



## Legal Alert: NLRB to Require Posting of Notice of Employee Rights

8/30/2011

**Executive Summary:** The National Labor Relations Board (NLRB) has issued a final rule that will require employers covered by the National Labor Relations Act (NLRA) to post a notice in the workplace explaining employees' rights under the NLRA. The posting requirement applies to employers covered by the Act, regardless of whether the workplace is unionized or union-free. The rule was published in the Federal Register on August 30, 2011, and will take effect November 14, 2011. The notice requirement does not apply to employers who are not covered by the NLRA, including, among others, any person subject to the Railway Labor Act, as well as entities over whom the Board has been found not to have jurisdiction or over which the Board has chosen not to assert jurisdiction.

### Background

In December 2010, the Board issued a Notice of Proposed Rulemaking (NPRM) stating that it believes most employees are not aware of their rights under the NLRA and proposing a rule that would require employers to post a notice in the workplace that explains these rights.<sup>[1]</sup> The notice included in the proposed rule was identical to the notice that non-exempt federal contractors and subcontractors are required to post. Rather than tracking the language of the NLRA, the proposed notice contained examples of employer and union practices that would violate the Act.

### *Final Rule Differs Slightly from Proposed Rule*

The Board received numerous comments in response to the NPRM; however it disagreed with most of them. Thus, the Notice of Employee Rights contained in the Final Rule is similar to that in the proposed rule, with a few exceptions. For example, the introduction to the Notice has been revised to include both the right to engage in union and other concerted activity and the right to refrain from doing so. The Board also made a few revisions to the examples of unlawful employer conduct and unlawful union conduct.

The Notice must be posted "in conspicuous places where [it] is readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted." The language of the required Notice is set forth below, in italics: ***EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT***

*The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in*

other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA\* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace. *Under the NLRA, you have the right to:*

- *Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.*
- *Form, join or assist a union.*
- *Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.*
- *Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.*
- *Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.*
- *Strike and picket, depending on the purpose or means of the strike or the picketing.*
- *Choose not to do any of these activities, including joining or remaining a member of a union.*

*Under the NLRA, it is illegal for your employer to:*

- *Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in nonwork areas, such as parking lots or break rooms.*
- *Question you about your union support or activities in a manner that discourages you from engaging in that activity.*
- *Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.*
- *Threaten to close your workplace if workers choose a union to represent*

them.

- *Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.*
- *Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.*
- *Spy on or videotape peaceful union activities and gatherings or pretend to do so.*

*Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:*

- *Threaten or coerce you in order to gain your support for the union.*
- *Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.*
- *Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.*
- *Cause or attempt to cause an employer to discriminate against you because of your union-related activity.*
- *Take adverse action against you because you have not joined or do not support the union.*

*If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.*

*Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: <http://www.nlr.gov>.*

*You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired. If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.*

*\*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have*

been discriminated against for refusing to violate the NLRA may be covered).

*This is an official Government Notice and must not be defaced by anyone.*

A copy of the Notice is included in Appendix A to the Final Rule, which was published in the August 30, 2011 Federal Register, available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-08-30/pdf/2011-21724.pdf> or by clicking here. Additionally, the Board has published a fact sheet addressing some questions that may arise regarding the Final Rule. The fact sheet is available at <https://www.nlr.gov/news-media/fact-sheets/final-rule-notification-employee-rights> or by clicking here.

The Board has stated that copies of the Notice will be available on the NLRB web site and from NLRB Regional Offices by November 1, 2011.

### ***Physical Requirements of the Notice***

The poster must be 11x17 inches, although, unlike the NPRM, the final rule does not require that the poster be in color. The Board will furnish paper copies to employers who request them. Alternatively, employers will be able to download the notices from the NLRB's web site. The downloadable version will be available in two formats: a one-page 11x17-inch version and a two-page 8 ½ x11-inch version, which must be printed in landscape format and taped together to form the 11x17-inch poster.

### ***Foreign Language Requirement***

If as many as 20 percent of an employer's employees are not proficient in English but speak the same foreign language, the employer must post the notice in that language, both physically and electronically (if the employer is otherwise required to post the notice electronically). If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must either physically post the notice in each of those languages or, at the employer's option, post the notice in the language spoken by the largest group of employees and provide each employee in each of the other language groups a copy of the notice in the appropriate language. If such an employer is also required to post the notice electronically, it must do so in each of those languages. If some of an employer's employees speak a language not spoken by employees constituting at least 20 percent of the employer's workforce, the employer is encouraged, but not required, either to provide the notice to those employees in their respective language or languages or to direct them to the Board's Web site, [www.nlr.gov](http://www.nlr.gov), where they can obtain copies of the notice in their respective languages.

### ***Electronic Posting***

In addition to posting the Notice physically in their facilities, employers who customarily post notices to employees regarding personnel rules or policies on an internet or intranet site will be required to post the Notice of Employee Rights on those sites as well. Such employers may post either an exact copy of the poster, downloaded from the Board's web site, or a link to the Board's web site that contains the poster. The link to the Board's web site must read, "Employee Rights under the National Labor Relations Act." Unlike the

proposed rule, the Final Rule does not require that the electronic link to the Board's site include the introductory language of the Notice. Additionally, unlike the proposed rule, the Final Rule does not require employers to provide the Notice of Employee Rights via e-mail or other forms of electronic communication such as Twitter.

### ***Federal Contractors***

Federal contractors who comply with the Department of Labor's notice-posting rule will be deemed in compliance with the Board's requirement.

### ***Entities Excluded from the Notice Requirement***

Entities who are excluded from the definition of "employer" under the NLRA are not required to post the Notice of Employee Rights. This includes: the United States or any wholly owned government corporation; any Federal Reserve Bank; any state or political subdivision thereof; any person subject to the Railway Labor Act; any labor organization (other than when acting as an employer); or anyone acting in the capacity of officer or agent of such labor organization.

Additionally, employers employing exclusively workers who are excluded from the definition of "employee" under § 104.201 are not required to post the Notice. The Notice requirement also does not apply to entities over which the Board has been found not to have jurisdiction or over which the Board has chosen not to assert jurisdiction.

The Notice requirement also does not apply to entities whose impact on interstate commerce, although more than de minimis, is so slight that they do not meet the Board's discretionary jurisdiction standards. These standards are summarized in the Final Rule. Additionally, the U.S. Postal Service is not required to comply with the Notice requirement.

### ***Enforcement***

The Board may find that an employer who fails to post the notice has committed an unfair labor practice. The failure to post the Notice may also, in appropriate circumstances, be grounds for tolling the statute of limitations in an unfair labor practice charge. The Board has stated, however, that the failure to post the Notice will not toll the statute of limitations in situations where an employer can prove that the employee had actual or constructive knowledge of the allegedly unlawful conduct and actual or constructive knowledge that this conduct violated the NLRA and yet failed to file a timely charge. Additionally, the tolling provision will not apply to charges filed by unions, because unions routinely deal with issues arising under the NLRA and are more familiar with the requirements of the Act.

Additionally, the Board may find that a knowing and willful failure to post the Notice is evidence of unlawful motive in an unfair labor practice case.

There is no monetary penalty or fine for failing to post the Notice because the Board lacks the authority to impose penalties and fines.

### **Employers' Bottom Line:**

Once the Notice of Employee Rights is posted, employees, especially those in union-free workplaces, are likely to have numerous questions. Most of these questions undoubtedly will be directed to front-line supervisors. It is important for all employers, but especially those who are currently union-free, to train supervisors on how to effectively and legally address these questions.

Ford & Harrison attorneys in conjunction with F&H Solutions Group will be providing additional information to assist employers in addressing some of these questions. Additionally, our attorneys and F&H Solutions Group consultants are available to provide individualized education and training to enable you effectively to address the questions and issues that may arise when the Notice requirement becomes effective. For more information, please contact the Ford & Harrison attorney with whom you usually work.

[1] For more information on the NPRM, please see our December 23 Alert, *NLRB Proposes Rule Requiring Posting of Employee Rights under the NLRA*, available at: <http://www.fordharrison.com/shownews.aspx?show=6828>.