, [legal scholars petitioned](#) for such a rule to be created by arguing:

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Employees . . . are generally unaware of their rights under the Act; indeed, it appears that most are even unaware of the existence of the Board and have no knowledge of what it is supposed to do. This is especially true of unorganized employees In view of the vast numbers of unorganized employees and the general misperception among unorganized employees that they possess few if any rights of the kind protected by this Act, there is a greater need for a general notice and posting requirement regarding section 7 and related unfair labor practices[.]

Seventeen years later, on December 22, 2010, [the NLRB proposed a rule](#) requiring employers, including labor organizations in their capacity as employers, to post a notice in order to “increase knowledge of the NLRA among employees, in order to better enable the exercise of rights under the statute. A beneficial side effect may well be the promotion of statutory compliance by employers and unions.” In order to give teeth to the new rule, the NLRB created several enforcement mechanisms for failing to post the notice: 1) a new Unfair Labor Practice (ULP) for failing to post the notice was created; 2) the statute of limitations for filing ULP charges would be tolled until the notice was posted; and 3) failure to post the notice would constitute evidence of employer anti-union animus, an element of other ULPs. After the required period for public comment, the rule went into effect in October 2011 and was immediately challenged.

Last year, two east coast conservative circuit courts struck down the notice-posting rule for different reasons. In May, with [National Association of Manufacturers v. NLRB](#), a three-judge panel decided the notice-posting rule violated section 8(c) of the Act, which protects employers’ First Amendment freedom of speech, because of the means of enforcing the rule. The plaintiffs had argued the government was forcing them to post a notice in favor of unionization. Using the axiom that freedom of speech necessarily includes the freedom to refrain from speaking, the court ruled the NLRB created three enforcement mechanisms that force speech. “Although § 8(c) precludes the Board from finding noncoercive employer speech to be an unfair labor practice, or evidence of an unfair labor practice, the Board’s rule does both.” According to the D.C. Circuit, the entire rule must fail after the enforcement mechanisms do because the NLRB cannot possibly expect voluntary compliance.

The Fourth Circuit took the ruling even further in June. In [Chamber of Commerce of the U.S. v. NLRB](#), another three-judge panel concluded the NLRB did not even have the authority to enact a notice-posting rule. The court reasoned that unlike other federal departments and agencies, Congress never provided the NLRB with the expressed authority to require employers to post notices regarding rights. Further, the court repeatedly determined “the Board was designed to serve a reactive role,” meaning the NLRB can never *sua sponte* issue a notice-posting rule, but can only require employers to post a notice as punishment. Because the NLRB exceeded its congressional authority in a proactive attempt to educate workers of their rights, the entire rule was struck down. Thus, the notice-posting rule of the NLRB [lies judicially defeated](#). The NLRB has [chosen not to appeal](#) these rulings but may fight for such a notice-posting rule in the future.

Because unions lack means to inform employees of their rights, the future of workplace democracy is uncertain. The unionized [workforce](#) has declined from its once mighty [position](#). The booming middle class based on industrial labor has fallen into the ranks of the lower class, with [minimum wage](#) service sector employment often being the only option for multitudes of Americans lacking higher education. Unable to combat the stagnant decline in [private sector unionization](#), perhaps the NLRB will one day cease to exist as the antiquated notions of union security agreements, bargaining units, and the [representation election](#) are replaced with [right-to-work statutes](#), independent contracting, and the sacred at-will employment idiom. Until then, it is up to employers to [voluntarily post the notice](#), which the D.C. Circuit doubts will occur. When it comes to bargaining rights, employers are allowed to keep their employees in the dark. Besides, if nobody knows about labor rights, who cares?

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