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## Fair Notice: Reassessing NLRB Authority to Inform Employees of Their Rights to Unionize

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# Fair Notice: Reassessing NLRB Authority to Inform Employees of Their Rights to Unionize

## **Keywords**

United States. National Labor Relations Board, Notice (Law), Civil rights, Labor laws & legislation, Employee rights, Freedom of speech -- United States -- Law & legislation, Constitutional law -- United States

## COMMENTS

### FAIR NOTICE: REASSESSING NLRB AUTHORITY TO INFORM EMPLOYEES OF THEIR RIGHTS TO UNIONIZE

DANIEL B. AMODEO\*

*Today, the vast majority of American workers are unaware of their substantive rights to organize and engage in concerted activities in the workplace. Over the last thirty years, union activism has experienced stark declines that have consequently lessened the level of public educational dialogue surrounding labor rights. As the agency tasked with promoting and enforcing labor organization rights, the National Labor Relations Board (NLRB) sought to combat this issue through its rarely utilized rulemaking authority—a measure fraught with perilous consequences. In 2011, the NLRB promulgated a regulation that required employers to display posters in the workplace that inform employees of their substantive rights. This effort faced major criticism, setting off litigation that invalidated the notice poster requirement and ultimately curtailed the NLRB’s authority to codify substantive rules. Without reexamination, the results of the notice poster litigation will substantially impact the NLRB’s future rulemaking efforts.*

*Despite the Supreme Court’s affirmation of the NLRB’s power to issue substantive rules in *American Hospital Ass’n v. NLRB*, two courts invalidated the NLRB’s notice-posting regulation as an overreach of the*

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Board's rulemaking authority. Remarkably, both decisions arrived at the same conclusion through starkly different reasoning. Categorizing the NLRB as a purely reactive entity, the U.S. Court of Appeals for the Fourth Circuit invalidated the notice-posting rule as an impermissible proactive effort in *Chamber of Commerce v. NLRB*. Alternatively, in *National Ass'n of Manufacturers v. NLRB*, the U.S. Court of Appeals for the District of Columbia Circuit held that the notice-posting regulation violated statutory and constitutional protections of workplace speech regarding labor organization.

This Comment argues that the Fourth and D.C. Circuit opinions create a difficult barrier for all future NLRB rulemakings, and their combined result contradicts the Supreme Court's decision in *American Hospital Ass'n*. Looking to constructions of the NLRB's rulemaking authority, as well as the legislative history of rulemaking and notice under the National Labor Relations Act, this Comment proposes that the NLRB possesses rulemaking authority to proactively restrict and influence matters through generally applicable regulations. In particular, the progeny of union-specific notice requirements pursuant to *Communications Workers of America v. Beck* provide a strong basis for NLRB authority to require more generalized notification of rights. Moreover, in examining the contents of the notice poster, this Comment argues that the regulation does not violate workplace speech protections because the poster bears a purely governmental message that is reasonable in the discourse and debate of labor rights. Furthermore, employers who disagree with the poster maintain the right to disavow any nexus or endorsement with the posters content.

#### TABLE OF CONTENTS

Introduction.....	792
I. A Brief History of Notice Poster Regulations Under the NLRA.....	794
A. General Overview of NLRB Jurisdiction and Authority ..	794
1. NLRB adjudicatory powers.....	795
2. NLRB rulemaking powers .....	795
a. Procedural and housekeeping rulemaking.....	797
b. Substantive rulemaking .....	798
B. An Educational Measure: Notice-Posting Requirements in the Employment Context.....	799
C. The NLRB's Long Path to Promulgation of a Notice-Posting Requirement.....	802
1. The NLRB's weak attempt to promulgate requirements for union notice to nonmember employees pursuant to <i>Communications Workers of America v. Beck</i> .....	803
2. Congress and the White House spin their wheels—	

limited efforts of support and disapproval for notice-posting requirements under the NLRA .....	807
a. <i>Beck</i> notices during the George H. W. Bush and Bill Clinton presidencies .....	808
b. Restoration of <i>Beck</i> notices during President George W. Bush's Presidency.....	808
c. President Barack Obama's direct support for a notice-posting requirement that provides broad information of rights under the NLRA—Executive Order 13,496.....	811
3. NLRB efforts to promulgate 29 C.F.R. Part 104.....	811
D. The NLRB's Notice-Posting Regulation: An Overview...	813
E. Legal Challenges to the Board's Regulation.....	815
1. Controversy at the NLRB regarding the notice-posting rule .....	815
2. Litigation challenging the notice-posting rule.....	816
a. The D.C. Circuit's opinion.....	817
b. The Fourth Circuit's opinion.....	818
II. The Board's Notice-Posting Requirement Properly Serves To Adapt the NLRA to the Changing Patterns of Industry....	819
A. NLRB Authority To Promulgate Notice-Posting Requirements.....	820
1. <i>Beck</i> and AHA as a framework for a notice-posting requirement under the NLRA .....	821
2. Finding the gap: The statutory absence of notice-posting requirements under the NLRA.....	824
a. NLRA provisions support the Board's authority to promulgate a notice requirement.....	825
b. Sister act: Constructing a gap in the NLRA through comparisons with the Railway Labor Act.....	827
c. Negating congressional admonition: An example of employment notice requirements promulgated through rulemaking.....	835
B. The Right To Disagree Is Not Infringed: Compulsory Notice-Posting Requirements and Speech Protections Under the NLRA .....	836
1. The notice poster propagates a government message.....	838
2. The right to disagree is not infringed: Employer speech protections.....	839
Conclusion .....	844

*The labor movement was the principal force that transformed misery and despair into hope and progress. Out of its bold struggles, economic and social reform gave birth to unemployment insurance, old age pensions, government relief for the destitute, and above all new wage levels that meant not mere survival but a tolerable life. The Captains of Industry did not lead this transformation; they resisted it until they were overcome. When in*

*the thirties the wave of union organization crested over the nation, it carried to secure shores not only itself but the whole society.*

—Martin Luther King, Jr.<sup>1</sup>

## INTRODUCTION

There is much truth to the old adage “knowledge is power.” Born from this maxim is the controversy between labor and business regarding a simple poster intended to teach employees about their right to unionize.<sup>2</sup> In 2011, the National Labor Relations Board (NLRB or “the Board”) promulgated a regulation requiring that all employers subject to the jurisdiction of the National Labor Relations Act (NLRA or “the Act”) post notices in the workplace that inform employees of their substantive rights.<sup>3</sup> The notice poster, an eleven-by-seventeen inch document,<sup>4</sup> provides a restatement of various unfair labor practices and available remedies under the NLRA.<sup>5</sup> The policy aim of the posting rule is simple: increase awareness of the law “to better enable the exercise of rights under the statute, and to promote statutory compliance by employers and unions.”<sup>6</sup>

Despite the NLRB’s noble justifications, critics assert that the Board lacks authority to promulgate a compulsory notice-posting regulation because of its purely reactive role as an arbiter of labor disputes.<sup>7</sup> Moreover, critics have also questioned the legal implications of a notice-posting requirement, specifically with respect

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1. Martin Luther King, Jr., Address to the State Convention of the Illinois, AFL-CIO 1–2 (Oct. 7, 1965) (transcript available at <http://mlk-kpp01.stanford.edu/primarydocuments/651007-002.pdf>).

2. See generally Teresa Tritch, Editorial, *No Right To Know Your Rights*, N.Y. TIMES (May 9, 2013), <http://takingnote.blogs.nytimes.com/2013/05/09/no-right-to-know-your-rights> (discussing the problematic nature of the poster because many employees do not know about their right to unionize, but employers are not required to post the poster, which informs employees about their right to unionize).

3. See Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104).

4. See 29 C.F.R. § 104.202 (b) (2012) (“The Notice to employees shall be at least 11 inches by 17 inches in size, and in such format, type size, and style as the Board shall prescribe.”); see also Employee Rights Notice Posting, NAT’L LAB. REL. BOARD, <http://www.nlr.gov/poster> (last visited Jan. 16, 2014) (providing various copies of printable NLRB notice posters for employer use and display in compliance with the rule).

5. See *Employee Rights Under the National Labor Relations Act*, NAT’L LAB. REL. BOARD, [http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3788/employee\\_rights\\_fnl.pdf](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3788/employee_rights_fnl.pdf) (last visited Jan. 16, 2014).

6. 75 Fed. Reg. at 80,410.

7. See *infra* notes 22–27 and accompanying text (explaining how Congress delegated adjudicatory authority to the Board contingent upon an aggrieved party bringing an unfair labor practice (“ULP”) claim).

to statutory protections that govern speech rights in the workplace.<sup>8</sup> As a matter of jurisdiction, the NLRB may not investigate or engage any labor dispute without first receiving a timely filing from one of the affected parties.<sup>9</sup> In response, supporters argue that the NLRB is unable to effectively operate if the public at large remains uneducated about its rights to bring labor controversies before the Board.<sup>10</sup>

The tension between opponents and supporters of the notice-posting requirement has culminated in a heated political debate seeking to define the powers of the NLRB as an agency.<sup>11</sup> Lawsuits challenging the regulation grappled with the wisdom and legality of the Board's requirement that employers display government-sponsored posters aimed at educating workers.<sup>12</sup> Ultimately, courts deemed the notice-posting requirement invalid, posing significant challenges to the Board's rulemaking authority and weakening efforts to educate the public of its substantive labor rights.<sup>13</sup>

This Comment argues that the NLRB possesses the rulemaking authority necessary to promulgate a notice-posting requirement, and that the compulsory poster does not violate speech protections because it advances a strictly factual and governmental message that employers are free to openly disagree with. Part I of this Comment provides an overview of the Board's path to promulgating a notice-posting requirement, as well as the political and legal landscape that has affected the process. Part II analyzes the NLRB's authority to promulgate the notice-posting rule by examining the mechanisms of the Board's rulemaking authority in tandem with the legislative history of notice-posting requirements under the NLRA. In doing so, Part II prescribes a framework of Supreme Court case law to support

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8. See *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956–59 (D.C. Cir. 2013) (recounting arguments made by the opponents to the NLRB's proposed regulation with respect to section 8(c) of the Act).

9. See *infra* notes 22–27 and accompanying text.

10. See Peter D. DeChiara, *The Right To Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 435–36, 436 n.28 (1995) (citing surveys of high school students and extrapolating the failures of educating entry level workers of their rights under the NLRA).

11. See Steven Greenhouse, *New Rule Seen as Aid to Efforts To Unionize*, N.Y. TIMES (Aug. 25, 2011), [http://www.nytimes.com/2011/08/26/business/labor-agency-to-require-posting-unionization-rights.html?\\_r=0](http://www.nytimes.com/2011/08/26/business/labor-agency-to-require-posting-unionization-rights.html?_r=0) (quoting various opinions of labor leaders and trade group association executives and their differing viewpoints on the NLRB's authority to require notice postings).

12. See *Chamber of Commerce v. NLRB*, 721 F.3d 152, 166 (4th Cir. 2013) (invalidating the rule), *aff'g* 856 F. Supp. 2d 778, 796–97 (D.S.C. 2012); *Nat'l Ass'n of Mfrs.*, 717 F.3d at 963 (D.C. Cir. 2013) (invalidating the rule), *aff'g in part, rev'g in part* 846 F. Supp. 2d 34, 63 (D.D.C. 2012).

13. See *Chamber of Commerce*, 721 F.3d at 166 (invalidating the rule); *Nat'l Ass'n of Mfrs.*, 717 F.3d at 963 (invalidating the rule).

the NLRB's power to promulgate the notice-posting regulation and other substantive rules. Additionally, Part II addresses the implications of a notice-posting regulation in light of protections afforded to non-coercive speech under the Act. This focus will address the poster's function as a tool of government speech in the discourse of labor law, as well as the critical ability of employers to disavow any endorsement of the poster's contents. Part III concludes that the NLRB has the authority to promulgate the invalidated regulation, and that courts should revisit and clarify the Board's authority in future challenges to its rulemakings.

## I. A BRIEF HISTORY OF NOTICE POSTER REGULATIONS UNDER THE NLRA

### A. *General Overview of NLRB Jurisdiction and Authority*

To aid in assessing the background and complications of the NLRB's notice-posting regulation, it is first necessary to review the Board's jurisdiction and authority. The NLRB is a quasi-judicial independent agency tasked with enforcing the NLRA.<sup>14</sup> Congress established the NLRB in 1935 to address civil unrest surrounding organized employment matters.<sup>15</sup> The Board serves to encourage and protect the right to collectively bargain, associate with unions, organize labor, and negotiate employment terms through designated representatives.<sup>16</sup> To achieve these aims, the NLRA charges the Board with enforcing section 7 of the Act, which articulates the inherent rights of labor organization.<sup>17</sup> Congress provided a framework for identifying violations of section 7 rights in section 8 of the NLRA, which defines prohibited unfair labor practices<sup>18</sup> ("ULP"). The Act divides ULP's into several categories: illegal employer actions, illegal union actions, protections of political viewpoints, the obligation to honor collective bargaining efforts, contract enforceability, and the right to strike.<sup>19</sup> The mechanisms through

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14. See 29 U.S.C. § 153 (2012) (outlining the Board's composition as an independent agency); *id.* § 160 (outlining the Board's adjudicatory powers); *id.* § 156 (outlining the Board's rulemaking powers).

15. See *id.* § 151 (providing the policy rationale and findings of fact that prompted enactment of the NLRA).

16. *Id.*

17. See *id.* § 157 (delineating the rights to join unions and engage in concerted activities for the purposes of collective bargaining as well as the right to refrain from such activity).

18. See *id.* § 158 (outlining employer and union practices that are strictly prohibited under the Act).

19. *Id.* § 158(a)-(g).



which the Board may enforce the NLRA are restricted to two primary means—adjudication<sup>20</sup> and rulemaking.<sup>21</sup>

### 1. *NLRB adjudicatory powers*

Until recently, the Board has primarily relied upon adjudications to formulate labor policy.<sup>22</sup> Scholars have taken particular interest in this phenomenon, noting the various advantages and pitfalls of approaching labor disputes solely through adjudications.<sup>23</sup> As a matter of form, the NLRB's adjudicatory powers are strictly reactive.<sup>24</sup> Congress restricted the NLRB's investigative authority to a remedial role—indicating in the NLRA's legislative history that the Board may not act in a “roving” manner to seek out and initiate investigations absent a ULP charge.<sup>25</sup> Accordingly, the NLRB cannot bring ULP matters into adjudication proceedings *sua sponte*; the Board must rely upon aggrieved parties to bring ULP allegations to the Board's attention.<sup>26</sup> The limitations period for bringing such claims is narrowly restricted to six months from the date of the alleged ULP.<sup>27</sup>

### 2. *NLRB rulemaking powers*

In addition to adjudicating claims, the NLRB has the power to promulgate regulations “necessary to carry out” the policy aims of the NLRA.<sup>28</sup> The Act's legislative history indicates that Congress

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20. *Id.* § 160(b) (describing the complaint process for bringing matters before the Board for review).

21. *Id.* § 156 (providing that the NLRB has the ability to promulgate rules necessary to enforce the provisions of the Act).

22. See Emily Bayer, Comment, *Setting Labor Policy Prospectively: Rulemaking, Adjudicating, and What the NLRB Can Learn from the NMB's Representation Election Procedure Rule*, 63 ADMIN. L. REV. 853, 859 (2011) (noting the NLRB's preference for adjudication because it avoids the politics of labor that place strong pressure on the formalized rulemaking process).

23. See Joan Flynn, *The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 394–95 (1995) (commenting on the Board's adjudicatory functions and the creation of “*per se* rule[s] in application” pursuant to NLRB findings); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 279 (1991) (noting the scrutiny of the Board's use of adjudication instead of rulemaking to set policy that resulted after the Supreme Court's decision in *NLRB v. Wyman-Gordan Co.*, 394 U.S. 759 (1969)).

24. See 29 U.S.C. § 160(b) (providing that the Board may only initiate investigations once it has received a complaint, thus limiting its powers to independently commence investigations).

25. H.R. REP. NO. 74-972, at 22 (1935).

26. See 29 U.S.C. § 160(b) (restricting the NLRB's power to act unless a party files a ULP charge with the Board).

27. *Id.*

28. *Id.* § 156; see also *id.* § 151 (noting the inequality between employees and employers in the organization and negotiation of employment terms and the NLRA's general goal of “encouraging practices fundamental to the friendly adjustment of industrial disputes”).

delegated rulemaking authority to the Board under the “customary” conferral of rulemaking powers.<sup>29</sup> This customary conferral typically provides for substantive rulemaking to better define and enforce an agency’s statutory authority.<sup>30</sup> Though sparsely used, the Board possesses broad discretion to choose when it will set policy through rulemaking.<sup>31</sup>

In 1947, Congress sought to amend the NLRA in concert with newly prescribed rulemaking procedures set forth in the Administrative Procedure Act.<sup>32</sup> The amendments to the NLRA altered the wording of the Board’s rulemaking authority but did not alter the essential character and function of the Board’s power to promulgate rules “necessary” to carry out the aims of the NLRA.<sup>33</sup>

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29. See S. REP. NO. 74-573, at 2 (1935) (“Section 6. Rules and regulations—This section follows the customary policy of giving the Board the power to make and amend rules and regulations. Such rules and regulations become effective only upon publication and there are no criminal penalties attached to their breach.”); H.R. REP. NO. 74-972, at 13 (“Section 6: This is a common provision authorizing the Board to make, amend, and rescind such rules and regulations as may be found necessary to implement and carry out the provisions of the bill.”); see also *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778, 787 n.6 (D.S.C. 2012), *aff’d*, 721 F.3d 152 (4th Cir. 2013) (noting that Congress has inserted the same language contained in the NLRA in the enabling statute for nearly 190 other administrative agencies).

30. See *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (“Where the empowering provision of a statute states simply that the agency may ‘make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,’ we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is ‘reasonably related to the purposes of the enabling legislation.’” (internal citations omitted)); see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (holding that a “general conferral of rulemaking or adjudicative authority” is sufficient to support “deference for an exercise of that authority within the agency’s substantive field”); *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713–14 (2011) (holding that a general grant of rulemaking authority requires judicial deference); *United States v. Eurodif S.A.*, 555 U.S. 305, 319 (2009) (providing that the Supreme Court “look[s] to an authoritative agency for a decision about the statute’s scope, which is defined in cases at the statutory margin by the agency’s application of it, and once the choice is made [the Court] ask[s] only whether the Department’s application was reasonable”).

31. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (holding that the Board has the choice between adjudicating matters or rulemaking, and that adjudication “may also produce the relevant information necessary to mature and fair consideration of the issues”); *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947) (providing that agencies are due deference in making determinations as to whether to adjudicate matters or pursue rulemaking to solve general issues).

32. See Labor Management Relations Act, Pub. L. No. 80-101, § 6, 61 Stat. 136, 140 (1947) (amending the rulemaking statute to require the Board to promulgate rules consistent with the Administrative Procedure Act, which, under 5 U.S.C. § 553, requires notice and comment in rulemaking efforts).

33. See 29 U.S.C. § 156 (2012) (“The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed in subchapter II of chapter 5 of title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.”); S. REP. NO. 80-105, at 20 (1947) (noting that the revisions to the rule merely required the NLRB to post notices of rulemaking in the federal register, consistent with the requirements under the Administrative Procedure Act).

The Act has been amended by Congress two additional times since 1947, but the rulemaking provisions have remained untouched.<sup>34</sup>

*a. Procedural and housekeeping rulemaking*

Despite Congress's conferral of rulemaking authority, the NLRB has been reticent to exercise its power to issue regulations.<sup>35</sup> For decades, courts, interested parties, and scholars have urged the Board to use its rulemaking authority.<sup>36</sup> Notwithstanding these appeals for more regulatory action, the Board remained reluctant in its rulemaking efforts, promulgating only a mere "smattering of procedural, privacy, and housekeeping rules."<sup>37</sup> These regulations are limited to the form and practice before the NLRB, and serve to codify the guidelines for various Board functions and adjudicatory matters.<sup>38</sup> In essence, the Board's housekeeping rules are best classified as either non-binding guidance<sup>39</sup> or procedural rules akin

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34. See Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (leaving section 6 intact); Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (same); Labor Management Relations Act, Pub. L. No. 80-101, § 6, 61 Stat. 136, 140 (1947) (amending section 6).

35. See Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FLA. INT'L U. L. REV. 411, 413 (2010) (noting that the Board has only passed a few regulations in its existence); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 732 (1961) ("The NLRB has issued no formal rules other than those governing the practice and procedure to be followed in cases brought before the agency. This is not for lack of statutory authorization to make substantive rules."); Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 983 (1980) ("[T]he NLRB's reliance on adjudication has been to minimize congressional and judicial intervention in the Board's policies.").

36. See Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 27–28 (1987) (positing that the NLRB should engage in substantive rulemaking to provide legal doctrine that is not tethered to the specific factual nature of adjudicated standards); Peck, *supra* note 35, at 730–31 (arguing that the Board's decision to forgo rulemaking is improper). In addition to pressure from scholars, Judge Friendly of the U.S. Court of Appeals for the Second Circuit issued a number of opinions urging the Board to adopt regulatory standards for policy making over adjudication. See, e.g., *NLRB v. Penn Cork & Closures, Inc.*, 376 F.2d 52, 57 (2d Cir. 1967) (urging the Board to utilize the preferable method of rulemaking to address union-security agreement standards); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (arguing that the Board has failed to take advantage of regulating the labor industry through rulemaking); *NLRB v. A.P.W. Prods. Co.*, 316 F.2d 899, 905 (2d Cir. 1963) (noting that the NLRB, like many other agencies, can use rule-making power to concretely express and apply rules formulated through adjudication of claims (citing *Chenery Corp.*, 332 U.S. at 202)).

37. Lubbers, *supra* note 35, at 412.

38. See, e.g., 29 C.F.R. § 100.201 (2013) (providing guidelines for audits and investigations); *id.* § 101.601 (providing the scope and purpose of regulations governing NLRB debt collection efforts); *id.* § 102.139 (providing guidelines for notice of closed meetings pursuant to the Sunshine Act (citing 5 U.S.C. § 552b(c))); *id.* § 102.178 (providing guidance that the NLRB shall continue operations when the Board lacks a full quorum).

39. E.g., OFFICE OF THE GEN. COUNSEL, NLRB, GC NO. 11-01, EFFECTIVE REMEDIES IN ORGANIZING CAMPAIGNS (2010), available at 2010 WL 7141477. Statements of

to guidelines and court rules.<sup>40</sup> It was not until the late 1980s, nearly half a century since Congress first established the Board, that the NLRB finally exercised its authority to promulgate substantive rules.<sup>41</sup>

*b. Substantive rulemaking*

The Board has struggled to promulgate substantive rules that address statutory interstitial matters against the backdrop of longstanding public debate over its rulemaking authority.<sup>42</sup> For decades, the NLRB's substantive rulemaking power remained untested—leaving the Board open to speculation that Congress did not delegate the NLRB with the power to promulgate substantive regulations.<sup>43</sup> In 1989, the Board finally confronted the act of substantive rulemaking when it promulgated a regulation classifying collective bargaining units in the health care industry.<sup>44</sup> Inundated with an increasing caseload of health care related filings, the Board moved to universally classify health care bargaining units to promote judicial efficiency.<sup>45</sup>

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general policy and interpretive rules, such as NLRB general counsel memoranda, are typically exempted from APA formal and informal rulemaking requirements. See 5 U.S.C. § 553(b)(3)(A) (2012).

40. Compare 29 C.F.R. 102.14 (providing guidelines for service of process in matters filed with the Board), with FED. R. CIV. P. 4(c) (providing guidelines for service of process in matters filed with federal courts).

41. *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 608 (1991) (proclaiming that the NLRB promulgated a substantive rule “[f]or the first time since the National Labor Relations Board . . . was established in 1935”).

42. See Administrative Procedure Act, 5 U.S.C. § 551 (defining the term “rule” to include the prescription of “law or policy”); National Labor Relations Act, 29 U.S.C. § 156 (providing that the NLRB has the power to promulgate rules necessary to aid in enforcing other provisions within the act); *Am. Hosp. Ass'n*, 499 U.S. at 613 (holding that Congress would have curtailed rulemaking authority provided to the Board in the other sections of the Act if it intended to limit such powers from substantive matters); *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (describing the quasi-legislative function of filling the interstices of a statute’s ambiguity).

43. See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 407 (1981) (noting that the NLRB “has acted as little more than an umpire in disputes between organized labor and management”); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 566 (2002) (arguing that “an anti-labor, Republican-led” Congress had no intention of providing for legislative rulemaking power when it amended the NLRA in 1947).

44. See *Collective-Bargaining Units in the Health Care Industry*, 54 Fed. Reg. 16,336 (Apr. 21, 1989) (codified at 29 C.F.R. pt. 103 (1990)).

45. See Scott A. Zebrak, Comment, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Health Care Bargaining Unit Rule and by the Proposed Beck Union Dues Regulation*, 8 ADMIN. L.J. AM. Ü. 125, 145 n.111 (1994) (discussing the voluminous amount of health care litigation before the Board promulgated the health care bargaining unit regulation).

This lone experiment in substantive rulemaking drew opposition from business and trade associations,<sup>46</sup> igniting litigation that ultimately concluded at the Supreme Court.<sup>47</sup> In *American Hospital Ass'n v. NLRB*<sup>48</sup> (“AHA”), the Court held that the Board possesses the power to promulgate rules that address issues “in advance” of foreseeable NLRA-related matters.<sup>49</sup> Examining the structure of the NLRA and the expressions of Congress when it delegated rulemaking authority to the Board, the Court concluded that the Board’s “goal of facilitating the organization and recognition of unions” served as permissible justification for promulgating proactive rules under the bounds of the NLRA.<sup>50</sup>

*B. An Educational Measure: Notice-Posting Requirements in the Employment Context*

Notice-posting requirements are common in the workplace, serving to inform workers of employment-related rights under various federal and state laws.<sup>51</sup> Congress has expressly legislated notice-posting requirements in several employment related areas. These laws notify workers of their rights under landmark statutes such as Title VII of the Civil Rights Act,<sup>52</sup> the Age Discrimination in Employment Act,<sup>53</sup> the Occupational Safety and Health Act,<sup>54</sup> the Americans With Disabilities Act,<sup>55</sup> and the Family and Medical Leave Act.<sup>56</sup> Each of these required posters serves to alert workers of their rights and the statutory limitations that govern the exercise and enforcement of

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46. *Id.* at 158 (noting that political opposition may serve as an obstacle to rulemaking).

47. *Am. Hosp. Ass'n*, 499 U.S. at 606.

48. 499 U.S. 606 (1991).

49. *Id.* at 613.

50. *Id.* (emphasis added).

51. See DeChiara, *supra* note 10, at 439–43 (surveying other notice-posting requirements in both employment and non-employment contexts that provide notice of safety hazards, anti-discrimination rights, wage and hours limits, and civil rights protections in the employment forum).

52. 42 U.S.C. § 2000e-10 (2012) (providing notice of “excerpts, from or, summaries of, the pertinent provisions” in the Family Medical Leave Act).

53. 29 U.S.C. § 627 (requiring employers to post notices “setting forth information as the [Equal Employment Opportunity] Commission deems appropriate” to carry out the statute); see also 29 C.F.R. § 1601.30 (2013) (compelling notices under various Title VII provisions).

54. 29 U.S.C. § 657(c) (requiring notices to inform employees of their rights and protections under the Occupational Safety and Hazard Act).

55. 42 U.S.C. § 12115 (requiring employers to “post notices in an accessible format to applicants, employees, and members describing the applicable provisions of” the Americans with Disabilities Act).

56. 29 U.S.C. § 2619(a) (compelling the posting of a notice “setting forth excerpts from, or summaries of, the pertinent provisions” of the Family Medical Leave Act).

those rights.<sup>57</sup> Failure to comply with these posting requirements can, in some cases, lead to punitive or remedial damages.<sup>58</sup>

Recognizing the important educational function these posters bring to the workplace, courts have placed a high premium on their presence.<sup>59</sup> In controversies where an employer fails to display a notice poster, whether intentionally or inadvertently, courts can waive the statute of limitations under the doctrine of equitable tolling.<sup>60</sup> This legal doctrine applies to cases where a plaintiff brings a claim beyond the time allotted by the statute, and such untimeliness is not the product of bad faith.<sup>61</sup> A court will only prescribe equitable tolling of a statute's limitation period if it determines, based upon balancing factors, that the circumstances materially prejudiced the plaintiff.<sup>62</sup>

When applying the doctrine of equitable tolling to federal employment laws, most circuits consider an employer's failure to post as a contributing factor to a plaintiff's ignorance of the law.<sup>63</sup> The

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57. See *Poster Page: Workplace Poster Requirements for Small and Businesses and Other Employers*, U.S. DEP'T OF LABOR, <http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm> (last visited Jan. 16, 2014) (containing links to digital copies of various employment related posters).

58. See, e.g., 29 U.S.C. § 2619(b) (providing penalties for violating the notice-posting requirement).

59. See, e.g., *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 46 (1st Cir. 2005) (tolling the statute of limitations pursuant to an employer's failure to post a required notice poster under the equal employment opportunity act).

60. *Id.*

61. See *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874) (discussing the deeply rooted origins of equitable tolling in common law to remedy fraud that "prevent[s] parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist"). The doctrine of equitable tolling provides five factors that must be balanced in order to determine if a waiver of timely requirements is permissible: (1) plaintiffs must lack notice of the limitation period, (2) notice cannot be constructively formed, (3) the plaintiff must pursue claims in good faith, (4) any prejudice to the defendant must be balanced, and (5) the court must weigh and consider the reasonableness of the plaintiff's ignorance of the limitation period. See *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008) (listing the five factors).

62. See *Bailey*, 88 U.S. (21 Wall.) at 348 (holding that in suits in equity the weight of authority is in favor of the idea that where the party is unaware of it, the statutory bar does not run until the party becomes aware of the fraud); see also Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 514-16 (2004) (reviewing Supreme Court precedent on material afflictions caused by defendant misconduct and fraudulent concealment that ultimately prejudice a plaintiff's ability to viably bring a claim within statutorily limited filing periods).

63. See *Mercado*, 410 F.3d at 46 (applying equitable tolling for failure to post under title VII); *EEOC v. Ky. State Police Dep't*, 80 F.3d 1086, 1094-95 (6th Cir. 1996) (applying equitable tolling for failure to post under the ADEA); *Beshears v. Asbill*, 930 F.2d 1348, 1352 (8th Cir. 1991) (noting that claims may be equitably tolled where an employer fails to show that the employee was unaware of his or her rights and no notice was posted); *Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012 (4th Cir. 1983) (finding implied intent that congress would allow for equitable tolling of

judicial impetus supporting notice posters provides substantial weight and legitimacy to the posters' presence in the workplace.<sup>64</sup> Given the equalizing powers that notice posters provide—notice of substantive rights, or, alternatively, protections where notice is not provided—it comes as no surprise that the NLRB would seek to promulgate a notice-posting requirement similar to those contained in other federal statutes.<sup>65</sup>

As professed in the Board's notice of proposed rulemaking, "unions have been a traditional source of information about the NLRA's provisions."<sup>66</sup> Over the last forty years, union density has steadily declined in the private sector workforce.<sup>67</sup> The stark decline in union activity has negatively impacted the public's general awareness of labor rights afforded under section 7 of the Act.<sup>68</sup> A poster providing notice of rights under the NLRA supplements the knowledge gap created by a decline in union activism and provides workers with information about their rights to organize and engage in concerted activities.<sup>69</sup> Moreover, an NLRA poster provides notice of both the legal remedies available under the Act and the short six month limitations period to file ULP claims.<sup>70</sup>

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title VII); *Elliott v. Grp. Med. & Surgical Serv.*, 714 F.2d 556, 563 (5th Cir. 1983) (holding that failure to comply with statutory notice provision "vitiates the normal assumption that an employee is aware of his rights"); *Posey v. Skyline Corp.*, 702 F.2d 102, 104 (7th Cir. 1983) ("[T]he 180 day period in which a charge must be filed with the EEOC is not absolute but is subject to equitable modification." (citing *Kephart v. Inst. of Gas Tech.*, 581 F.2d 1287, 1289 (7th Cir. 1978))). *But see* *Wilkerson v. Siegfried Ins. Agency, Inc.*, 683 F.2d 344, 347 (10th Cir. 1982) (finding that failure to post does not automatically trigger equitable tolling absent any intentional misconduct).

64. *See* Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg., 54,006, 54,034 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104) (arguing that equitable tolling is a matter of fairness that is important in the employment forum).

65. *See id.* (arguing that the application of equitable tolling to an NLRB poster rule prevents unfairness and deprivation of legal protections that are afforded to aggrieved employees under the Act).

66. *Id.* at 54,011.

67. *See* Amanda L. Ireland, Note, *Notification of Employee Rights Under the National Labor Relations Act: A Turning Point for the National Labor Relations Board*, 13 NEV. L.J. 937, 943–46 (2013) (providing an overview of the decline in union density from the 1970s through today, outlining some of the thematic and economic societal transformations contributing to decreased union participation).

68. *Id.*

69. *See Employee Rights Under the National Labor Relations Act*, *supra* note 5 (outlining the rights of laborers to unionize and be free of coercive antiunion tactics by employers).

70. *Id.*

C. *The NLRB's Long Path To Promulgation of a Notice-Posting Requirement*

The Board's consideration of a notice-posting requirement has endured longstanding pendency and political battles. In the mid-nineties, academics and union-rights organizers strongly urged the Board to promulgate a notice-posting requirement.<sup>71</sup> The Board did not easily adopt these persuasions,<sup>72</sup> but one particular request withstood the test of time to influence the Board's eventual promulgation of a notice-posting requirement.<sup>73</sup> In 1993, Charles J. Morris, a professor at Southern Methodist University Dedman School of Law, filed a rulemaking petition with the NLRB urging the Board to promulgate a regulation to require compulsory notice-postings.<sup>74</sup> At the time of Professor Morris's filing, the NLRB was deliberating over a different and narrowly tailored notice requirement pursuant to

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71. See DeChiara, *supra* note 10, at 437 (noting several case studies and examples that illustrate a general lack of awareness about unionization rights under the NLRA); Charles J. Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 STETSON L. REV. 101, 111–12 (1993) (urging the Board to adopt a broad notice-posting regulation to inform employees of their substantive rights).

72. After the NLRB promulgated its health care bargaining unit regulation, the Administrative Conference of the United States (“ACUS”) issued recommendation 91-5 which urged the Board to develop policies through rulemaking instead of adjudications. See *Facilitating the Use of Rulemaking by the National Labor Relations Board*, 1 C.F.R. § 305.91-5 (1992). In consideration of ACUS's recommendation, the Board initially moved to promulgate a notice regulation. See *Union Dues Regulations*, 57 Fed. Reg. 43,635, 43,635–36 (proposed Sep. 22, 1992) (to be codified at 29 C.F.R. pt. 103) (referring to ACUS recommendation 91-5 as persuasive in the Board's considerations to engage in rulemaking). While it seemed plausible that the Board would move in the direction of regulating more proactively, this effort was short lived in favor of case-by-case adjudication and the issuance of non-binding guidance. See *Rules and Procedures for the Implementation of Communications Workers v. Beck*, 487 U.S. 735 (1988), 61 Fed. Reg. 11,167 (proposed Mar. 19, 1996) (to be codified at 29 C.F.R. pt. 102) (withdrawing the Board's proposed regulation); see also OFFICE OF THE GEN. COUNSEL, NLRB, GC NO. 88-14, GUIDELINES CONCERNING CWA v. BECK (1988) [hereinafter NLRB GC 88-14 GUIDELINES], available at 1988 WL 236187 (issuing non-binding interpretive guidance on *Beck* related matters).

73. See Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410, 80,411 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104) (mentioning the rulemaking petition of Professor Charles J. Morris as the earliest influencing factor in the Board's decision to promulgate the notice-posting regulation).

74. See Petition of Charles J. Morris, an Interested Person, for the Amendment of Proposed Regulations or, in the Alternative, for the Issuance of a New General Rule Regarding Information Posting, Rulemaking Regarding Union Dues Regulations (N.L.R.B. Feb. 9, 1993) [hereinafter Morris Petition] (copy on file with the author); see also Administrative Procedure Act, 5 U.S.C. § 553(e) (2012) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”); 29 C.F.R. § 102.124 (2013) (“Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation.”).



the Supreme Court's ruling in *Communications Workers of America v. Beck*.<sup>75</sup> Professor Morris saw the Board's effort to promulgate a narrowly tailored notice requirement as an ideal opportunity to persuade the NLRB to think more broadly about notice requirements and rulemaking.<sup>76</sup>

Professor Morris's rulemaking petition appealed to the idea of promoting even-handed notification of employee rights under the NLRA, noting that most employees are "unaware of the existence of the Board and have no knowledge of what it is supposed to do."<sup>77</sup> Much of Professor Morris's request eventually manifested in the notice-posting regulation promulgated by the Board in 2011.<sup>78</sup> However, political and legal considerations served to dampen NLRB efforts to move forward with promulgating a notice-posting requirement during the petition's nearly twenty-year pendency.<sup>79</sup>

1. *The NLRB's weak attempt to promulgate requirements for union notice to nonmember employees pursuant to Communications Workers of America v. Beck*

In reaction to the Supreme Court's decision in *Beck*, the NLRB considered codifying a regulation requiring that unions provide notice to nonmembers of their right to withhold funding support for certain union activities.<sup>80</sup> In *Beck*, the Supreme Court resolved a circuit split regarding the permissible use of union fees from nonmember employees that benefited from collective bargaining agreements.<sup>81</sup> Union-security agreements grant unions the ability to collect fees from nonmember employees that receive the benefit of

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75. 487 U.S. 735, 762–63 (1988) (holding that unions could only collect fees from nonmembers for duties the union performed in its capacity as the sole representative of the employees).

76. See Morris Petition, *supra* note 74, at 3–4 ("There is no good reason why notices of other federal statutory rights affecting employees but not comparable notices regarding rights and duties under the National Labor Relations Act should be found on employee bulletin boards throughout the country.").

77. *Id.* at 2.

78. See *infra* notes 150–66 and accompanying text (summarizing the NLRB's notice-posting regulation which provides notice of general rights under the NLRA).

79. See *infra* notes 106–41 and accompanying text (discussing the revolving standard of issuing and repealing notice requirements in the federal government workplace).

80. Implementation of Supreme Court's Decision in *Communications Workers of America v. Beck*, 57 Fed. Reg. 7,897 (proposed Mar. 5, 1992) (calling for comment submissions regarding a potential regulation codifying labor union duties pursuant to *Beck*).

81. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 740–41 (1988) (restating claims against the validity of employer-union agreements that enable collection of agency fees for purposes other than collective bargaining, contract administration, or grievance proceedings).

collective bargaining despite their dissociation with organized labor.<sup>82</sup> This measure prevents nonmembers from free riding the concerted and costly efforts of union representation and negotiation.<sup>83</sup> The *Beck* case addressed a union's use of nonmember "agency fees" for non-administrative or political purposes.<sup>84</sup> Twenty nonmember employees filed suit against a union asserting that the use of agency fees for purposes other than contract administration vitiated their express disassociation with unions.<sup>85</sup> The use of nonmember agency fees for political purposes, they argued, treated nonmember contributions as the functional equivalent of union dues.<sup>86</sup>

Circuit courts had offered varying opinions on the permissible uses of nonmember dues.<sup>87</sup> The U.S. Court of Appeals for the Fourth Circuit held that unions could only use nonmember dues for the purpose of administering and negotiating collective bargaining agreements.<sup>88</sup> Alternatively, the U.S. Court of Appeals for the Second Circuit held that courts could not interfere with the use of nonmember agency fees because it was a private matter of union expenditure.<sup>89</sup> To remedy these incongruent holdings, the Supreme Court concluded that unions could only assess fees necessary to "performing the duties of an exclusive representative

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82. See *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742-43 (1963) (concluding that Congress intended to prevent nonmembers from receiving the free benefit of union representation by authorizing union-security agreements with employers to compel nonmember contribution (citing *Radio Officers' Union of the Commercial Tel. Union v. NLRB*, 347 U.S. 17, 41 (1954))).

83. *Id.* at 741 (recounting the intentions of Congress when it enacted the NLRA to encourage union participation by eliminating the ability of nonmember employees to benefit from union activities without paying dues).

84. *Beck*, 487 U.S. at 745.

85. *Id.* at 739; see also *id.* at 748-49 (discussing the legislative history of nonmember fee assessments and the NLRA).

86. *Id.* at 739-40 (contemplating whether the use of nonmember fees for non-administrative purposes violates the union's "duty of fair representation"). The NLRA permits unions, through union security agreements with employers, to assess fees from nonunion employees who are the beneficiaries of collective bargaining. *Gen. Motors Corp.*, 373 U.S. at 742-43. This measure serves to protect the interests of collective bargaining by eliminating free benefits for employees that are subject to a collective bargaining agreement but not a member of the negotiating union. *Id.* at 745.

87. *Beck*, 487 U.S. at 740-41 (highlighting a conflict between the Second and Fourth Circuits).

88. See *Beck v. Commc'ns Workers of Am.*, 776 F.2d 1187, 1209 (4th Cir. 1985) (holding that unions may compel nonmembers to pay for administrative costs, but nonmembers are "entitled to a refund of any amount collected of them by the union beyond these costs" (internal quotations omitted)), *aff'd*, 487 U.S. 735.

89. See *Price v. Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am.*, 795 F.2d 1128, 1135 (2d Cir. 1986), (holding that a union does not act arbitrarily or in bad faith by spending union-security agreement funds for non-administrative purposes), *vacated*, 487 U.S. 1229 (1988) (mem.).

of the employees in dealing with the employer on labor-management issues.”<sup>90</sup>

After *Beck*, the NLRB struggled to find a constructive means of enforcing the Court’s newly created rule governing agency fee expenditures.<sup>91</sup> Initially, the Board’s General Counsel issued guidelines regarding the implementation of the *Beck* decision.<sup>92</sup> The General Counsel memo provided that unions have “an *obligation to notify* nonmember employees” of three matters: (1) total use of funds for nonrepresentational activities, (2) the right to object to such use, and (3) the right for nonmembers to limit the use of their contributions to representational matters only.<sup>93</sup> In an effort to codify the General Counsel’s memorandum, the NLRB sought to promulgate a regulation that would require “all employees covered by contractual union-security clauses, whether union members or nonmembers, [to be] informed of their rights” afforded by the *Beck* decision.<sup>94</sup>

Professor Morris saw the Board’s efforts to codify *Beck* as an opportunity to form a regulatory policy that provided broad notice to employees covered under the NLRA.<sup>95</sup> Coloring the proposed *Beck* regulation as a one-sided provision, Morris argued that the Board should proceed with the broader purpose of providing notice of all substantive employee rights afforded under the Act.<sup>96</sup> In contrast to Professor Morris’s position, the Board’s proposed regulation limited notice requirements to nonmember agency fees and skirted the issue of providing comprehensive notice to nonmembers of other rights afforded under the NLRA.<sup>97</sup> Despite compelling arguments for both broad and narrow notice-posting requirements,<sup>98</sup> the Board never completed its process of formalizing the *Beck* regulation.<sup>99</sup>

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90. *Beck*, 487 U.S. at 762–63 (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984)) (internal quotation marks omitted).

91. See Brian J. Woldow, Comment, *The NLRB’s (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 ADMIN. L. REV. 1075, 1082–85 (2000) (discussing the NLRB’s attempts to enforce the *Beck* notice rule without a governing regulation).

92. NLRB GC 88-14 GUIDELINES, *supra* note 72.

93. *Id.* at \*1 (emphasis added).

94. Union Dues Regulations, 57 Fed. Reg. 43,635, 43,641 (proposed Sept. 22, 1992) (to be codified at 29 C.F.R. pt. 103.40).

95. See Morris Petition, *supra* note 74, at 4 (“Petitioner hereby proposes that the pending Rulemaking Proceeding regarding the *Beck* rules . . . be amended, *i.e.* expanded, to encompass the issuance of a broad rule.”).

96. *Id.*

97. 57 Fed. Reg. at 43,636 (outlining the Board’s efforts to codify notice requirements that only detail a nonmember’s rights under union-security agreements).

98. Compare DeChiara, *supra* note 10, at 461–63 (arguing that a broad notice poster would provide workers with knowledge of their rights and deter employers from retaliating against employees who exercise their rights), with Rex H. Reed,

The NLRB showed its reluctance to promulgate regulations by abandoning its efforts to codify *Beck* in favor of individualized adjudication.<sup>100</sup> In *California Saw & Knife Works*,<sup>101</sup> the Board prescribed that a “[u]nion has an obligation under the duty of fair representation to give *Beck* rights notice” to nonmember employees.<sup>102</sup> Over time, the Board has expressed an implied *Beck* rule that can be synthesized through its adjudications of *Beck* related matters.<sup>103</sup> In response, unions have deployed informal notices to nonmembers of the right to object to agency fee expenditures.<sup>104</sup> Although an implied rule exists pursuant to *Beck* and *California Saw*, the Board’s decision to forgo codification of a notice-posting requirement has left the matter of NLRA-related notice postings relatively unguided and without the aid of a regulation.<sup>105</sup>

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*Revolution Ahead: Communications Workers v. Beck*, 13 HARV. J.L. & PUB. POL’Y 635, 655–56 (1990) (arguing that *Beck* notices provide nonmembers with political and economic freedom to abstain from supporting union activity that is highly influential on the political and legislative process).

99. See Rules and Procedures for the Implementation of *Communications Workers v. Beck*, 487 U.S. 735 (1988), 61 Fed. Reg. 11,167 (proposed Mar. 19, 1996) (to be codified at 29 C.F.R. pt. 102) (withdrawing the Board’s proposed rule, and noting that the Board has addressed *Beck* rights through adjudication and will continue to adjudicate *Beck* issues); see also Woldow, *supra* note 91, at 1082–83 (discussing the NLRB’s attempts at enforcing the *Beck* notice rule without a governing regulation).

100. The NLRB did not hear its first case addressing non-member union assessments until 1995. See *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 231–36 (1995) (providing analysis and guidance of proper notification procedures to nonmember employees). The Board has continued to address some of the minutiae of the *Beck* notice requirement. See, e.g., *Am. Fed’n of Television & Recording Artists*, 327 N.L.R.B. 474, 476 (1999) (clarifying accounting and audit procedures to ensure compliance with *Beck* notice disclosures); *Transp. Workers of Am.*, 329 N.L.R.B. 543, 544 (1999) (qualifying that expenses incurred by union representatives in the course of meeting with governmental agencies to discuss “activities that are representational in nature and attributable to the objecting nonmembers own bargaining unit” are chargeable under a union security agreement even though they may appear to be political in nature).

101. 320 N.L.R.B. 224 (1995).

102. *Id.* at 231.

103. See Woldow, *supra* note 91, at 1092–95 (describing the Board’s slow development of *Beck* notice requirements and providing suggestions for future enforcement and adjudication).

104. See, e.g., *Beck Rights Notice: Notice to Musicians Employed Under US Collective Bargaining Agreements*, AM. FED’N OF MUSICIANS, <http://www.afm.org/why-join/u-s-benefits/beck-rights-notice> (last visited Jan. 16, 2014); *Notice to all Union and Nonunion Members Regarding Their Rights Under NLRB v. Gen. Motors and CWA v. Beck*, MARINE ENGINEERS’ BENEFICIAL ASS’N, [http://mebaunion.org/PDF/Beck\\_Rights.pdf](http://mebaunion.org/PDF/Beck_Rights.pdf) (last visited Jan. 16, 2014); *Union Security Agreements: Notice to Persons Covered by Union Security Agreements Regulated Under the National Labor Relations Act*, INT’L UNION, UNION AUTOMOBILE, AEROSPACE & AGRIC. IMPLEMENT WORKERS AM., <http://www.uaw.org/beck> (last visited Jan. 16, 2014).

105. See Woldow, *supra* note 91, at 1093–96 (recounting the challenges with the NLRB’s structure that dampen the effect of judicially enforcing *Beck*).

2. *Congress and the White House spin their wheels—limited efforts of support and disapproval for notice-posting requirements under the NLRA*

Without a formal notice regulation in place, Congress and the White House grappled with compulsory notice-postings under the NLRA. Over the course of twenty years, four different Presidents ordered and repealed various NLRA notice-posting requirements.<sup>106</sup> Political divisions between the pro-union Democratic Party agenda<sup>107</sup> and the pro-management Republican Party agenda<sup>108</sup> dictated the breadth and scope of each administration's effort to define notice requirements under the NLRA.<sup>109</sup> The bulk of these executively ordered requirements provided limited information to employees and sought to enforce the *Beck* rights that Professor Morris challenged as narrow and one-sided.<sup>110</sup> Additionally, throughout the mid-nineties, the Republican-controlled Congress, in the midst of party gridlock, recognized the NLRB's reluctance to promulgate a *Beck* notice regulation, and it attempted, but failed, to legislate a compulsory notice-posting requirement.<sup>111</sup> These executive and legislative efforts fell short of providing notice to employees of all rights afforded under the NLRA—protracting the call for an informative and broad NLRA notice-posting requirement for decades.

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106. See *infra* notes 112–41 and accompanying text (chronicling the efforts of the executive branch to supplement the NLRB's lack of effort to codify *Beck* notice requirements).

107. See DEMOCRATIC NAT'L CONVENTION, MOVING AMERICA FORWARD: 2012 DEMOCRATIC NATIONAL PLATFORM 10–11 (2012), available at <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf> (expounding the Democratic Party's unwavering support for labor laws that protect union activity).

108. See REPUBLICAN NAT'L CONVENTION, WE BELIEVE IN AMERICA: 2012 REPUBLICAN PLATFORM 7–8 (2012), available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf> (expounding the Republican Party's vision for a workforce unencumbered by union activity).

109. See Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 349 (1998) (detailing the Republican agenda and interest in enforcing *Beck* notice requirements); David M. Burns, Comment, *Requiring Unions To Notify Covered Employees of Their Right To Be an Agency Fee Payer in the Post Beck Era*, 48 CATH. U. L. REV. 475, 481–82 (1999) (recounting the politics surrounding the first Bush and the Clinton administrations' treatment of *Beck* notices).

110. See *supra* notes 71–76 and accompanying text.

111. See Worker Right To Know Act, H.R. 3580, 104th Cong. § 6 (1996) (requiring that employers provide notice to nonmembers of their rights to refuse certain uses of agency fees); see also Worker Paycheck Fairness Act, H.R. 1625, 105th Cong. § 5 (1997) (requiring notice postings for employees subject to a union-security agreement workplace); Knollenberg, *supra* note 109, at 357, 361 (recounting the failure of legislative efforts to codify *Beck* notices “mostly along party lines”).

*a. Beck notices during the George H. W. Bush and Bill Clinton presidencies*

In April of 1992, President George H. W. Bush issued Executive Order 12,800<sup>112</sup> instructing the Secretary of Labor to promulgate a regulation implementing the *Beck* decision for all government contractors.<sup>113</sup> With the NLRB on the sidelines and a pro-union Congress in power, the President's efforts provided the only avenue for codifying *Beck* notices.<sup>114</sup> However, this effort failed when President Bush lost his bid for reelection. Just a few months after coming into office, President Clinton repealed Executive Order 12,800 with his own Order 12,836.<sup>115</sup>

In response to President Clinton's express disapproval of *Beck* notices, the Republican-controlled Congress of the mid-nineties sought to enact its own solution.<sup>116</sup> From 1996 to 1999, Congress considered three different bills that would have codified *Beck* notice requirements.<sup>117</sup> Each bill failed, leaving the issue of notice under the NLRA to the Board's developing *Beck* jurisprudence.<sup>118</sup>

*b. Restoration of Beck notices during President George W. Bush's Presidency*

After taking office in 2000, President George W. Bush rolled back President Clinton's Executive Order to reinstate *Beck* notice

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112. Exec. Order No. 12,800, 3 C.F.R. 290 (1993).

113. *See id.* at 291 (issuing compulsory notice language informing nonmember employees of their right to object to the use of their contribution for certain purposes); *see also* Obligations of Federal Contractors and Subcontractors; Notice of Employee Rights Concerning Payment of Union Dues or Fees, 57 Fed. Reg. 33,403 (proposed July 24, 2013) (to be codified at 29 C.F.R. pt. 470) (providing that the proposed regulation will require contractors to post notices to employees of their rights to object to uses of agency fees).

114. *See* Knollenberg, *supra* note 109, at 347–50 (recounting Representative Knollenberg's experiences as a freshman member in the early 1990s, and the limitations placed upon the republican agenda to implement *Beck* when the democratic party retained control over Congress).

115. Exec. Order No. 12,836, 3 C.F.R. 588 (1994) (revoking Exec. Order No. 12,800).

116. *See* Knollenberg, *supra* note 109, at 349 (“Republicans, nonetheless, have continued to push for *Beck* legislation.”).

117. Bipartisan Campaign Reform Act of 1999, S. 1593, 106th Cong. § 5 (1999) (seeking to amend section 8 of the NLRA to make it “an unfair labor practice” for any labor organization to assess nonmember agency fees and to fail to establish guidelines for providing notice to nonmembers); Worker Paycheck Fairness Act, H.R. 1625, 105th Cong. § 5 (1997) (requiring employers to post notices informing employees of applicable union security agreements, and creating the affirmative duty for unions to secure authorization for certain uses of nonmember agency fees); Worker Right To Know Act, H.R. 3580, 104th Cong. § 6 (1996) (obligating employers to post notices of employee rights under section 7, and clarifying the permissible and restricted uses of agency fees paid by nonmembers).

118. Though Congress and the President failed to codify *Beck* notice-posting requirements, the Board did adjudicate the issue on a number of occasions throughout the 1990s. *See supra* note 100.

requirements for government contractors.<sup>119</sup> Section 2 of Executive Order 13,201 required government contractors to “post a notice” informing workers of their rights to object to a union’s use of security agreement fees for non-administrative purposes.<sup>120</sup> This time the President’s Executive Order resulted in the codification of a regulation.<sup>121</sup> Though the Board was reluctant to promulgate its own *Beck* regulation,<sup>122</sup> it did offer interpretive guidance of *Beck* notices in response to President Bush’s Executive Order.<sup>123</sup>

Unions opposing Executive Order 13,201 moved to invalidate the regulation, asserting that the NLRA preempts compulsory display of *Beck* notice posters. In *UAW-Labor Employment & Training Corp. v. Chao*,<sup>124</sup> three unions and a federal contractor sued to enjoin President Bush’s notice-posting requirement.<sup>125</sup> The unions mounted a two-pronged argument against the regulation. First, they argued that the NLRA explicitly preempted the regulation because it prevents states and other actors, here the President, from setting standards inconsistent with the Act.<sup>126</sup> Second, the unions argued that section 8(c) of the NLRA preempted the essence of the regulation because the rule compelled union speech.<sup>127</sup> Section 8(c) of the NLRA provides that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.<sup>128</sup>

The unions asserted that the message compelled by Executive Order 13,201 violated their right to refrain from the

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119. Exec. Order No. 13,201, 3 C.F.R. 754 (2002) (issued Feb. 17, 2001).

120. *Id.* at 755.

121. 29 C.F.R. § 470.1–470.23 (2005).

122. *See supra* notes 100–05 and accompanying text.

123. *See generally* OFFICE OF THE GEN. COUNSEL, NLRB, GC NO. 01-04, GUIDELINES FOR RESPONSE TO BECK-RELATED PUBLIC INQUIRIES (2001), *available at* 2001 WL 988353 (issuing non-binding interpretive guidance in connection with an executively ordered *Beck* notice requirement).

124. 325 F.3d 360 (D.C. Cir. 2003).

125. *Id.* at 362.

126. *See* Final Brief for Appellees at 12, *UAW-Labor Emp’t & Training Corp.*, 325 F.3d 360 (No. 02-5080) (providing a three-pronged test to determine whether a labor related law is preempted by the NLRA (citing *Wis. Dep’t of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986))).

127. *See id.* at 13 (arguing that section 8(c) protects the right of employers to engage freely in non-coercive speech regarding labor relations matters, including the right to refrain from speaking on the topic).

128. 29 U.S.C. § 158(c) (2012).

dissemination of speech in violation of section 8(c)'s protection of labor-related speech.<sup>129</sup>

Rejecting the arguments advanced by the unions, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit held that the NLRA did not preempt the President's *Beck* notice-posting rule.<sup>130</sup> Looking to the substance of the regulation—the requirement that employers post notices regarding *Beck* rights—the D.C. Circuit concluded that the NLRA did not preempt the President's order because the Act only preempts laws that adversely regulate matters that are protected by the NLRA.<sup>131</sup> *UAW-Labor Employment & Training Corp.* involved a notice poster containing a restatement of rights that the Supreme Court interpreted from the NLRA in its *Beck* decision.<sup>132</sup> The court rejected arguments that the poster adversely regulated the protections offered by the Act.<sup>133</sup> In response to arguments that a compulsory notice-posting requirement violates a union's speech rights under Section 8(c) of the Act, the D.C. Circuit held that the compulsory rule does not violate the NLRA because the Act does not protect against compulsory disclosure of legal rights.<sup>134</sup> With the *Beck* notice requirement affirmed, federal contractors remained

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129. See Final Brief for Appellees, *supra* note 126, at 13 (suggesting that the Executive Order compels an employer to speak when the employer is protected from such compulsory requirements under the Act).

130. *UAW-Labor Emp't & Training Corp.*, 325 F.3d at 366.

131. The D.C. Circuit highlighted two categories of preemption analysis for federal labor law that govern the assessment of whether a law or regulation violates the NLRA. *Id.* at 362–63 (providing that federal labor law preempts matters that are arguably protected by the NLRA, and laws that frustrate the bargaining power of unions or afflict the balance of union and employer negotiating power Congress left unrestricted when it passed the NLRA are invalid). To determine if a law or regulation is preempted by the NLRA, courts must weigh and consider Board expressions, either through adjudication or rulemaking, of the question at issue. *See id.* at 363 (noting that Supreme Court precedent looks to the treatment and regulation of activities that the NLRB controls to determine if a law or regulation conflicts with the Act and adversely modifies labor rights (citing *Wis. Dep't of Indus.*, 475 U.S. at 286; *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959))). Applying those analytical frameworks to the case at bar, the D.C. Circuit concluded that, based on the Board's treatment of *Beck* notices in its adjudication, the *Beck* notice did not contravene the NLRA pursuant to the Board's treatment of *Beck* notices through adjudication. *See id.* at 363–64 (analyzing cases in which the NLRB determined that employer silence as to *Beck* rights does not violate the Act, and concluding that the Board's treatment of employer silence did not create a protected activity but instead recognized a permissible action (citing *Rochester Mfg. Co.*, 323 N.L.R.B. 260 (1997))).

132. *Id.* at 362 (highlighting that the President's Executive Order requires contractors to post notices informing employees of their rights under the array of Supreme Court cases addressing nonmember fee expenditures, including the *Beck* decision (citing *Comm'n's Workers of Am. v. Beck*, 487 U.S. 735, 754–63 (1988))).

133. *Id.* at 363 (concluding that the Board's interpretations of the NLRA and *Beck* do not preempt a requirement that workplace actors post notices).

134. *Id.* at 365 (reasoning that section 8(c) does not provide a right to silence under the NLRA).



obligated to post *Beck* notices until the next administration moved to modify the law.

*c. President Barack Obama's direct support for a notice-posting requirement that provides broad information of rights under the NLRA—Executive Order 13,496*

Signaling support for a notice-posting requirement containing a broader discussion of rights under the NLRA, President Obama issued Executive Order 13,496 shortly after taking office.<sup>135</sup> The order revoked the narrow *Beck* notice provisions of Executive Order 13,201, and instead required government contractors to post notices in the workplace informing employees of their rights under the NLRA.<sup>136</sup> The prescribed notice provision details general information about employee rights and “the obligations of employers and unions under the NLRA.”<sup>137</sup>

The substance of this notice-posting requirement reflected many of the concerns originally raised by Professor Morris when he requested that the NLRB expand its proposed *Beck* notice-requirement to cover all rights under the NLRA.<sup>138</sup> The poster must provide information in three categories: rights under the NLRA, illegal actions of employers, and illegal actions of unions.<sup>139</sup> Opponents criticized the expanded message, pointing to the diminishment of the *Beck* notice provision in the poster.<sup>140</sup> Like all preceding Executive Orders, the compelled notice-posting requirement only applied to federal government contractors.<sup>141</sup>

### 3. NLRB efforts to promulgate 29 C.F.R. Part 104

Persuaded by Executive Order 13,496 and the pro-union agenda of the Obama administration, the Board ended the nearly twenty-year pendency of Professor Morris's request when it moved to promulgate

135. See Exec. Order No. 13,496, 3 C.F.R. 214, 214–15 (2010) (issued Jan. 30, 2009) (repealing Exec. Order No. 13,201 and requiring that federal contractors post notices in the workplace and failure to do so could result in termination or suspension of the contract); see also 29 C.F.R. § 471.1–471.23 (2013) (codifying the President's Executive Order and providing the substance and form of the notice poster).

136. 75 Fed. Reg. 28,368 (May 20, 2010) (codified at 29 C.F.R. pt. 471).

137. 29 C.F.R. pt. 471 app. A.

138. See *infra* notes 150–66 and accompanying text.

139. 29 C.F.R. pt. 471 app. A.

140. See 75 Fed. Reg. at 28,375 (“All nine comments about the right to refrain from engaging in union activity universally criticized its lack of prominence, two of these comments asserting that the provision's prominence was so diminished that they did not notice the statement at all.”); see also 29 C.F.R. pt. 471 app. A (providing that nonmembers can “[c]hoose not to [engage in] any of these [union] activities, including joining or remaining a member of a union”).

141. See 29 C.F.R. pt. 471 app. A.

a broad notice-posting requirement in late 2010.<sup>142</sup> In December of 2010, the Board published a notice of proposed rulemaking outlining its vision for notice-posting requirements.<sup>143</sup> The NLRB originally set the notice and comment period for sixty days, but then allowed all comments submitted by March 23, 2011, to come in to the record.<sup>144</sup>

Soon after the NLRB issued its notice of proposed rulemaking, a swath of individuals, trade associations, and business industries voiced strong opposition to the rule.<sup>145</sup> These opponents advanced a variety of arguments against requiring notices in the workplace under the NLRA.<sup>146</sup> The most prominent argument posited against the proposed regulation was that the NLRB lacked substantive rulemaking authority under section 6 of the Act and that the notice

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142. See Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,411 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104) (recounting the arguments advanced by private citizens, governors, and the President for over two and a half decades which eventually moved the Board to promulgate the rule); see also Stephen Dinan, *Obama Moves To Reverse Bush Labor Union Policies*, WASH. TIMES (Jan. 31, 2009), <http://www.washingtontimes.com/news/2009/jan/31/obama-moves-to-reverse-bush-labor-union-policies/?page=all> (“After eight years in a Washington-style exile, leaders of labor unions were brought into the White House on Friday and treated to a series of executive orders signed by President Obama that will curb union-busting and preserve workers’ jobs on federal contracts.”).

143. See 75 Fed. Reg. at 80,411.

144. See Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,007 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104) (noting the large influx of comments relating to the Board’s effort to promulgate a notice-posting regulation).

145. See *id.* (“In all, 7,034 comments were received from employers, employees, unions, employer organizations, worker assistance organizations, and other concerned organizations and individuals, including two members of Congress. The majority of comments, as well as Board Member Hayes’s dissent, oppose the rule or aspects of it . . .”). Many of these comments derived from an organized opposition campaign, as evidenced by an identical form message submitted by several commenters. See, e.g., Comment from Glenda Morgan to NLRB regarding FR Doc. No. 2010-32019 (Jan. 26, 2011), available at <http://www.regulations.gov/#!documentDetail;D=NLRB-2010-0011-1115>; Comment from Blake Hermel to NLRB regarding FR Doc. No. 2010-32019 (Feb. 15, 2011), available at <http://www.regulations.gov/#!documentDetail;D=NLRB-2010-0011-3971>; Comment from Megan Beck to NLRB regarding FR Doc. No. 2010-32019 (Feb. 15, 2011), available at <http://www.regulations.gov/#!documentDetail;D=NLRB-2010-0011-2694>; Comment from Paul Weininger to NLRB regarding FR Doc. No. 2010-32019 (Jan. 26, 2011), available at <http://www.regulations.gov/#!documentDetail;D=NLRB-2010-0011-1463>; Comment from Phyllis Stromberg to NLRB regarding FR Doc. No. 2010-32019 (Feb. 23, 2011), available at <http://www.regulations.gov/#!documentDetail;D=NLRB-2010-0011-5372>.

146. See, e.g., 76 Fed. Reg. at 54,008 (reviewing comments submitted in opposition to the rule that contend the NLRB lacks legal authority to promulgate such a regulation); *id.* at 54,011 (discussing the comments submitted in opposition to the regulation that adopt Member Hayes’s dissent as their justification for opposition); *id.* at 54,012 (discussing comments submitted in opposition to the regulation that highlight First Amendment concerns over the compulsory message and the treatment of noncompliance).

requirement contravened other protections afforded by the NLRA.<sup>147</sup> The bulk of the comments supporting the NLRB's regulatory efforts came from unions, employee interest groups, and private citizens.<sup>148</sup> Ultimately, the NLRB rejected many of the criticisms levied against the regulation and proceeded to promulgate the notice-posting requirement.<sup>149</sup>

#### D. *The NLRB's Notice-Posting Regulation: An Overview*

To understand the issues raised in conjunction with the NLRB's notice-posting requirement, it is important to examine the rule and its functions. The regulation is broken into subparts.<sup>150</sup> Subpart A covers the definitional standards of the regulation,<sup>151</sup> the required notice,<sup>152</sup> and exceptions to the regulation.<sup>153</sup> Subpart B covers the

147. See *id.* at 54,008–10 (addressing the Board's authority to promulgate substantive rules under section 6 of the NLRA (citing *Mourning v. Family Publ'ns. Servs.*, 411 U.S. 356 (1973))); *id.* at 54,010–11 (analyzing the interstitial matter of a notice-posting requirement and the recognized implied right of workers to receive information under the act (citing *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 531–32 (1992); *Harlan Fuel Co.*, 8 N.L.R.B. 25, 32 (1938))); *id.* at 54,011–12 (responding to arguments that sections 8, 9, and 10 preempt the substance of the rule and noting that the poster seeks to further those provisions by providing notice of those rights).

148. See, e.g., Comment from Pamela Dorsey, United Steelworkers Pharmacy Benefit Call Ctr., to NLRB regarding FR Doc. No. 2010-32019 (Feb. 23, 2011), *available at*, <http://www.regulations.gov/#!documentDetail;D=NLRB-2010-0011-5722> (positing that the notice requirements would be beneficial to clarify misunderstandings and to help keep employees informed of their rights); Comment from Danielle Feris, Hand in Hand: The Domestic Employ'rs Ass'n, to NLRB regarding FR Doc. No. 2010-32019 (Feb. 23, 2013), *available at*, <http://www.regulations.gov/#!documentDetail;D=NLRB-2010-0011-5930> (supporting the notice-posting rule as a measure that contributes to the mission of bettering standards in workplace); Comment from Aquilina Versoza, Philipino Workers Ctr., to NLRB regarding FR Doc. No. 2010-32019 (Feb. 23, 2011), *available at* <http://www.regulations.gov/#!documentDetail;D=NLRB-2010-0011-6046> (remarking that the proposed notice can help to "improve[] workplace conditions" for workers unaware of their substantive rights); *cf.* Comment from Tracy Tunwall, IASHRA, to NLRB regarding FR Doc. No. 2010-32019 (Feb. 23, 2011), *available at* <http://www.regulations.gov/#!documentDetail;D=NLRB-2010-0011-5658> (noting support for the Board's poster but urging the Board to post "complete and not selective or one sided" information regarding rights to unionize or decertify a union under the NLRA).

149. 76 Fed. Reg. at 54,007 ("After careful consideration of the comments received, the Board has decided to issue a final rule . . .").

150. See *Obligations of Federal Contractors and Subcontractors; Notification of Employee Rights Under Federal Labor Law*, 29 C.F.R. §§ 104.201–104.204 (2013) (Subpart A, the notice-posting requirement); *id.* §§ 104.210–104.214 (Subpart B, General Enforcement and Complaint Procedures); *id.* § 104.220 (Subpart C, which does not provide any regulatory functions but merely seeks to preserve and incorporate other employment law provisions beyond the four corners of the regulation).

151. *Id.* § 104.201.

152. *Id.* § 104.202.

153. *Id.* § 104.210 ("[T]he Board will determine whether an employer is in compliance when a person files an unfair labor practice charge alleging that the employer has failed to post the employee notice required under this part. Filing a

mechanisms for enforcement of noncompliance,<sup>154</sup> and equitable remedies available to aggrieved employees in instances where noncompliance may have impacted their substantive rights.<sup>155</sup>

Part A is best summarized as the notice-posting rule, requiring that employers display an eleven-by-seventeen inch poster containing a specific message drafted by the NLRB.<sup>156</sup> The poster expressly touches upon three categorical areas: (1) the rights of employees to unionize, collectively bargain, discuss compensation, and strike; (2) the illegality of employers prohibiting discussion of union organization, questioning union support, retaliating against union association, and promising benefits to discourage union support; and (3) the illegality of unions threatening or coercing employees to join a union, to discriminate in making jobs referrals, causing an employer to discriminate against a union member, or taking adverse actions against employees because they have not joined a union.<sup>157</sup> Notably, the notice poster does not contain any express discussion of *Beck* rights because the NLRB concluded that unions generally adhered to the *Beck* decision.<sup>158</sup> Printable copies of the poster are available online,<sup>159</sup> or alternatively, an employer can request copies from the closest regional NLRB office.<sup>160</sup>

Part B of the regulation provides the NLRB's means of enforcing the notice-posting requirement set forth in Part A. As a matter of jurisdiction, the NLRB does not have the power to initiate investigations.<sup>161</sup> Accordingly, Part B restates the NLRB's limitations and ability to enforce the regulation only in instances where an employee files a ULP charge with the Board.<sup>162</sup> The regulation first

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charge sets in motion the Board's procedures for investigating and adjudicating alleged unfair labor practices . . .").

154. *Id.* § 104.213.

155. *Id.* § 104.214.

156. *See id.* § 104.202 (detailing the notification requirement, the size of the notice, and the requirements governing the location of the poster at the business); *see also Employee Rights Under the National Labor Relations Act, supra* note 5 (providing an example of the notice poster)

157. *Employee Rights Under the National Labor Relations Act, supra* note 5.

158. Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,023 (Aug. 30 2011) (codified at 29 C.F.R. pt. 104) (finding unnecessary the inclusion of *Beck* rights in the Board's notice poster because unions are already required to inform employees of their *Beck* rights, unions comply with *Beck* notice requirements, and *Beck* does not apply to the majority of private sector employees).

159. 29 C.F.R. § 104.202(e).

160. *Id.*

161. *See supra* notes 24–26 and accompanying text.

162. *See* 29 C.F.R. § 104.210 (asserting that the Board's only enforcement mechanism against a noncompliant employer is an employee's initial charge against their employer for failure to post the notice).

provides an informal means of addressing a violation through discussions between NLRB officials and the employer to ensure full knowledge and compliance with the notice-posting rule.<sup>163</sup> Should this effort fail, the regulation provides injunctive remedies.<sup>164</sup> The NLRB may order the employer to post the notice in the workplace along with an additional poster containing a message that notifies employees of the prior non-compliance.<sup>165</sup> Further, the NLRB may treat failure to post “as evidence of unlawful motive” if there is a finding of “a knowing and willful refusal to comply.”<sup>166</sup>

### *E. Legal Challenges to the Board’s Regulation*

#### *1. Controversy at the NLRB regarding the notice-posting rule*

The Board’s internal consideration of the rule was not without controversy. Board member Brian Hayes, a Republican appointed to the NLRB in 2009 by President Obama,<sup>167</sup> dissented in the Board’s notice of proposed rulemaking.<sup>168</sup> Hayes’s dissent rejected NLRB

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163. 29 C.F.R. § 104.212(a).

164. *Id.* § 104.212 (providing that the Board can bring a ULP charge against violators); *id.* § 104.213 (listing remedies to cure a failure to post); *id.* § 105.214 (permitting the tolling of the NLRA’s statute of limitations for other ULP charges if the employer has failed to post the notice).

165. *Id.* § 104.213 (stating that the Board will order a noncompliant employer “to cease and desist from the unlawful conduct and post the required employee notice, as well as a remedial notice”). The NLRB has customarily relied upon remedial postings in adjudication proceedings to notify workers of an employer’s specific violations of the NLRA. This injunctive remedy usually requires the posting of conspicuous notices that provide information and admission of the NLRB’s final judgment. *See* NLRB v. Express Publ’g Co., 312 U.S. 426, 438 (1941) (recognizing that courts have held that section 10(c) of the NLRA authorizes employers to post “notices advising the employees of the Board’s order and announcing the readiness of the employer to obey” (citing NLRB v. Penn. Greyhound Lines, 303 U.S. 261, 268 (1938))); *see also, e.g.*, Gem Mgmt. Co., 339 N.L.R.B. 489, 490 (2003) (providing an example copy of a notice poster required by the NLRB pursuant to a judgment and final order finding the commission of a ULP).

166. 29 C.F.R. § 104.214(b).

167. Press Release, White House, President Obama Announces Intent to Nominate Brian Hayes as NLRB Member (July 9, 2009), *available at* <http://www.whitehouse.gov/the-press-office/president-obama-announces-intent-nominate-brian-hayes-nlr-member>. As a member of the NLRB, Hayes ardently contributed to the polarizing and politicized debate surrounding the Board, at one point threatening to intentionally resign from the Board to prevent the agency from operating with a quorum. *See* Steve Greenhouse, *Republican Might Quit Labor Board*, N.Y. TIMES (Nov. 23, 2011), <http://www.nytimes.com/2011/11/23/business/brian-e-hayes-threatens-to-quit-labor-board.html?pagewanted=all> (detailing the partisan divide within the Board and Brian Hayes’s threat to quit the Board to “deny the [Board] the three-person quorum it needs to make any decisions”).

168. *See* Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410, 80,415 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104) (providing Hayes’s rationale for opposing the rule and his call for comments supporting his position that the NLRA does not confer authority to promulgate a notice-posting requirement).

arguments that the Board possesses the power to promulgate a notice-posting regulation pursuant to the limiting remedial powers contained under section 10 of the NLRA.<sup>169</sup> Hayes argued that the NLRA differs from other statutes containing notice-posting requirements, and that the “absence of such express language in our Act is a strong indicator, if not dispositive, that the Board lacks the authority to impose such a requirement.”<sup>170</sup> Though Hayes was alone in his sentiments at the NLRB, his dissent later provided support and guidance to groups opposing the rule through litigation.<sup>171</sup>

## 2. *Litigation challenging the notice-posting rule*

Upon enactment, four trade associations filed suit against the NLRB seeking declaratory and injunctive relief to invalidate the notice-posting regulation.<sup>172</sup> The National Association of Manufacturers, the National Right to Work Legal Defense and Education Foundation, the Coalition for a Democratic Workplace, and the Chamber of Commerce (“the Chamber”) brought actions against the NLRB in district courts.<sup>173</sup> Shortly after filing, the U.S. District Court for the District of Columbia consolidated the many suits brought against the Board’s regulation.<sup>174</sup> The Chamber suit proceeded separately in the U.S. District Court for the District of South Carolina.<sup>175</sup>

The opinions of the district courts split on the validity of the notice-posting requirement. The D.C. District Court upheld the

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169. *Id.*

170. *Id.*

171. See Corrected Brief of Appellees at 19, *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013) (No. 12-1757) (pointing to Hayes’s argument that section 10 of the NLRA restricts the Board to a purely reactive role in adjudicating ULP charges (citing Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg., 54,006, 54,039 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104))); see also *Chamber of Commerce*, 721 F.3d at 155 (holding that the NLRA confers rulemaking authority for the Board to carry out its statutorily defined reactive roles in addressing ULP charges and union elections only).

172. *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778 (D.S.C. 2012), *aff’d*, 721 F.3d 152; *Nat’l Ass’n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34 (D.D.C. 2012), *aff’d in part, rev’d in part*, 717 F.3d 947 (D.C. Cir. 2013).

173. See generally *Chamber of Commerce*, 856 F. Supp. 2d 778; *Nat’l Ass’n of Mfrs.*, 846 F. Supp. 2d 34. Uniquely, the NLRA does not contain a judicial review provision to establish the more customary circuit court jurisdiction over rulemaking challenges. See Lubbers, *supra* note 35, at 427–28 (finding that NLRB rulemaking falls within the ACUS’s criteria for circuit court review). Without a judicial review provision, opponents to Board regulations can more easily engage in “district court forum shopping and two-level review in challenges to virtually all significant Board rules.” *Id.* at 428.

174. *Nat’l Ass’n of Mfrs.*, 846 F. Supp. 2d at 38, 41.

175. See *Chamber of Commerce*, 856 F. Supp. 2d at 778.

posting requirement,<sup>176</sup> but struck down the regulation's enforcement mechanisms on grounds that they violated congressional intent.<sup>177</sup> Conversely, the South Carolina District Court struck the entire rule on grounds that Congress never granted the NLRB the authority to promulgate a notice-posting requirement.<sup>178</sup> The NLRB appealed both actions, and for a brief time experts believed the controversy would remain split amongst the two circuits.<sup>179</sup> However, such predictions were short-lived.<sup>180</sup>

*a. The D.C. Circuit's opinion*

The D.C. Circuit reversed the district court's holding and concluded that the regulation violated provisions of the NLRA.<sup>181</sup> Declining to adopt its previous standard in *UAW-Labor Employment & Training Corp.*,<sup>182</sup> the D.C. Circuit held that compulsory notice postings are in conflict with the NLRA's protection of non-coercive speech.<sup>183</sup> The Act provides that the NLRB has no authority to regulate noncoercive speech that takes an adverse opinion to unionization.<sup>184</sup>

Judge Randolph, writing for the court, sought to distinguish his opinion from the *UAW* holding by highlighting the absence of NLRB

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176. See *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 48 (upholding the rule on grounds that Congress did not intend to prevent the Board from promulgating a notice-posting requirement).

177. *Id.* at 52–54 (reasoning that failure to post the notice does not fall under 29 U.S.C. § 158's provision which makes it an unfair labor practice to “interfere with, restrain, or coerce” an employee's rights); *id.* at 55–56 (holding that the NLRA does not permit the Board to promulgate a rule that materially affects the statute of limitations under the Act); *id.* at 61–63 (finding that the regulation's posting requirements are severable from the invalidated enforcement mechanisms).

178. See *Chamber of Commerce*, 856 F. Supp. 2d at 789–97 (examining the plain language, structure, and legislative history of the NLRA and comparing the NLRA to other relevant labor statutes to determine that the Board does not have the authority to issue the notice-posting rule).

179. Abigail Rubenstein, *NLRB Appeal Could Split Circuits on Union Poster Rule*, LAW360.COM (June 15, 2012), <http://www.law360.com/articles/350594/nlr-appeal-could-split-circuits-on-union-poster-rule>.

180. See *Chamber of Commerce v. NLRB*, 721 F.3d 152, 160–67 (4th Cir. 2013) (affirming the district court's invalidation of the notice-posting regulation); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 963–64 (D.C. Cir. 2013) (reversing the district court's decision finding the notice-posting requirement valid).

181. *Nat'l Ass'n of Mfrs.*, 717 F.3d at 958–59 (concluding that the rule violates section 8(c) of the Act).

182. See *supra* notes 119–34 and accompanying text (discussing the D.C. Circuit's standard in *UAW-Labor Emp. & Training Corp.* which upheld a *Beck* notice-posting requirement promulgated pursuant to Executive Order 13,201).

183. See *Nat'l Ass'n of Mfrs.*, 717 F.3d at 958–59 (acknowledging the *UAW* decision and declining to adopt its holding on adverse grounds (citing *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003))).

184. 29 U.S.C. § 158(c) (2012) (providing that viewpoints which contain “no threat of reprisal or force or promise of benefit” are permissible in the workplace and cannot be treated as a ULP under the NLRA).

enforcement mechanisms in Executive Order 13,201.<sup>185</sup> The enforcement provisions contained in the Board's challenged regulation specifically treated noncompliance as a potential ULP, classifying an employer's knowing and willful defiance to post as "evidence of anti-union animus."<sup>186</sup> Analyzing the regulation's enforcement mechanisms against section 8(c) of the NLRA, Judge Randolph concluded that the regulation's treatment of willful noncompliance violated the protected anti-union viewpoint of an employer.<sup>187</sup> Though the D.C. Circuit's opinion did not reach the merits of the NLRB's authority to promulgate a notice-posting rule under section 6 of the NLRA, Judge Henderson and Judge Brown filed a concurring opinion stating that the Act does not authorize a "prophylactic" rule like the disputed notice-posting regulation.<sup>188</sup>

*b. The Fourth Circuit's opinion*

Conversely, the Fourth Circuit avoided the issue of employer speech rights and instead focused on limitations the NLRA poses to rulemaking and requiring notice under the statute.<sup>189</sup> To determine if the regulation was permissible, the court analyzed the statute's language and the legislative context behind the Board's structure, functions, and rulemaking power.<sup>190</sup> Ultimately, the Fourth Circuit rejected the argument that the NLRB's reactive investigatory role necessitates a notice-posting requirement to inform employees of their rights, and instead held that the NLRA does not provide the

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185. See *Nat'l Ass'n of Mfrs.*, 717 F.3d at 958 (asserting that "there was no prospect of a contractor's being charged with an unfair labor practice for failing to post the required notice" because the Board was not involved with administering the order).

186. *Id.* at 955 (quoting Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,035–36 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104)).

187. *Id.* at 959 (concluding that the treatment of failure to post as evidence of anti-union sentiment violates NLRA protections that allow parties to express non-coercive messages). But see *id.* at 959 n.19 (explaining that NLRB regulations requiring employers to post election notices do not violate the First Amendment or the NLRA because they do not treat failure to post as evidence of anti-union sentiment).

188. *Id.* at 967 (Henderson, J., concurring) (finding that the NLRA does not require the Board to "educate its employees on the fine points of labor relations law" because Congress delineated the specific, remedial means through which the Board could enforce its policies).

189. See *Chamber of Commerce v. NLRB*, 721 F.3d 152, 160–61 (4th Cir. 2013) (maintaining that the Board's authority to promulgate a notice-posting rule must derive from some implicit or explicit portion of the statute, and finding no such evident authority).

190. See *id.* at 162 (asserting that the circuit court should review the provision in the context of other statutory language (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 133, 132 (2000))).



Board with the authority to affirmatively act absent a ULP claim triggering the Board's jurisdiction.<sup>191</sup>

Further, the Fourth Circuit assessed the landscape of legislative history behind the formation of the NLRA to conclude that Congress never intended to authorize, or, alternatively, leave a gap for the NLRB to authorize, a notice-posting requirement.<sup>192</sup> To aid in its assessment, the Fourth Circuit examined the deliberations of Congress in amending the Railway Labor Act, an analogous labor-related administrative statute covering the railway and airline industries, enacted at the same time as the NLRA.<sup>193</sup> Acknowledging that Congress inserted notice provisions in the Railway Labor Act and omitted those provisions in the NLRA, the Fourth Circuit concluded that the drafters of the NLRA never intended to create compulsory notice-postings under the Act.<sup>194</sup> Ultimately, the Fourth Circuit joined the D.C. Circuit in striking the rule, and rested its judgment on grounds that the Board did not possess congressionally delegated authority to promulgate a notice-posting regulation.<sup>195</sup>

## II. THE BOARD'S NOTICE-POSTING REQUIREMENT PROPERLY SERVES TO ADAPT THE NLRA TO THE CHANGING PATTERNS OF INDUSTRY

As the agency tasked with enforcing and interpreting the NLRA, the Board is entrusted with adapting applications of the Act to the evolving workplace.<sup>196</sup> The D.C. and Fourth Circuit decisions unmistakably challenge the Board's ability to fulfill its duty through rulemaking.<sup>197</sup> Both decisions held that the Board retains a purely

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191. See *id.* at 162–63 (analyzing sections 6 through 10 of the NLRA and concluding that the Board may not derive any power from those respective sections to promulgate the disputed notice-posting regulation).

192. See *id.* at 164–66 (analyzing the history of the NLRA and subsequent amendments to the Act to conclude that “Congress’s continued exclusion of a notice-posting requirement from the NLRA” is sufficiently dispositive of the NLRA’s authority to promulgate such a rule).

193. *Id.* at 157 n.4, 165 (observing that other federal labor statutes contain explicit employment notice provisions).

194. *Id.*

195. *Id.* at 166–67.

196. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (delineating the Board’s role as the entrusted interpreter of the Act to ensure compliance through evolving industry practices).

197. See *Chamber of Commerce*, 721 F.3d at 161 (“[T]he substantive provisions of the Act make clear that the Board is a reactive entity, and thus do not imply that Congress intended to allow proactive rulemaking of the sort challenged here through the general rulemaking provision of section 6.” (emphasis added)); *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947, 967 (D.C. Cir. 2013) (Henderson, J., concurring) (“In sum, given the Act’s language and structure are manifestly remedial, I do not believe the Congress intended to authorize a regulation so aggressively prophylactic as the posting rule.” (emphasis added)).

reactive role in all matters and limited the NLRB's power to promulgate regulations that create affirmative duties outside of adjudicatory investigations.<sup>198</sup> If these two decisions are not reexamined, the NLRB's ability to promulgate substantive regulations will face substantial challenges.

Though untested for years, the Board has retained substantive rulemaking powers to aid its mission of protecting and encouraging labor organization.<sup>199</sup> This rulemaking power necessarily serves to provide clarity and guidance to industry by requiring affirmative duties that seek to mitigate labor strife and the need for adjudication of unfair labor practices.<sup>200</sup> In reassessing the rulemaking powers of the NLRB, the progeny of *Beck* requirements and the *AHA* decision provide support for the Board's power to affirmatively require notice to workers.<sup>201</sup> Moreover, the notice poster connects the Board's voice to the discourse of workplace labor discussions and offers a strictly factual and permissible restatement of the law.<sup>202</sup>

#### A. NLRB Authority To Promulgate Notice-Posting Requirements

The litigation challenging the NLRB's notice regulation presents a new iteration of issues previously explored in challenged *Beck* notice-posting requirements: whether such notices are preempted by a limitation of power under the NLRA.<sup>203</sup> The NLRA does not contain a notice-posting provision, leaving open a theoretical question of

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198. See *Chamber of Commerce*, 721 F.3d at 161; *Nat'l Ass'n of Mfrs.*, 717 F.3d at 967 (Henderson, J., concurring).

199. See 29 U.S.C. § 151 (2012) (providing that the Board shall "encourag[e] the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing"); *id.* § 156 (providing the Board's rulemaking powers to carry out the policy aims of the Act); see also *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991) (affirming the NLRB's power to promulgate substantive regulations that control matters outside of individualized and remedial adjudications).

200. *Am. Hosp. Ass'n.*, 499 U.S. at 613 (upholding a regulation promulgated by the Board that defines substantive bargaining unit classifications "in advance" of potential future controversies, thus mitigating disputes between health care unions and medical employers).

201. *Id.* at 614 (holding that the Board has authority to promulgate substantive rules); *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 758–59 (1988) (holding that unions may not assess agency fees for non-administrative expenditures, a ruling that impliedly required some form of notice to nonmembers of their rights); *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 233 (1995) (extending the *Beck* decision to require unions to provide notice of rights under section 8 of the NLRA to nonmembers incurring agency fee charges under union security agreements).

202. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (holding that government speech is "not subject to scrutiny").

203. See *supra* notes 126–29 and accompanying text (describing the unions' two main arguments against *Beck* notice posters, both rooted in the NLRA's preemption of laws that conflict with Board interpretations of the NLRA).

whether the absence of a congressionally mandated poster creates a statutory interstice.<sup>204</sup> Three sources provide guidance in assessing the Board's ability to promulgate a notice-posting regulation: the legal precedent addressing NLRB rulemaking authority,<sup>205</sup> the express language of the statute,<sup>206</sup> and the expressions and intentions of Congress when it enacted the NLRA.<sup>207</sup>

1. *Beck and AHA as a framework for a notice-posting requirement under the NLRA*

Despite the inconsistent history of *Beck* notice-posting requirements,<sup>208</sup> the Supreme Court's decision in *Beck*, when conflated with *AHA*, provides justification and authority for the Board's prophylactic notice-posting regulation.<sup>209</sup> Remarkably, the decisions of the D.C. Circuit and the Fourth Circuit failed to analyze the *Beck* case and subsequent Board requirements for union notice to nonmembers.<sup>210</sup> *Beck* and its progeny substantiate the proposition

204. See Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,006–07 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104) (“The Board is almost unique among agencies and departments administering major Federal labor and employment laws in not requiring employers routinely to post notices at their workplaces informing employees of their statutory rights.”).

205. See *Am. Hosp. Ass’n*, 499 U.S. at 613 (recognizing the Board's power to promulgate rules “in advance” of future legal disputes).

206. See 29 U.S.C. § 156 (2012) (providing the Board with the power to promulgate rules necessary to carry out the other provisions of the act); see also *id.* § 151 (delineating the policy aims of the NLRA).

207. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring) (providing that an “agency is due no deference, [if] Congress has left no gap for the agency to fill” (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984))); see also *id.* at 1876 (finding that courts can examine statutory language, context, and structure as well as canons of textual construction to determine if a statute’s “ambiguity comes accompanied with agency authority to fill a gap”).

208. See *supra* Part I.C.1, C.2.b. (recounting the Board's reluctance to issue regulations codifying *Beck* and the controversy involving President George W. Bush's efforts to reignite codification of *Beck* notice requirements in the workplace).

209. See *Am. Hosp. Ass’n*, 499 U.S. at 612 (holding that the Board has the power to resolve “certain issues of general applicability” through rulemaking); *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 758–59 (1988) (establishing the right of nonmembers to restrict agency fee expenditures to representative matters only); see also *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 252 (1995) (“Unions are obligated under their duty of fair representation to provide notice of *Beck* rights to all nonmember employees.”).

210. The Fourth Circuit did not reference the *Beck* case or the Board's adjudicated notice-posting standard in *California Saw*. See generally *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013). The D.C. Circuit makes only scant references to the *California Saw* case, dismissing its applicability in a brief footnote. See *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n.18 (D.C. Cir. 2013) (“[N]o one—and certainly not the Board—has even suggested that the posting rule was needed because employers are misleading employees about their rights under the National Labor Relations Act.” (citing *Rochester Mfg. Co.*, 323 N.L.R.B. 260 (1997); *Cal. Saw*, 320 N.L.R.B. 224)). But see Notification of Employee Rights Under the National Labor

that notice-requirements permissibly serve to clarify ambiguities within the NLRA.<sup>211</sup>

Concerned with potential violations of section 8(a)(3) of the NLRA, which provides unions with the power to charge nonmembers specifically for benefits they receive under collective bargaining agreements, the *Beck* Court restricted unions to “the collection of only those fees necessary to finance collective-bargaining activities.”<sup>212</sup> Anticipating an onslaught of litigation pursuant to this ruling, the NLRB drafted compliance guidelines to help mitigate future issues—including the need for unions to provide notice of rights and expenditures to nonmembers.<sup>213</sup> Although the NLRB never fully promulgated a *Beck* notice requirement, such a requirement would likely be justified pursuant to the Court’s holding in *AHA*.<sup>214</sup>

The *AHA* decision acknowledged that the Board “has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.”<sup>215</sup> Intrinsic in this holding is the Board’s power to proactively regulate matters outside of adjudication proceedings.<sup>216</sup> The Board has recognized that interested parties have been pushing it to develop policies that will lessen the individualized approach of

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Relations Act, 76 Fed. Reg., 54,006, 54,017 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104) (demonstrating misleading employer comments that workers may only join “union companies” if they want to engage in a union environment).

211. See *Cal. Saw*, 320 N.L.R.B. at 252 (requiring unions to provide notice of *Beck* rights to employees out of their duty of fair representation).

212. *Beck*, 487 U.S. at 759.

213. See *supra* notes 80–103 and accompanying text (describing the NLRB’s failed attempt to implement the *Beck* decision through regulations establishing that unions must inform nonmembers of the precise use of their agency fees).

214. See Union Dues Regulations, 57 Fed. Reg. 43,635, 43,635–36 (proposed Sept. 22, 1992) (to be codified at 29 C.F.R. pt. 103) (justifying the need for affirmative rulemaking pursuant to *AHA*); see also *id.* at 43,637 (identifying an inherent duty to disclose certain fiduciary information to members and nonmembers to avoid a breach of “section 7 rights of employees to refrain from concerted activities”).

215. *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 612 (1991).

216. See 29 U.S.C. 160(b) (2012) (providing that the Board has the authority to initiate adjudication proceedings only pursuant to a ULP charge with the Board); *Am. Hosp. Ass’n*, 499 U.S. at 612 (“The requirement that the Board exercise its discretion in every disputed case cannot fairly or logically be read to command the Board to exercise standardless discretion in each case.”). Legislative history also hints at the Board’s authority to promulgate rules outside of the requirements under section 10 of the NLRA, as indicated by a portion of a house report discussing the expectation that the Board will promulgate rules governing procedure. See, e.g., H.R. REP. NO. 74-972, at 21 (1935) (“It is contemplated, of course, that the Board will establish rules governing procedure in greater detail, in such manner as will be conducive to the proper dispatch of business and to the ends of justice.” (emphasis added)). This language supports a rule providing notice to parties of what rights and restrictions apply to them under the NLRA. See *id.* at 29 (stating that the Board may “prescribe such rules and regulations as it deems necessary to carry out the provisions of this resolution”).

adjudicating common and repeated issues.<sup>217</sup> The regulation disputed in *AHA* specifically achieves this aim, and circumvents the need for individualized adjudication to address bargaining unit classifications in the health care industry.<sup>218</sup> The regulation offers eight classifications of health care bargaining units in anticipation of future disputes.<sup>219</sup>

This type of rule, a proactive yet non-investigatory measure, operates in full compliance with the NLRA's legislative history which indicates that the Board may not act in a "roving" manner to seek out and initiate *investigations*.<sup>220</sup> Accordingly, the *AHA* decision affirms the Board's authority to promulgate regulations that address, clarify, and potentially mitigate legal issues in future controversies *before they reach the Board* through adjudication.<sup>221</sup> The Board's effort to promulgate a *Beck* notice requirement achieves the same effect and seeks to provide clarity on the rights and restrictions that govern nonmembers and unions.<sup>222</sup>

When conflated with *Beck* and *California Saw*, the *AHA* decision establishes a basis for providing notice to workers of their rights under the NLRA. The *Beck* decision highlights some of the intricacies of labor law, noting that unions derive a right to collect union-security dues but also must adhere to "the judicially created

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217. See Collective-Bargaining Units in the Health Care Industry, 52 Fed. Reg. 25,142, 25,144-45 (proposed July 2, 1987) (to be codified at 29 C.F.R. pt. 103) (noting that Congress sought to pass legislation requiring the NLRB to promulgate regulations and the Seventh Circuit admonished the Board to engage in more rulemaking).

218. See 29 C.F.R. § 103.30 (providing eight distinct classifications for bargaining units that are the only "appropriate units" recognized in the health care industry under the Act, absent any extraordinary circumstances).

219. *Id.*

220. The Fourth Circuit, in its review of this controversy, placed emphasis on the legislative history of the NLRA and Congress's express refusal to grant the Board "roving" powers. See *Chamber of Commerce v. NLRB*, 721 F.3d 152, 156, 164 (4th Cir. 2013). The discussion of the NLRB's lack of "roving" power specifically addressed the Board's jurisdictional authority to issue investigative subpoenas. See H.R. REP. NO. 74-972, at 22 (stating that the subpoena power conferred under section 11 of the act is restricted only to the reactive role of adjudicating claims and overseeing elections); see also 29 U.S.C. § 160 (providing that the Board may only initiate adjudication proceedings pursuant to ULP charges). This express restriction does not speak to the Board's rulemaking authority. See H.R. REP. NO. 74-972, at 22 (making no mention of, or restriction to, rulemaking powers).

221. See *Am. Hosp. Ass'n*, 499 U.S. at 612 ("[E]ven if a statutory scheme requires individualized determinations, the decision-maker has the authority to rely on rulemaking to resolve certain issues of general applicability . . .").

222. See Union Dues Regulations, 57 Fed. Reg. 43,635, 43,636-37 (proposed Sep. 22, 1992) (to be codified at 29 C.F.R. pt. 103) (discussing the shifting standard of fair representational duties and the need for notification of rights pursuant to that shifting standard).

duty of fair representation.”<sup>223</sup> This common law duty is subject to developing standards and interpretations of the NLRB and the courts.<sup>224</sup> *Beck* notices and the final rule examined in *AHA* provide unions, employers, and employees with notice and guidance of the Board’s interpretation of law.<sup>225</sup> A more general notice-posting requirement—aimed at providing knowledge of legal rights and requirements governed by the Board’s decisions—is similarly and properly focused to regulate matters “of general applicability.”<sup>226</sup>

2. *Finding the gap: The statutory absence of notice-posting requirements under the NLRA*

The NLRA’s silence as to notice-posting requirements, when coupled with the Board’s authority to promulgate rules “necessary to carry out”<sup>227</sup> other provisions of the Act, creates a legislative gap.<sup>228</sup> It is well established that administrative agencies must receive deference when promulgating rules within their substantive jurisdiction that are not preempted by legislative intent or limiting principles set forth in the agency’s statute.<sup>229</sup> Congress’s legislative expressions that speak directly to the matter being litigated also restrain a court’s interpretation of the statute.<sup>230</sup> Close examination of the NLRA’s

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223. *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 742 (1988) (finding that the lower court had jurisdiction to hear claims of whether exacting fees beyond those necessary to finance collective bargaining violated fair representation).

224. *See, e.g., id.* at 745 (acknowledging that this case presents the first time that the court examines the precise limits of section 8(a)(3) of the NLRA).

225. *See Am. Hosp. Ass’n*, 499 U.S. at 614 (deferring to the “Board’s reasonable interpretation of the statutory text”); *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 233 (1995) (interpreting the NLRA to determine that “a union acts arbitrarily and in bad faith—in breach of its duty of fair representation—when it fails to inform newly hired nonmembers of their *Beck* rights at the time the union first seeks to obligate these newly hired nonmember employees to pay dues”).

226. *Cf. Am. Hosp. Ass’n*, 499 U.S. at 612 (upholding a rule limiting the type of employee units appropriate for collective bargaining in acute care hospitals because regulators may resolve issues of general applicability through rulemaking, absent an express Congressional prohibition).

227. 29 U.S.C. § 156 (2012).

228. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013) (prescribing that courts must defer to an agency’s reading of ambiguities within its statute, even if the reviewing court may not have arrived at the same conclusion if the controversy were to have originated within its own jurisdiction).

229. *Id.* at 1874 (granting deference to the FCC “because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority”); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (providing the well-known two-pronged standard of review under which courts must review administrative decisions with deference).

230. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33, (2000) (stating that lower courts must review a statute in its full context while also looking to other expressions of Congress that address the considerations the regulating agency

structure, as well as the legislative history of the Act, provides insufficient support that Congress was against notice-posting requirements under the NLRA.<sup>231</sup>

*a. NLRA provisions support the Board's authority to promulgate a notice requirement*

Nothing in the NLRA serves to limit the Board's authority to promulgate a notice-posting requirement.<sup>232</sup> Section 6 of the NLRA confers proactive rulemaking authority, as acknowledged by the Supreme Court's decision in *AHA*.<sup>233</sup> This section plainly states that the Board shall have authority to promulgate "rules and regulations as may be necessary to carry out the provisions" of the NLRA.<sup>234</sup> Accordingly, the Board cannot promulgate regulations that expand beyond the scope of the statute; it must provide justification for a rule's necessity in aiding with the administration of another section within the statute.<sup>235</sup>

*Beck* notice provisions offer a good example of this principle. The *Beck* decision was the first time the Supreme Court "delineated the precise limits section 8(a)(3) places on the negotiation and enforcement of union-security agreements."<sup>236</sup> A *Beck* notice serves to carry out section 8(a)(3) by providing guidance regarding the statute's treatment of union-security agreements and the rights of

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seeks to confront); *cf. City of Arlington*, 133 S. Ct. at 1874 (responding to the dissent by arguing that rulemaking should not be subject to de novo determinations of whether Congress expressly delegated authority for a particular issue that is within the purview of an administrative agency's substantive field).

231. *Am. Hosp. Ass'n*, 499 U.S. at 613 ("As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6, we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section."); *see also Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34, 48 (D.D.C. 2012) ("[T]he Court cannot find that in enacting the NLRA, Congress unambiguously intended to preclude the Board from promulgating a rule that requires employers to post a notice informing employees of their rights under the Act. Neither the text of the statute nor any binding precedent supports plaintiffs' narrow reading of a broad, express grant of rulemaking authority."), *aff'd in part, rev'd in part*, 717 F.3d 947 (D.C. Cir. 2013).

232. *See Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 47–48 (noting that limitations cited by opponents only address "limits on the Board's authority . . . once a violation has been found" through adjudication, and concluding that Congress did not place a limitation to preclude the Board from promulgating the challenged regulation).

233. *See Am. Hosp. Ass'n*, 499 U.S. at 612 (recognizing the Board's substantive rulemaking authority); *see also* 29 U.S.C. § 156 (2012) (providing the Board with the power to make rules necessary to aid in its administration of other provisions under the act).

234. 29 U.S.C. § 156 (emphasis added).

235. *Id.*

236. *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988).

employees to object to agency fee expenditures.<sup>237</sup> Such notice would be proper under the NLRA because it derives from another provision within the statute.<sup>238</sup>

Opponents of the Board's broader notice-posting authority argue that no provisions in the statute support the NLRB's aim of generally informing workers of their rights.<sup>239</sup> Examining the full statute, sections 1 and 7 of the NLRA provide justifications for a notice-posting requirement.<sup>240</sup> Section 1 recognizes that employers have historically denied employee efforts to collectively organize, and thus provides in part:

It is hereby declared to be *the policy of the United States* to eliminate the causes of certain substantial obstructions . . . by *encouraging* the practice and procedure of collective bargaining *and by protecting* the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . .<sup>241</sup>

This section delineates the congressionally mandated policy that the Board facilitate and encourage the exercise of concerted and organized activities under the protections of the Act.<sup>242</sup> To aid in advancing this policy, Congress provided the Board with both adjudicative and rulemaking powers.<sup>243</sup> As a limiting principle, Congress restricted the Board's investigatory abilities under section 10 of the Act to a remedial role.<sup>244</sup> However, this restriction does not

237. See NLRB GC 88-14 GUIDELINES, *supra* note 72, at \*1 ("If a union has a union-security clause covering statutory employees, and if it expends part of the funds collected thereunder on non-representational activities, that union has an obligation to notify nonmember employees: (1) that a stated percentage of funds was spent in the last accounting year for non-representational activities; (2) that nonmembers can object to having their union-security payments spent on such activities; and (3) that those who object will be charged only for representational activities.").

238. See *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 231 (1995) (dismissing the need under section 8(b)(1)(A) for notice of *Beck* rights to nonmembers).

239. See Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,011 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104) ("Some comments, such as those of the Council on Labor Law Equality (COLLE), contend that the Board has no authority whatsoever to administer the NLRA unless a representation petition or unfair labor practice charge has been filed under Sections 9 or 10, respectively.").

240. *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34, 46 (D.D.C. 2012) (finding no ground for differentiating the powers granted to the Board to carry out section 7 and the broad powers associated with other sections), *aff'd in part, rev'd in part*, 717 F.3d 947 (D.C. Cir. 2013).

241. 29 U.S.C. § 151 (2012) (emphasis added).

242. *Id.*

243. See *supra* notes 14–50 and accompanying text.

244. See 29 U.S.C. § 151 (delineating the policy to encourage employees to exercise certain concerted practices and right); *id.* § 160(a)-(b) (providing that the Board may "prevent any person from engaging in any unfair labor practice . . . [w]henver it is charged that any person has engaged or is engaging in any such



encumber the Board's rulemaking power under section 6, which allows the Board to promulgate regulations that will mitigate and clarify ambiguities that are "generally applicabl[e]" to labor interactions and disputes.<sup>245</sup>

Further, section 7 of the NLRA also provides justification for the Board's notice-posting requirement.<sup>246</sup> Section 7 delineates the rights of employees to collectively bargain, engage in concerted activities, join unions, or refrain from any of those activities.<sup>247</sup> By conflating the rights outlined in section 7 with the policy aims of section 1—"encouraging the practice and procedure" of these rights—the argument can be made that the Board possesses a reasonable basis for promulgating a notice-posting requirement.<sup>248</sup> As stated in the NLRB's policy justification for the final rule, the Board wanted "to better *enable* the exercise of rights under the statute"—a basis that is in line with the policy aims granted by Congress when it originally enacted the NLRA in 1934.<sup>249</sup>

*b. Sister act: Constructing a gap in the NLRA through comparisons with the Railway Labor Act*

Notice-posting requirements contained in the NLRA's sister act, the Railway Labor Act (RLA), support the inference that Congress, whether intentionally or unknowingly, created a legislative gap when it omitted a notice-posting requirement in the NLRA.<sup>250</sup> In support of its decision invalidating the NLRB's notice-posting regulation, the Fourth Circuit compared the legislative histories of the NLRA and

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unfair labor practice"); *see also supra* note 220 and accompanying text (emphasizing the legislative intent that the Board's authority not be "roving").

245. *See* *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609–10 (1991).

246. *See* Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104) (discussing section 7 and acknowledging that employees must be aware of their rights to exercise them).

247. 29 U.S.C. § 157.

248. *See* 76 Fed. Reg. at 54,006 (providing the Board's justification for promulgating a rule under sections 6 and 7 of the NLRA).

249. *See* Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104) (emphasis added); *see also* 29 U.S.C. § 151 (providing that the policy aim of the NLRA is to "encourage" the practices and rights afforded under the Act).

250. *See* *Chamber of Commerce v. NLRB*, 721 F.3d 152, 157 & n.4 (4th Cir. 2013) (observing that the NLRA is different from most labor bills for its lack of a notice provision); *see also* *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (expounding that administrative agencies cannot go beyond the boundaries set forth by Congress, and if "Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow"); *Am. Hosp. Ass'n*, 499 U.S. at 612–13 (validating the Board's authority to promulgate regulations that apply to substantive interstitial questions that arise within "the Act's underlying policy, the goal of facilitating the organization and recognition of unions").

the RLA.<sup>251</sup> Scholars, practitioners, and courts regularly analogize the RLA to the NLRA because they feature congruent statutory language and similar purposes.<sup>252</sup> Although the two statutes are alike in certain ways, the agencies administering each statute are not identical.<sup>253</sup> Moreover, the NLRA strips the Board of its power to regulate union activities subject to the RLA's jurisdiction over the railroad and airline industries.<sup>254</sup>

Concurrent with its enactment of the NLRA, Congress also amended the RLA.<sup>255</sup> Included among those amendments were two notice provisions, one requiring notice of contracts abrogated under the amendments, and another requiring notice of dispute resolution rights under the RLA.<sup>256</sup> Conversely, Congress rejected a similar proposed contract abrogation and notice provision in the NLRA.<sup>257</sup>

In passing landmark labor legislation, Congress sought to address the problem of employment contracts that retroactively violate the law by requiring abrogation of improper agreements.<sup>258</sup> In an effort to facilitate compliance with this measure, Congress inserted notice provisions in both the RLA and the NLRA to compel disclosure of

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251. See *Chamber of Commerce*, 721 F.3d at 164 (“We also find the history of the NLRA instructive, particularly vis-a-vis congressional treatment of sister agencies with statutory authorization to require the posting of notices.”).

252. See *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 432 (1989) (“We have observed in the past that carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA.” (citing *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969))); *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 751 (1988) (analogizing the NLRA to the RLA); see also *Baver*, *supra* note 22, at 881 (comparing the National Management Board that administers the RLA to the NLRB).

253. Rafael Gely, *A Tale of Three Statutes . . . (and One Industry): A Case Study on the Competitive Effects of Regulation*, 80 OR. L. REV. 947, 955 (2001) (discussing the mechanical differences between the National Mediation Board and the NLRB).

254. See 29 U.S.C. § 152 (providing that the NLRB's jurisdiction “shall not include . . . any person subject to the Railway Labor Act”).

255. See National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935); Pub. L. No. 73-442, 48 Stat. 1185 (1934).

256. See *Chamber of Commerce*, 721 F.3d at 164–66 (discussing the various notice provisions contained in the NLRA and the RLA legislation).

257. See Pub. L. No. 73-442, § 2 (Fifth), 48 Stat. at 1188 (containing the RLA's contract abrogation notice provision); S. 2926, 73d Cong. § 304(b) (as introduced in Senate, Feb. 28, 1934) (providing that “[a]ny term of a contract or agreement of any kind which conflicts with the provisions of this Act is hereby abrogated, and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate action”), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1, 14 (1949).

258. See Pub. L. No. 73-442, § 2 (Fifth), 48 Stat. at 1188 (abrogating contracts that “require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization”); S. 2926, 73d Cong. § 304(b) (as introduced in Senate, Feb. 28, 1934) (abrogating contracts that violate any provision in the NLRA), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 257, at 1, 14.

contract abrogation.<sup>259</sup> Congress deleted the contract abrogation provisions from the NLRA before it was enacted, thereby mooted the necessity to provide notice of repealed employment contracts.<sup>260</sup> Conversely, the RLA amendments passed with the contract abrogation notice requirement intact.<sup>261</sup> Additionally, Congress also required notice to railway workers of their right to bring disputes before the National Mediation Board under the RLA.<sup>262</sup>

Opponents of the Board's notice-posting regulation seized upon the absence and deletion of notice-requirements under the NLRA by asserting that Congress was aware of the option to require notice-postings and affirmatively chose not to exercise that option.<sup>263</sup> At first blush, the conflicting expressions of notice requirements under the RLA and NLRA might seem to negate a congressional delegation of authority that would allow the Board to require affirmative notice-postings.<sup>264</sup> However, to reach that conclusion courts must assess whether Congress addressed the "*precise question* at issue" when it deleted a notice-posting requirement from the NLRA.<sup>265</sup>

While the aims of these notice provisions seem aligned, Congress viewed the substance and effect of each provision differently. Looking only to the abrogation notice provision in the NLRA, Congress grappled with the complicated and messy effect of

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259. See Pub. L. No. 73-442, § 2 (Fifth), 48 Stat. at 1188 (RLA Amendments); S. 2926, 73d Cong. § 304(b) (as introduced in Senate, Feb. 28, 1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 257, at 1, 14.

260. See S. 2926, 73d Cong. at 23 (reported May 10, 1934 with Amendments) (striking section 304(b) from the bill and reintroducing new language), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 257, at 1084-85.

261. See 45 U.S.C. § 152 (Fifth) (providing notice of contracts abrogated under the RLA).

262. See *id.* § 152 (Eighth) ("Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.").

263. As support for this assertion, Amici submitted a detailed chart delineating the timing and sequence of various amendments and deletions to both the RLA and NLRA. See Brief of *Amici Curiae* Honorable John Kline, Chairman, Committee of Education & the Workforce, United States House of Representatives, et al. in Support of Plaintiff/Appellees at 30, *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013) (No. 12-1757) (providing a chart delineating the simultaneous deliberations and committee votes on the RLA and NLRA amendments).

264. See *Chamber of Commerce*, 721 F.3d at 166 (concluding that Congress's exclusion of notice provisions in the NLRA "can fairly be considered deliberate").

265. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (emphasis added) (providing that courts must assess whether Congress substantively addressed the measure an administrative board is taking under step-one of the two-step *Chevron* doctrine analysis).

requiring all employers to provide notice of contracts that violated *any term* of the NLRA.<sup>266</sup> James A. Emery, one of the most ardent objectors to the contract abrogation provision, testified in opposition to the NLRA in his capacity as general counsel for the National Association of Manufacturers.<sup>267</sup> Emery convinced the House Committee on Education and Labor to remove the abrogation provision—a decision that was characterized as a major victory in tempering the aims of the NLRA’s principal sponsor, Senator Robert F. Wagner.<sup>268</sup> The problem, Emery argued, was that abrogation frustrated existing agreements that are genuinely “agreeable to the parties.”<sup>269</sup> The committee agreed, acknowledging that the contract abrogation provision might go beyond the commercial regulatory authority of Congress as interpreted by the Supreme Court.<sup>270</sup>

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266. S. 2926, 73d Cong. § 304(b) (as introduced in Senate, Feb. 28, 1934) (providing that “[a]ny term of a contract or agreement of any kind *which conflicts with the provisions of this act*, is hereby abrogated, and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate action” (emphasis added)), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 257, at 1, 14.

267. *See Hearings on S. 2926 Before the S. Comm. on Educ. & Labor: Part II*, 73d Cong. (1934) [hereinafter *Part II NLRA Hearings*] (statement of James A. Emery, General Counsel, National Association of Manufacturers) (appearing before the committee as a representative of the manufacturing industry in opposition to “the suggestion that the normal conduct of the employers shall be outlawed”), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 257, at 367, 373–75; *J.A. Emery Scores Wagner Labor Bill: Counsel of Manufacturers’ Association Says Terms Contradict Its Purposes*, N.Y. TIMES, Mar. 4, 1934, at 31 (providing Emery’s commentary and review of the NLRA and the objections of manufacturers to its substance). Perhaps a less-than-surprising twist to the history of notice provisions under the NLRA, the National Association of Manufacturers was among the first to challenge the Board’s notice-posting regulation in the D.C. Circuit. *See supra* notes 172–75 and accompanying text (recounting the procedural history).

268. *See Wagner To Accept Labor Bill Change: Senator at Hearing Agrees To Include Ban on ‘Coercion From any Source,’* N.Y. TIMES, Mar. 27, 1934, at 7 (detailing the clash between Emery and Senator Wagner and their eventual compromise to ban coercive actions by any actor in the labor context and the removal of contract abrogation provisions from the Act); *see also Part II NLRA Hearings, supra* note 267, at 395 (statement of Sen. Robert F. Wagner) (agreeing to remove section 304(b) of the draft NLRA).

269. *See Part II NLRA Hearings, supra* note 267, at 394 (statement of James A. Emery, General Counsel, National Association of Manufacturers) (arguing that many existing labor agreements remain amenable between employees and management, and the NLRA will frustrate this balance with abrogation and required notice of the contract’s destruction).

270. The Senate report accompanying the amendments to the NLRA that struck section 304(b) made clear that Congress was concerned regarding the far-reaching implications of the abrogation provision in light of recent Supreme Court precedent. *See S. REP. NO. 73-1184*, at 5–6 (1934) (stating that Congress wanted to remove unfair pressure and not fair discussion in labor negotiations, and the matter of broadly abrogating labor contracts might cause confusion), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 257, at 1099, 1104–05. A noteworthy point, the Senate report made special mention that the prohibitions removed from the bill “may be better adapted to a specialized field in which for

At the time Congress deliberated over the NLRA, intense judicial debate stirred uncertainty regarding the extent the federal government could regulate commercial activities.<sup>271</sup> The Supreme Court grappled with the breadth and implication of contractual liberties afforded under the Fourteenth Amendment's substantive due process doctrine, and the Court ultimately invalidated earlier legislative efforts to address economic problems causing labor strife.<sup>272</sup> Just three years prior to the ratification of the NLRA, the Supreme Court struck down the National Industrial Recovery Act (NIRA) in *A.L.A. Schechter Poultry Corp. v. United States*.<sup>273</sup> In response to the *Schechter Poultry* decision, Congress cautiously deliberated the NLRA with the aim of avoiding another Supreme Court battle resulting in the invalidation of labor related legislation.<sup>274</sup> Ultimately, the U.S. Senate removed the abrogation provision from the NLRA because of the constitutional implications of the provision's broad effect of abrogating contracts that violated any term of the Act, and not for any reason regarding the substance of requiring notice under the NLRA.<sup>275</sup>

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many years there has been a history of successful labor organization than to industries generally," which leaves open the possibility that Congress, or the Board through its adjudicative or rulemaking authority, can regulate certain contractual deficiencies with precision. *Id.*

271. Prior to Congress's consideration and enactment of the NLRA, the Supreme Court invalidated legislative power to modify labor contracts pursuant to *Lochner v. New York* and its progeny. See 198 U.S. 45, 64 (1905) (concluding that the negotiations between employee and employer cannot be prohibited or regulated without violating the Constitution); see also, e.g., *Adair v. United States*, 208 U.S. 161, 175 (1908) (holding that "the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land"). However, by the time Congress moved to consider the NLRA the doctrine of fundamental economic liberty had weakened. See *Nebbia v. New York*, 291 U.S. 502, 523 (1934) (overruling *Lochner* and *Adair* and holding that contractual rights are not absolute and therefore can be subject to regulation on behalf of the public interest).

272. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549–50 (1935) (striking down the National Industrial Recovery Act' because of its intrusion into the contractual bargaining over process of wages and hours).

273. 295 U.S. 495 (1935).

274. See 79 CONG. REC. 8,536 (statement of Sen. Monaghan) (1935) (arguing that the NLRA rests upon a constitutional basis that is not adverse to the *Schechter Poultry* decision), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 257, at 3003, 3006; *id.* at 6,183 (statement of Sen. Robert F. Wagner) (combatting the "malicious falsehood" that the Act serves to force individuals into union agreements), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 257, at 2282, 2284; *id.* at 9,668, 9,681–82 (1935) (statement of Rep. Hollister) (opposing the NLRA and arguing that it seeks to circumvent the limitations on regulating commerce as expressed in *Schechter Poultry*), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 257, at 3093, 3107–08.

275. See *Part II NLRA Hearings*, *supra* note 267, at 394–95 (providing discussion of committee members as to perceived illegality of a broad contract abrogation

Conversely, Congress included an abrogation notice provision in the RLA which addressed a much narrower subset of concerns. The RLA provision singularly aimed to prevent railway carriers from continuing to operate under “yellow dog contracts,” in which the railway carrier forced all employees to join a union of its choosing.<sup>276</sup> The RLA provision invalidated any employment contract requiring employees to join a specific company union, and required the carrier to provide notice of such abrogation pursuant to the statute’s requirement.<sup>277</sup>

Juxtaposing the RLA and NLRA contract abrogation provisions, it becomes clear that Congress chose to strike the NLRA provision because it had a greater effect compared to the narrow and calculable scope of the RLA abrogation provision.<sup>278</sup> This line of reasoning—retracting a problematic federal law that abrogates labor contracts and the accompanying notice provisions—does not address the very different question of NLRB authority to require notices in other circumstances.<sup>279</sup>

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provision and the unanimous consent to eliminate the requirement from the bill on grounds that it presented “a more serious question of constitutional law”). It is evident, based upon the full record that the argument in favor of removing the abrogation provision rested upon concerns over the Supreme Court’s rigid limitations on regulation of contracts, as opposed to concerns over providing notice to workers. *See id.* at 431–32 (providing Mr. Emery’s written legal analysis regarding the NLRA and citing recent precedent affirming the doctrine of contractual liberty to rebut section 304(b) of the proposed legislation).

276. *See* 45 U.S.C. § 152 (Fifth) (2012) (providing that employers cannot require prospective employees “to sign any contract or agreement promising to join or not join a labor organization”); *see also* H.R. REP. NO. 73-1944, at 2 (1934) (explaining that section 2 (Fifth) aims to forbid employer manipulation of labor organizations and by prohibiting employers “from requiring employees to sign ‘yellow-dog contracts’ requiring them to join company unions”).

277. 45 U.S.C. § 152.

278. *Compare* Act of June 21, 1934, Pub. L. No. 73-442, § 2 (Fifth), 48 Stat. 1185, 1188 (“No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.”), *and* H.R. REP. NO. 73-1944, at 2 (prohibiting employers “from requiring employees to sign “yellow-dog contracts” requiring them to join company unions”), *with* S. 2926, 73d Cong. § 304(b) (as introduced in Senate, Feb. 28, 1934) (providing that “[a]ny term of a contract or agreement of any kind *which conflicts with the provisions of this Act* is hereby abrogated, and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate action” (emphasis added)), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 257, at 1, 14.

279. *See Part II NLRA Hearings, supra* note 267, at 394 (statements of James A. Emery, General Counsel, National Association of Manufacturers) (arguing that the inclusion of a provision intended to provide notice to employees of abrogation pursuant to passage of the NLRA might cause confusion and generate imprudent ULP filings as a result of perceived wrongdoing by the frustration of the contract’s

This same line of reasoning also carries over to the second RLA notice-posting requirement.<sup>280</sup> In addition to the contract abrogation notice-provision, Congress also inserted a separate notice-posting provision in the 1934 RLA amendments.<sup>281</sup> This provision required railway carriers to post notices informing all railway employees of their right to bring dispute resolution matters before the National Mediation Board established under the RLA.<sup>282</sup> The legislative history of the RLA amendments remains virtually silent regarding this poster, thereby leaving courts and scholars with their best approximations as to why Congress included an additional posting provision in the RLA but omitted such a requirement in the NLRA.<sup>283</sup>

A Supreme Court administrative law decision from the fall 2012 term may serve to clarify the Board's authority in this situation. In *City of Arlington v. FCC*,<sup>284</sup> the Court upheld filing deadlines adopted by the FCC to clarify ambiguous statutory requirements for the timely processing of wireless facility zoning applications.<sup>285</sup> In administering the Telecommunications Act of 1996, the FCC issued a rule to better define the statute's requirement that filings be processed "within a

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purpose); *see also* Reply Brief of the National Labor Relations Board at 17–18, *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013) (No. 12-1757), (advancing the argument that the notice provision struck from section 304(b), and the rationale underlying its deletion, is incongruent from the purpose and structure of the notice-posting requirement promulgated by the Board).

280. 45 U.S.C. § 152 (Eighth) (requiring notice of dispute resolution procedures under the RLA).

281. *Id.*

282. *See id.* ("Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.").

283. *See Chamber of Commerce*, 721 F.3d at 165 ("[T]he fact that Congress considered the possibility of a notice requirement indicates at the very least that Congress was aware of the option of authorizing such action and chose not to."); *see also* Reply Brief, *supra* note 279, at 11 n.4 ("The complete absence of any mention of the RLA's notice provision in that Act's *own legislative history* is strong support for the commonsense conclusion that such notice provisions are not so momentous that any limit can be inferred from Congressional silence on the matter."). Some scholars have argued that the historical context of union strife surrounding the legislation of the NLRA may have influenced the decision of Congress to omit inserting notice provisions in the Act—a focus beyond the scope of this Comment. *See* DeChiara, *supra* note 10, at 431 & n.1 (noting the decline of union density and the growing need for notification of rights in lieu of union activity). *See generally* Ireland, *supra* note 67, at 943–47, 972–74 (providing background on the decline of union density in America and economic analysis supporting the need for greater dissemination of union rights information to uninformed workers).

284. 133 S. Ct. 1863 (2013).

285. *Id.* at 1867, 1875.

reasonable period of time.”<sup>286</sup> The regulation prescribed 90-day and 150-day processing periods for various circumstances.<sup>287</sup> Municipalities challenged the FCC’s ability to make such a ruling, and argued that the FCC lacked authority to make such an interpretation.<sup>288</sup> The Supreme Court disagreed, holding that a general conferral of rulemaking authority was sufficient to support deference “for an exercise of that authority within [an] agency’s substantive field.”<sup>289</sup>

The frameworks of *Beck* and *AHA* support the application of *City of Arlington* to the issue of deleted, imprecise, and irrelevant notice-posting requirements in the NLRA’s legislative history.<sup>290</sup> Indeed, Congress did not exercise the option to require notice when it entrusted the enforcement and interpretation of the NLRA to the Board.<sup>291</sup> As the administrative agency tasked with interpreting and applying the NLRA to the labor field, the Board is responsible for “adapt[ing] the Act to changing patterns of industrial life.”<sup>292</sup> A notice requirement necessarily adapts the Act to the decline in public awareness of labor rights—a matter necessary for the full implementation and utility of the NLRA in the workplace. Congress, in 1934, never spoke directly to the issue of *Beck* notices,<sup>293</sup> specified hospital bargaining unit classifications,<sup>294</sup> or the need for notice to all

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286. *Id.* at 1867.

287. *Id.*

288. *Id.*

289. *Id.* at 1874; *see also id.* at 1871 (“[I]t becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency’s assertion of authority, or not.”).

290. *See supra* Part II.A.2 (providing a generalized framework of Board rulemaking and notice requirement precedent that supports its authority to require broader notice provisions).

291. *See* Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,006–07 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104) (“The Board is almost unique among agencies and departments administering major Federal labor and employment laws in not requiring employers routinely to post notices at their workplaces informing employees of their statutory rights.”).

292. *See* *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). The *J. Weingarten, Inc.* decision did not address a matter of rulemaking but rather a matter of statutory interpretation through adjudication. *Id.* at 252. However, the obligation to adapt the Act to the issues and constraints surrounding labor is not limited to the matter of adjudication. *See* *Am. Hosp. Ass’n v. NLRB.*, 499 U.S. 606, 612 (1991) (affirming the Board’s authority to prescribe rules to help clarify labor related issues).

293. *See* *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 252 (1995) (requiring unions to provide notice of *Beck* rights despite the absence of an express congressional mandate directly addressing this matter).

294. *See* *Am. Hosp. Ass’n*, 499 U.S. at 612 (upholding the Board’s prescribed health care bargaining unit classifications despite the absence of an express congressional mandate directly addressing this matter).



employees of their rights under the Act.<sup>295</sup> The subsequent and concurrent enactment of notice-posting requirements in other contexts neither contradicts nor is inconsistent with Congress's grant of broad NLRB rulemaking authority to encourage and protect the labor rights of American workers.<sup>296</sup>

*c. Negating congressional admonition: An example of employment notice requirements promulgated through rulemaking*

Since 1934, Congress has amended the NLRA three times, and on each occasion has left the issue of notice-posting requirements unaddressed.<sup>297</sup> During intervening sessions, Congress also enacted various employment provisions that require agencies to promulgate notice-posting requirements.<sup>298</sup> Courts have measured these congressionally enacted notice provisions against the NLRB's regulation, concluding that "Congress's continued exclusion of a notice-posting requirement from the NLRA, concomitant with its granting of such authority to other agencies, can fairly be considered deliberate."<sup>299</sup> Although the optics of notice posters in other contexts appear unresponsive of congressional will to require notices under the NLRA, the presence of other posting requirements do not address the entirely separate issue of the Board's authority to promulgate a regulation of its own.<sup>300</sup>

A notice poster promulgated by the Department of Labor's Wage and Hour Division (WHD) serves as a comparable example and demonstrates that, despite congressional silence, agencies may promulgate a notice-posting regulation through rulemaking.<sup>301</sup> In 1949 and in 1987, the WHD promulgated notice-posting

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295. See 76 Fed. Reg. at 54,006 (promulgating a regulation proscribing notice posters under the NLRA despite the absence of express congressional mandate addressing this matter).

296. See 29 U.S.C. § 151 (2012) (providing the Board's mission to eliminate practices that obstruct the exercise of labor rights); *id.* § 156 (providing the Board with rulemaking authority to aid in furthering the other sections of the Act).

297. See generally Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (containing no provisions requiring generalized notice posters); see also Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (same); Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (same).

298. See *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778, 784 n.4 (D.S.C. 2012) (providing a timeline of employment related legislation requiring notice postings), *aff'd*, 721 F.3d 152 (4th Cir. 2013).

299. *Chamber of Commerce*, 721 F.3d at 166.

300. See *supra* notes 28-50 and accompanying text (addressing NLRB authority to promulgate regulations under its statute as well as Supreme Court precedent supporting the Board's authority to promulgate substantive rules).

301. See 29 C.F.R. § 516.4 (promulgated by the Department of Labor Wage and Hour Division).

requirements pursuant to a grant of rulemaking authority under the Fair Labor Standards Act<sup>302</sup> (FLSA). WHD based its power to compel notice-postings on its authority to prescribe rules “necessary or appropriate” to ensure that employers “make, keep, and preserve such records of . . . wages, hours, and other conditions and practices of employment.”<sup>303</sup> The posting requirement promulgated from this authority compelled employers to post a notice informing workers of their rights and wage rates under the FLSA.<sup>304</sup>

The legislative history establishing the WHD and its rulemaking authority does not address the matter of notice-posting requirements.<sup>305</sup> The language conferring rulemaking authority upon the WHD to carry out the FLSA is nearly identical to the authority granted to the NLRB.<sup>306</sup> Though the WHD notice-posting rule has not been legally challenged, its nearly sixty-five year existence serves as an example of notice-posting requirements originating beyond the halls of Congress.

*B. The Right To Disagree Is Not Infringed: Compulsory Notice-Posting Requirements and Speech Protections Under the NLRA*

Notice-posting requirements educate workers, unions, and employers of the legal rights that apply to job-related interactions.<sup>307</sup> Requiring legal disclosure is not uncommon; there are a myriad of

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302. See Records To Be Kept by Employers: Posting of Notices, 14 Fed. Reg. 7,516 (Dec. 16, 1949) (codified at 29 C.F.R. § 516.18 (1950)) (determining that the “posting of notices of the applicability of the act . . . is a necessary adjunct to proper enforcement of the statutory provisions, and is an essential aid to the Division in preventing evasion or circumvention of the statutory provisions, and that a general requirement for posting of such notices in all covered establishments should be adopted”); see also Fair Labor Standards Act: Records To Be Kept by Employers, 52 Fed. Reg. 24,894, 24,898 (Jul. 1, 1987) (codified at 29 C.F.R. pt. 516 (1988)) (“Every employer employing any employees subject to the Act’s minimum wage provisions shall post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy.”).

303. 29 U.S.C. § 211(c).

304. See DEP’T OF LABOR, EMPLOYEE RIGHTS UNDER THE FAIR LABOR STANDARDS ACT (2009), available at <http://www.dol.gov/whd/regs/compliance/posters/minwage.pdf> (last visited Jan. 16, 2014).

305. S. REP. NO. 99-159, at 7 (1985) (noting that the WHD will be the arm of the Department of Labor tasked with investigating FLSA violations, but providing no mention or discussion of notice-posting requirements).

306. Compare 29 U.S.C. § 211(c) (providing that the WHD “shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter”), with *id.* § 156 (“The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter.”).

307. See Morris, *supra* note 71, at 112 (“[E]mployees must know what their rights are and have a realistic expectation that the Board can protect them in the exercise of those rights.”).

statutes and regulations requiring notice and disclosure of substantive rights,<sup>308</sup> safety risks,<sup>309</sup> and matters of health<sup>310</sup> in the law. A notice-posting requirement under the NLRA serves the same justifications—aiming to educate workers of the rights and protections afforded to them under the Act.<sup>311</sup>

Chief among the workplace rights afforded under the NLRA are protections of non-coercive viewpoints expressed about union activity.<sup>312</sup> Explicit in this statutory protection is the right of employers, unions, and laborers to express differing views in a forum of free-flowing ideas.<sup>313</sup> Implicit in this statutory protection is the implementation of First Amendment rights.<sup>314</sup>

Opponents of the NLRB's notice-posting regulation successfully argued that the rule violated their rights under section 8(c) of the NLRA.<sup>315</sup> This assertion echoed the losing arguments of unions in litigation opposing *Beck* notice-posting requirements during the George W. Bush administration.<sup>316</sup> The distinctions that triggered this differing result stem from the NLRB's treatment of a failure to post as "evidence of an antiunion animus."<sup>317</sup> requiring The D.C. Circuit concluded that section 8(c) protects an employer's right to disagree with, or non-coercively omit, any positions supporting

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308. See 15 U.S.C. § 1632(a) (requiring disclosure of percentage rates and charges for the purposes of consumer education and protection in transactions).

309. See *id.* § 1278(a) (mandating warning labels on toys or games for children who are at least three years of age that the product may contain products that could choke a young child).

310. See *id.* § 1333(a) (requiring warning labels disclosing addictive and negative health effects on smoking and tobacco products).

311. See Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,006 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104) ("For employees to fully exercise their NLRA rights, however, they must know that those rights exist and that the Board protects those rights.").

312. See 29 U.S.C. § 158(c) (providing protections for non-coercive speech).

313. *Id.*

314. See U.S. CONST. amend. I. (prohibiting Congress from enacting laws that abridge the freedom of speech); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (discussing section 8(c)'s implementation of First Amendment protections by providing that differing views and opinions on labor cannot be construed as a ULP).

315. See *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 (D.C. Cir. 2013) (concluding that NLRB's treatment of a willful failure to post as anti-union activity violates the NLRA and the First Amendment).

316. See *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (rejecting arguments that *Beck* notice-posting requirements violate a union's section 8(c) right to refrain from stating a message to which it disagrees).

317. See *Nat'l Ass'n of Mfrs.*, 717 F.3d at 955, 958 (discussing the Board's treatment of non-compliance with the law); *id.* at 959 (analyzing the Board's treatment of a failure to post as a ULP and concluding that failing to post is a protected "right of employers (and unions) not to speak"). *But see UAW-Labor Emp't & Training Corp.*, 325 F.3d at 369 (recognizing the implementation of section 7 and section 8 rights is "a matter left to the Board").

unionization.<sup>318</sup> Accordingly, the Board's classification of willful noncompliance as evidence of an anti-union animus violates the intent of Congress when it amended the NLRA to include section 8(c).<sup>319</sup> This finding, however, does not preclude the Board from requiring employers to post notices under the Act<sup>320</sup>—it merely supplants the Board's prescribed enforcement measures.<sup>321</sup>

Two key distinctions support the Board's ability to require notice-postings without the enforcement mechanisms it originally prescribed. First, the Board's poster propagates the government's message, providing the public with the Board's interpretations and expressions of law. Second, employers enjoy the right to disavow any nexus with, or endorsement of, the poster's content.

1. *The notice poster propagates a government message*

The doctrine of government speech provides that the government must be able to communicate its own message in order to properly function.<sup>322</sup> As an interpreter of the NLRA, the Board also contributes to workplace discourse as a governmental voice seeking to provide more certainty and exactness in the law.<sup>323</sup> Accordingly, the NLRB issues regulations and adjudicatory

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318. See *Nat'l Ass'n of Mfrs.*, 717 F.3d at 959 (“We therefore conclude that the Board’s rule violates § 8(c) because it makes an employer’s failure to post the Board’s notice an unfair labor practice, and because it treats such a failure as evidence of anti-union animus . . .”).

319. See S. REP. NO. 80-105, at 23–24 (1947) (“Section 8(c) . . . would insure both to employers and labor organizations full freedom to express their views to employees on labor matters, refrain from threats of violence, intimidation of economic reprisal or offers of benefit . . . [I]f, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, will not be precluded from considering such statements as evidence.”).

320. See *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 233 (1995) (affirming that a “notice requirement furnishes significant protection to the interests of the individual” under the NLRA).

321. See *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34, 63 (D.D.C. 2012) (“In sum, the Board lawfully promulgated Subpart A of its Final Rule, which requires employers to post a notice of employee rights, but exceeded the authority granted to it by Congress under the NLRA by promulgating the two provisions under Subpart B that permit the Board to deem failure to post an unfair labor practice and to toll the statute of limitations for claims brought by employees against employers who failed to post the notice.”), *aff'd in part, rev'd in part*, 717 F.3d 947 (D.C. Cir. 2013).

322. *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 232, 238 (2009) (“[I]n order to function, [the] government must have the ability to express certain points of view, and it would be unable to do so effectively if, for example, the Constitution required a government pro-democracy campaign to be accompanied by a pro-fascism campaign.”).

323. S. REP. NO. 74-573, at 4, 8 (1935).

opinions to provide the public with knowledge of its understanding and application of the NLRA.<sup>324</sup>

Congress included section 8(c) in the NLRA to promote and protect the free flow of ideas between employees, unions, and employers.<sup>325</sup> The legislative history of section 8(c) evidences intent “to prevent the Board from attributing anti-union motive to an employer on the basis of [the employer’s] past statements.”<sup>326</sup> In essence, Congress wanted to restrict the Board from reading heavily into prior speeches and publications of employers.<sup>327</sup> This limitation, however, does not preclude the government from contributing to the forum of labor discussion—particularly in connection with restatement and disclosure of the law.<sup>328</sup>

The Board’s notice poster acts in accordance with section 8(c) and propagates the Board’s interpretation of the Act, while also providing readers with identification of its authorship.<sup>329</sup> The poster contains the clear and conspicuous statement that “[t]his is an official Government Notice and must not be defaced by anyone.”<sup>330</sup> The poster also bears the insignia of the Board, informing readers that the contents of the poster are attributable to a governmental agency and not a union, employee, or employer.<sup>331</sup> Accordingly, the NLRB’s poster seeks to propagate a government message that is not attributable to any employer, union, or employee.<sup>332</sup>

## 2. *The right to disagree is not infringed: Employer speech protections*

Tantamount to an employer’s right to refrain from speaking is the right to openly disagree.<sup>333</sup> The Supreme Court has provided a syllogism which controls matters of government speech: where a

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324. See *supra* notes 24–49 and accompanying text.

325. See *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 (1966) (recounting that section 8(c) evidences “congressional intent to encourage free debate on issues dividing labor and management”).

326. *Id.* at 62 n.5.

327. See H.R. REP. NO. 80-510, at 45 (1947) (providing Congress’s justification for amending the Act to provide protection for non-coercive speech).

328. See NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT: GENERAL PRINCIPLES OF LAW UNDER THE STATUTE AND PROCEDURES OF THE NATIONAL LABOR RELATIONS BOARD 1 (1997 ed.), available at <http://www.nlr.gov/sites/default/files/documents/224/basicguide.pdf> (providing the view of the Board’s Office of General Counsel on the basic functions and framework of the NLRA to members of the public).

329. See *Employee Rights Under the National Labor Relations Act*, *supra* note 5 (providing a copy of the poster that contains the NLRB’s insignia prominently displayed on the upper left hand corner).

330. *Id.*

331. *Id.*

332. *Id.*

333. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (holding that a private party may disavow a compelled message by posting its own message).

private individual is directly impacted by a governmental message, and if that individual is unable to disavow itself of the government's message, the government's action is invalid.<sup>334</sup> Opponents of the NLRB's notice-posting regulation contended that an employer's unwillingness to display a notice poster amounts to an expression that is protected under the NLRA.<sup>335</sup> Any requirement adverse to that right, they argued, violates speech protections.<sup>336</sup>

Courts have previously explored this issue in other employment-posting contexts.<sup>337</sup> In *Lake Butler Apparel Co. v. Secretary of Labor*,<sup>338</sup> the U.S. Court of Appeals for the Fifth Circuit examined an employer's challenge to a compulsory notice poster informing employees of their rights under the Occupational Safety and Health Act<sup>339</sup> (OSHA). Remarkably, the D.C. Circuit omitted any mention of the *Lake Butler* opinion in its review of the NLRB's notice-posting regulation.<sup>340</sup> The omission of this authority on notice-postings is

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334. Compare *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding that New Hampshire's requirement for all motorists to display the motto "live free or die" was unconstitutional), and *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that a school policy forcing students to salute the U.S. flag as unconstitutional), with *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (holding that the government is not subject to scrutiny under the Free Speech Clause), *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (holding that a government mandated accommodation of military recruiters at law schools is constitutional because the school can disavow itself of any endorsement of the military), *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005) (holding that a message strictly controlled by the government and paid for by assessed taxes does not violate the First Amendment), and *PruneYard Shopping Ctr.*, 447 U.S. at 87 (holding that a private party may disavow a compelled message by posting its own message expressing such disagreement).

335. See Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,012 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104) (recounting objections by opponents to the regulation who characterize the poster as conveying "pro-union NLRA rights").

336. *Id.*

337. See *Lake Butler Apparel Co. v. Sec'y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975) (holding that the posting of an OSHA notice does not reflect the expression of the employer and the compulsory mandate to display the document does not amount to employer speech).

338. 519 F.2d 84 (5th Cir. 1975).

339. *Id.*; see also 29 C.F.R. § 1903.2 (requiring that employers subject to OSHA post notice informing employees of their rights and remedies under the law).

340. The D.C. Circuit did address its conclusory statements from the *UAW-Labor Employment & Training Corp.* decision where it previously cited *Lake Butler*. See *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 958 (D.C. Cir. 2013) (citing *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003)). However, the substance of the D.C. Circuit opinion offers a scant rebuttal to the *Lake Butler* decision. Compare *Nat'l Ass'n of Mfrs.*, 717 F.3d at 959 (addressing the *UAW* decision to clarify that the court was "making a different point: that apart from the § 8(c) bar against unfair-labor-practice charges, the National Labor Relations Act did not give employers an unconstrained right to silence"), with *Lake Butler*, 519 F.2d at 89 ("The posting of the notice does not by any stretch of the imagination reflect one way or the other on the views of the employer. It merely states what the law requires. The

incongruous with the D.C. Circuit's prior review of *Beck* notices during the George H. W. Bush administration, where the D.C. Circuit expressly relied upon *Lake Butler* to support its holding.<sup>341</sup>

In *Lake Butler*, an OSHA inspector found a clothing manufacturing plant in violation of various OSHA standards, including failure to display a notice poster, during a routine compliance inspection.<sup>342</sup> In response to these violations, the manufacturer filed for administrative review and reconsideration with the OSHA Review Commission.<sup>343</sup> The Commission upheld the violations and the manufacturer appealed to the Fifth Circuit, arguing that a compulsory notice poster violates free speech protections.<sup>344</sup> Ultimately, the Fifth Circuit concluded that a notice-posting requirement "merely states what the law requires" and does not reflect the employer's views.<sup>345</sup> Supreme Court precedent supports the findings in *Lake Butler* that employers and citizens have a right to disagree with, but not obstruct, government expressions.<sup>346</sup>

The Supreme Court has been careful to distinguish matters where a speaker cannot refute a compulsory and disagreeable message, noting that the opportunity for a private citizen to openly disagree with the message eliminates First Amendment problems.<sup>347</sup> A First Amendment decision from the Court's fall 2012 term, issued after the D.C. Circuit's opinion, offers a ripe example further supporting this important distinction.<sup>348</sup> In *Agency for International Development v.*

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employer may differ with the wisdom of the law and this requirement even to the point as done here, of challenging its validity . . . . But the First Amendment which gives him the full right to contest validity to the bitter end *cannot justify his refusal to post a notice . . . .*" (emphasis added)).

341. See *UAW-Labor Emp't & Training Corp.*, 325 F.3d at 365 (arguing that an employer's right to silence is limited in the labor context because, legally and constitutionally, an employer bears a burden to provide notice to workers of risks and rights in the workplace) (citing *Lake Butler*, 519 F.2d at 89)).

342. *Lake Butler*, 519 F.2d at 85.

343. *Id.* at 85–86.

344. *Id.*

345. *Id.* at 89.

346. See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006) (noting that compelled speech is imputed where the compelled speaker's message is affected by the government's viewpoint).

347. See *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 87–88 (1980) (holding that a private party may disagree with publicly displayed notices of pamphlets, rendering their free speech rights protected within the forum) (citing *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)).

348. See *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (confirming that requiring grant recipients to adopt the government's anti-prostitution policy as a condition of funding violates the First Amendment).

*Alliance for Open Society International, Inc.*,<sup>349</sup> the Supreme Court examined a conditional spending clause that required federally funded international nonprofit organizations to have a policy openly denouncing prostitution.<sup>350</sup> If the government found an organization in violation of this requirement, it would lose funding.<sup>351</sup> Several nonprofits moved to invalidate this requirement and argued that the compelled message stifled the neutral viewpoint of organizations seeking to provide aid to the sex worker demographic.<sup>352</sup> Chief Justice Roberts, writing for the six-three majority, invalidated the conditional spending requirement because it did not allow room for a grant recipient to disavow itself of the government's message.<sup>353</sup> The *AID* decision translates easily to the Board's notice-posting requirement because it highlights the significance of an entity's ability to disavow itself of any endorsement of *government speech*.<sup>354</sup>

In other contexts, the Court has held that a compulsory message does not impinge on the rights of an entity or individual where one is able to openly disagree.<sup>355</sup> In *Rumsfeld v. Forum for Academic and Institutional Rights Inc.*,<sup>356</sup> the Court upheld a program requiring law schools to allow military recruiters on campus—despite a school's express disagreement with the military.<sup>357</sup> In support of this

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349. 133 S. Ct. 2321 (2013).

350. *Id.* at 2326.

351. 22 U.S.C. § 7631(f) (2012) (“No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking . . .”).

352. *Agency for Int'l Dev.*, 133 S. Ct. at 2326 (“Respondents fear that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS.”).

353. *See id.* at 2330–31 (invalidating government requirements that private entities adopt the government's anti-prostitution policy or lose funding).

354. *Id.* at 2330 (invalidating the government's aim of compelling fund recipients to “adopt a similar stance” to its policy aims, and the damaging inability for groups to disavow the government's message (internal citations omitted)). The Court's analysis highlights the countervailing and pressurized dynamic between government speech and private speech protections. Ultimately, both the government and private speakers retain the right of expression in the global forum. *Compare id.* at 2332 (invalidating the conditional spending clause because it requires recipients to “pledge allegiance” to the government's message), *with id.* at 2332 (Scalia, J., dissenting) (“The First Amendment does not mandate a viewpoint-neutral government.”).

355. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2003) (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” (internal citations and quotations omitted)).

356. 547 U.S. 47 (2003).

357. *Id.* at 70; *see also id.* at 69–70 (holding that schools are free to openly disagree with the required presence of military recruiters on campus, and therefore a school



proposition, the Court borrowed a hypothetical example from the employment context: “Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.”<sup>358</sup> In essence, regulation of certain conduct in compliance with a statutory obligation does not necessarily amount to compulsory speech.<sup>359</sup>

The same justifications apply to the concept of notice-posting requirements under the NLRA, particularly when examined through the lens of *Beck* and the Board’s subsequent interpretations of *Beck*-notice requirements.<sup>360</sup> The Board may require unions to provide notice to nonmembers of their rights under section 8(a) to object to certain expenditures—a measure which substantively functions to regulate nonmember and union conduct.<sup>361</sup> The fact that a union is required to provide a statement of expenditures to a nonmember “hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.”<sup>362</sup> A notice poster requiring employers to provide broader information regarding the rights afforded under the NLRA furthers these same interests, and places all parties on notice of the laws governing their interactions.<sup>363</sup> An employer is free to openly disagree with the law, but that disagreement does not absolve the employer of its responsibility to post notices informing employees of their rights.<sup>364</sup>

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does not expressly or implicitly adopt a pro-military message because of the right to freely disassociate).

358. *Id.* at 62.

359. *See Rust v. Sullivan*, 500 U.S. 173, 198 (1991) (holding that employees are free to pursue activities in contrast to government speech); *id.* at 200 (providing that an individual subject to government speech is permitted to make clear that more information exists beyond the scope of the government’s message).

360. *See UAW-Labor Emp’t & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (upholding a *Beck* notice requirement and noting the constraints placed upon employer speech in the employment context to post various notices).

361. *See Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 231–37 (1995) (outlining the requirement for notice and the justifications for providing such notice of *Beck* rights).

362. *Rumsfeld*, 547 U.S. at 62.

363. *See Notification of Employee Rights Under the National Labor Relations Act*, 76 Fed. Reg. 54,006, 54,006–07 (August 30, 2011) (to be codified at 29 C.F.R. pt. 104) (providing the Board’s justification that employees are unaware of their rights and therefore lack notice of their legal protections under the Act).

364. *Rumsfeld*, 547 U.S. at 62 (providing an example from the employment context which illustrates that laws regulating employer conduct do not necessarily regulate speech, and therefore do not abridge the employers message but rather an underlying action).

## CONCLUSION

In enacting the NLRA, Congress sought to erect a governmental agency that would promote and enforce peaceful settlements of labor disputes.<sup>365</sup> To successfully facilitate this policy aim, it is essential that all actors in the workplace possess the requisite knowledge of their legal rights.<sup>366</sup> Though Congress declined to insert a notice-posting provision within the NLRA, the absence of such language does not preclude the Board from promulgating its own notice requirements through its rulemaking authority.<sup>367</sup> The presence of legal advisory notices in the workplace is a form of government-mandated disclosure and informs private citizens of their legal rights through a government message.<sup>368</sup> Although there are many arguments in opposition to the contents and message of the Board's notice-posting provision, those disagreeing viewpoints possess the power to persuasively voice their opposition to the same audiences—perhaps with even greater effect.

The Board was correct in exercising its authority to notify workers of their substantive rights under the NLRA. It is emphatically the prerogative of the Board to protect, encourage, and expound upon the rights promised to labor workers under the Act. As this piece went to print, the NLRB announced that it would not petition the Supreme Court for review of its notice-posting regulation.<sup>369</sup> Should the NLRB seek to proactively regulate employers in the future, the effect of the D.C. and Fourth Circuits rulings should be revisited to clarify the NLRB's broad rulemaking authority. Regardless of political leanings, it remains a great travesty whenever citizens are unaware of their substantive rights. More must be done to educate the public, and the NLRB retains the power to pursue such a mission.

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365. See 29 U.S.C. § 151 (2012) (declaring that government policy is to encourage collective bargaining between employers and employees).

366. See 76 Fed. Reg. at 54,006 (proclaiming that employees need to know their rights in order to exercise them).

367. See *supra* notes 209–26 and accompanying text.

368. See *supra* notes 51–58 and accompanying text.

369. *The NLRB's Notice Posting Rule*, NAT'L LAB. REL. BOARD (Jan. 6, 2014), <http://www.nlr.gov/news-outreach/news-story/nlrbs-notice-posting-rule>.